The Tyra Law Firm, P.C.

Fall 2013 **Quarterly Newsletter** Volume 7, Issue 1

Welcome to Laura Fifty

The Tyra Law Firm, P.C. welcomes Laura J. Fifty as our Receptionist and Administrative Assistant.

Practically a native Hoosier, Laura was born in Columbus, Ohio and moved to Indianapolis when she was four years old. Laura brings over 25 years' experience as a litigation administrative assistant. She is a veteran of the United States Navy where she was a court reporter for the Judge Advocate General. After her discharge, she moved to Atlanta, Georgia where she worked for a small Plaintiff's trial lawyer firm for many years.

She returned to Indianapolis in 2002 and worked for a large law firm primarily in the litigation department. Laura reads a lot and one of her hobbies is crossword puzzles. She enjoys spending time with her family, and caring for her two cats, Winston and Spencer as well as her dog, Duke.

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Photos of our new office!

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"ABNORMALLY HAZARDOUS ACTIVITY"

Robert Fechtman, as Guardian of Estate of Roberto Hernandez v. United States Steel

Indiana Court of Appeals, September 25, 2013

Hernandez was employed by Roger & Sons, a contractor hired to perform maintenance at U.S. Steel's Gary Works. Hernandez and two other workers were cleaning a sidewalk near a dust catcher attached to a blast furnace. When the dust catcher is emptied, it releases large amounts of carbon monoxide gas. The U.S. Steel control room complied with its protocol for protecting workers in the vicinity of the dust catcher, but Roger & Sons had failed to notify the U.S. Steel control room that it had workers in the vicinity, as the contractor was required to do. As a result, when the dust catcher was emptied, Hernandez suffered carbon monoxide poisoning.

A worker is barred from bringing a civil suit against his/her own employer under worker's comp exclusivity. It is therefore common for a worker injured on a worksite to argue that the general contractor or premises owner is liable because it was attempting to delegate to the worker's employer a "non-delegable duty." A principal remains liable for a non-delegable duty breached by the contractor. One example of a non-delegable duty is an "abnormally hazardous activity" under the Restatement (Second) of Torts, Section 519-520.

Hernandez therefore argued that the release of carbon monoxide from the dust catcher was an "abnormally dangerous activity," so that U.S. Steel was liable for Roger & Sons' negligence in failing to notify the U.S. Steel control room of its workers' presence near the dust catcher when it was being emptied.

At the trial of Hernandez' claim against U.S. Steel, the jury found Hernandez five percent at fault, U.S. Steel fifteen percent at fault, and non-party Roger & Sons eighty percent at fault. Hernandez appealed the trial court's refusal to give a jury instruction he tendered that U.S. Steel was strictly liable for this abnormally hazardous activity.

The Court of Appeals affirmed the trial court's denial of the tendered instruction. The Court reviewed the six factors listed in Section 520 on which an abnormally hazardous activity might be based, and found that, although there certainly were some risks involved in emptying the dust catcher, it did not qualify as "abnormally hazardous" in light of the precautions U.S. Steel took to protect workers (noting no prior injuries in over a decade of emptying the dust catchers several times a day), and the necessity of conducting this activity as part of steel manufacturing.

KeyPoint: An injured worker will typically claim that a party on the worksite (and very often multiple parties at the worksite) violated a non-delegable duty as a means of finding tort defendants who are not subject to worker's comp exclusivity. However, as this case illustrates, Indiana courts tend to take a restrictive view of non-delegable duties.

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EVIDENCE SUPPORTING SUMMARY JUDGMENT

Hitesh Seth v. Midland Funding, LLC

Indiana Court of Appeals, November 8, 2013

Midland Funding, LLC filed a Complaint against Hitesh Seth, alleging breach of a credit card contract and seeking damages in the amount of $3,410.87, plus interests and costs. Midland moved for summary judgment, which was granted following a hearing. On appeal, Hitesh argued that Midland's designated evidence was inadmissible hearsay and therefore there was insufficient support for summary judgment.

The Court of Appeals reversed, holding that Midland did not provide a prima facie case in support of summary judgment in its favor. In order

to make that prima facie case, Midland had to show that Hitesh opened a Visa account with Columbus Bank and Trust, that Midland was the assignee of the debt, and that Hitesh owed Columbus Bank and Trust the amount alleged in the complaint. As its designated evidence, Midland offered multiple documents, but the only proper designated evidence was an affidavit from the Manager of Portfolio Sales for Jefferson Capital, LLC (whose parent company acquired certain accounts issued by Columbus Bank and Trust), and an affidavit from an employee of Midland's servicing agent.

The Court held these affidavits insufficient to support summary judgment. In the affidavit from the Jefferson Capital employee, there was nothing in either the affidavit itself or the attached documents that included Hitesh's name or credit card account. The affidavit from the Midland employee was also considered insufficient, as her employment with Midland's servicing agent did not establish sufficient personal knowledge of the complaint against Hitesh, making it inadmissible hearsay. Further, the affidavit does not fall under the business records exception because it does not purport to authenticate any business records, nor does it include any sworn, certified, or self-authenticated copies of any business records she may have relied upon.

The designated evidence submitted by Midland was therefore insufficient to prove its prima facie case and shift the burden of proof to Hitesh to show that a material question of fact existed. Summary judgment in favor of Midland was reversed.

KeyPoint: In this debt-collection matter, these particular affidavits were insufficient to allow summary judgment in favor of the creditor. Beyond a debt collection situation, however, this also indicates that courts are giving a broader significance to the quality of evidence presented to support a Motion for Summary Judgment.

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FEDERAL PREEMPTION

Medtronic, Inc. v. Lori A. Malander, Individually and as Personal Representative of the Estate of David M. Malander

Indiana Court of Appeals, October 11, 2013

A Medtronic defibrillator and a Medtronic Transvene Model 6936 right ventricular lead were implanted in David Malander in 1997. The Lead was considered a Class III medical device, so it was subject to premarket FDA approval. In a 2004 surgery, the defibrillator was updated, but the Lead was left in place. During a follow-up appointment, the doctor realized that the Lead was experiencing episodes of random short V-V intervals, which is when the "defibrillator incorrectly senses electrical activity in the heart, or in the lead, at a much faster rate than the heart is capable of."

Surgery was scheduled in 2006 to again upgrade the defibrillator and possibly replace the Lead. During the surgery, the Lead was tested, revealing no problems. The surgeon also called the Medtronic technical services department during surgery to request information on the Lead; Medtronic said that they did not think there was a problem and the Lead was not replaced. David died on January 2, 2007, after an incident of ventricular tachycardia – testing showed 361 short V-V intervals had occurred between December 14 and 31, 2006.

The Malandars sued Medtronic for negligence, and Medtronic filed a motion for summary judgment, arguing that the Malanders' claims were preempted by federal law and that Medtronic did not assume a duty to the Malanders. The trial court denied the motion for summary judgment.

The Court of Appeals affirmed the denial of the motion for summary judgment. While

Federal law does preempt related state law claims, the Court of Appeals determined that the Malanders' claims dealt with the interaction between the doctor and Medtronic's technicians who said there was no problem with the Lead. This type of claim is not considered preempted by federal law because this was "off label" information. The Court also held that Medtronic may have assumed a duty by voluntarily agreeing to give technical support during surgery. Since there was a material question of fact as to this issue, summary judgment would have been inappropriate.

KeyPoint: A medical device manufacturer cannot rely on FDA approval preempting state law claims when (1) the manufacturer made assurances to the Plaintiff beyond the standard labeling, and (2) the manufacturer assumed further duties to the Plaintiff.

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HOMEOWNER'S INSURANCE

Nancy A. Missig v. State Farm, et al.

Indiana Court of Appeals, September 17, 2013

Nancy Missig purchased a home with her husband in 1990. Her husband died in 1999, leaving Nancy as the sole owner of the property. In 2001, Nancy's son, Andre, and his girlfriend, Autumn, moved into the house along with Autumn's children. Soon thereafter, Nancy moved out. In 2002, Andre and Autumn were married, and Nancy entered into a contract to sell the house to them. Under the sales contract, Andre and Autumn were to provide insurance and pay property taxes.

In 2005, Nancy quitclaimed the property from herself as the sole owner to herself and Andre, so that Andre could claim the homestead exemption. Nancy purchased homeowners' insurance through Shelter Insurance and told Andre and Autumn to renew the policy in 2007 and begin paying the premiums. Instead, Andre and Autumn obtained a homeowners' policy through State Farm. Nancy called State Farm to inform the sales representative that she was a co-owner of the property and asked if she would be named on the policy. Nancy was told that if she were an owner of the property she would be named as an additional insured; however, no promise was made that Nancy would in fact be on a future policy.

In 2008, Andre and Autumn applied for the State Farm policy, informing their sales representative that the two of them jointly owned the home and that Nancy just owned the land. As a result, Andre and Autumn were the only two listed on the policy. In May 2010, the house burned down and was a total loss. Nancy went to State Farm to obtain information about the claim, but was told that she was not a named insured on the policy.

State Farm authorizes its adjusters only to pay claims to those who are named on the policy. Andre and Autumn received the proceeds of the claim in various installments, with Autumn forging Andre's signature on one check and using those proceeds to purchase a new residence solely in her name. Nancy requested that Andre and Autumn share the proceeds with her, but she never received any money. Nancy then filed a Complaint against Andre, Autumn, and State Farm. After a bench trial, the judge ruled in State Farm's favor and against Andre and Autumn for the unpaid balance of the contract to purchase Nancy's house. Andre also brought a cross-appeal against State Farm, arguing bad faith by putting Autumn's name on the proceed checks (including the one where she forged Andre's signature) and not Nancy's.

The Court of Appeals held that Nancy was not the State Farm customer who paid the premiums, so she was not entitled to any of the policy proceeds. It also held that State Farm was not on notice that Andre and Autumn had covenanted to insure the house for Nancy's benefit. Finally, the

Court held that Andre and Autumn, and not State Farm, were liable to Nancy, as State Farm acted in good faith toward its named insureds.

KeyPoint: A homeowner carrier does not have to provide coverage for a home's co-owner when the insureds did not list the co-owner on the policy.

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HOW MUCH CAN YOU BELIEVE A CAR SALESMAN

Heather Kesling v. Hubler Nissan, Inc.

Indiana Supreme Court, October 29, 2013

Hubler Nissan placed an online advertisement for a 1996 Mitsubishi Eclipse. Part of the advertisement included the words "sporty car at a great value price." After seeing this advertisement, Kesling went to Hubler's lot to test-drive the car. However, the salesman had to jump start the car before it could be driven. After he got the car started, the car idled roughly, and Kesling asked the salesman about it. The salesman responded that it "would just need a tune-up" since it had "been sitting for a while." Kesling then negotiated the sale of the car. She also signed an acknowledgement that that car was sold "AS IS – NO WARRANTY… regardless of any oral statements about the vehicle."

Once Kesling left the lot, she first took it to a car parts store for a diagnosis, but they could not retrieve the diagnostic codes. Kesling then took the car to a Mitsubishi dealership, as well as an independent mechanic, and both inspections revealed extensive problems with the car that were much more than just needing a tune-up. A couple years later, Kesling got an expert inspection in preparation for litigation. This inspection revealed three separate problems that made the car unsafe to operate and that would have been obvious to anyone who would have inspected the car at the dealership.

Kesling filed suit against Hubler for violation of the Indiana Deceptive Consumer Sales Act, and that the salesman's representations constituted fraud. The trial court granted summary judgment in favor of Hubler, and stated that there were no substantive representations made by the Hubler salesman. The trial court also found no evidence the defects existed at the time the car was sold. Finally, the trial court stated that signing the "as-is" disclaimer and immediately having the car inspected after Kesling bought it indicated she did not rely on the salesman's statement about "just needing a tune-up."

On appeal, the Court of Appeals reversed, and found that calling the car a "sporty car at a great value price" could implicitly represent it was a good car, and at least was safe to drive. The Court also found an issue of fact existed as to whether the defects were present when the car was purchased, and whether Hubler knew of those defects.

Upon transfer, the Indiana Supreme Court affirmed there was an issue of fact regarding Kesling's fraud claim based on his statements. For example, the Court pointed to the fact Hubler had inspected the car when it had been traded in, and therefore the inference exists that Hubler had constructive knowledge of any issues with the car. Moreover, as to the "as is" clause in the sales agreement, the Supreme Court noted that as-is provisions disclaim implied warranties, but do not provide protection from fraudulent misrepresentations.

However, the Supreme Court also reversed in part, and found the statement "sporty car at a great value price" is classic puffery, which undercuts Kesling's deception claim. In this respect, the Court stated the statement was a statement of opinion instead of a representation of fact.

KeyPoint: Making a statement of opinion cannot be the basis for a claim of deception or fraud. However, if you know of, or more importantly should know of, a specific set of facts and fail to disclose them, there will be sufficient evidence to support a claim for fraud.

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INSURANCE POLICY LAWSUIT LIMITATION

Darliss Wert v. Meridian Security Ins. Co.

Indiana Court of Appeals, November 14, 2013

Darliss Wert and her husband were involved in a motor vehicle accident with Barbara Offill. The Werts settled with Offill for her policy limits, and then sued Meridian Security Insurance Company, who was the Werts' automobile insurance carrier, for underinsured motorist benefits. However, the Werts' UIM claim was filed more than two years after the date of the accident. Meridian Security moved for summary judgment on the grounds that their policy language precludes lawsuits against them more than two years after the accident, and the trial court granted the motion. The Court of Appeals reversed.

On appeal, the Werts argued the two year limitation on claims against Meridian Security is ambiguous when read in connection with another provision in the policy that required the Werts to fully comply with their policy, which in this case required the Werts to settle or obtain a judgment from the tortfeasors before filing a lawsuit against Meridian Security. Here, the Werts had been going through the process of settling with Offill before seeking their UIM benefits from Meridian Security.

Consequently, the Court found a direct conflict with these policy provisions that created an ambiguity, and therefore precluded summary judgment for Meridian Security. The Court noted Meridian Security was essentially requiring the Werts to file a lawsuit against them before the Werts were in full compliance with the policy.

KeyPoint: An insurer cannot require its insured to fully comply with one provision of the insurance policy that could potentially cause the insured to fail to comply with another provision of the policy, and thereby deny coverage on those grounds.

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NEGLIGENT SUPERVISION BY A SCHOOL

Richard Prancik v. Oak Hill United School Corp.

Indiana Court of Appeals, October 31, 2013

Prancik was a student at Oak Hill Junior High School. One day, during a passing period, another student, K.M., approached Prancik from behind in a classroom and placed him in a choke hold. Prancik lost consciousness and fell to the floor, which resulted in facial injuries. The teacher was in the hallway per school policy that required teachers to pay more attention to the areas where the most students were located, and did not see the incident. K.M. had no history of violent behavior, and had no previous conflicts with Prancik.

Prancik sued the school corporation under a negligent supervision theory. Oak Hill eventually moved for summary judgment, but the trial court denied the motion. On interlocutory appeal, Oak Hill alternatively requested the trial court to reconsider its ruling based on recently-discovered legal authority. The trial court subsequently reversed its initial ruling, and entered summary judgment in favor of Oak Hill. The Court of Appeals affirmed summary judgment was appropriate for Oak Hill.

On appeal, the Court addressed whether there were any genuine issues of material fact that could establish a breach of duty by Oak Hill. The Court pointed to the fact that there was no history that K.M. had violent tendencies, no history of altercations between Prancik and K.M., and no evidence that the school's policy of having teachers observe the hallway instead of the classroom had resulted in harm to any students. In response to Prancik's argument that the teacher should have been positioned to be able to observe both the hallway and the classroom, the Court stated this was nothing more than mere speculation, which cannot provide a basis for avoiding summary judgment. The teacher was merely acting reasonably, according to the Court of Appeals, and it also noted that teachers are not required to observe students at all times.

KeyPoint: Summary judgment is appropriate when there is no evidence establishing a basis for paying specific attention to a certain set of circumstances, even though an injury is suffered as a result of those circumstances.

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PSYCHIATRIC-DETENTION IMMUNITY

Thomas Haggerty, et ux. v. Anonymous Party 1, et al.

Indiana Court of Appeals, November 20, 2013

Haggerty, who resides in Bloomington, was hospitalized for alcoholism-related complications. Up to that time, he had been drinking twelve beers and a liter of vodka per day. His wife drove him to an in-patient treatment facility in Indianapolis. He refused treatment at the facility and informed staff that he would be walking back to his home in Bloomington, some sixty miles away, in below-freezing conditions. Security officers took him to a nearby facility for detention and evaluation. An evaluation at the first facility had noted a suicide risk, but evaluations at the second facility conflicted on this issue.

In his suit against the two facilities for violation of his civil rights, the trial court granted the motion for summary judgment of the first facility, but denied the motion of the second facility. The Court of Appeals affirmed the summary judgment for the first facility, and reversed the denial of summary judgment for the second facility.

Ind. Code 12-26-2-6 provides immunity for those who participate in proceedings for an individual's detention or commitment without malice, bad faith, or negligence.

The Court of Appeals found that all that the first facility had done was to notify security officers that Haggerty had left the facility against medical advice and could be at risk walking in below-freezing conditions. The Court further found that given the facts of Haggerty's departure from the first facility, it was also entitled to immunity, both because there was some indication of a suicide risk, and in any event, detention is permitted despite absence of a suicide risk if the patient is "mentally ill and either dangerous or gravely disabled" and "in need of immediate restraint." The Court concluded there was not factual dispute as to the second facility's good-faith belief of these circumstances.

[Note: kudos to Jerry Padgett's wife, Jennifer Padgett, who was one of the attorneys on appeal for the prevailing facilities.]

KeyPoint: There are a number of legal claims for which the Indiana Code provides immunity for good-faith conduct, such as psychiatric detention, Good Samaritan assistance, enforcement of laws, and governmental discretionary decisions.

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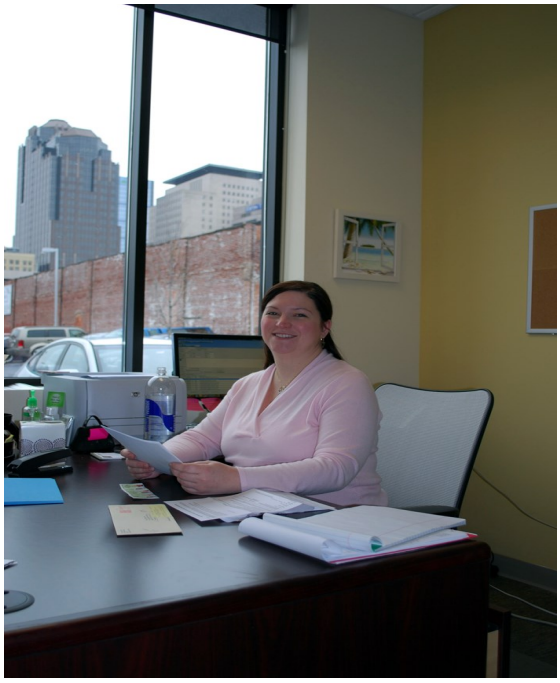

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