The Tyra Law Firm, P.C.

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KEVIN TYRA ELECTED TO DTCI BOARD OF DIRECTORS

At the annual conference of the Defense Trial Counsel of Indiana at Indiana University in Bloomington on November 19-20, Kevin Tyra was elected to a three-year term on the DTCI Board of Directors.

Kevin is completing his second term as Chair of the DTCI Insurance Coverage Section.

Kevin provided an insurance caselaw update at the Insurance Coverage Section break-out, which also included a presentation on "When Financial Institutions Hit the Wall: Bernie Madoff, Marcus Schrenker, and More."

Pictured: Kevin at the conference with Jerry Padgett, Denise Chavis, and fellow board member Ed Murphy of Ft. Wayne

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CAUSATION AS A CASE-DISPOSITIVE ISSUE

By Jerry M. Padgett and Kevin C. Tyra
[Note: this article previously appeared in the October 14, 2009 issue of *Indiana Lawyer*.]

It would seem that causation is not a likely basis for summary judgment. "Generally, causation, and proximate cause in particular, is a question of fact for the jury's determination." *Bush v. Northern Indiana Public Service Co.*, 685 N.E.2d 174, 178 (Ind. Ct. App. 1997). But as Lee Corso would say, "Not so fast, my friend." Treatment of this issue has varied in recent Indiana appellate decisions. This article will provide a general overview of how some of these cases have been decided, and how causation may succeed on summary judgment.

What is proximate causation?

The element of causation actually has two components: "causation-in-fact" and "scope of liability." *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243-44 (Ind. 2003). "Causation-in-fact" is established by showing that but-for the defendant's action or omission, the injury would not have occurred. The "scope of liability" contemplates whether the plaintiff's injury was a natural and probable consequence of the defendant's action or omission, which, under the circumstances, should have been foreseen or anticipated by the defendant. If the ultimate injury was not reasonably foreseeable as a consequence of the defendant's action or omission, the defendant will not be liable.

In addition to the *prima facie* question of whether proximate cause exists, the existence of an intervening cause can be case-dispositive as well. When a third party becomes involved so that their actions also contribute to the injuries suffered by the plaintiff, Indiana law provides that this "independent agency" intervenes between the original defendant's negligent act and the plaintiff's injury, which breaks the chain of causation and absolves the original defendant of liability. *Mayfield v. The Levy Co.*, 833 N.E.2d 501, 506 (Ind. Ct. App. 2005).

The question that needs to be asked in this situation is whether it was reasonably foreseeable under the circumstances that the independent agency would intervene to cause the plaintiff's injury. This intervening cause must be an independent act that interrupts the natural consequences of the original defendant's actions. If this intervening cause is not reasonably foreseeable, the original defendant is relieved from all liability stemming from his negligent act. The rationale for absolving the original defendant of liability in this situation is because the courts only want to assign legal responsibility to those whose actions are closely connected to the plaintiff's injury. *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917 (Ind. Ct. App. 2001). However, what constitutes an intervening cause is also something upon which Indiana case law appears to be divided.

Causation and motor vehicle accidents

The following cases all stem from motor vehicle accidents involving a roadside feature, and demonstrate how even when faced with what appear to be similar fact patterns, recent Indiana case law analyzing what constitutes a material fact regarding causation has produced completely opposite results.

In *Correll v. Indiana Dept. of Transp.*, 783 N.E.2d 706 (Ind. Ct. App. 2003), *trans. denied*, Correll was driving across a bridge that was originally four lanes wide, but had been narrowed down to two lanes through the placement of concrete barriers along the outside edges of the inner two lanes. A drunk driver approaching from the opposite direction crossed into Correll's lane and hit Correll head-on. Correll filed suit against INDOT, claiming the design and maintenance of the bridge was negligent. The trial court granted INDOT's motion for summary judgment, finding the actions of the drunk driver constituted an independent cause of the accident, which super-

seded any alleged liability by INDOT. The Court of Appeals overturned the trial court's decision.

The Court of Appeals concluded that whether INDOT should have reasonably foreseen a drunk driver (or any other type of impaired driver) would cross the center line and injure an oncoming motorist is a question properly decided by the jury. Therefore, the Court held the trial court erred in determining the drunk driver's conduct was unforeseeable as a matter of law, and that a genuine issue of material fact existed as to whether INDOT's design of the bridge was the proximate cause of Correll's injuries.

However, in *Carter v. Indianapolis Power & Light Co.*, 837 N.E.2d 509 (Ind. Ct. App. 2005), *rh'g. denied; trans. denied*, the Court found there was no material fact regarding causation. In *Carter*, three teenagers driving on a hilly road decided to "jump the hills," or, drive at a high rate of speed over the hills to briefly send the car airborne. The teenagers jumped several hills at approximately sixty miles per hour, and then accelerated to almost eighty miles an hour to jump the "big hill." However, after going airborne and landing in the middle of the road, the driver lost control and oversteered. The car sideswiped a telephone utility pole and then slammed into an IPL utility pole and caught fire. Only one of the teenagers survived. The Estate of one of the passengers filed suit against IPL, among others, and alleged IPL negligently placed, installed, and maintained the utility pole. This utility pole was located a few feet from the side of the road, closer than the plaintiffs asserted it should have been. IPL moved for summary judgment, and the trial court granted the motion.

In upholding summary judgment for IPL, the Court of Appeals found the undisputed evidence established that any breach of a duty by IPL did not proximately cause the accident. The Court noted there was no way for IPL to reasonably foresee that a driver would intentionally jump the hills on that street at a high rate of speed. Therefore, the negligent driving of the third party driver was found to be an intervening cause, which relieved IPL from all liability for any negligent placement of the utility poles.

Similarly, there was no material dispute as to causation in *Florio v. Tilley*, 875 N.E.2d 253 (Ind. Ct. App. 2007). Florio was driving on a snowy highway, when he pulled over to the shoulder to wait until weather conditions improved. Florio stopped his car just north of an on-ramp to the highway. A driver began to merge from the on-ramp to the highway just as Tilley was driving his semi-tractor on the highway in the same direction. The car entering the highway slid on a patch of ice, struck the semi-tractor, and ultimately struck Florio's parked car. Florio filed suit against Tilley, but the trial court later granted Tilley's motion for summary judgment. The Court of Appeals affirmed this ruling.

Florio argued on appeal that had Tilley avoided driving altogether until the weather improved, there would have been no accident. However, the Court of Appeals stated this was insufficient to establish proximate cause. Florio also argued that Tilley would have had time to avoid the collision if he had been driving at a much slower speed. The Court found there was no evidence to support this argument, and that even if Tilley's speed was excessive for the conditions, speed alone is only a remote cause and is not sufficient to establish proximate causation. The Court also noted Florio presented no evidence that Tilley had time to react to the loss of control by another driver, and therefore found a reasonable jury could not infer Tilley was negligent in failing to avoid the collision.

In contrast, the Court of Appeals has even more recently held that whether a property owner should foresee that a driver would lose control and strike a mailbox located three feet off the road was a question for the jury to decide. *Sparks v. White*, 899 N.E.2d 21 (Ind. Ct. App. 2008). In *Sparks*, White inexplicably drove off the road and struck a brick mailbox support. This mailbox support was on Sparks' property. White filed suit against Sparks, alleging he was negligent in maintaining an unreasonably dangerous mailbox support, and Sparks moved for summary judgment. The trial court denied the motion, but in this instance the Court of Appeals affirmed the denial of summary judgment.

As it related to causation, Sparks argued he could not have foreseen that White would cross the oncoming lane of traffic, drive off the road for no apparent reason, and strike his mailbox. In deciding this issue, the Court noted that Comment H to Section 368 of the Restatement (Second) of Torts states the distance of an object from the side of a road as it relates to the recognizable risk of harm to those traveling on a highway is important to consider, as well as several other factors, such as the nature of the condition creating the potential risk and the character and use of the highway. As such, the Court found a genuine issue of material fact existed as to whether Sparks foresaw or should have foreseen that White would leave the road and strike the mailbox located three feet from the side of the road.

Even in cases not entirely decided on causation, the issue of whether a material fact exists as to causation can still be important. In *Witmat Development Corp. v. Dickison*, 907 N.E.2d 170 (Ind. Ct. App. 2009), an intoxicated driver left the road, traveled approximately 230 feet, crashed into a water pit along the side of the road, and ultimately drowned. While the Court found the property owner owed no duty to the intoxicated driver because the driver was not traveling with reasonable care, the Court also noted that an equally important part of their decision was that the driver's Estate failed to designate any evidence showing that some other factor other than the intoxicated status of the driver caused the accident. Therefore, there was no issue of material fact to preclude summary judgment.

Product liability

The most recent example of proximate causation as a dispositive issue can be found in *Kovach v. Caligor Midwest, et al.*, 913 N.E.2d 193 (Ind. 2009). In *Kovach*, a young child was administered a post-operative dose of pain medication from a medicine cup with translucent markings to measure the contents, including markings for 15 ml and 30 ml. The nurse testified she filled the cup approximately halfway, or 15 ml. However, the child's father stated the nurse administered a full cup. The child went into respiratory arrest and subsequently died.

The parents sued, among others, the manufacturers and distributors of the cup. These defendants moved for summary judgment, arguing in part that the cup markings were not the proximate cause of the alleged overdose. The trial court granted the motion for summary judgment, but the Court of Appeals overturned this ruling. The Indiana Supreme Court granted transfer, and reversed the Court of Appeals' decision.

In affirming the trial court's entry of summary judgment, the Supreme Court cited to the nurse's extensive experience in using the medicine cup, and that the undisputed evidence demonstrated that if there was an overdose, it was not because of an imprecise measurement due to unreadable marks on the cup. Instead, the Supreme Court stated if the child died because of an overdose, it was because he erroneously received a full cup of pain medication when he should have only received a half cup, which the nurse knew she was supposed to administer. Therefore, the Supreme Court found the accident could not be attributed to any alleged defects in the cup.

Viability of causation defenses

These authors cannot discern how the Court of Appeals has determined that the power company could not foresee teenagers hill-jumping on a county road when the power company located poles near the road, but the owner of a brick mailbox stand was expected to foresee that a driver would drive off the road and into his mailbox.

The Indiana appellate courts have yet to establish application of a clear standard on causation as a dispositive issue. In the meanwhile, defense counsel should look closely at any case in which the *Dickison* unforeseeability argument, the *Florio* remote-causation argument, or the *Kovach* argument of no causation-in-fact, may be made as the basis for summary judgment on causation.

As these cases demonstrate, whether a genuine issue of material fact exists as to causation considerably varies even when comparing similar cir-

cumstances. The defense counsel should always consider how the alleged negligence actually caused the injury to determine whether liability exists. Even though a duty may exist and a breach of that duty may have occurred, you may still be able to dispose of your case on summary judgment if there is no proximate causation.

[*Postscript*: Since the publication of this article, the Indiana Court of Appeals issued a ruling in *Humphery v. Duke Energy Indiana, Inc.*, 2009 WL 3785754 (Ind. Ct. App. 2009) that was factually almost identical to *Carter*, but reached the opposite result. In *Humphery*, Duke Energy allegedly placed a pole closer to a rural four-way-stop intersection than it should have. Another driver disregarded the stop sign and hit a vehicle driven by plaintiff's decedent, pushing decedent's vehicle into the utility pole, killing him. The Court of Appeals reversed the summary judgment that the trial court had granted to Duke Energy. The Court distinguished the *Humphery* case from the *Carter* case on the basis that Carter was a passenger in the vehicle with the negligent driver, while the *Humphery* decedent was driving a different vehicle from the negligent driver. Frankly, the distinction the Court attempts to make does not make sense to us. The contradictory decisions from the Court of Appeals continue.]

AIRBAG WARNING: NO FEDERAL PRE-EMPTION

Peter Cook, et ux. v. Ford Motor Co.
Indiana Court of Appeals, September 21, 2009

Lori Cook was driving the Cooks' children in their 1997 Ford F-150 truck. Her husband, Peter Cook, buckled their eight-year-old daughter Lindsey into the front passenger seat and the Cooks' two-year-old son was in a child seat in the back seat of the truck. Lori and the children were involved in a low-speed rear-end collision. At some point prior to the collision, Lindsey had unbuckled her seat belt and was unrestrained at the time of the collision. The air bags deployed as a result of the collision and Lindsey suffered serious head trauma.

The Cooks filed a products liability lawsuit against Ford Motor Company, alleging that Lindsey's injuries were caused in part by Ford's defective instruction and warnings with respect to the front passenger seat airbag and airbag deactivation switch.

The truck was equipped with a front side passenger airbag which could be manually disabled. Lori, the primary driver of the vehicle, did not read the owner's manual nor any of the warnings printed within the car. Peter, however, did read portions of the owner's manual, including the section regarding the use of the passenger side airbag:

> *"Keep the passenger air bag turned on unless there is a rear-facing infant seat installed in the front seat. When the passenger air bag switch is turned off, the passenger air bag will not inflate in a collision.*
>
> *"If the passenger air bag switch is turned off, it increases the likelihood of injury to forward facing occupants in the passenger seat.*
>
> *"If possible, place children in the rear seat of your vehicle. Accident statistics suggest that children are safer when properly restrained in rear seating positions than when they are restrained in front seating positions.*
>
> *"Children who are too large for child safety seats (as specified by your child safety seat manufacturer) should always wear safety belts."*

Peter believed that the only reason to turn off the airbag was if a child was riding in the front passenger seat in a rear-facing child seat. The Cooks contended that the warnings given failed to adequately instruct them to deactivate the airbag for all child passengers and/or to specifically warn of the dangers of airbags to children.

Ford argued that the Cook's failure to warn

claim was impliedly pre-empted by federal regulation governing airbag warnings, 49 C.F.R. 571.208 which was promulgated from the National Traffic and Motor Vehicle Safety Act (the "Safety Act"). Because it had complied with the federal regulation, the product was not defective and Ford was not negligent in its warnings. The trial court granted Ford's Motion for Summary Judgment and entered judgment in Ford's favor. The Cooks appealed.

Ford cited Standard 208 of the regulation, which provides as follows:

> *"The vehicle owner's manual shall provide in a readily understandable format:*
> *(a) Complete instructions on the operation of the cutoff device;*
> *(b) A statement that the [airbag] cutoff device should only be used when a rear-facing infant restraint is installed in the front passenger seating position; and*
> *(c) A warning about the safety consequences of using the cutoff device at other times."*

The Indiana of Court Appeals reversed, holding that while the standard requires an airbag warning to be included in the owner's manual, it describes only generally the content that should be covered by the warning. The Cooks' claim that the airbag warning should have been worded differently in no way conflicted with the standard and was therefore not preempted by federal regulation.

The Court opined that the "savings clause" of the Safety Act expressly preserves those actions that seek to establish a greater safety than the minimum safety achieved by a federal regulation intended to provide a floor.

The Court noted that when Standard 208 was amended to address front passenger airbags, children and cutoff devices, the National Highway Traffic Safety Administration (NHTSA) specifically declined to establish the precise language that must appear in the owner's manual. The Court reasoned that the Standard thus provided a floor for the warnings to be included in an owner's manual with respect to airbag safety and use of a cutoff device but not a ceiling.

In overturning the summary judgment, the Court also held that the question of whether Lindsey's subsequent unbuckling of her seatbelt and her mother's failure to re-buckle the seatbelt were intervening causes cutting off Ford's liability, were questions of fact for a jury to decide.

Key Point: A federal regulation governing product safety warnings does not, in of itself, trigger the application of the preemption doctrine.

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CONSEQUENTIAL DAMAGES FOR DELAYED PAYMENT TO AN INSURED

Rockford Mutual Ins. Co. v. Terrey Pirtle
Indiana Court of Appeals, August 11, 2009

Pirtle insured a historic building with Rockford Mutual. Pirtle began restoring the building, and rented the property while it was being restored. The property was later damaged in a fire. The year before the fire, the building was valued at $165,000. Rockford Mutual initially authorized $80,000 to settle the claim, which was approximately what an independent adjustor had estimated was the amount of damages to the building. Pirtle rejected the offer, as this amount was insufficient to satisfy the mortgage or repair the damage to the building. Due to the damage to the building, Pirtle was no longer able to lease it to his tenants. Pirtle's contractor estimated the damage to the building to be $232,915.39. Rockford Mutual's claims supervisor authorized settlement up to Pirtle's policy limit of $193,000.

However, Rockford Mutual offered Pirtle $69,874.62, which is what Rockford Mutual considered to be the actual cash value of the building. Pirtle made a counter demand of the policy limits

minus a 10% discount, but Rockford Mutual responded that it was only authorized to offer the actual cash value at that time, because Pirtle could not receive the replacement cost until repairs or replacement of the building had been completed. An independent adjustor later determined the actual cash value of the building to be $86,146.66.

Pirtle filed suit against Rockford Mutual for breach of contract and bad faith. Rockford Mutual subsequently paid the $86,146.66 for the actual cash value, and the bad faith claim was dismissed. However, the breach of contract claim went to trial, where the jury awarded Pirtle $124,149.55 under the policy and $406,136.58 in consequential damages. The Court of Appeals affirmed.

On appeal, Rockford Mutual argued Pirtle was limited to recovering only the actual cash value because the terms of the policy required Pirtle to first repair or replace the property before Rockford Mutual could pay any replacement costs. Rockford Mutual also took issue with the fact that Pirtle used the actual cash value amount he eventually received to pay on the mortgage, rather than trying to repair the building.

However, the Court noted that Pirtle was placed in a "no win" situation, since he was behind on the mortgage payments and still had no rental income by the time he did receive the actual cash value payment. The Court further noted that even when replacement is required by an insurance policy, the insured's compliance can be excused by the actions of the insurer.

As a matter of first impression, the Court then addressed whether an insured could be excused from performance of a condition precedent contained in a fire insurance policy. As to this case, the Court noted Pirtle had informed Rockford Mutual he wanted his replacement costs paid, but Rockford Mutual initially only responded with an offer to cash out the policy for $80,000. Subsequently, after mortgage foreclosure proceedings had begun and the property had been condemned, Rockford Mutual then offered $69,874 as an actual cash value amount, with the balance of the $193,000 policy limit to be paid once the property was repaired. As a result, Pirtle was placed in a very bad position to start making repairs. Therefore, the Court found equitable principles excused Pirtle's failure to repair or replace the building prior to receiving his replacement costs.

As to the award of consequential damages, Rockford Mutual argued the dispute over the actual cash value was in good faith and therefore was erroneously awarded. However, the Court stated Rockford Mutual's motive for its delayed payment was irrelevant, because the promisee in a breach of contract claim will be compensated for all damages proximately resulting from the promisor's breach. The Court further stated public policy did not preclude the award of consequential damages.

Key Point: Under a fire insurance policy, the insured's failure to comply with a condition precedent can be excused if the insurer delays payment to the point the delay affects the insured's overall financial situation. And in general, insurers should avoid extended delays in making payments under a policy as much as possible.

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THE OLD OAKEN BUCKET GAME

Boilermakers v. Hoosiers

At the conclusion of the annual DTCI conference at Indiana University, Kevin Tyra (Purdue University, BA 1978), took in the Old Oaken Bucket Game between Purdue and Indiana University with his daughter, Allison, a junior at IU.

Kevin is pleased to report that the Boilermakers once again retained the Bucket, winning the game, 38-21.

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