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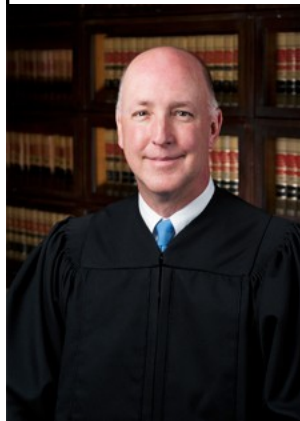
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SIGNIFICANT CHANGES IN THE INDIANA SUPREME COURT



Justice Steven H. David



Justice Mark S. Massa



Justice Loretta H. Rush

Three spots on the five-justice Indiana Supreme Court changed in the past two years, including the retirement this year of Chief Justice Randall Shepard and Justice Frank Sullivan. Both Chief Justice Shepard and Justice Sullivan were fair and highly respected, and also demonstrated an understanding of the concerns and the realities of the insurance industry. Their participation on the Court will be missed by those of us on the defense side.

The defense side hailed the Supreme Court ruling allowing the introduction of medical write-offs into evidence to allow a jury to consider the difference between what was paid and what was charged for medical services (*Stanley v. Walker*). On the other hand, in *Sibbing v. Cave*, the Court held that a defendant generally could not question the necessity of medical treatments by a medical provider, which hampers the ability of defense counsel to challenge medical care (including, in some instances, chiropractic care) that is excessive and improperly pumps up the plaintiff's special damages. Notably, the new Chief Justice, Brent Dickson, wrote the majority opinion in *Sibbing*, and Chief Justice Shepard wrote a pointed dissent.

Similarly, Justice Robert Rucker (who remains on the Supreme Court) wrote the majority opinion in *Monroe Guaranty Ins. Co. v. Magwerks*, which essentially held that a P&C carrier could be held in bad faith even when its denial of a first-party claim was upheld, and that bad faith could be based on an

adjuster's use of a legal term before the courts had even defined the term. Justice Sullivan wrote a dissent, and Chief Justice Shepard concurred, but urged a much more balanced view of the case.

The new Justices bring varied backgrounds to the bench, which may influence their decision making. Justice Steven David was sworn into the Court in October, 2010. He graduated from Murray State University and earned his law degree from Indiana University's Robert H. McKinney School of Law. He served in the Army Judge Advocate General's Corps beginning in 1986 and served on the Boone County bench beginning in 1999. Prior to that, David served as General Counsel to Mayflower Transit.

Justice Mark Massa was appointed in April 2012 and received his law degree from Indiana University's Robert H. McKinney School of Law. He was a speechwriter and deputy press secretary from Governor Robert Orr while attending law school. He has also served as the Executive Director of the Indiana Criminal Justice Institute and was General Counsel to Governor Mitch Daniels from 2006 to 2010.

Justice Loretta Rush was sworn into the bench in November, 2012. She attended law school at the Robert H. McKinney School of Law at Indiana University. Justice Rush served as a Judge in the Tippecanoe Superior Court from 1999-2012 over juvenile matters. Before that, she was a plaintiff's attorney in Chief Justice Dickson's old firm. She is the first woman to serve on the Indiana Supreme Court since Myra Selby stepped down in 1999.

The new Justices join Chief Justice Dickson and Justice Rucker. While trends in the new Court remain to be seen, there is the distinct possibility that the balance of the Court may have shifted this year from leaning in favor of the defense and the insurance industry to leaning in favor of plaintiffs.

ADDITIONAL INSURED

Peabody Energy Corp. v. Richard F. Roark, et al.
Indiana Court of Appeals, August 30, 2012

Premises owner Peabody Energy Corporation ("Peabody") entered into a Master Performance Agreement ("MPA") with Beelman Truck Co. ("Beelman"). The MPA included an "Indemnity and Insurance" clause providing for Beelman to indemnify Peabody against any claims for bodily injury "sustained by any person or persons, arising out of or in consequence of the performance of the work called for by the Contract" whether or not allegedly resulting from Beelman's negligence, except the clause did not cover the sole negligence of Peabody. The clause also provided for Beelman to name Peabody in its CGL coverage. This clause is typical in subcontracts in Indiana, and generally has been upheld by Indiana courts.

Beelman's CGL policy with North American Capacity Ins. Co. ("NAC") included a clause extending additional-insured status to parties with such rights under written contracts with Beelman, "with respect to liability arising out of your operations or premises owned by or rented to you."

Beelman's truck driver, Richard Roark, was injured while making a delivery to Peabody when ground gave way on Peabody's property, injuring Roark. Roark sued Peabody, alleging Peabody was negligent. Peabody filed a third-party complaint against NAC, demanding coverage. The trial court entered summary judgment in favor of Beelman and NAC and against Peabody (that is, as a matter of law, the indemnity and additional-insured clause does not provide Peabody with any rights against either Beelman or NAC for the Roark claim).

The Court of Appeals affirmed summary judgment in favor of Beelman, but held that Peabody, not NAC, was entitled to summary judgment on the additional-insured issue. In doing so, the Court rejected NAC's argument that the

Roark claim arose from Peabody's own negligence. The Court focused, instead, on the fact that Roark's injuries were "sustained . . . arising out of or in consequence of the performance of [Beelman's] work." In that regard, the Court found it significant that Roark was on Peabody's property for the sole purpose of performing the Beelman contract when he was injured. Because the accident arose out of Beelman's operations, Peabody qualified as NAC's additional insured.

Keypoints: (1) The contractual obligation of the sub to indemnify the general or premises owner, and the sub's obligation to add the general or premises owner to the sub's CGL policy (and for the CGL carrier to defend and indemnify the general or premises owner) are two completely separate obligations. (2) The provision (and Indiana legal principle) that the general or premises owner is not indemnified for its own sole negligence per the indemnity clause of the subcontract does not necessarily apply to the general or premises owner's rights as an additional insured. (3) The language of the additional-insured clause in the sub's CGL policy is very important: in this case, the NAC clause extended additional-insured status to Peabody because it provided for coverage "with respect to liability arising out of your operations;" if instead the clause said it would extend additional-insured status only if the named insured was negligent, the Court probably would have held in favor of the CGL carrier.

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COLLATERAL ESTOPPEL AND ARBITRATION AWARDS

National Wine and Spirits, Inc. v. Ernst and Young, LLP
Indiana Supreme Court, October 23, 2012

National Wine and Spirits ("National") hired Ernst and Young to provide audit services. During the contract period, a National employee embezzled more than \$4 million dollars from the company. National sued Ernst and Young under theories of negligence,

breach of contract, and unjust enrichment. Ernst and Young moved to compel arbitration per the terms of the contract between the two parties.

The arbitration panel found Ernst and Young to be negligent but assessed comparative fault at 40% for National. Ernst and Young paid \$2.25 million to National to satisfy the arbitration judgment. Less than 2 years later, National sued Ernst and Young for deception and fraud, contending Ernst & Young presented manipulated evidence at the arbitration. Ernst and Young moved for summary judgment, and the trial court granted the motion with respect to both the fraud claim and deception claim. National appealed, and the Court of Appeals overturned the summary judgment for deception, stating an inference created a material issue of fact.

On appeal to the Indiana Supreme Court, Ernst and Young argued that both components of *res judicata*—issue preclusion and claim preclusion—precluded National's deception claim and supported summary judgment in Ernst and Young's favor. The Indiana Supreme upheld the trial court decision, finding that issue preclusion, or collateral estoppel, barred National's deception claim. Collateral estoppel has the following requirements: (1) a final judgment on the merits in a court of competent jurisdiction; (2) identity of the issues; and (3) the party to be estopped was a party or the privity of a party in the prior action.

In this case the Court noted that a final judgment resulting from an arbitration agreement has the same force of law as a decision adjudicated in court. The fact that Ernst and Young did not confirm the arbitration award into a formal judgment from a court is of no consequence to the validity of the award as there are many valid reasons, including the award not being in dispute, to forgo confirmation.

National also argued that the deception claim was contractually barred from being considered per the terms of the arbitration agreement as it occurred outside the time frame of the audit services. In particular, National claimed that Ernst

and Young manipulated cell notes to make it appear there was additional negligence on the part of National. However, the Court noted that this issue was encompassed by the broad language of the arbitration agreement as it related to auditing services, and the arbitration panel did consider the issue in arriving at its negligence determination, even though the issue was not specifically ruled on.

Keypoint: Arbitration judgments do not have to be confirmed in court to have binding effect for the purpose of collateral estoppel. Also, discovering fraud afterward doesn't necessarily mean the award will thereby be set aside.

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EXPERT WITNESSES

Estate of John Carter v. Loretta Robinson
Indiana Court of Appeals, October 30, 2012

In 2002, John Robinson treated with Dr. John Carter with complaints of stress. Dr. Carter did not note any irregular heart symptoms, and diagnosed Robinson with severe stress and insomnia, and prescribed some medication. Robinson died later that afternoon. Robinson's estranged wife Loretta hired Dr. James Bryant to perform the autopsy to determine the cause of death. The autopsy report stated Robinson died from acute and chronic congestive heart failure that had been ongoing for some time. Loretta Robinson ("Robinson") filed a lawsuit against Dr. Carter after the medical review panel issued its opinion.

Robinson identified Dr. Bryant as an expert witness, and he was deposed six weeks before the trial date. However, six days after Dr. Bryant's deposition, Dr. Carter unexpectedly died, and the trial date was postponed. Dr. Carter's Estate filed an amended witness list to add Dr. Michael Kaufman as an expert witness to rebut Dr. Bryant's opinions, and also moved to exclude Dr. Bryant's testimony. The trial court denied both motions. The jury awarded Robinson \$550,000 in damages. Dr. Carter appealed, and the Court of Appeals affirmed. The Court first addressed whether the

trial court should have excluded Dr. Bryant's testimony. The main crux of Dr. Carter's argument was that Dr. Bryant did not employ the differential etiology methodology in determining the cause of death; that is, "systematically ruling out causes that would not apply to the patient." However, the Court found that Dr. Bryant had considered and "reliably" ruled out alternative explanations, and that the trial court properly denied Dr. Carter's motion in this respect.

The Court of Appeals also found the trial court had not abused its discretion by denying Dr. Carter's request to amend his witness list to include Dr. Kaufman. The Court stated that even though there were delays in making Dr. Bryant available for his deposition, Dr. Carter still had waited over a year after Dr. Bryant was first disclosed as an expert before requesting his deposition. The Court further noted that the reasons for which Dr. Carter wished to use Dr. Kaufman, *i.e.* to discredit Dr. Bryant's opinions at trial, were still accomplished through Dr. Carter's cross-examination of Dr. Bryant.

Finally, the Court found there was no error when the trial court refused to give one of Dr. Carter's tendered jury instructions that included language that stated the determination of whether Dr. Carter exercised reasonable care should not be based on hindsight. The Court found no authority that a hindsight jury instruction is required, and that even if there was error in not giving the instruction, it was harmless error.

Keypoint: Whether a doctor properly utilizes a differential etiology methodology in determining a cause of death is likely to be made on a case-by-case basis, and is dependent on the specific facts. However, a doctor is not required to utilize this method in every situation. Furthermore, when a party knows of the existence of an expert witness and delays in seeking the expert's deposition, that party will likely be foreclosed from disclosing a rebuttal expert witness shortly before trial.

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NO CREDIT TO TORTFEASOR FOR
UM/UIM PAYMENTS

State Farm and Alan Steady v. Richard Kern
Indiana Court of Appeals, September 20, 2012

Steady and Kern were involved in a motor vehicle accident in which Steady was found to be 100% liable. Steady had policy limits of \$25,000 dollars. After a trial, a jury awarded Kern damages of \$98,000, of which Steady's insurer paid limits of \$25,000 plus payments for medical coverage and State Farm paid the balance from UM/UIM coverage of \$68,000. State Farm then moved to realign itself as a plaintiff to recover UM/UIM benefits paid to its insured as a result of Steady's negligence. Steady then filed a motion with the trial court to have the judgment against him satisfied, and the court granted that motion.

State Farm appealed to the Indiana Court of Appeals, arguing that the Indiana UM/UIM statute specifically allowed it to recover sums paid from UM/UIM coverage as a subrogee of its insured. The Court of appeals agreed, stating "Indiana Code section 27-7-5-6(a) provides that the insurer may enforce its insured's right of recovery against the third-party tortfeasor, either in its own name or in the name of its insured, and that the insurer shall then be subrogated to the proceeds of any settlement or judgment that results." The Court went on to say that allowing a tortfeasor to reduce his liability by the amount paid in UM/UIM coverage would undermine the purpose of the statute and provide a benefit to the tortfeasor he was not due.

Keypoint: Indiana's UM/UIM statute protects an insurer's right of subrogation against an underinsured tortfeasor.

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P&C INSURER'S RESPONSIBILITY TO
PAY EQUITABLE LIEN

Marling Family Trust v. Allstate
Indiana Court of Appeals, November 16, 2012

Thomas Pipes granted the Marling Family Trust a second mortgage on his home as security for a promissory note. Pipes obtained insurance on the home through Allstate but failed to have the Trust listed as a mortgagee. Pipes later lost the property to foreclosure, and the Trust bought the property during the foreclosure process. After inspecting the home, the Trust discovered water damage to the home, and filed a claim with Allstate for coverage as a mortgagee. Allstate denied the claim, largely arguing the Trust failed to establish an equitable lien. The Trust filed suit, and the trial court granted Allstate's motion for summary judgment.

On appeal, the Trust argued that *Lakeshore Bank & Trust Company v. United Farm Bureau Mutual Insurance Company, Inc.* applied to the facts of this case, and that the trial court erred in its decision. In *Lakeshore*, Lakeshore Bank held a mortgage on a married couple's home. The mortgage agreement required the couple to maintain homeowner's insurance with a loss-payable clause in favor of Lakeshore. The couple did secure an insurance policy through Farm Bureau, but failed to name Lakeshore as a mortgagee. The couple ultimately defaulted on the mortgage, and Lakeshore initiated foreclosure proceedings. During foreclosure proceedings, a fire destroyed the home. Lakeshore obtained a default judgment against the couple and attached the insurance-policy proceeds. When Lakeshore attempted to collect the policy proceeds from Farm Bureau through proceedings supplemental, Farm Bureau informed Lakeshore that it had already distributed the proceeds to the couple. Lakeshore dismissed its claim against Farm Bureau with prejudice but later sued Farm Bureau a second time after learning that Farm Bureau had distributed the policy proceeds despite actual knowledge of Lakeshore's interest. The Court of Appeals ruled that

once the insurer had notice of the mortgagee's rights, the mortgagee is considered to have rights to the proceeds of the policy as though the mortgagee was written into the policy.

Allstate argued the facts of *Lakeshore* are distinguishable because the property in that case had not been foreclosed, and in the present case, the property was both foreclosed and subsequently purchased by the Marling Family Trust. Further, Allstate argued that *Lakeshore* applies only when an insurer has actual knowledge of the mortgagee's interest and distributes the proceeds to an improper party. In this case, Allstate argued that although the Marling Family Trust informed it of the claim, Allstate never made a claim payment, and *Lakeshore* is thus inapplicable.

The Court of Appeals sided with the Trust and determined the fact the Trust filed the claim after it purchased the property was of no consequence because the applicability of whether there was coverage under the policy went back to the date of the occurrence. Further, the Court ruled that an equitable lien provides broad protection and the *Lakeshore* opinion is applicable here even though Allstate did not yet make payment for the claim.

Keypoint: An equitable lien is still payable by an insurer even if the insurer has not yet paid policy proceeds to the insured so long as the insurer has notice of the interest.

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SURPRISE - CHANGING YOUR STORY AT TRIAL

Deborah Cleveland v. Clarian Health Partners
Indiana Court of Appeals, October 3, 2012

Robin Cleveland fell from scaffolding at a construction site, and he was transported to Methodist Hospital and arrived at 9:53 a.m. The trauma team detected signs of substantial internal bleeding. At 10:45 a.m., the trauma team transported Robin from the emergency department, and he arrived in the operating room at 10:53 a.m. During surgery, the trauma team discovered a tear in Robin's heart, a potential tear in his heart, and a small tear in the sac surrounding the heart. Robin bled to death during surgery.

Deborah Cleveland, as the personal representative, sued Clarian, Methodist Hospital, Dr. George Rodman (the head of the trauma unit), Dr. Scott Otto (the chief resident), and Dr. Jennifer Choi (a second year resident). Dr. Choi was deposed, and was asked about the decision to taken Robin to surgery and when an operating room became available.

Eventually, all of the defendants were dismissed except for Clarian. The case eventually went to a jury trial approximately seven years after Dr. Choi's deposition. During Cleveland's examination of Dr. Choi, Dr. Choi changed her testimony from what she had testified in her deposition regarding the timing of the decision to take Robin to surgery and when an operating room became available. The jury returned a verdict for Clarian. The Court of Appeals affirmed.

Cleveland argued Dr. Choi's change in her testimony was such a surprise that it materially prejudiced Cleveland's right to a fair trial. Cleveland also argued that Clarian knew or should have known Dr. Choi would change her testimony, and should have supplemented Dr. Choi's deposition testimony prior to trial. Cleveland finally argued the failure to supplement the deposition testimony constituted misconduct by Clarian, and entitled Cleveland to a new trial.

The Court of Appeals addressed whether a party has a duty to amend deposition testimony of a nonparty employee. However, the Court did not make its decision on whether such a duty exists, but instead looked at whether Clarian violated a duty, assuming one had existed. In that respect, the Court found Dr. Choi's trial testimony on the timeline of events did not directly contradict her deposition testimony any more than her deposition testimony was internally inconsistent. Therefore, the Court concluded there was an insufficient factual basis to find a substantial and material change in Dr. Choi's deposition testimony that would potentially trigger a duty on Clarian to amend that testimony prior to trial, or that there was misconduct in failing to do so.

Keypoint: While the Court avoided deciding whether a defendant definitely has a duty to supplement deposition testimony of a nonparty employee, the defendant cannot be found to have committed misconduct for not making such a supplement if there is no clear change between the deposition testimony and the trial testimony of the nonparty employee.

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WORKER'S COMP DERIVATIVE CLAIMS

Amerisafe Risk Services, Inc. v. Estate of Hazel Wadsack
Indiana Court of Appeals, November 9, 2012

Nineteen-year-old Matthew Wadsack was electrocuted while working for a tree service, and was hospitalized and in a coma for an extended period of time. His parents were appointed as his temporary guardians. Amerisafe was the worker's compensation insurer for Matthew's employer, and Leerae Riggs was assigned to handle the worker's compensation claim. Eventually, the Wadsacks filed a complaint against Amerisafe and Riggs, alleging they intentionally or recklessly acted with extreme and outrageous conduct that was designed to deny Matthew his worker's compensation benefits. The

Wadsacks claimed Riggs' actions caused them emotional distress, and that Hazel Wadsack died as a result of that distress.

Amerisafe filed a motion to dismiss on the grounds that the Wadsacks' complaint fell within the exclusivity provision of the Worker's Compensation Act, and that the trial court therefore had no jurisdiction. The trial court denied the motion. Amerisafe appealed, and the Court of Appeals reversed the trial court's decision.

The Wadsacks argued their claim was not covered by the Worker's Compensation Act because their claim was not on behalf of Matthew or based directly on his injuries, but instead based on the handling of his claim. However, the Worker's Compensation Act states claims specifically extend to personal representatives and next of kin. Also, the Act states worker's compensation claims encompass allegations of bad faith in handling claims. Therefore, the Court found the Wadsacks' claim was derivative of Matthew's claim, and consequently fell within the exclusivity provision of the Act.

Keypoint: A family member's claim will fall within the purview of the Worker's Compensation Act if it is in any way derivative of the underlying worker's comp claim.

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Season's Greetings from The Tyra Law Firm!



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