The Tyra Law Firm, P.C.

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WELCOME TO BETH RIGA

The Tyra Law Firm, P.C. welcomes Beth L. Riga as our newest attorney.

Beth was awarded her bachelor's degree summa cum laude from Ball State University in 1992, and was awarded a master's degree in speech communications from Ball State in 1993. She graduated from Notre Dame Law School in 2002.

Beth practiced in insurance defense, including product liability defense, auto liability defense, and premises liability defense, in Indianapolis from 2002 until the birth of her daughter in 2008. She has first-chair jury trial experience.

Beth has been married to Stephen Riga, another Indianapolis attorney, for over seventeen years. They and their daughter live in Brownsburg.

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GOLF TOURNAMENT DANGER

Cassie Pfenning v. Joseph Lineman, et al.
Indiana Supreme Court, May 18, 2011

Sixteen-year-old Cassie Pfenning was struck by a golf ball at a golf outing while driving a beverage cart at her grandfather's request.

Cassie sued the estate of her grandfather, the golfer who hit the ball that struck her, the sponsor of the event, and the operator of the golf course. The trial court granted summary judgment to all four defendants, but the Indiana Supreme Court found genuine issues of material fact prevented the grant of summary judgment to the sponsor and the girl's grandfather.

The circumstances of a sports event affect the analysis of breach of duty in a negligence action. "[I]n negligence claims against a participant in a sports activity, if the conduct of such participant is within the range of ordinary behavior of participants in the sport, the conduct is reasonable as a matter of law and does not constitute a breach of duty." If an athlete "intentionally caused injury or engaged in [reckless] conduct," the participant's activity will be found to be a breach of duty. The golfer's "hitting the errant drive which caused the plaintiff's injury is within the range of ordinary behavior of golfers."

Summary judgment for the golf course owner was appropriate, because there was no genuine issue of fact to contradict the objectively reasonable expectation that individuals on the golf course would realize the risk of being struck by an errant golf ball. Also, the risk of being struck by an errant golf ball did not involve an unreasonable risk of harm.

The trial court should not have granted summary judgment for the sponsor, because the facts did not establish a lack of duty on the part of the sponsor or the absence of a breach of duty or proximate cause.

Summary judgment was inappropriate on the claim of negligent supervision against plaintiff's grandfather. He was aware of the plaintiff's age, her lack of familiarity with golf, and her lack of awareness of the risk of injury. The grandfather selected a beverage cart without a windshield. A windshield may have prevented and/or lessened Cassie's injuries.

Keypoint: If the conduct of an athlete is within the range of ordinary participants in that activity, the conduct is not a breach of duty. Only behavior that is reckless or intended to cause injury will be found to be a breach of duty on the part of the sports participant.

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INSURANCE COVERAGE HIGHLIGHTS

A fractured storm drain pipe caused significant water damage at a school. West Bend had coverage during the period when a contractor fractured the pipe. Grange had coverage during the period when the flooding occurred due to the fractured pipe. The Court of Appeal held that both policies were triggered. The trigger is the damage rather than the negligence that caused the damage, but in this case, damage occurred in both policy periods. *Grange Mutual Cas. Co. v. West Bend Mut. Ins. Co.* (Indiana Court of Appeals, March 15, 2011).

Bradley and Natalie lived together in a long-term relationship and often commuted together. Bradley, who was insured by Indiana Insurance, died in an auto accident while driving Natalie's Focus, which was insured by Erie Insurance. Indiana Insurance filed a dec action, arguing the policy exclusion that there is no coverage "for the ownership, maintenance, or use of . . . any vehicle, other than 'your covered auto,' which is . . . furnished or available for your regular use." The Court of Appeals held that whether Bradley "regularly used" the Focus was a fact question, and therefore reversed the trial court's grant of summary judgment for Indiana Insurance. *Estate of Bradley Kinser, et al. v. Indiana Ins. Co.* (Indiana Court of Appeals, May 25, 2011).

French obtained State Farm homeowner's insurance for his $77,000 manufactured home. The independent agent estimated the total replacement cost of the home to be $173,000. State farm issued a policy with dwelling limits coverage of $173,200. Eight months later, the manufactured home was destroyed by fire. State Farm paid French $82,483.50 to replace the manufactured home with the same model. French replaced the manufactured home with a stick-built home that cost over $180,000, and sued State Farm for the difference, arguing this was the "reasonable and necessary cost" of "similar construction" under the policy. The Court of Appeals held that "reasonable and necessary cost" and "similar construction" are ambiguous terms, and the determination of what is "similar construction" is fact sensitive, and therefore summary judgment was properly denied for both parties. *Jerry French, et ux. v. State Farm Fire & Cas. Co.* (Indiana Court of Appeals, May 26, 2011).

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MED MAL: INCREASED RISK OF HARM

Carol Cutter v. Geneva Herbst
Indiana Court of Appeals, April 7, 2011

Jeffry Herbst's physician sent him to Lutheran Hospital with bilateral pneumonia. Herbst arrived at Lutheran in cardiogenic shock and died later that night of fulminant myocarditis (inflammation of the heart).

Herbst's Estate filed a complaint against the physician and Lutheran with the Indiana Department of Insurance. A medical review panel concluded the physician failed to meet the appropriate standard of care, but that the failure was not a factor in Herbst's death. The panel found Lutheran met the standard of care. The Estate settled with the physician and Lutheran under an agreement that permitted access to the Patient Compensation Fund ("the Fund").

The Fund presented expert testimony that Herbst had less than a 10% chance of surviving the hospitalization even with proper care, and that he would have been unable to return to work if he had survived. The trial court determined the Estate was not entitled to additional damages, and entered judgment for the Fund based on the testimony that Herbst would have only had a 10% chance of survival even if he had received immediate aggressive treatment. The Estate argued the 10% chance was post-negligence, and not pre-negligence. The trial court subsequently amended its order to award $750,000 to the Estate based on its calculation that there was a cumulative 40% chance of survival (50% pre-negligence and 10% post-negligence). Both parties appealed.

The Court of Appeals observed that proportional damages are calculated by subtracting the decedent's post-negligence chance of survival from the pre-negligence chance of survival, which accounts for a healthcare provider's negligence but does not hold them accountable for their patient's illnesses. As such, the Court found the trial court properly granted the Estate's motion to correct error.

Keypoint: The value of increased risk of harm in a wrongful death claim accounts for both pre-negligence and post-negligence chances of survival.

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ENFORCEMENT OF SETTLEMENT AGREEMENT

Anderson Property Management, LLC v. H. Anthony Miller, Jr., LLC
Indiana Court of Appeals, March 8, 2011

Miller contracted with Anderson to sell part of Miller's building to Anderson. A surveyor conducted a land survey of the property Anderson was buying, but did not place any visible markers on the property to show the common property line. The contract required Miller to demolish the part of the building that straddled the property line so that the single building could be turned into two separate buildings. A dispute arose between Miller and Anderson over the portion of Anderson's part of the building that was to be demolished.

Miller and Anderson mediated the dispute, and it was settled. The settlement agreement had a precondition that "the parties presume that existing building of Defendant, except 3' encroachment, is located on Defendant's property." After a surveyor's report showed that this precondition was incorrect, Miller asked the judge to enforce the settlement agreement. The trial judge held that Miller could waive that condition, and ordered Anderson to comply with the settlement agreement.

The Indiana Court of Appeals determined that the settlement agreement was specific in stating the presumption about the precondition was "that of both *parties* and that the terms of the agreement were *contingent on* that presumption." The precondition ran to the benefit of both parties, so both parties must agree to waive it for the settlement agreement to be enforced. Anderson refused to waive the precondition, so the settlement agreement was not in effect.

Keypoint: Parties must be careful in drafting settlement agreements. Any precondition to the settlement of the case contained in a settlement agreement may be waived only if both parties agree.

Allan Zukerman v. Robert Montgomery
Indiana Court of Appeals, April 25, 2011

Several suits involving different parties and several different real estate deals were pending in different courts. Based on one of these suits, Zukerman filed a demand for arbitration. Zukerman and Montgomery had a partnership agreement, which required the parties seek arbitration of their disputes.

Zukerman and Mongomery entered into a "Full and Final Settlement of Arbitration Dispute and All Other Pending Matters." Other parties involved in the suits that were not part of the arbitrated dispute did not participate in this settlement. Montgomery asked the court to consolidate all the cases into one and for enforcement of the settlement agreement as to all the parties. The court granted these motions.

To be valid and enforceable, a contract must be reasonably definite and certain in the terms and conditions of the promises made, including by whom and to whom, although absolute certainty in all terms is not required. The contract needs to provide a basis for determining the existence of a breach and for giving an appropriate remedy. Amounts and prices must be fixed or subject to some ascertainable formula or standard.

The language of the settlement agreement was not "reasonably certain 'in the terms and conditions of the promises made, including by whom and to whom.'" It was not clear whether those who signed the agreement did so in their individual capacities or on behalf of one or more businesses in which they had an ownership interest. The court could not tell if each of the parties to the agreement had the authority to act on behalf of the companies and partnerships involved in the various suits. Some provisions of the settlement agreement were open to different interpretations. The agreement did not use a formula or standard to determine "the extent of each party's obligations to relinquish

shares or property interests free and clear of encumbrances." It was unclear what actions or omissions by the parties to the settlement agreement would breach the agreement or what remedy the court could order in the event of any breach.

The Court of Appeals held the settlement agreement could not be enforced, because the material terms were not reasonably definite and certain so the intention of the parties could be ascertained.

Keypoint: A settlement agreement must be clear about the promises made, the parties making the promises, the parties benefiting from the promises, what a breach of the settlement agreement is, and a remedy for breach with a fixed amount or price or a formula for determining the appropriate remedy.

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SETTLEMENT MIS-STEP

Edwin Blinn v. The Law Firm of Johnson, Beaman, Bratch, Beal and White, LLP
Indiana Court of Appeals, April 29, 2011

Blinn filed suit against attorney Beal and Beal's law firm for negligent representation in a federal criminal case. Beal would sign off on a policy limits settlement, but the Firm would not. Therefore, Blinn filed a limited stipulation of dismissal, which dismissed Blinn's claim against the Firm without prejudice and left the claim pending against Beal, in order to effectuate a settlement with Beal.

However, settlement negotiations between Blinn and Beal failed, and Blinn subsequently sought to reinstate the Firm as a defendant. Blinn argued that even if the dismissal was not set aside, the Journey's Account Statute would permit him to re-file the claim. The trial court denied Blinn's motion.

Subsequently, Blinn filed a new complaint against the Firm. The Firm moved to dismiss on the grounds that the statute of limitations had expired and the Journey's Account Statute did not revive the claim. The trial court granted the motion, and the Court of Appeals affirmed.

The purpose of the Journey's Account Statute is to enable a diligent plaintiff to receive a judgment on his claim if something, other than the plaintiff's negligence in prosecuting the claim, causes the claim to fail. However, the Journey's Account Statute does not revive a claim that has been voluntarily dismissed. The Court pointed to the fact that Blinn sought the voluntary dismissal of the Firm as part of his settlement strategy against Beal.

The Court also rejected Blinn's argument that the Firm acted in bad faith when it signed the stipulation of dismissal after the statute of limitation had run, in that the Firm had no duty to consider whether Blinn could re-file his complaint against the Firm if settlement with Beal was unsuccessful.

Keypoint: A plaintiff can out-smart himself by strategically dismissing a defendant, if the plaintiff later attempts to re-institute the claim against that defendant when the plan backfires.

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PATIENT COMPENSATION FUND EVIDENCE

Stephen Robertson v. B.O.
Indiana Court of Appeals, May 23, 2011

B.O., by his parents, filed a complaint against Lutheran Hospital alleging Lutheran failed to timely respond to changes in his fetal heart rate, asserting the spastic diplegia that was diagnosed when B.O. was four years old resulted from Lutheran's negligence. Lutheran settled with B.O. in an agreement that allowed B.O. access to the Patient Compensation Fund ("the Fund").

After B.O. filed suit against the Fund, the Fund disclosed several expert witnesses who opined B.O. either did not have spastic diplegia or that it was not the result of a birth injury. The trial court

granted partial summary judgment that the Fund could not argue B.O. did not incur the damages or that the damages were not caused by the healthcare provider's conduct.

The Court of Appeals pointed to a recent Indiana Supreme Court decision that found the Fund may introduce evidence of a preexisting risk of harm that is relevant to establish the amount of damages, even if it is also relevant to liability issues that are foreclosed by judgment or settlement. Furthermore, an award of excess damages by the Fund is not automatic, and an admission of liability through a settlement agreement between a plaintiff and a health care provider does not obligate the Fund to pay for non-compensable damages.

Therefore, whether a health care provider settles a malpractice claim does not preclude the Fund from introducing relevant evidence on the compensable nature of a plaintiff's damages. As such, the Court found the Fund could present evidence as to whether B.O. had spastic diplegia and whether his symptoms were caused by negligence during his birth.

Keypoint: Just because the settlement of an underlying malpractice claim allows a plaintiff to seek damages from the Fund does not prevent the Fund from challenging the claim with evidence that would otherwise contest liability or causation.

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PROPERTY CLAIM INVESTIGATION

Auto-Owners Ins. Co. v. Gary Hughes
Indiana Court of Appeals, March 1, 2011

An arson fire destroyed Hughes' home, and he made a property claim to his homeowner's carrier, Auto-Owners. Ten months after the fire, Auto-Owners denied the claim on the basis of the insured's "arson, fraud, misrepresentation, false swearing, and lack of the determination of ownership and/or an insurable interest."

Almost fourteen months after the fire, Hughes filed suit against Auto-Owners for breach of contract and bad faith. The trial court denied Auto-Owners' motion for summary judgment that the claim was barred because it was not filed within the one-year contractual limitation period. Hughes had argued that Auto-Owners should be estopped from asserting the one-year limitation in the policy because it had refused Hughes' request for a copy of the policy.

The Court of Appeals was emphatic that the carrier is obligated to provide a copy of the policy to the insured when requested in the course of a claim investigation: "following a loss, an insurer must provide a copy of an insurance policy to the insured upon request or be estopped from raising noncompliance with policy terms as a defense in subsequent litigation."

However, in this case, Auto-Owners was able to document that it had in fact sent a copy to Hughes when requested, and Hughes had only been able to testify that he did not recall having received a copy of the policy from Auto-Owners. Because Hughes was not able to establish that he had not received a copy of the policy, the Court determined that this did not create a genuine issue of material fact, and ordered the trial court to enter summary judgment for Auto-Owners.

Keypoints: When the insured in a first-party claim requests a copy of the policy, the carrier must provide it. Moreover, it is essential that the carrier be able to document that it did in fact send a copy to the insured; in this case, an Auto-Owners log note documenting that the policy was sent to the insured.

Richard Sigo v. Prudential Property and Casualty Ins. Co.
Indiana Court of Appeals, April 25, 2011

Prudential denied Sigo's claim for the fire loss of his home on the basis that he caused the fire. Sigo was charged with arson but was acquitted in the criminal trial. When Sigo sued Prudential for denying his homeowner's claim, the trial court excluded evidence that Sigo had been acquitted in the criminal trial.

The Court of Appeals affirmed, holding that the probative value of the acquittal was substantially outweighed by the danger of unfair prejudice to the carrier. The Court noted that Prudential was not a party to the criminal trial, and the standard for conviction (beyond a reasonable doubt) is higher than the civil standard of the preponderance of evidence. Sigo's intention to use the acquittal to impeach a state fire marshal's investigator who testified at the criminal trial and would testify in the civil trial for Prudential was insufficient to overcome the unfair prejudice mentioning the acquittal would have on Prudential's case.

Keypoint: As a general rule, the insured cannot use an acquittal against the carrier in a first-party claim suit involving the alleged intentional wrongdoing of the insured. On the other hand, the carrier can still use a conviction of the insured for the same incident as part of the carrier's defense.

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WORKER'S COMP: LEASED EMPLOYEES

James Taylor v. Ford Motor Co., et al.
Indiana Court of Appeals, March 1, 2011

Visteon leased Taylor to Automotive Components Holdings ("ACH"), a subsidiary of Ford, through an Hourly Employee Lease Agreement ("the Agreement"), which provided Visteon was Taylor's employer, and that ACH was not his employer. Taylor was injured when a Ford employee struck him with a forklift.

Taylor filed suit against the forklift operator, ACH, and Ford for negligence. The Defendants filed a motion to dismiss, and argued the court lacked subject matter jurisdiction due to Indiana's Worker's Compensation Act ("the Act"). The trial court granted the motion to dismiss, and the Court of Appeals affirmed.

The Act provides the exclusive remedy for an employee who suffers personal injury arising out of the course of his employment. Taylor argued he was only an employee of Visteon, that the forklift operator was not a fellow employee, and therefore his claims were not precluded by the exclusivity of the Act. The Defendants cited to language in the Act that states a lessor and a lessee of employees shall each be considered joint employers of the employees provided by the lessor to the lessee for the purposes of the Act.

The Court of Appeals found that even though Taylor was only a Visteon employee under the Agreement, the mandatory language in the Act meant Visteon and ACH were joint employers for purposes of the exclusivity portion of the Act. The Court further stated there is nothing in the Act that says a lessor and lessee of leased employees can contractually agree to exclude themselves from the Act.

Furthermore, the Court concluded not only Visteon and ACH were joint employers of Taylor, but also ACH and Ford due to ACH's subsidiary status. As a result, Taylor was an employee of ACH and Ford for the purposes of the Act. Therefore, the trial court had no subject matter jurisdiction due to worker's compensation exclusivity.

Keypoint: Even though the lessor and lessee of an employee agree to contractual terms stating who is the actual employer of a leased employee, both will be deemed joint employers for the purposes of the Worker's Compensation Act.

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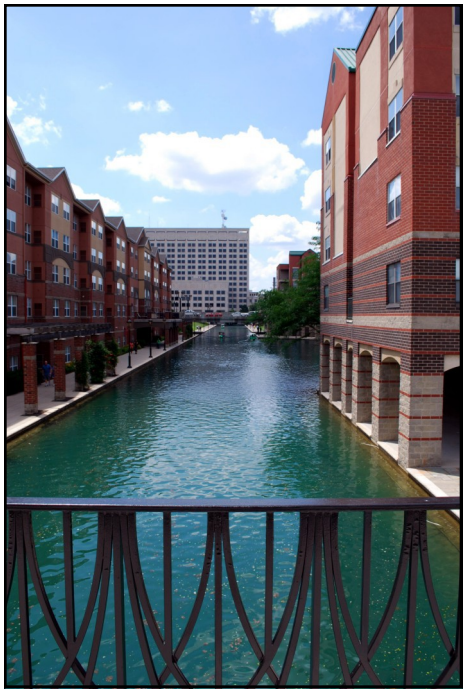

Views from our "backyard" in the Canal District

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