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C'MON, MAN!

EXPECTING CLAIMANTS TO EXERCISE PERSONAL RESPONSIBILITY

By Kevin C. Tyra

(this article originally appeared this month in *The Indiana Lawyer*)

As Jerry Padgett and I discussed in our commentary, "Causation As A Case-Dispositive Issue" (*The Indiana Lawyer*, October 14, 2009), the Indiana Court of Appeals has held in favor of summary judgment for defendants in instances in which the plaintiff's negligence clearly intervened whatever fault may have been assigned to the defendant. See, e.g., *Carter v. Indianapolis Power & Light Co.*, 837 N.E.2d 509 (Ind.App. 2005), *reh'g denied, trans. denied*; and *Witmat Development Corp. v. Dickison*, 907 N.E.2d 170 (Ind.App. 2009).

Two recent decisions by the Indiana Court of Appeals demonstrate what we hope is a continuing trend of expecting plaintiffs to exercise personal responsibility. In each case, the Court absolved the defendant of responsibility for harm to the plaintiff which was clearly the result of the plaintiff's poor choices.

In *Caesars Riverboat Casino, LLC v. Kephart*, 903 N.E.2d 117 (Ind.App. 2009), *transfer granted 9/11/09*, Caesars brought a collection action against Genevieve Kephart, who signed six counter checks totaling \$125,000, which was the amount she lost while gambling at Caesars in one night. Kephart counterclaimed, alleging Caesars knew she was a compulsive gambler, marketed specifically to her, and enticed her to come to its casino to gamble.

Caesars moved to dismiss Kephart's counterclaim for failure to state a claim. The trial court denied Caesars' motion. The Court of Appeals reversed, holding that Indiana's common law does not recognize a private right of action for negligently allowing or enticing a compulsive gambler to engage in lawful gambling.

Judge Mathias' opinion commented that a retailer has no duty to refuse to sell merchandise to a compulsive shopper, and that this case is "more akin to that of a participant injured during a sport-

ing activity, than to that of a traditional negligence plaintiff.” The opinion also observed that Kephart had not sought help for her compulsion until after this incident.

In a recent unpublished decision in a legal malpractice claim, *Ridge v. Lark* (Cause No. 51A01-0906-CV-300, January 27, 2010), the Court of Appeals affirmed a judgment against a plaintiff who persistently ignored his attorney’s advice.

Attorney Matthew Lark represented Ridge in a claim for the death of Ridge’s wife in a motor vehicle accident. Lark obtained a \$650,000 settlement for Ridge in mediation. Lark and co-counsel repeatedly recommended a structured settlement to Ridge, and also introduced Ridge to investment advisors who could assist in the use of a settlement. In addition, the defendant trucking company brought a structured settlement specialist to the mediation. Ridge rejected all of this advice, and instead insisted on receiving his \$400,000 portion of the settlement in a lump sum.

The same day he received the disbursement, Ridge gave \$282,108.45 of the proceeds to his employer, Robert Melton of Melton’s Tree Service.

Thereafter, Ridge sued Lark for legal malpractice. Ridge claimed that he was an incapacitated person, and therefore Lark was negligent in relation to the distribution of the settlement proceeds. After a four-day trial, the trial court found that Ridge was not “incapacitated,” and entered judgment against Ridge. The Court of Appeals affirmed.

Among other things, the trial court had found that Ridge had a broad range of computer- and internet-related skills, that he had successfully represented himself in the past in a marital dissolution and in negotiating a plea on criminal charges, and that he had long maintained employment, including as a supervisor. Also, the trial judge concluded from observing Ridge on the witness stand that he was “street smart.” Favorable opinions about Ridge’s competence were shared by other witnesses at trial who knew Ridge.

Trial defense counsel should take these decisions as further encouragement to forcefully argue comparative fault not only at trial, but also through dispositive motions, where appropriate.

DOCTOR’S HEARSAY OPINIONS / CHALLENGING MEDICAL TREATMENT

Eric Sibbing v. Amanda Cave
Indiana Supreme Court, March 4, 2010

Sibbing rear-ended Cave’s car. Cave treated multiple times for injuries she alleged resulted from this accident. At trial, Sibbing did not contest liability, but disputed the nature and extent of Cave’s injuries. Cave received a plaintiff’s verdict and was awarded \$71,675 in damages. The Court of Appeals affirmed, and the Indiana Supreme Court granted transfer and also affirmed.

The Indiana Supreme Court addressed two issues. First, Sibbing claimed the testimony Cave gave at trial about what her treating physicians told her was improperly admitted. The Supreme Court found these statements were in fact inadmissible hearsay, and specifically held that the Rule 803(4) hearsay exception only applies to statements a patient makes to his or her health care provider, but does not apply to the converse (the Court of Appeals had held that the patient could testify as to opinions the doctor expressed to her).

In so holding, the Court stated that declarations made by a health care provider do not have the same indicia of reliability that a patient’s statements have, and that a substantial likelihood exists that the patient may fail to fully or accurately comprehend or understand what the health care provider is saying. However, in affirming the trial court’s entry of judgment, the Supreme Court found this erroneous admission of

evidence cumulative with regard to other evidence, and therefore did not merit a reversal.

The second issue stemmed from Sibbing's argument that the trial court erred in striking portions of his medical expert's deposition testimony, which challenged the medical necessity of some of the treatments received by Cave. The Supreme Court set out to clarify the term "reasonable and necessary" medical expenses since Indiana case law generally dealt with the "reasonable" component, but did not provide much clarification on the proper application of "necessary."

The Supreme Court first addressed the prior Court of Appeals decision in Whitaker v. Kruse, which stated that an injured party may recover for injuries caused by the original tortfeasor's conduct, and that in order to recover the plaintiff only must show he exercised reasonable care in choosing the physician. The Supreme Court stated the rule from Whitaker does not affect the evaluation of whether the amount claimed for a medical expense is reasonable. However, the Court found Whitaker restricts the type of evidence a defendant may present as to the "scope of liability" aspect of proximate causation (whether the injury was a natural and probable consequence of the defendant's conduct that should have been foreseen or anticipated).

But, the Supreme Court stated Whitaker does not preclude challenges to the "causation in fact" element of proximate causation; that is, but for the alleged negligence, the disputed medical treatment would not have occurred. The Court cited to the example of how a defendant may properly challenge whether a plaintiff's medical treatment resulted from a preexisting condition instead of as a result of the alleged tortious act.

Therefore, the Supreme Court held that the phrase "reasonable and necessary" means the amount of medical expenses must be reasonable, and that the nature and extent of the treatment must be necessary in that it proximately resulted from the defendant's wrongful conduct. And because Sibbing was only challenging the necessity of certain treatments, the Supreme Court found the trial court properly excluded Sibbing's expert testimony.

KeyPoint: A patient's testimony regarding what health care providers told her about her medical care is inadmissible hearsay. Further, when contesting whether medical treatment is "necessary," a defendant can challenge whether medical treatment would have been needed if the accident had not occurred, but cannot dispute the medical judgment of the plaintiff's health care provider in choosing what treatments to provide the plaintiff. Unfortunately, this decision gives plaintiffs free rein to present evidence of any medical treatment at all, no matter how inappropriate, and the defense is muzzled to challenge it so long as the treater claims the need for treatment was due to the accident.

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INSURED'S "REASONABLE INTERPRETATION"

Everett Cash Mut. Ins. Co. v. Rick Taylor, et ux.
Indiana Supreme Court, April 29, 2010

Rick and Katrina Taylor had procured a standard farm personal liability policy from Everett Cash Mutual. The policy contained several exclusions, including exclusion for "benefits . . . required to be provided by an insured under a workers' compensation, non-occupational disability, occupational disease or like law . . ."

The Taylors employed independent contractor Sherlock Contract Painting to paint a house, grain bin, and barn. While painting, Sherlock employee Collis sustained injuries when he was shocked by an electrical wire and fell from a ladder. Collis filed a worker's comp claim against Sherlock, which did not have worker's comp coverage. Collis therefore brought a claim against the Taylors under Ind. Code 22-3-2-14(b), which essentially says that if the employer does not have worker's comp coverage, and the party that hired the employer did not get an insurance certificate

from the employer, the hiring party is fully responsible for the worker's comp benefits to the injured worker.

Everett Cash Mutual denied the Taylors' tender of the claim, due to the above-cited worker's comp exclusion. The Taylors sued Everett Cash Mutual for breach of contract. The trial court denied Everett Cash Mutual's motion for summary judgment. The Court of Appeals reversed.

On transfer, a unanimous Supreme Court affirmed the trial court. The Court acknowledged that Collis' claim was for worker's comp benefits, and there was a worker's comp exclusion in the Taylors' farm policy. But the Court focused on what would be the reasonable interpretation and expectation of an insured for coverage for this type of claim.

First, the Court summarily rejected the carrier's contention that the claim did not arise from an "occurrence," since Collis' claim arose from his accident.

The Court then turned to the worker's comp exclusion, agreeing with Everett Cash Mutual that a reasonable person could conclude that Collis' claim was excluded by that provision in the Taylor policy. However, because, according to the Court, the Taylors could not have acquired worker's comp coverage because they operated a farm (which is generally outside the worker's comp system) and had no employees, "it is hard to imagine them thinking that an exclusion regarding worker's compensation could preclude them from having protection from a lawsuit by someone injured in an accident on their property."

Essentially, the Court appears to hold that reasonable policyholders would not have foreseen that they may not have coverage for the kind of situation presented by Collis' claim. Therefore, although the Court did not hold that the worker's comp exclusion was ambiguous, it nevertheless held that to enforce the exclusion against coverage for a claim such as Collis', the exclusion must explicitly say it excludes the failure to exact a certificate of insurance from a contractor, resulting in the vicarious liability of the policyholder for a worker's comp claim.

KeyPoints: (1) This case highlights a little-known lesson for just about everyone: in Indiana, when anyone hires a contractor on a contract exceeding \$1,000, that party needs to get a certificate of worker's comp insurance from the contractor. (2) This decision could be a harbinger of a serious shift in policy interpretation against carriers. Even though the Court did not hold the exclusion was ambiguous, it nevertheless did not enforce the exclusion's plain meaning, which had been the judicial standard for a very long time in Indiana. (3) Carriers should look at their policy language, not just for worker's comp exclusions, but for any policy language that may need to go into more explicit detail about what possible claims are excluded.

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GOVERNMENTAL IMMUNITY

Robert Bules, et al. v. Marshall County, et al.
Indiana Supreme Court, January 27, 2010

Robert Bules was driving a tractor-trailer, along with his passenger son Brian, and crested a hill to find water in the road ahead. At the same time, Bules noticed a sign on the edge of the water but did not realize the sign warned of high water. Bules crashed after hitting the water and losing control. Bules sued Marshall County under a theory of negligent warning of a dangerous road condition. Marshall County moved for summary judgment on the grounds that the Indiana Tort Claims Act ("ITCA") provides immunity for losses that occur from temporary conditions on public roadways resulting from the weather. The trial court granted the motion for summary judgment, but the Court of Appeals reversed, holding that whether the placement of the signs was negligent presented a genuine issue of material fact regarding immunity. The Indiana Supreme Court granted transfer, and upheld the entry of summary judgment in favor of

Marshall County.

The Supreme Court stated that when the government is in the process of responding to a weather condition, the immunity provided by the ITCA extends to all claims caused by that condition during a period of reasonable response regardless of when the alleged injury occurred. Here, the water on the roadway stemmed from unprecedented fluctuation in temperatures that caused flooding and freezing. In fact, the flooding had progressed over a matter of several days prior to Bules' accident, and had reached a historic crest on the date of the incident.

Therefore, the Supreme Court stated that even if the County was negligent in its initial response to warn passengers of the flooding on the road, the accident still occurred while this weather condition was evolving. And because immunity under the ITCA applies during a period of reasonable response, the Court found the immunity applied to bar Bules' claim against the County because the weather condition causing the flooding had not yet stabilized. The Supreme Court further stated that a period of reasonable response lasts at least until the condition stops worsening.

KeyPoint: Even if a governmental entity may negligently respond to a weather condition that creates a temporary problem with public roadways, immunity under the ITCA will preclude any claims resulting from the problem as long as the weather condition has not stabilized at the time of the incident.

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REPORTING CHILD ABUSE

Anonymous Hospital v. A.K., et. al,
Indiana Court of Appeals, January 26, 2010

The parents of an 11-month-old girl took their daughter to the hospital due to an unexplained fever. During the course of rendering care to the child the treating physician at the hospital ordered a urinalysis. Lab analysis of the first sample showed sperm present in the child's urine. A second sample was ordered and collected by way of a catheter. This sample also showed the presence of sperm. Based upon the lab results, Hospital personnel contacted the local child protective services and law enforcement, pursuant to its obligation under Indiana Code section 31-33-5-1, -2 and -4, which requires individuals to immediately make a report if there is reason to believe that a child is a victim of child abuse or neglect.

The child was admitted to the hospital the next morning where yet a third sample was obtained and analyzed. Analysis of the third sample did not indicate the presence of any sperm. Child protective services came to Hospital to investigate the situation and, later that day, gave permission for the child to be discharged to the care of the parents.

Based on the incident, Parents filed a complaint against Hospital alleging that the Hospital committed medical malpractice. Hospital filed a petition for preliminary determination of law and motion for summary judgment in the trial court arguing that it is immune from liability for making a report of possible child abuse or neglect as it is required by law to do so. Indiana law provides that a person who makes such a report is immune from both civil and criminal liability because of doing so; however, immunity will not attach if the person making the report has acted maliciously or in bad faith. The trial court denied the Hospital's motion and Hospital appealed.

The Parents alleged that the Hospital committed malpractice by negligently testing the urine samples and reporting those test result to authorities, causing the family to be separated during the investigation. Specifically, the Parents claimed that Hospital reported the information without having done a more thorough testing procedure and without a managing physician being involved.

The Indiana Court of Appeals held in favor of the Hospital. The fact that the Hospital reported the abuse without delay and further testing being done does not support an inference of bad faith so as to revoke the Hospital's immunity. The statute makes it clear that time is of the essence in such a situation by requiring that abuse or neglect "shall immediately" be reported. The Court also found that the immunity should be extended to both the report of the suspected abuse as well as any underlying misdiagnosis, defeating both the parents' bad faith allegations and malpractice claims.

KeyPoint: Immunity granted under statute requiring the report of suspected child abuse will not be revoked simply because the report is later found to be incorrect and based upon only a limited amount of information.

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UNDISCLOSED EXPERT

White-Rodgers, et al. v. Lonnie Kindle, et al.
Indiana Court of Appeals, April 14, 2010

White-Rodgers manufactured the gas control on a water heater in an apartment that exploded, which killed a resident and injured others. In the ensuing litigation, the resident/plaintiffs sought the production of information by and about experts White-Rodgers had retained in prior, unrelated litigation that had settled before White-Rodgers had designated those experts as witnesses for trial. The prior litigation had also involved

a gas explosion in a residence using a White-Rodgers gas control.

Information by and from non-testifying experts and consultants is protected from discovery by Indiana Trial Rule 26(B)(4), barring "exceptional circumstances." The issue in this case was whether that protection survives the conclusion of the litigation in which the experts and consultants had been retained.

The trial court had ruled that White-Rodgers was required to disclose this information in the current litigation. The Court of Appeals reversed. The Court explained that not protecting this information from disclosure in "subsequent litigation would chill the purposes of the discovery rules, which are to 'provide parties with information essential to litigation of the issues, to eliminate surprise, and to promote settlement.'" Requiring disclosure would leave parties reluctant to consult with experts if they knew the results would later be discoverable in subsequent litigation. Moreover, parties would be reluctant to settle if they knew that settlement would strip them of their non-testifying experts' confidentiality. The Court also based its ruling on the principle of fairness that one party should not build its case on the resources and due diligence of another party.

KeyPoint: This decision is especially reassuring to manufacturers and others involved in multiple product liability cases arising from the same product. Information by or from a non-testifying consultant in one case will not be required to be disclosed in subsequent litigation.

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WRONGFUL DEATH ACT:
“DEPENDENCY”

Estate of Donald Terry v. Norris Stephens, R.N.,
Indiana Court of Appeals, Feb. 17, 2010

In 1990, the Social Security Administration determined that decedent Donald Terry was disabled due to a severe personality disorder. Donald’s divorce from his ex-wife was finalized in 1991. The divorce decree provided that Donald was to have no visitation with his three minor children and no contact with his ex-wife or the three minor children for at least six years while he completed treatment. The decree also relieved Donald of any obligation to pay child support but ordered him to pay child support arrearage in the amount of \$1200. He failed to pay the arrearage and never paid any child support for his three minor children.

In 1998, while incarcerated, Donald committed suicide. At the time of his death, Donald had not had contact or a relationship with his children for seven years. Donald’s estate filed an action against Stephens, alleging that she had committed medical malpractice that proximately resulted in Donald’s death. The trial court denied Stephens’ motion for summary judgment wherein she contested the “dependency” status of Donald’s children. Stephens filed a motion to reconsider and the trial court summarily granted summary judgment in her favor, reversing its previous order. Donald’s estate appealed.

Donald’s estate argued that though Donald did not provide financial support to his minor children during his lifetime, he nonetheless expressed love, care, and affection for his three children and that these facts were sufficient to establish the children as “dependents” under Indiana’s Wrongful Death Act.

The Indiana Court of Appeals, noting that Donald had provided neither financial nor non-pecuniary services to his three minor children during their lifetime, disagreed with the estate. The Court of Appeals held that the provision of love, care, and affection, is not

sufficient to establish dependent status. The Court observed that “pecuniary loss is the foundation of the wrongful death action” and reasoned that where the decedent was not capable of providing support, no loss of such support had actually occurred. In addition, the fact that Donald was obligated to pay a child support arrearage was not sufficient to establish a dependency relationship with his children, where at the time of his death, Donald was not able to support himself or anyone else due to his mental illness.

Donald’s estate also alleged that the Wrongful Death Act was unconstitutional as its application in this case drew a distinction between dependents of the mentally ill and those of non-mentally persons. The Court of Appeals, using the two-prong test enunciated in Collins v. Day, held that because the Wrongful Death Act seeks to provide redress for pecuniary loss, it was not impermissible to draw a distinction between the children of decedents who were able to support their children and those who were not.

KeyPoint: The Wrongful Death Act is not meant to provide solely for loss of love and affection. In order to sustain a claim, the minor children must also be financially dependent upon the decedent at the time of his or her death.

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UPCOMING EVENTS

May 21: Defense Trial Counsel of Indiana, Insurance Law Section seminar: Kevin Tyra will be presenting case law update.

July 16: Indiana Continuing Legal Education Forum “Masters Series” Conference, French Lick, IN: Kevin is a panelist in the Advanced Insurance Law seminar.

August 18: Indiana Insurance Institute fraud seminar: Kevin will speak on medical-expense reductions (*Stanley v. Walker*) and challenging the necessity of medical procedures (*Sibbing v. Cave*).

November 20: Defense Trial Counsel of Indiana annual conference: Kevin is a panelist on the topic of use of apologies to defuse claims.



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