The Tyra Law Firm, P.C.

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Welcome to Denise W. Chavis

We are very pleased to announce that attorney Denise Chavis joined The Tyra Law Firm in March. Denise holds a Bachelor of Science Degree in Industrial Engineering and Management Sciences from Northwestern University. She worked for a number of years as an engineer for Eli Lilly & Company before embarking on her legal career. She is a graduate from the Indiana University School of Law.

Denise was admitted to practice law in Indiana in 1998 and has practiced in Indianapolis in several areas over the years, including premises and product liability defense, commercial litigation, environmental and toxic tort defense, and civil appeals. While our clients can expect the best from Denise in any kind of case, a significant part of her caseload is in product liability and other technologically-focused cases that would particularly utilize her engineering training.

Denise and her husband Pat, who is also an attorney practicing in Indianapolis, have two teenage children.

Inside this issue:

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FEDERAL PRE-EMPTION

Wyeth v. Diana Levine
U.S. Supreme Court, March 4, 2009

Wyeth manufactures Phenergan, an antihistamine used to treat nausea. Levine received Phenergan by IV-push injection, which was intended to be injected into a vein, but was erroneously injected into an artery. Injecting Phenergan into an artery can cause irreversible gangrene. Levine's arm was subsequently amputated.

Levine sued Wyeth on common-law negligence and strict-liability theories, arguing that Wyeth should have provided a stronger warning about the risk of gangrene resulting from an erroneous IV-push injection, and instead instructing providers to only use IV-drip administration, which carries a lower risk of this complication.

Wyeth moved for summary judgment, arguing that the FDA approval of the Phenergan warning label pre-empted any stricter state-law liability standard. Wyeth argued that it could not issue the stronger warning which Levine argued was warranted by state-law standards because it would have violated the FDA approval of the label Wyeth used. The Vermont trial court denied the motion. After a trial, the jury awarded Levine a $7.4 Million verdict.

However, Justice Stevens' majority opinion observed that it would not have been *impossible* for Wyeth to strengthen the warning that had been approved by the FDA, particularly in light of emergent information about the risks of IV-push administration, the fact that Wyeth never asked the FDA to make the change, and the opportunity Wyeth had to make a change under the "changes being effected" regulation. The Court also observed that Congress has never expressly pre-empted state law in the area of FDA regulation.

KeyPoint: Compliance with an FDA warning order does not necessarily protect the drug manufacturer from state-law liability.

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FETAL DEATH CLAIM

Savannah Ramirez v. James A. Wilson, et al.
Indiana Court of Appeals, January 29, 2009

When Megan Nelson was nine months pregnant with Savannah, her vehicle and James Wilson's truck collided, killing Megan and Savannah, who died *in utero*. Savannah's father brought a claim under the Child Wrongful Death Act, Ind. Code 34-23-2-1. Following *Bolin v. Wingert*, 764 N.E.2d 201 (Ind. 2002), the trial court granted summary judgment to the Defendants on the basis that a viable fetus which dies *in utero* is not a "child" covered by the CWDA.

On appeal, Savannah's estate argued that *Bolin* (which involved the death of a ten-week-old fetus) was wrongly decided, and that *Bolin* should not be applied to a viable fetus.

With very little discussion, the Court of Appeals rejected Savannah's argument and held that until the Indiana Supreme Court may rule otherwise, the *Bolin* decision controls, and the CWDA does not apply to the death of any fetus.

KeyPoint: At least for now, a parent who loses a fetus through another person's negligence does not have a claim under the Indiana Child Wrongful Death Act.

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GENERAL CONTRACTOR LIABILITY

Kenneth E. Smith, Jr., et al. v.
Gerhard King, et ux.
Indiana Court of Appeals, March 17, 2009

Gerhard King ("King") acted as his own general contractor when he built a new house. King was on site every few days as the construction progressed. He hired Harbrecht to perform framing and carpentry work and Smith's company to perform heating and air conditioning work.

Harbrecht had not yet finished the stairway leading down into the basement. King nailed down a sheet of plywood to cover it up. Thereafter, King told Smith to begin installing the heating and cooling system. Smith found the plywood lying up against the opening to the basement, and then proceeded to use a ladder to climb down into the basement. A few days later, while looking up to use a tape measure over his head, Smith stepped over the uncovered stairway opening and fell, suffering severe injuries.

The Smiths filed a complaint against the Kings and Harbrecht for negligence. The Kings moved for summary judgment on the grounds that as the general contractor, they had no duty to Smith and were also not vicariously liable for Harbrecht's negligence. The trial court granted this motion, and both the Smiths and Harbrecht appealed. The Court of Appeals affirmed.

The general rule in Indiana is that a property owner owes no duty to furnish the employees of a subcontractor with a safe place to work, at least as that duty is imposed on employers. However, property owners must maintain the property in a reasonably safe manner for independent contractors and their employees. The danger was known and obvious to Smith, especially because Smith had actually climbed down through the hole into the basement on one occasion. The Court stated the evidence did not support a reasonable inference that the Kings should have anticipated Smith would fall through the hole, and therefore found no error in granting summary judgment to the Kings.

The Court emphasized that generally an employer has no duty to supervise an independent contractor's work to assure a safe workplace, and that the employer therefore is not liable for the negligence of the independent contractor.

Finally, as to whether the Kings assumed a duty to Smith through conduct, the Court found that King's one instance of nailing down the plywood over the open hole did not raise a jury question as to whether a duty was assumed by the Kings.

KeyPoint: A general contractor will likely not be found to be negligent for any injuries sustained by its subcontractors if the injuries are caused by a known and obvious condition. Also, minimal actions by the general contractor to ensure safety precautions are being taken will likely prevent a finding of the existence of a duty on the part of the general contractor.

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INCREASED RISK OF HARM

Jim Atterholt, Commissioner v.
Geneva Herbst, Personal Representative
Indiana Supreme Court, March 10, 2009

Jeffry Herbst presented to his primary care physician, who diagnosed bilateral pneumonia and admitted him to the hospital, where he died eleven hours later of fulminant myocarditis. In the ensuing wrongful death action against the physician and the hospital, the defendants agreed to pay limits under the Medical Malpractice Act, which allowed the Estate to pursue the statutory cap against the Patient Compensation Fund ("PCF"). In such an action, liability is already established by the medical providers' settlement with the patient. Only damages are at issue in a claim against the PCF.

At the hearing between the Estate and the PCF, the PCF offered evidence that even with proper care, Herbst had a less than 10% chance of surviving the hospitalization, and had he survived,

he would have been unable to return to work. The trial court excluded the evidence and awarded the Estate the statutory cap of $1 Million.

The Supreme Court reversed, holding that increased risk of harm is relevant not only to liability and proximate cause, but also to damages. Therefore, in this case, the PCF would be liable for only 10% of the value of Herbst's survival, and would not be liable for any claim for lost wages. The evidence should therefore have been admitted in the PCF hearing.

KeyPoint: Evidence of increased risk of harm is relevant to liability, proximate cause, and damages in medical malpractice claims. In addition, the logic of this opinion should also allow such evidence in default judgment hearings, in which the defendant's default waived any dispute about liability or proximate cause, but the defendant may still contest damages.

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INSURANCE AGENT NEGLIGENCE

Estate of Mintz v. Connecticut General, et al.
Indiana Supreme Court, March 25, 2009

As part of Prof. Jerome Mintz' employment benefits at Indiana University, he received life insurance coverage under a group plan with Connecticut General Life Insurance Company ("CG"). The benefit program provided that unless Mintz converted the group policies into individual policies, coverage under the policies would be reduced at age 65 and again upon his retirement. Wayne Gruber was an independent insurance servicing agent who handled CG policies at IU.

Shortly after turning 65, Prof. Mintz and his wife Betty requested Gruber help them convert the entire value of the professor's policies. Gruber assured them that he would handle "everything." Mintz signed the "Conversion Application" forwarded to him by Gruber and paid the premium amount Gruber told him to pay. However, a second conversion application would be necessary to convert the rest of the policy after the professor's retirement. Gruber did not forward a second application nor advise Mintz of the need for one, and neither Gruber nor the Mintzes took any further action. Even though he received a second letter from IU notifying him of the second reduction of the policy values due to his retirement, Mintz assumed that the entire value of the policies had been covered by the first application he signed.

Eight months after his retirement, Mintz discovered that the entire value of the group coverage had not been converted into individual policies. Mintz filed a complaint against Gruber and CG alleging negligence, breach of contract and intentional infliction of emotional distress.

CG and Gruber prevailed on all of the claims in the trial court. Prof. Mintz passed away during the pending of the proceedings. His estate appealed the trial court rulings. The Supreme Court granted transfer of the matter and while affirming the grant of summary judgment to CG, it reversed the ruling in favor of Gruber.

The Supreme Court noted that the trial court's decision was based upon its belief that Mintz's injuries were not proximately caused by Gruber's negligence but rather by Mintz's own failure to act. However, the Supreme Court, citing the Comparative Fault Act, held that even if Gruber's inaction could not be considered "the" proximate cause of Mintz's injuries, the evidence showed that it could be considered at least "a" proximate cause and it was therefore improper to grant summary judgment in Gruber's favor.

Gruber also argued that because any duty he had to Mintz would be an assumed duty and his liability based upon a failure to act rather than "misfeasance" or bad acts, he remained entitled to summary judgment. The Court held that "failure to do what a reasonably prudent person would do after taking control of a situation...is nonetheless misfeasance." The fact that liability is based on a failure to act as opposed to affirmative bad acts is inconsequential.

The Court upheld the judgment in favor of CG, finding that Gruber was not an agent of CG

but rather an intermediary between Mintz as the insured and CG as the insurer. CG therefore could not be held liable for Gruber's negligence.

Keypoint: An insurance agent may be liable for failing to place the proper coverage once the agent assures the insured he is taking care of it.

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JURISDICTION: eBay DISPUTES

Richard Attaway, et ux. v. Llexcyiss Omega, et al.
Indiana Court of Appeals, March 13, 2009

Omega and York were Indiana residents who listed a Porsche for auction on eBay. The eBay listing stated the car was in Indiana and that the winning bidder would be responsible for the delivery of the Porsche, as well as the costs of the delivery. The Attaways, residents of Idaho, were the winning bidders for $5000, plus the delivery costs. The Attaways paid through PayPal, which charged their payment to the Attaways' MasterCard. A vehicle delivery company hired by the Attaways subsequently picked up the Porsche and delivered it to them in Idaho.

Upon receipt of the Porsche, the Attaways claimed its condition was significantly unlike the description in the eBay listing, and filed a claim with PayPal to refund their payment. PayPal denied their claim, but the Attaways were still successful in getting MasterCard to rescind the payment made to Omega and York. Omega and York filed suit in small claims court for $5900. The Attaways filed a motion to dismiss, claiming the court had no personal jurisdiction over them because they are Idaho residents. The trial court denied their motion.

The situation where the seller sued the buyer for rescission of payment after the buyer had picked up the item in the seller's state, was a case of first impression in Indiana, and possibly even in the country.

Because the Attaways knew the Porsche was located in Indiana prior to bidding on it, they would have also probably seen they would be responsible for the delivery of the car once the auction was over. By submitting a bid, the Attaways agreed to appear in person or otherwise have someone on their behalf appear to retrieve the car. This process of hiring a company to retrieve the car was more than just a single online purchase. As such, the Court held the Attaways availed themselves of the privilege of conducting activities in Indiana that would allow them to reasonably anticipate the need to defend a lawsuit in Indiana related to this purchase. Therefore, the Court found the personal jurisdiction requirements of the federal due process clause were satisfied.

The Court also found the burden on the Attaways to defend this case in Indiana was no greater than it would have been for Omega and York to prosecute their claim in Idaho. As such, the Court stated it was within the boundaries of fair play and substantial justice to allow Indiana residents to exercise personal jurisdiction over out-of-state residents who enter into contracts with Indiana residents for property that is located within Indiana.

KeyPoint: When making bids on eBay for an item located in a different state in which you are responsible for the retrieval and delivery, you are likely submitting to the jurisdiction of that other state for any subsequent legal claims related to the item.

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MEDICAL EXPERT OPINIONS AND HEARSAY

Eric Sibbing v. Amanda Cave
Indiana Court of Appeals, March 5, 2009

Sibbing's car crashed into the back of Cave's truck. The force of the crash broke the latches under Cave's seat and lifted her truck slightly off the ground. Cave was able to drive her truck away from the accident but it was severely damaged by the crash. Sibbing's car was totaled and had to be towed from the scene of the crash.

Although Cave initially minimized her complaints of pain, she eventually sought treatment from an internist, Dr. Muhammad Saquib at Priority 1 Medical. Cave's MRI showed that she had a bulging disc in her spinal column in the same location that Cave had reported pain and tenderness after the accident. Cave received treatment from both Priority 1 and from a chiropractor.

In the ensuing litigation over the accident, Sibbing's medical expert testified that he felt a "nerve conduction test" performed on Cave by Priority 1 was not a valuable diagnostic tool and that he did not "believe in" the chiropractic care she received. Prior to trial, Cave moved to strike Sibbing's expert's testimony. The trial court granted her motion.

During the trial, Cave was allowed to testify that hospital personnel told her that she would feel worse in the weeks following the accident because injuries from car accidents are often not immediately felt. She also was allowed to testify as to what Dr. Saquib told her was the source of her pain, i.e. the bulging disc and that she had no degenerative conditions indicating the bulging disc was caused by the accident. A jury entered a verdict in Cave's favor.

Sibbing argued on appeal that the trial court abused its discretion by allowing Cave to testify as to hearsay, that is, what Dr. Saquib told her about her diagnostic tests and the cause of her pain; and because Sibbing's expert's opinion on the medical necessity of Cave's treatments was excluded.

The Court of Appeals affirmed the trial court, holding that Cave's testimony was admissible as a "statement for purposes of medical diagnosis or treatment," rejecting Sibbing's argument that this exception only applied to statements made *by* patients, not statements made *to* patients. The Court also held that any error committed would be considered harmless in any event because all of Cave's "objectionable" testimony was also presented to the jury through other admissible exhibits and witnesses.

Sibbing also argued that the exclusion of his expert's testimony made it impossible for him to challenge the reasonableness and necessity of Cave's medical expenses. However, the Court reasoned that, although a plaintiff may not receive payment for treatment unrelated to the injuries caused by a defendant or for non-existent injuries, they remain entitled to damages or costs for treatments that may later be found to be ineffective or which in fact aggravate their injuries. Because Sibbing's expert offered no testimony that the treatments Cave received were either unrelated to her injuries or that she had no injuries, but instead were a subjective statement of his "disbelief" in their effectiveness, his testimony bore no relevance to the issue of the necessity or reasonableness of her medical expenses.

Keypoint: Unfortunately, this decision allows a plaintiff to testify to medical opinions while circumventing the right of the defendant to cross-examine the source of those opinions. The decision also allows a plaintiff to claim, unchallenged, medical expenses that are not in fact reasonable or necessary.

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PAID (RATHER THAN BILLED) MEDICAL EXPENSES

James Butler v. Indiana Department of Insurance
Indiana Supreme Court, April 7, 2009

Nondis Jane Butler brought a medical malpractice claim against Clarian Health Partners and several individual health care providers. Butler died before the resolution of her lawsuit, and her Estate pursued the case as a wrongful death action under the statute governing actions for the wrongful death of an unmarried adult with no dependents.

The Estate and Clarian settled for an amount that entitled the Estate to proceed on its claim for the balance of its sought-after damages against the Indiana Department of Insurance, which administers the Patient Compensation Fund. The Fund moved for partial summary judgment, arguing that if a health care provider accepts a reduced amount (for example, under Medicare or health-insurance guidelines) of what was initially billed in full satisfaction due to a contractual agreement, the Estate should only be able to recover that reduced amount. The Estate cross-filed, arguing it should be able to recover the initial total amount.

The Estate argued Indiana's wrongful death statute allows for recovery of reasonable and necessary medical expenses whether or not they are paid. The Supreme Court noted that under Indiana common law, a plaintiff may recover the reasonable value of medical services, regardless of whether the plaintiff is personally liable or the services were rendered gratuitously.

Looking specifically to Indiana's wrongful death statute, the Court held the statute authorizes recovery for only those reasonable medical expenses that are necessitated by the wrongful act of another. As such, the Court found that medical charges that were initially billed, but subsequently accepted in full at a reduced amount pursuant to an agreement with health insurers, are not a "necessitated" expense.

Therefore, the Supreme Court held that when medical providers issue a billing statement for health care services but later accept a reduced amount as payment in full, the amount recoverable for reasonable medical expenses necessitated by the wrongful conduct of another person is the reduced amount, and not the initial total of the billed charges.

KeyPoint: For claims brought under Indiana's adult wrongful death statute, the amount of damages recoverable by the decedent's estate will be limited if the decedent's health care providers accept a reduced amount as payment in full of its initial billed charges.

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UPCOMING EVENTS – SUMMER, 2009

- May 20, IASIU Golf Outing in Lebanon, Indiana: Kevin Tyra and Amy Heustis will again run the beer cart as part of their ongoing humanitarian efforts to keep fraud investigators properly hydrated.
- June 25, Defense Trial Counsel of Indiana, Insurance Coverage Section half-day seminar, will be held at the Education Center at the Emelie Building, in which the Tyra Law Firm is located. Kevin Tyra, who is the chair of the Insurance Coverage Section, will provide an insurance coverage law update at the seminar.
- August 19, Insurance Institute of Indiana, half-day Insurance Fraud Seminar at the Indiana Government Center: Kevin Tyra will provide an insurance coverage law update.

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