# The Tyra Law Firm, P.C.

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Quarterly Newsletter

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## Office "Field" Trip

Amy Heustis, Kevin Tyra and Jan Tyra in the end zone at Lucas Oil Stadium. Jerry Padgett was our photographer.

The Tyra Law Firm spent an afternoon in late October touring Lucas Oil Stadium, the new home of the Indianapolis Colts, from top to bottom. Stops along the way included the press box, visitor's locker room and the playing field.

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## INSURANCE COVERAGE FOR SUCCESSOR CORPORATIONS

*Travelers Cas. & Sur. v. United States Filter, et al.*
Indiana Supreme Court, October 15, 2008

Over the years, Travelers and other insurance carriers had issued over eighty insurance policies to Wheelabrator Corp., a subsidiary of Signal Applied Technologies, Inc., which owned Wheelabrator's assets and liabilities. Beginning in 1986, Signal engaged in a series of several mergers, buy-outs, and sales of assets of Wheelabrator. In 1996, United States Filter bought the assets of what was then known as Wheelabrator Corporation Division.

Wheelabrator manufactured an airless blast machine that functions like a sandblaster, but uses a wheel with flanges that hurl "shot" at the metal to be cleaned. Numerous claimants alleged exposure to silica from working near the blast machine. United States Filter sought insurance coverage from Wheelabrator/Signal's carriers for these claims. The threshold issue in the ensuing declaratory judgment action was whether United States Filter, a successor to Wheelabrator/Signal, was an insured under the policies issued prior to the series of mergers, etc.

The carriers pointed to policy language that stated: "Assignment. Assignment of interest under this policy shall not bind the [insurer] until its consent is endorsed hereon," and "transfer of your rights and duties under this policy. Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured." Such consent from the carriers had never been obtained as the insured and its assets were being bought and sold.

Nevertheless, the trial court granted partial summary judgment to United States Filter on the issue that these carriers were still obligated to defend United States Filter. The Court of Appeals affirmed, explaining that the bodily-injury claims were choses in action that arose when each claimant was exposed to silica, and held that these choses in action were transferrable rights under the policies, to be distinguished from the transfer of the policies themselves.

The Supreme Court granted transfer and reversed the trial court and Court of Appeals, holding that the assignment and transfer clauses should be enforced as written. The Court rejected the Court of Appeals' distinction between transferring rights under the policies and transferring the policies themselves. Because the interests were assigned and transferred from Wheelabrator/Signal, through other corporate entities, and ultimately to United States Filter, and because these insureds never obtained the consent of the carriers to the assignments and transfers, the carriers had no obligation to provide coverage to the successors.

The Court commented that carriers have a legitimate interest in restraining assignment, "protect[ing] them from a material increase in risk for which they did not bargain, specifically because of a change in the nature of the insured."

**Keypoint**: The claim professional should look carefully at the corporate insured which is seeking coverage, to make sure it is the original insured, and if it is not, consider whether the coverage has properly been assigned or transferred to the successor.

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## CIVIL RIGHTS CLAIMS: ATTORNEY FEES

*Christopher Barker v. City of W. Lafayette, et al.*
Indiana Court of Appeals, October 9, 2008

After Barker was arrested by West Lafayette police for resisting law enforcement and battery and he was acquitted of the charges, he pursued a Section 1983 civil rights action for false arrest, excessive force, and malicious prosecution, along with state claims for false arrest and battery.

The jury found in Barker's favor on his claims of false arrest and malicious prosecution, and in favor of the City on the battery and excessive force claims.

In response to Barker's petition for attorney fees, the trial court held that it would be unreasonable to award fees for those claims (battery and excessive force) on which Barker did not prevail.

In reversing the trial court, the Court of Appeals held that the prevailing plaintiff is entitled to: (1) fees for time expended establishing his litigation fees; (2) appellate fees; (3) and fees even for time expended on unsuccessful claims.

The Court allowed an hourly rate of $325/$250/$175, accepting the assertions of Barker's counsel that they have a statewide practice specializing in civil rights litigation, thereby justifying higher rates than might otherwise be considered reasonable. The Court also allowed billing for paralegal time, including time the City had argued was secretarial in nature.

**Keypoint**: In evaluating civil rights claim exposure, the claim professional should consider all the attorney fees that may be awarded, including fees on claims that ultimately may not succeed, as well as appellate fees and paralegal fees.

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## INFERRED NEGLIGENCE IN A MOTOR VEHICLE ACCIDENT

*Kory Foddrill v. Constance Crane*
Indiana Court of Appeals, October 16, 2008

Constance Crane was stopped at a red light, when she was struck from behind by a car operated by Kory Foddrill. The force of this collision caused Crane to strike her head on the sun visor in her car, and also hit the steering wheel with her midsection. When they both got out of their vehicles, Foddrill was seen holding a cell phone that he claimed did not work. However, he was subsequently seen using the cell phone to make a phone call. The next morning, Crane complained of stiffness and bruising, and within a few days was also complaining of pain in her neck and shoulders.

Crane first treated with a chiropractor, but did not obtain any relief. She then sought treatment from a physician, who diagnosed her with neck pain as a result of the accident. This case ultimately went to trial approximately four years after the date of the accident, and Crane testified she was not as coordinated as she was prior to the accident, nor could she hold her head down for very long. The jury found Foddrill was 100% at fault, and awarded damages to Crane in the amount of $194,100.00. Foddrill appealed this jury verdict and award of damages.

On appeal, Foddrill claimed there was not sufficient evidence to support Crane's claim for negligence. In its analysis, the Court of Appeals looked to the elements of a negligence claim. First, as to breach of duty, the Court acknowledged that while the mere fact a motor vehicle accident occurs does not give rise to an inference of negligence, the showing of additional direct or circumstantial evidence can provide an inference that the other person was negligent. In this case, there was no bad weather, nothing wrong with Crane's car, and Foddrill denied that his cell phone worked when he was later seen using it, all of which are circumstantial evidence that he was negligent in causing the accident. As such, Foddrill's collision into a stationary vehicle with no suggestion of any other contributing causes did allow for an inference of negligence.

Considering proximate cause, the Court noted that while Crane's physician was unable to definitively state her injury was a result of the accident, Crane's injuries were not so complex that a common layperson would not understand them. There was no evidence that Crane suffered any preexisting conditions, and she immediately complained of pain after the accident occurred. The Court held that no expert was needed to show a causal relationship between the accident and Crane's injuries.

Regarding Foddrill's claim that the jury verdict was excessive, the Court affirmed the award of damages to Crane, because the amount was not outrageous and in line with the type of injuries she sustained and the impediments these injuries caused to her normal daily activities and favorite hobbies.

**Keypoint**: Simply because you are involved in a motor vehicle accident does not mean you are negligent, but other factors involved in the accident may help to show that you were.

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## MEDICAL MALPRACTICE: SEXUAL MISCONDUCT

*Fairbanks Hospital v. Dan Harrold, et al.*
Indiana Court of Appeals, November 6, 2008

Dan Harrold's 18 year old daughter was admitted to Fairbanks Hospital for inpatient substance abuse treatment. During her stay, hospital employee Larry Shears participated in her care. During the course of this treatment, Shears made unwanted sexual advances on Harrold.

The Harrolds filed a proposed complaint with the Indiana Department of Insurance, and filed a civil lawsuit against both Shears and Fairbanks Hospital. In the case before the Department of Insurance, a medical review panel ultimately opined that Fairbanks failed to comply with the applicable standard of care and that the Harrolds were damaged as a result. In the civil lawsuit, Fairbanks filed a Motion for Determination of Law to argue that the case fell within the scope of the Indiana Medical Malpractice Act. The trial court denied Fairbanks' motion. Fairbanks appealed this decision.

The Court of Appeals reviewed prior Indiana case law regarding cases involving sexual misconduct between health care providers and patients. In those cases, the recovery sought by the plaintiffs was based on the claim that the health care providers' offending conduct was the actual sexual misconduct. Here, the Harrolds' claim involved a failure to properly supervise the actions of an employee.

The Court of Appeals did find one prior decision, *Winona Memorial Hospital v. Kuester*, dispositive of this case. In *Kuester*, there was an allegation of negligent credentialing of a doctor whose malpractice caused the plaintiff's injury. The injury was caused by two actions – the negligence in credentialing the doctor, and the doctor's negligence in treating the plaintiff. The plaintiff had to first establish the doctor's negligent act proximately caused her injury before proceeding on the claim against the hospital for negligent credentialing. Therefore, both alleged tortious acts must sound in medical malpractice and not ordinary negligence to fall within the scope of the Medical Malpractice Act.

In applying *Kuester* to this case, the Court noted that Shears' sexual misconduct and Fairbanks' negligent supervision of Shears must both sound in medical malpractice in order for the Medical Malpractice Act to apply. Because an employee's sexual misconduct with a patient cannot constitute the provision of health care, Shears' actions do not constitute medical malpractice. As such, the Court held that the Medical Malpractice Act did not apply, and the trial court did not err in denying Fairbanks' motion.

**Keypoint**: The Indiana Medical Malpractice Act does not apply to allegations that a health care provider negligently trains or supervises its employees, if the immediate act that causes a plaintiff's injury does not itself constitute medical malpractice. Therefore, in situations like this, hospitals and other health care facilities will be subjected to claims of ordinary negligence, which, more importantly, means they are not entitled to a statutory cap on damages under the Medical Malpractice Act.

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## RESERVATION OF RIGHTS

*Founders Ins. Co. v. Virginia Olivares, et al.*
Indiana Court of Appeals, October 7, 2008

Linda Vara and her son, Daniel Farley, owned a 1992 Olds Cutlass. Farley was listed as an "excluded driver" on Vara's policy with Founders at the time the Cutlass was involved in a hit-and-run accident on December 16, 2002 with Virginia Olivares (the damaged Cutlass was abandoned a short distance from the accident, with no damage to the steering column, which is one factor suggesting the vehicle had not been stolen). Farley filed a theft report several hours after the accident.

Olivares, however, asserted that she thought Farley had been driving the Cutlass. Olivares asserted this position in a letter to Founders on January 8, 2003. Founders' claim file included a September 18, 2003 reservation-of-rights letter to Vara, denying coverage based on the "non-permissive user" defense.

Olivares filed suit against Vara, Farley, and her own UM carrier on June 18, 2004. Founders retained insurance-defense counsel for Vara and Farley, and allegedly sent reservation of rights letters to Farley and Vara on September 14, 2004. Founders did not have any evidence that these letters were actually mailed to either Vara or Farley, or that they received them. The "e-mail format" copies scanned into the claim file did not have letterhead and were not signed by the purported author.

When Olivares amended her complaint to add Founders on May 3, 2006, Founders counterclaimed with a dec action that it had no coverage on the non-permissive-user defense and the excluded-driver defense.

After a bench trial on the dec action on June 12, 2007, the court entered judgment in favor of Olivares. Essentially, the trial court did not believe Founders ever actually sent the September 14, 2004 letter to Farley and Vara, and therefore Founders was estopped from asserting the excluded-driver coverage defense.

The Indiana Court of Appeals agreed with the trial court when it had applied the coverage exception that "an insurer may be estopped from raising the defense of noncoverage when it assumes the defense of an action on behalf of its insured without a reservation of rights but with knowledge of facts which would have permitted it to deny coverage." The "facts" were that Olivares had previously informed Founders in writing that it was her position that Farley was the hit-and-run driver, and that the dec page showed Farley was an excluded driver.

The Court of Appeals further upheld the trial court's conclusion that the September 14, 2004 ROR letters were never sent to Vara and Farley. Finally, the Court observed that Farley was prejudiced as a matter of law because he was deprived of the notice that he may need to retain personal counsel in the Olivares suit.

It is also noteworthy that neither the trial court nor the Court of Appeals had any concern that Farley was a "resident of [Vara's] household," and therefore an insured under the terms of the Founders policy, even though Farley was living in a residence owned by Vara in Hammond (and which was the listed address in the Founders policy), but Vara was living in New Jersey.

**Keypoints**: 1. The claim file should contain some clear indication that an ROR letter was actually sent to the insured, and preferably, that the insured actually received it. Ideally, that would be to send the ROR letter both first-class mail, and certified mail, return receipt requested. In addition, a notation in the claim file from a mail-room clerk or secretary that they actually put the letter in the mail would be very helpful.

2. The ROR letter should address every theory asserting liability and coverage. In this case, the two theories were either that a thief stole the Cutlass (as asserted by the insureds), in which case the non-permissive user coverage defense would apply; or that Farley was driving the Cutlass (as asserted by Olivares), in which case the excluded-driver defense would apply. The ROR letter should address all plausible theories of how the loss occurred.

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## SPOLIATION OF EVIDENCE BY INSURANCE CARRIER

*American Nat'l Prop. & Cas. Co. v. Traci Wilmoth et al.*
Indiana Court of Appeals, September 19, 2008

Traci Wilmoth lived with her boyfriend, Richard Rider, and their two children in a rental house. A fire occurred at this house, both children were killed, and Rider later died as a result of the injuries he sustained in the fire. While fighting the fire, the firefighters removed a couch from the house and placed it in the front yard. The couch remained there for six weeks, and the landlord of the house later disposed of the couch after the fire department concluded the fire was accidental.

Ultimately, Wilmoth filed suit against the landlord's insurance company, and alleged the insurance company permitted spoliation of evidence with regard to the couch, which Wilmoth contended may be necessary in a claim against the landlord to show the origin of the fire. American National moved for summary judgment, but the trial court denied their motion. A jury later awarded damages to Wilmoth. American National appealed the denial of their summary judgment motion and the jury verdict.

The Court of Appeals noted that the existence of a relationship between an insurance carrier and a third-party claimant may warrant the recognition of a duty to preserve evidence, but only if the carrier knew or should have known that litigation was likely and the claimant would need the evidence. The Court noted that American National never had exclusive possession of the couch, nor did it ever receive any notice of a pending lawsuit.

While a duty may arise when the carrier takes possession of evidence that turns out to be important if the claim is later denied and litigation ensues, American National never had possession of the couch, much less exclusive possession of the couch.

Also, it was not foreseeable that the loss of the couch would potentially interfere with Wilmoth's claim against her landlord. While foreseeability can be inferred from the carrier's actual possession of evidence, foreseeability does not always depend on actual possession. The Court therefore declined to hold that an insurer never owes a third-party claimant a duty to preserve evidence unless it takes exclusive possession.

Finally, the Court addressed public policy concerns regarding spoliation of evidence by an insurance carrier. The Court stated when a carrier is in a better position than the third-party claimant to understand the significance of the evidence and the need to maintain it, the carrier can be held to a duty to preserve this evidence. However, the Court recognized that to comply with this duty, an insurance carrier only has to exercise the appropriate degree of care to maintain the evidence. In this case, the Court found that this public policy did not support the imposition of a duty on American National, because finding a duty would essentially require insurers to always preserve any potentially relevant evidence after any potentially covered event. This is, according to the Court, a practical impossibility in most situations.

**Keypoint**: An insurance carrier may be required to preserve evidence critical to a third-party claimant's lawsuit, but only if certain conditions are met. While taking direct possession of evidence generally will create a duty to maintain it, other factors may support the finding of a duty outside of actual possession.

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## WORKER'S COMP: "PERSONAL EVENT"

*Bridget Pavese v. Cleaning Solutions*
Indiana Court of Appeals, September 30, 2008

Bridget Pavese, an employee of Cleaning Solutions, was beginning to clean a floor as part of her job as a custodial worker. Pavese first dusted the floor, and then went to get a scrubbing machine. However, her coworkers found her unconscious on the floor approximately 10-15 minutes later, and Pavese had no memory as to how she fell. Pavese's physician tried to rule out any preexisting conditions that may have caused the fall. After receiving medical treatment for a few months, Pavese suggested to her physician that her fall could have been work-related, and her physician stated he could not rule this out.

Pavese filed a worker's comp application. However, the Board found no evidence the injury was work-related, and that Pavese's injury was a "personal event," for which Pavese was not entitled to worker's compensation benefits. Pavese appealed to the full Board, and the decision was affirmed. Pavese then appealed to the Indiana Court of Appeals.

Pavese claimed the worker's compensation statute was unconstitutional as applied to her, as it required her to prove a negative – that is, she has to prove that her injury was not the result of a "personal event." In the alternative, Pavese claimed that if the statute was constitutional, she had met her burden.

The Indiana Court of Appeals rejected Pavese's claim that the statute was unconstitutional, because she only quoted from the Indiana Constitution without providing any analysis as to how it was unconstitutional. The Court then addressed her claim that she met her burden of proving her injury was not a "personal event."

The Worker's Compensation Act has two requirements for an employee to receive benefits. First, the injury must arise out of employment. Second, the accident causing the injury must occur in the course of employment. The Indiana Supreme Court's 2003 *Milledge* decision initially put the burden of proof on the employer to show the injury did not arise out of the employment. However, the Indiana General Assembly subsequently amended the Worker's Compensation Act to place the burden of proof on the employee to show it did arise out of the employment.

Pavese suggested a couple of different explanations of how her injury occurred, one of which was work-related (slick floor), and one of which was personal (syncope). The Court therefore found that she failed to meet her burden of proof that her injury arose out of her employment. As such, the Court affirmed the decision of the Worker's Compensation Board to deny compensation to Pavese as a result of her injury.

**Keypoint**: In order for an employee to recover for an injury sustained while at work, the burden of proof is clearly on the employee to show that the injury was not the result of a personal event.

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# HAPPY HOLIDAYS!

THE ATTORNEYS AND STAFF OF THE TYRA LAW FIRM THANK YOU FOR YOUR LOYALTY AND SUPPORT THROUGHOUT THE YEAR. WE WISH OUR CLIENTS AND FRIENDS A JOYFUL HOLIDAY SEASON AND A PEACEFUL AND PROSPEROUS NEW YEAR.

*Kevin, Jerry, Amy and Jan*

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