

# THE TYRA LAW FIRM, P.C.

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QUARTERLY NEWSLETTER

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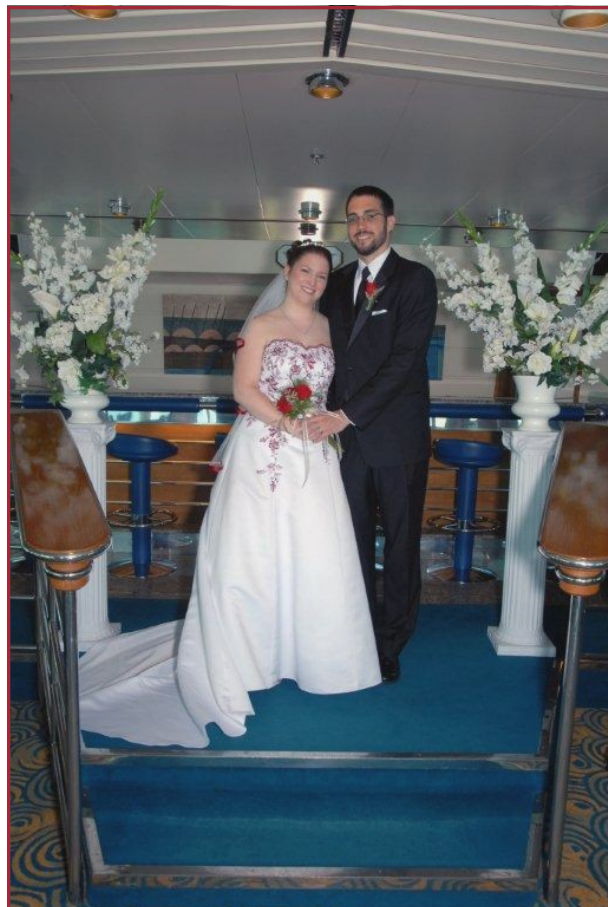
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## Congratulations to Amy and Adam

Our paralegal, Amy Heustis, married Adam Tyra (Jan and Kevin's son) on a cruise from Port Canaveral, Florida to Nassau, Bahamas, on September 13, 2010.

You will notice in e-mails and other contact with Amy that she now goes by Amy Tyra.

In addition to Amy's employment with The Tyra Law Firm, P.C., Adam is employed as a highway-design engineer with Janssen & Spaans.



## COMPULSIVE GAMBLER

*Caesars Riverboat Casino v. Genevieve Kephart*  
Indiana Supreme Court, September 30, 2010

Caesars Riverboat Casino, LLC operates a riverboat casino in Elizabeth, Indiana. Genevieve Kephart is a resident of Tennessee. Kephart has a pathological addiction to gambling of which Caesars was aware. On March 18, 2006 Kephart travelled to Caesars after receiving an offer of free transportation, hotel room, food, and alcohol from Caesars. In a single night of gambling, Kephart lost \$125,000 through the use of six counter checks provided to her by Caesars.

The counter checks were returned to Caesars for insufficient funds. Caesars filed suit against Kephart for payment of the checks, treble damages, and attorney fees as provided under statute. Kephart counterclaimed alleging that Caesars knew of Kephart's pathological addiction and took advantage of the addiction for gain. Kephart sought damages for the consequences resulting from the \$125,000 loss, including damages for past, present, and future mental, emotional and psychological injury. Kephart contended that Caesars owed her a common law duty to protect her from its enticement to gamble because it knew she was a pathological gambler.

Caesars moved to dismiss the counterclaim pursuant to Trial Rule 12 (B)(6). The trial court denied Caesar's motion but certified its ruling for interlocutory appeal. The Court of Appeals accepted jurisdiction and reversed the trial court's judgment. The Indiana Supreme Court granted transfer.

The Supreme Court stated that the Indiana statute, I.C. 4-33-1-2, which legalized riverboat gambling in 1993, an abrogation of the long-standing prohibition against gambling in the state, pre-empted any state law regarding the entire subject of riverboat gambling. Specific to this case, the Court highlighted the statute's creation of a "voluntary exclusion" program under which any person could request that they not receive direct marketing materials from the casinos,

are not allowed to gamble and are not extended check cashing or credit privileges. The Court ruled that "[t]he existence of the voluntary exclusion program suggests the legislature intended pathological gamblers take personal responsibility to prevent and protect themselves against compulsive gambling." The Court added that the legislature did not require casinos to identify and refuse service to pathological gamblers who did not self-identify. The Court ruled that Kephart's claim therefore directly conflicted with the legislature's choice and reversed the judgment of the trial court.

Justice Dickson dissented from the majority opinion, stating that derogations of the common law are to be strictly construed against limitations on a claimant's right to bring suit, and noting that nothing in Indiana's statutory system of gambling regulation is there any provision that expressly or unmistakably abrogates Indiana's common law requiring business operators to exercise reasonable care for the safety of their customers and subjecting them to accountability in damages for failing to do so.

**Keypoint:** Indiana's riverboat gambling laws restrict a compulsive gambler's claims that a casino enticed her, again reflecting the Indiana appellate courts' inclination to hold individuals responsible for their own behavior.

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## CONSTRUCTION DEFECT COVERAGE

*Sheehan Construction Co., et al. v.*

*Continental Casualty, et al.*

Indiana Supreme Court, September 30, 2010

For years, Indiana caselaw was very favorable to the CGL carriers regarding construction-defect coverage for builders and contractors. Basically, Indiana law had been that there is absolutely no CGL coverage for claims (typically by home buyers) for defective workmanship in construction. The only viable claim was that the defective workmanship caused bodily injury or property damage to something other than the builder/contractor's own work product. See, e.g., *Indiana Ins. Co. v. DeZutti* (Ind. 1980); *R.N. Thompson & Assoc. v. Monroe Guaranty* (Ind.App. 1997); and *Amerisure v. Wurster Const. Co.* (Ind.App. 2004).

Sheehan Construction was the builder of a residential subdivision. The allegedly-defective work, resulting in significant water intrusion throughout the homes in the subdivision, was performed by subcontractors, and part of Sheehan's argument was that it had coverage for any defective work by subs because, among other things, the subs' defective work was still an "accident" from Sheehan's standpoint.

In a 3-2 split, the Supreme Court in Sheehan held that "if the defective work of the subcontractors was done intentionally instead of 'without intention or design', then it is not an accident. Otherwise the opposite is true." The Supreme Court decision is not altogether clear whether this principle applies only to coverage for a builder for the subs' defective workmanship, or for the builders' own defective workmanship as well; and whether the "intent" applies to the intentional nature of the work itself, or of the defective result. So far as I can tell, it does apply to defects created either by the builder or a sub, and the issue is whether the builder/sub intended the defective result, not the construction itself (obviously, the builder/sub intended to perform the work). As the Court said, "we align ourselves with the jurisdictions adopting the view that improper or faulty workmanship does constitute an acci-

dent so long as the resulting damage is an event that occurs without expectation or foresight."

**KeyPoints:** This decision will almost certainly change the posture of construction-defect coverage in Indiana unfavorably for carriers. Part of any investigation of such a claim should include inquiry into the builder/sub's "intent," that is, whether the builder/sub knew the building techniques were likely to create problems later in the building (especially if they were cutting corners to save on costs).

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## MED MAL STATUTE OF LIMITATIONS

*Suzanne Eads v. Community Hospital*

Indiana Supreme Court, September 1, 2010

Suzanne Eads had a cast put on her leg as a patient at Community Hospital, and was discharged with crutches. Eads requested the use of a wheelchair, but the Hospital denied this request. As Eads was leaving the hospital on the crutches, she fell. Eads subsequently filed a general negligence claim against the Hospital, but the Hospital's motion to dismiss was granted on the grounds that Eads' claim was actually for medical malpractice and that no proposed complaint had been filed with the Indiana Department of Insurance ("IDOI").

A couple of weeks before the trial court granted this motion, Eads filed a proposed complaint with the IDOI based on the same circumstances as her general negligence claim, and explained she wished to preserve her right to bring her claim if the general negligence claim was dismissed. The Hospital subsequently filed a petition for preliminary determination of law on the grounds the IDOI complaint was filed beyond the two year statute of limitations. The Hospital's petition was granted, and Eads appealed.

On appeal, Eads argued the Indiana Journey's Account Statute saved her IDOI complaint as a continuation of her general negligence claim. However, the Court of Appeals affirmed, and found that a medical malpractice claim is different from a general negligence claim. As such, the Court found the Journey's Account Statute did not provide for a continuation of the general negligence claim. The Indiana Supreme Court accepted transfer, and reversed.

The Supreme Court initially stated that the Journey's Account Statute can only be invoked if the claimant filed a timely claim that failed for reasons other than negligence in the prosecution of the claim. The Court rejected the Hospital's claims that Eads had been negligence in the prosecution of her general negligence claim, though, stating that Eads' decision not to appeal the dismissal of her general negligence claim and the fact that she initially filed her claim as a general negligence claim do not constitute negligence in prosecuting her claim.

In addition, the Supreme Court also rejected the Hospital's claim that the IDOI complaint asked for a different set of relief than her general negligence claim sought. The Supreme Court noted that Eads alleged an identical set of facts and the basis of each claim was the Hospital's failure to provide a safe means of egress, and that the IDOI complaint only altered the procedural requirements to be able to assert the claim. As such, the Supreme Court found the IDOI Complaint was a continuation of the general negligence claim.

Finally, the Supreme Court rejected the Hospital's claim that the IDOI complaint could not have been a continuation because it was filed two weeks before the general negligence claim was dismissed. The Court stated the Journey's Account Statute's requirements are met whether the second claim is filed before or after the failure of the first claim.

**KeyPoint:** The Journey's Account Statute provides that a general negligence claim that is dismissed by a state court can later be filed with the Indiana Department of Insurance as a medical malpractice claim even after the statute of limitations has expired, as long as it alleges the same set of facts.

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## PUBLIC INSURANCE ADJUSTER

*Meridian Security Ins. Co. v.  
Hoffman Adjustment Co., et al.*  
Indiana Court of Appeals, August 18, 2010

Meridian homeowner insureds Stefo and Adele Gubic suffered a fire loss at their residence. Meridian and the Gubics reached agreement on the construction and repair claim, but were not able to agree on the personal property claim. The Gubics retained Hoffman Adjustment Co. as their public adjuster. Disagreements ensued on several issues, including sufficiency of inventories, whether the property could be salvaged through cleaning, and the value of the property, and the Gubics filed a Petition for an Umpire. After allowing Meridian to photograph the personal property at issue, the Gubics disposed of the property.

The Gubics filed suit alleging breach of contract and bad faith against Meridian, which filed a counterclaim for declaratory judgment alleging fraud against the Gubics, along with a third-party complaint against Hoffman, alleging Hoffman breached the terms of the policy, failed to act in good faith, engaged in spoliation of evidence and fraud, committed unauthorized practice of law, and tortuously interfered with Meridian's business and contractual relationships with the Gubics.

Hoffman moved for summary judgment on the third-party complaint, and the trial court granted the motion. The Indiana Court of Appeals affirmed.

The Court explained that the Gubics hired Hoffman as their agent regarding their property claim. Generally, the agent is liable only to its principal for negligent performance of his duties, and the agent's wrongful acts are imputed to the principal. Also, Indiana law does not recognize a claim that an agent "interferes" with a third party's relationship with the agent's principal, because that would be tantamount to the principal interfering with its own relationship with the third party. Simi-

larly, any claims for Hoffman's alleged fraud and spoliation of evidence are really claims against the Gobics for breach of policy obligations.

**KeyPoint:** Many property insurance adjusters are familiar with how difficult it can be dealing with public insurance adjusters. This decision, unfortunately, gives public insurance adjusters virtual immunity from any claim by the property carrier for misconduct.

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## RELIGIOUS DEFENSE

*Rosalyn West v. Betty Wadlington, et. al.*  
Indiana Supreme Court, September 22, 2010

Rosalyn West was a member of Mt. Olive Missionary Baptist Church, chair of the Church's Christian Education Committee, and a member of the Church's Pastoral Search Committee. Betty Wadlington and Jeanette Larkins were also members of the church and belonged to the Church's Women of Faith Group. On October 14, 2007, Wadlington sent an e-mail message to Larkins and two other individuals informing them of an attached memo she previously sent to the Church's leadership which urged the Deacons and Trustees that West must be "dealt" with by being removed from Church offices she held. Wadlington's memo alleged that West was a "one woman wrecking crew," who was anything but "Christ-like" and who set up a former pastor for dismissal. The memo also characterized West as vindictive, possessing an "evil spirit," and warned that "the Holy Spirit is not the spirit that is guiding her thoughts, words and deeds."

Larkins, an officer with the Indianapolis Metropolitan Police Department, received Wadlington's email message at Larkins' work e-mail address and using this account, forwarded the message to eighty-nine other email addresses.

West filed a Complaint against Wadlington, Larkins, and the City of Indianapolis on theories of defamation and invasion of privacy. Larkins and the City filed a motion to dismiss pursuant to Indiana Trial Rule 12(b)(1) ("lack of subject matter jurisdiction") arguing that the First and Fourteenth Amendments of the U.S. Constitution barred the action due to the fact that an adjudication of the case would require excessive entanglement in the Church's politics and doctrine. The trial court granted the motion. West appealed and the trial court's ruling was reversed by the Indiana Court of Appeals. The Indiana Supreme Court granted transfer.

The Indiana Supreme Court held that "a court with authority to hear claims concerning defamation and invasion of privacy disputes is not ousted of subject matter jurisdiction merely because the defendant pleads a religious defense." The Court noted that while the First and Fourteenth Amendments may constitute grounds for summary judgment in the matter, their being raised as defenses to the claim had no bearing on the subject-matter jurisdiction of the trial court. The Court reversed the trial court's grant of dismissal and remanded the case for further proceedings.

**KeyPoint:** Subject-matter jurisdiction is not determined by the defendants' substantive legal defenses even if such defenses are constitutional in nature.

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## SETTLEMENT VOIDS UIM COVERAGE

*Cincinnati Ins. Co. v. Anita G. Adkins, et ux.*  
Indiana Court of Appeals, September 30, 2010

Strack struck and injured Adkins in a motor vehicle accident. Adkins accepted an offer from Strack's liability carrier of its policy limits. Adkins did not notify her umbrella underinsured motorist carrier, Cincinnati, of the settlement. Cincinnati learned of the settlement two weeks later. Adkins then accepted the policy limits of her primary UIM carrier.

Cincinnati contended that Adkins' umbrella UIM coverage was voided by her settlement with Adkins' liability carrier without first notifying Cincinnati and obtaining its consent, pursuant to her policy obligations. The Cincinnati policy provided in relevant part that "an insured who destroys the insurer's contractual subrogation rights breaches the insurance contract, and, as a result, extinguishes his right of action on the policy."

In a relative short opinion, the Court of Appeals agreed with Cincinnati that under the plain language of the policy, Adkins impaired Cincinnati's subrogation rights and thereby destroyed her umbrella UIM policy rights. The Court noted that Cincinnati had no obligation to present evidence of prejudice to support the voiding of the policy in this situation.

**KeyPoints:** This decision is fairly obvious and is not new law in Indiana, but serves to illustrate once again that the Indiana courts tend to strictly enforce the carrier's policy rights, and show little tolerance for insureds who impair those rights.

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## WRONGFUL DEATH: ATTORNEY FEES

*Hematology-Oncology of Indiana, P.C. v. Hadley Fruits*  
Indiana Court of Appeals, August 18, 2010

*Indiana Patient's Compensation Fund v. Beverly Brown*  
Indiana Court of Appeals, September 17, 2010  
(transfer pending)

In Fruits, the mother of three adult non-dependent children passed away. Fruits was one of these children, and was named as the personal representative of the Estate. The Estate filed a malpractice claim against Hematology-Oncology of Indiana ("HOI"). The medical review panel found against HOI, and the Estate subsequently filed a wrongful death claim. After going to trial, the jury found for the Estate and the trial court awarded attorney's fees and litigation expenses. HOI appealed on the grounds that such an award is not available under the Adult Wrongful Death Act. The Court of Appeals affirmed.

In Brown, Barbara Frieden suffered a fatal heart attack. At the time of her death, Frieden was not married and had no dependents. Brown was Frieden's sister, and was the executor of Frieden's estate. Brown filed suit against Frieden's health care providers on the grounds they failed to diagnose and treat Frieden's heart condition. Ultimately, the Estate settled with the health care providers in an amount that allowed the Estate to petition the Indiana Patient's Compensation Fund ("the Fund") for further compensation.

In addition to several claims the Fund did not contest, the Estate sought to recover for loss of services to Frieden's parents, expenses related to the administration of the Estate, attorney's fees, and litigation costs. And while the Fund did not contest the amounts requested for these claims, it argued these claims simply were not permitted by the Adult Wrongful Death Statute. The Fund filed for partial summary judgment on this issue, and

Brown filed a cross-motion for partial summary judgment. The trial court awarded Brown the full amount requested. The Fund appealed, but the Court of Appeals affirmed.

The central issue in both Fruits and Brown is whether attorney's fees are recoverable under the Adult Wrongful Death Statute. The Court in Fruits first looked at the general Wrongful Death Statute, which provides for the recovery of reasonable attorney's fees. The Court then looked at the Adult Wrongful Death Statute, which only expressly prohibits two types of damages: punitive damages and damages for a person's grief.

HOI's claim centered on the phrase "may include but are not limited to," which appears in the Adult Wrongful Death Statute's language as to what damages may be recovered. HOI argued this phrase was ambiguous and conflicted with the language in the general Wrongful Death Statute. The Court rejected this claim, and found the legislature did not intend to take away a category of damages in the Adult Wrongful Death Statute that is explicitly permitted in the general Wrongful Death Statute. The Court also found attorney's fees are compensatory, and not punitive, and therefore rejected HOI's other claim that attorney's fees are not recoverable.

In Brown, the Court noted the Adult Wrongful Death Statute does not expressly permit or prohibit attorney's fees, litigation costs, estate administration costs, or loss of services to non-dependents. At issue here was again the "may include but are not limited to" phrase in the Adult Wrongful Death Statute. Citing to prior case law, the Fund argued that no damages may be recovered under the Adult Wrongful Death Statute unless they are explicitly mentioned. However, the Court stated that the case law cited by the Fund only says that when specific language in a statute qualifies the amount of damages available, the more general language of the statute cannot be used to expand that category of damages.

The Court also noted that previous case law provides that damages under the Adult Wrongful Death Statute should be compensatory, and stated that dam-

ages for attorney's fees, litigation costs, estate administration costs, or loss of services to non-dependents are compensatory damages that remedy actual pecuniary losses. Therefore, the Court found no compelling reason why these damages should not be allowed.

The Court in Brown also addressed on a matter of first impression whether a nondependent can recover for loss of services under the Adult Wrongful Death Statute. In noting that the statute provides for an award of loss of the adult person's love and companionship, and looking to discussions regarding recovery for loss of consortium in prior case law, the Court stated that when loss of services can be proved, they would be recoverable under the Adult Wrongful Death Statute.

**KeyPoint:** The phrase "may include but are not limited to" appears to provide sufficient latitude for most claims for damages under the Indiana Adult Wrongful Death Statute. Therefore, claims for attorney's fees, as well as other general types of compensatory damages claims, can be recovered under the Indiana Adult Wrongful Death Statute. Also note that the Patient's Compensation Fund has petitioned for transfer to the Indiana Supreme Court, so we may not have heard the last word on these issues.

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## Indiana Litigation Statistics

In November, 2010, the Indiana Supreme Court issued its 2009 Indiana Judicial Service Report, which provides a wealth of statistical information about the courts and trends of litigation in Indiana.

Among the data in the report of particular interest to civil litigators and claims professionals:

The Indiana Court of Appeals disposed of 593 civil appeals in 2009. The Court affirmed the trial court in 65% of those cases, which is consistent with previous trends. As always, the place to take your best shot is at the trial court level, not the appellate level.

1,956,749 new cases were filed in Indiana courts in 2009. New-case filings dropped a little bit from 2002 to 2006, but have increased noticeably from 2007 to 2009, in large part due to a significant increase in foreclosure and debt-collection filings.

“Civil tort” cases (typically bodily injury claims) accounted for 275 civil jury trials throughout Indiana in 2009. All other civil cases (for example, contract disputes) accounted for 94 jury trials throughout Indiana in 2009.

To see the complete Report, go to [in.gov/judiciary](http://in.gov/judiciary).