The Tyra Law Firm, P.C.

Spring 2008

Quarterly Newsletter

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The Lecture Circuit

"THE TRIAL OF GOLDILOCKS"

Kevin Tyra presented a videotape of "The Trial of Goldilocks" to fifth-graders at Kitley Intermediate School in Indianapolis on May 23.

After discussing the importance of law in modern society, then watching a videotape of Goldilocks' trial for unlawful entry, Kevin led the class in "deliberating" their verdict in the case.

"INSURANCE PRIMER" SEMINAR: Defense Trial Counsel of Indiana

Kevin Tyra and Jim Hehner of the Hehner & Associates law firm presented a two-hour continuing legal education program on June 12, covering basic insurance law principles for forty members of the Defense Trial Counsel of Indiana.

CONGRATULATIONS TO AMY!

Tyra Law Firm employee Amy Heustis has received her Paralegal Certificate. Amy received her bachelor's degree in political science from Indiana University in 2007. She completed her one-year training program in paralegal studies in May, 2008. She has been with The Tyra Law Firm since October, 2007.

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CONTACT INFORMATION

The Tyra Law Firm, P.C.

334 North Senate Avenue

Indianapolis, Indiana 46204

Phone: 317.636.1304

Fax: 317.636.1343

Website: www.tyralaw.net

E-mail: kevin.tyra@tyralaw.net

CONTRACTUAL LIMITATION OF LIABILITY

Belden, Inc. v. American Electronic Components, Inc.

Indiana Court of Appeals, April 10, 2008

Over a number of years, Belden sold wire to American Electronic Components ("AEC"), an automobile sensor manufacturer, to use in its sensors. In 1996, Belden informed AEC it would start using a certain type of insulation in its wires to comply with AEC's quality control program. However, several years later, Belden began incorporating a different type of insulation in its wire, and the insulation cracked, leading to a recall of 14,000 cars.

AEC filed a Complaint against Belden for consequential damages, and later moved for partial summary judgment. Belden filed a similar cross-motion for summary judgment. The trial court granted AEC's motion for partial summary judgment, and denied Belden's motion. Belden then appealed the trial court's order.

On appeal, Belden argued the language on the back of its customer order acknowledgement form limited the damages available to AEC. The form also stated AEC's acceptance of the agreement was expressly made conditional upon AEC's assent solely to the terms of the form.

Under Section 2-207 of the UCC, if an acceptance contains a clause conditioning the acceptance on assent to additional or different terms, the writings do not form a contract. However, conduct by the parties is sufficient to establish a contract even if the writings between the parties do not form a contract, if the parties perform as if a contract existed.

The Court determined Belden could not unilaterally include terms that were expressly conditional on AEC's assent, and, as such, the writings between the parties did not create a contract. However, because Belden and AEC acted as if there was a contract, their conduct was sufficient to form a contract. Therefore, the terms of the contract were the written terms on which Belden and AEC agreed, as well as the supplementary terms incorporated under other provisions of the UCC.

The Court then addressed what supplementary terms were incorporated into the contract. The Court found the repeated sending of the order acknowledgement form with the limitation provision did not by itself establish a course of dealing showing that AEC agreed to these terms. This only demonstrated that Belden wanted AEC to assent to its terms and conditions, but not that AEC ever did so. Therefore, the Court held that the limitation on damages clause was not part of the contract, and the trial court properly granted AEC's partial motion for summary judgment.

Key Point: Contracts between businesses will only be based on the terms that all parties to the contract have agreed upon. Anything that expressly limits acceptance of additional language to the terms of the offer will not be included in the contract.

Jerry M. Padgett
jerry.padgett@tyralaw.net

OFFENDER LITIGATION "THREE STRIKE LAW"

Eric D. Smith v. Indiana Dept. of Correction

Indiana Supreme Court, April 9, 2008

Eric Smith, a long-term guest at the Maximum Control Facility in Westville and a legendary "prolific filer" of lawsuits alleging constitutional violations by the Department, challenged the

"Three Strikes Law" in Indiana's Frivolous Claim Law, Ind. Code 34-58-1-2.

The statute provides that when an offender files a civil suit, the trial court shall first determine whether on the face of the complaint, the claim is frivolous; and second whether the offender has had three prior civil suits dismissed on the basis that they were frivolous. If the answer to either issue is in the affirmative, the trial court dismisses the suit immediately (unless this suit credibly alleges that the offender is in immediate danger of serious bodily harm related to the allegations of the pending complaint).

The Indiana Supreme Court noted that while other states have statutes for screening frivolous offender litigation, Indiana is the only state which allows for automatic dismissal based on the offender's prior litigation history, regardless of the potential merits of the present litigation.

The Court held that the first part of the Frivolous Claim Act, requiring the court to determine whether the offender's claim is frivolous, is constitutional. However, the second part, requiring the court to dismiss the suit if the offender has had three prior suits dismissed as frivolous, is a violation of the Open Courts Clause of the Indiana Constitution. "The sweeping ban on all litigation imposed by the Three Strikes Law is unnecessary to accomplish the legitimate objectives of the legislation." As the Court saw it, if the newly-filed claim was frivolous, the trial court could dismiss it under the frivolous-claim provision; but if not, the offender was entitled to pursue his claim regardless of his prior litigation history.

Key Point: After all this time, score one for Eric. However, the overall effect is relatively minimal. The number of offenders who have had three prior suits dismissed as frivolous is small; and in any event, Indiana judges (both state and Federal) remain receptive to Motions To Dismiss and Motions For Summary Judgment by defendants against offender suits.

Kevin C. Tyra
kevin.tyra@tyralaw.net

MEDICAL MALPRACTICE: RES IPSA LOQUITUR

Patrick A. Cleary, M.D. v. Konnie A. Manning, Personal Representative

Indiana Court of Appeals, April 14, 2008

While Dr. Cleary was using a Bovie electrocautery device to remove tumors on Paul Manning's neck and ear, Dr. Caldwell administered oxygen by blowby (oxygen tube near the patient's nose). A spark from the Bovie came in contact with the oxygen, and burned Manning in a flash fire.

A medical review panel issued a unanimous opinion in favor of Dr. Cleary and the hospital. In Manning's ensuing suit, Dr. Cleary and the hospital filed motions for summary judgment. Manning relied on the doctrine of res ipsa loquitur ("the thing speaks for itself"). The defendants appealed from the trial court's denial of their motions for summary judgment.

A plaintiff relying on this doctrine must show that the injuring instrumentality was under the management or exclusive control of the defendant or his servants, and that the accident is such as in the ordinary course of things does not happen if those who have management of the injuring instrumentality use proper care. Dr. Cleary argued that he did not have exclusive control of the combination of equipment (that is, the Bovie provided by the hospital, and the supplemental oxygen managed by the anesthesiologist) that contributed to the flash fire.

The Court of Appeals held that the doctrine only requires that the defendant had exclusive control of *one* of the injuring instrumentalities, not *all* of them. Therefore, even if Dr. Cleary only had temporary control of the Bovie provided by the hospital (and therefore had no control over, for

example, the hospital's maintenance of the Bovie), and had no control over the supply of supplemental oxygen, he was subject to an inference of negligence.

On the issue of the second prong of res ipsa loquitur (that such an accident normally does not occur if the defendant had used proper care), the Court held that Manning did not need to present expert testimony about how and why a fire could occur in an operating room, because a fact finder could "rely on common knowledge to establish res ipsa loquitur." In this case, expert testimony was not required because a fire occurring during surgery where an instrument that emits a spark is used near a source of oxygen is not beyond the realm of the lay person to understand.

In a small concession to Dr. Cleary, the Court observed that res ipsa loquitur only allows an inference of negligence; the burden of production shifts to the defendant. The defendant can still present evidence that he was not negligent, and the fact-finder can accept that evidence and find in favor of that defendant.

Key Point: The Court's analysis does not consider that Dr. Cleary may have exercised reasonable care (as the medical review panel found), but the cause of the fire was an error in supplying the oxygen, or in the maintenance of the Bovie, both of which were beyond Dr. Cleary's control; nevertheless, Dr. Cleary was stuck with an inference that he was negligent. Close ought to count only in horseshoes, hand grenades, and nuclear explosions, not medical malpractice litigation.

Kevin C. Tyra
kevin.tyra@tyralaw.net

SCOPE OF MEDICAL MALPRACTICE ACT

H.D., et al. v. BHC Meadows Hospital, Inc.

Indiana Court of Appeals, April 10, 2008

The Dosses found a suicide note left by their 14 year old daughter, H.D. A counselor at H.D.'s school recommended BHC Meadows Hospital ("the Hospital"). H.D. was admitted to the Hospital, but only after the parents received assurances and signed a confidentiality agreement with the Hospital that H.D.'s admission would be kept private and not shared with H.D.'s school counselor or the school. However, H.D.'s therapist, who did not read the confidentiality agreement, faxed a letter to the school counselor regarding H.D.'s treatment to a general office where school personnel and students had access. Word soon spread about H.D.'s hospitalization, and when H.D. returned to school she became so traumatized that she soon required further treatment. At the outset of this second round of treatment, the Hospital signed another confidentiality agreement that prevented the Hospital from contacting the school. However, the Hospital sent two subsequent letters to the school.

After filing a Complaint against the Hospital, the Hospital moved to dismiss the Dosses' Complaint on the grounds that the Indiana Medical Malpractice Act ("Act") required the claim to first go before a medical review panel. The trial court granted the motion, and the Dosses appealed the court's order.

The Court of Appeals first determined the second round of letters sent by the Hospital to the school were solely for business purposes of marketing and customer satisfaction. As such, they were not related to the provision of health care, and therefore did not implicate the Act.

The Court's analysis of the first fax sent by H.D.'s therapist to the school counselor began by finding that the fax served a dual purpose of providing health care and for the business purposes of marketing and customer satisfaction. However, the Court ultimately determined the improper disclosure of a patient's confidential information did not implicate the Act. The Court found the facts in this case supported the Doss' claim for public disclosure of private facts, a cause of action that is not subject to the Act. Therefore, the Court held the trial court erred in dismissing the Doss' claims for lack of subject matter jurisdiction.

OB-GYN Associates of Northern Indiana, P.C. v.

Tammy Ransbottom

Indiana Court of Appeals, May 8, 2008

A registered nurse in Defendant's office performed a laser hair removal procedure for Ransbottom. The laser hair removal equipment did not require any certification or license to operate it. Ransbottom also had no medical reason for receiving this treatment, as it was purely a cosmetic decision.

After receiving this treatment, Ransbottom claimed she was burned, and subsequently filed her Complaint. The Defendant moved to dismiss on the grounds that the procedure constituted health care under the Act, and therefore should have been submitted to a medical review panel. The trial court denied the motion.

The Defendants argued to the Court of Appeals that the procedure constituted health care protected by the Act because it was performed by a registered nurse, involved the use of equipment that required training, and included possible medical implications and complications. The Court noted how the location of where an incident occurs, by itself, does not automatically mean a claim implicates the Act. In addition, the Court stated that a causal connection must exist between the conduct and nature of the patient and health care provider's relationship.

The determinative factor for the Court was that the procedure was not recommended by a doctor, and was not supervised by a doctor. The Court also found it relevant that the same procedure can be administered in beauty salons by beauty salon employees, and it was not necessary for the nurse to be a nurse to operate the equipment. Therefore, the Court affirmed the trial court's denial of the Defendant's motion to dismiss.

Key Point: Certain negligence claims may be brought against a health care provider without going through a medical review panel. Simply because a claim involves a health care provider does not always mean that the claim is governed by the Indiana Medical Malpractice Act.

Jerry M. Padgett
jerry.padgett@tyralaw.net

SURPRISE! WHEN A NEW TRIAL IS NECESSARY

Speedway SuperAmerica, LLC v. Gerald Holmes, et ux.

Indiana Supreme Court, May 15, 2008

While pumping gas at a Speedway gas station, truck driver Holmes slipped and fell and injured his knee and back. Holmes claimed he slipped on a diesel fuel spill, which also left a stain on his blue jeans.

The day before the trial, Holmes said he found his jeans and boots and provided them to his attorneys. However, Holmes' attorney had not listed the jeans and boots on the exhibit list.

On the day of trial, Holmes' attorneys told Speedway's attorney about the jeans and boots. During a recess, Speedway's attorney told the judge

he objected to this evidence, but the court permitted Holmes to introduce the jeans, but the court would instruct the jury that there would be no inference that the stain on the jeans was diesel fuel. Ultimately, the jury awarded damages to Holmes. Speedway filed a motion to test the jeans, which the trial court granted.

The tests on the jeans proved the stain was not diesel fuel. Furthermore, the expert determined the jeans had not yet even been manufactured as of the date of the incident. Speedway then moved for a new trial, but the trial court denied Speedway's motion.

Holmes argued that Speedway's failure to formally object to the admission of the jeans waived its claim for a new trial. However, the Supreme Court found the issue was not that Speedway claimed the jeans should have been excluded, but that the new evidence required a new trial. Speedway met all of the requirements for a new trial. The only significant issue before the Court was whether Speedway exercised due diligence in getting the test results on the jeans.

The Court stated that Speedway's failure to recognize the potential significance of Holmes' jeans was also shared by Holmes' attorney, as he had not listed the jeans on the exhibit list. In addition, Holmes' attorneys failed to inform Speedway of the existence of the jeans once Holmes found them. While the Court noted that requesting a continuance ordinarily would be the appropriate response to "surprise" evidence, it could not say that Speedway's failure to request a continuance was a failure to exercise due diligence, since Holmes should not be able to benefit from a situation that he created. The Supreme Court reversed and remanded with instructions to vacate the judgment for Holmes, and to schedule a new trial.

Nature's Link, Inc. v. Thomas Przybyla, et ux.

Indiana Court of Appeals, May 7, 2008

Nature Link's employee struck Przybyla's car. Przybyla complained of headache and neck pain. A few months later, an MRI revealed a narrowing of the spine and pinching of the root. Compared to earlier MRI's, Przybyla's doctor determined this condition was a new injury resulting from the incident with Defendant's employee.

Several weeks before trial, the Defendant disclosed its expert witness' report. The Defendant's expert was deposed a couple of weeks before trial, at which time he stated his reports contained all of his opinions, and that his opinion was that Przybyla's injuries were caused by a pre-existing condition. However, at trial, the Defendant's expert testified for the first time that Przybyla suffered from a hereditary disease that caused the problems with his spine. The jury found each party 50% at fault, and no damages were awarded to Przybyla. Przybyla moved for a new trial. The trial court determined that the Defendant's expert's new diagnosis was a discovery violation, and granted Przybyla's motion.

The Defendant argued on appeal that its expert's trial testimony was not a deviation from what he provided in his written reports. However, the Court found the Defendant's expert's testimony at trial was more than just a specification of the opinions in his reports. The duty to supplement discovery does not cease once a trial starts, and if something comes to the attention of a party during trial, they must disclose it to the opposing party. Because the Defendant's expert arrived at his diagnosis a few days before trial, the Court found this was a discovery violation that would allow for a new trial. As the Defendant should have supplemented its discovery responses, or at least notified Przybyla's attorney once it learned of the new diagnosis, the trial court properly ordered a new trial.

Key Point: Whenever last minute evidence becomes apparent, you must disclose it to your opposing party as soon as possible. Indiana courts disapprove of surprise tactics, and these cases establish a precedent for the "surprised" party to get a new trial.

Jerry M. Padgett
jerry.padgett@tyralaw.net

TORT CLAIM "PLANNING" IMMUNITY

City of Terre Haute v. Anita Pairsh

Indiana Court of Appeals, April 10, 2008

Pairsh tripped and fell on a park sidewalk in Terre Haute. When she filed suit, the City sought governmental immunity under the provision of the Indiana Tort Claim Act.

The Act provides that governmental entities are immune from liability arising from discretionary functions. The distinction of an immune "discretionary" function from a non-immune "maintenance" function is whether the function involves "planning" rather than "operations." Because of budget constraints, the City's Infrastructure Manager had inspected the park, and determined that the sidewalks "did not constitute an immediate hazard to pedestrians warranting immediate reconstruction and repair" and that "there were more sidewalks that were of greater priority that needed to be repaired first at that time."

The Court of Appeals held that the Manager was exercising official judgment and discretion, the weighing of alternatives, and assessment of competing priorities, the weighing of budgetary considerations, and the allocation of scare resources, all of which are "planning activities," and therefore immune under the tort claims act.

Key Point: Even for what may be otherwise considered "maintenance" issues, if the municipality can show that a manager made a conscious decision to defer repairs for budgetary reasons, the decision may still be immune from any claim for resulting injury.

Kevin C. Tyra
kevin.tyra@tyralaw.net

UM COVERAGE FOR LOVE AND COMPANIONSHIP

Maggie Bush, et al. v. State Farm

Indiana Court of Appeals, March 20, 2008

The Bushes' adult son, Leonard Bush, Jr., was killed as a passenger in a single vehicle accident through the negligence of the uninsured driver. The son was not a resident in the Bushes' household and did not have an auto policy of his own. The Bushes sought uninsured motorist coverage for themselves, for their loss of their son's love and companionship. State Farm denied coverage because the Bushes did not suffer "bodily injury" as defined in the policy.

The trial court followed the unambiguous policy language, found that the Bushes' loss of their son's love and companionship was not a "bodily injury," and granted summary judgment to State Farm.

The Court of Appeals, however, held that the State Farm policy (which has typical UM language, consistent with the state UM statute and other auto policies issued in Indiana) violated Indiana's UM statute. The very brief appellate opinion simply asserted that the Bushes would have a claim against the uninsured motorist for their loss of love and companionship, and therefore they have a claim against their UM carrier for those damages. The Court ignored the fact that the state UM statute specifies that UM coverage is only for "bodily injury, sickness or disease, including death."

Key Point: A battle over the scope of UM coverage continues to be waged in Indiana appellate courts, much like it has been for the last several years over the modified impact rule and bystander rule, expanding recoveries for negligent infliction of emotional distress. This round went to the insureds in a poorly-reasoned decision.

Kevin C. Tyra
kevin.tyra@tyralaw.net

IASIU GOLF OUTING

Kevin Tyra and paralegal Amy Heustis enjoyed a sunny day on May 21 running the beer cart for the annual golf outing of the International Association of Special Investigation Units at Ulen Country Club in Lebanon, Indiana.

The Tyra Law Firm, P.C.
334 North Senate Avenue
Indianapolis, Indiana 46204