The Tyra Law Firm, P.C.

Spring 2013

Quarterly Newsletter

Volume 6, Issue 3

WE'RE MOVING!

The Tyra Law Firm, P.C. is pleased to announce that after six years in The Emelie Building, we will be occupying new, larger office space in The McGowan Legacy Building at 355 Indiana Avenue, just one-half block from The Emelie Building. Our move-in date is estimated to be around Labor Day, depending on the contractor's completion of the build-out. Please look for our Summer Newsletter coming out in September for photos of the new office!

* * * * * *

Jon Zarich recently informed us that he will be resigning his positions at the Insurance Institute of Indiana and The Tyra Law Firm, P.C., to go into solo practice as an insurance-industry lobbyist at the Indiana General Assembly. We wish Jon all the best in his new endeavor.

As this Newsletter goes to press, we are finalizing our selection process from several outstanding associate candidates. We will introduce you to the new associate in the next Newsletter.

Inside this issue:

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

CAP ON PUNITIVE DAMAGES IS CONSTITUTIONAL

State of Indiana v. John Doe
Indiana Supreme Court, May 14, 2013

In 1995, the Indiana General Assembly passed a law regarding punitive damages in civil cases. Ind. Code 34-51-3-1, *et seq*. Among other things, the statute provides that punitive damages may not exceed the greater of three times the amount of compensatory damages or $50,000. In addition, when punitive damages are awarded in a civil trial, the plaintiff may keep 25% of the punitive damages, and the remaining 75% goes to the State of Indiana.

John Doe was awarded $150,000 in punitive damages as part of a childhood sexual abuse lawsuit. The defendant moved to reduce the punitive damages pursuant to the statutory cap, but the trial court denied the motion and found the statutory cap violated two provisions of the state Constitution. The State of Indiana subsequently intervened, but without allowing the State to respond, the trial court declared the statutory cap on punitive damages was unconstitutional. On direct appeal to the Indiana Supreme Court, the Court reversed the trial court and found the statutory cap on punitive damages does not violate the Indiana Constitution.

The Supreme Court discussed prior case law that addressed the issues raised by John Doe. In one case, the Court noted the validity of a statutory cap on compensatory damages in medical malpractice cases was upheld. Therefore, in the absence of a meaningful response by John Doe on this issue, the Supreme Court stated it found no reason why a cap on punitive damages is so materially different from a compensatory damages cap to find one unconstitutional when the other is not.

The Supreme Court also addressed the argument that the punitive damages cap violates the separation of powers, and found the legislature is permitted to set limitations on common law causes of actions and remedies while the judicial branch has the sole discretion to award damages as long as those damages fall within the statutory parameters. The Court likened this to the penalties for a criminal conviction; the legislature provides the range for a sentence for a particular crime and the court has the ability to sentence someone within that range.

KeyPoint: The statutory provision that limits the amount of punitive damages a plaintiff may recover does not represent a violation of that plaintiff's constitutional rights.

Jerry M. Padgett
jerry.padgett@tyralaw.net

DEFAMATION AND BAD FAITH

State Farm v. Joseph Martin Radcliff, et al.
Indiana Court of Appeals, April 11, 2013

Radcliff formed a company to repair homes damaged in a large 2006 hailstorm. Friction developed between Radcliff and State Farm in the course of adjusting many of these claims, and State Farm initiated an investigation into Radcliff and his company. Based on information State Farm provided to the authorities, Radcliff was arrested on fourteen felony counts, which were eventually dismissed pursuant to a diversion agreement with the State.

State Farm then sued Radcliff for fraud and racketeering. Radcliff and his company counterclaimed for, among other things, defamation. A six-week-long trial in Hamilton County, Indiana resulted in a $14.5 million verdict in favor of Radcliff and his company on their defamation claim. The Court of Appeals affirmed the verdict.

A recitation of the facts of the case, and the history between Radcliff and State Farm, would be far too long for this space. Among the salient facts, early on Radcliff initiated an unpleasant relationship with State Farm by filing a complaint with the Indiana Department of Insurance about hail claims which State Farm had denied, and posting signs in the hailstorm area that his company would "fight State Farm."

State Farm had doubts about whether Radcliff's clients had in fact sustained hail damage (and indeed whether the roofs were damaged at all), and whether Radcliff's employees were intentionally damaging the clients' roofs to mimic hail damage (commonly known as "dime spinning"). The information State Farm developed included interviews with three former Radcliff employees who acknowledged damaging shingles to mimic hail damage before State Farm inspectors would arrive. One of the former employees showed a State Farm investigator a text message from Radcliff warning the employees "Don't do it anymore. No more dime spinning."

However, only one of the three former employees testified at trial, and the Court described him as having "credibility issues." The original text was not preserved; the text message produced at trial had been relayed through several cell phones, so its authenticity was questioned.

There were also at least three other aspects of the State Farm investigation which the Court emphasized, and which are instructive. First, State Farm tended to provide to the National Insurance Crime Bureau (which in turn provided the information to the local police) the information that showed Radcliff was engaging in fraud, but did not provide information indicating that at least some of the roofs were in fact hail-damaged. Based on the information forwarded to the police, Radcliff was arrested and charged with felony insurance fraud.

Second, in several instances cited in the Court of Appeals decision, State Farm ordered a second inspection of a roof if the first inspection failed to find evidence of fraud.

Third, some of the State Farm internal communications suggested they were enjoying Radcliff's predicament, such as sharing an image (which someone had posted on the MySpace page of Radcliff's wife) of a stick-figure Radcliff behind bars being raped, with the comment, "enjoy."

The Court of Appeals held that the jury could appropriately disallow the statutory immunity for reporting suspected fraud to the authorities, because the evidence was sufficient to show that the State Farm employees were motivated by ill will rather than making reports in good faith (which is required for the immunity). The Court also was not concerned that Radcliff accepted a diversion agreement to the criminal charges, because in exchange for admitting probable cause for one count of misdemeanor criminal mischief, he avoided substantial potential jail time and fines, as well as considerable attorney fees going to a criminal trial. As the Court concluded, "He hardly had a choice."

KeyPoints: This decision provides several lessons for claim professionals in general, and for SIU investigators in particular. (1) Always keep claim notes and communications professional and courteous. (2) While there may be instances where you need to ask for a clarification of a report, or ask for a second report, be aware it may look like you are trying to disregard evidence that doesn't fit your preconceptions. (3) In either your analysis of a claim, or what you may forward to others, such as a state Department of Insurance or NICB, it is important to include a balanced presentation of the evidence, both for and against the validity of the claim. (4) Try to preserve the evidence developed in the investigation as best you can in a form that can then be used at trial if necessary, which may require consultation with counsel during the investigation regarding rules of evidence.

Kevin C. Tyra
kevin.tyra@tyralaw.net

EXPERT ECONOMIST OPINIONS

Think Tank Software Development Corp. v. Chester, Inc., et al.
Indiana Court of Appeals, May 7, 2013

Think Tank, a computer-related business, employed the individual defendants in this case. Think Tank required these employees to sign employment agreement that included non-compete clauses. The Think Tank employees eventually went to work for Chester, Inc. Some of these employees believed they had not signed a non-compete agreement when they were hired by Think Tank, and Think Tank could not produce the signed agreements.

Think Tank filed a complaint asserting these former employees were violating the non-compete agreement.

Over the course of the litigation, Think Tank had disclosed three reports by Benjamin Wilner, its economics expert, who rendered opinions regarding Think Tank's lost sales caused by the activities of the former employees. The court granted Chester, Inc.'s motion to exclude Wilner's testimony. Think Tank was then granted permission to seek an interlocutory appeal on this ruling.

In Think Tank's interlocutory appeal regarding the exclusion of its expert, the Court of Appeals addressed Chester, Inc.'s argument that Wilner did not qualify as an expert witness on economic causation under Rule 702 of the Indiana Rules of Evidence. However, the Court found, to the extent it was part of the trial court's ruling on the motion to exclude, that it was error to bar Wilner's testimony because he had sufficient qualifications to testify as an expert. Among other things, he held a Ph.D. in "Managerial Economics and Decision Science," and had worked as a professor of finance and as an economist. He was therefore qualified as an expert.

Next, Chester, Inc. challenged the scientific principles on which Wilner's economic causation opinions were based. Essentially, Wilner explained that he had performed "an event study" using the professionally-recognized "benchmark method" in calculating the damages, and used the "yardstick approach" to calculate general profit erosion, which also is professionally-recognized. Therefore, the Court held that the trial court erred in excluding Wilner's opinions. To the extent that Chester, Inc. also criticized what information Wilner did or did not consider in his analysis, that would be the basis for cross-examination of Wilner, not for exclusion of his opinions.

KeyPoints: The economics expert does need to use professionally-recognized methodology in reaching his opinions, but does not need to conduct (or refer to) scientific tests or analysis as may be needed by, for example, an engineering expert.

Jerry M. Padgett
jerry.padgett@tyralaw.net

IS A SLIP AND FALL LAWSUIT WORTH THE GAMBLE?

Charles Pickering v. Caesars Riverboat Casino, LLC
Indiana Court of Appeals, May 21, 2013

Pickering and some friends went to Caesars in January 2011. It was cold, and there was snow on the ground. Pickering and his friends parked on the roof of Caesars' parking garage. However, the ramp and the rooftop level were blocked by yellow caution tape, a saw horse, and some orange barrels due to the snow on the roof. After seeing footprints in the snow, the men proceeded to duck under the caution tape only to find the access door to the casino was locked. On the way back down the ramp, Pickering slipped in the snow, fell, and broke his pelvis.

Pickering filed suit against Caesars, alleging it was negligent in maintaining its premises in a reasonably safe condition. Caesars subsequently filed a motion for summary judgment, which the trial court granted. The Court of Appeals affirmed.

On appeal, Pickering argued there is a general duty for business owners to remove snow and ice from their premises, and that Caesars' attempt

to put up caution tape and barricades did not excuse it from its duty. However, Caesars argued that Pickering's visitor status changed from an invitee to a licensee when he ducked under the caution tape because he exceeded the scope of his invitation. Caesars also argued Pickering had actual knowledge of the condition of the premises when he proceeded up the ramp after crossing past the caution tape.

The Court found that a person may not maintain his invitee status when he enters an area to which the owner has specifically and visibly restricted access. As such, when Pickering ducked under the caution tape and proceeded up the ramp, he lost his status as an invitee and became a licensee. In the process, Caesars only owed Pickering a duty to refrain from willfully or wantonly injuring Pickering or acting in a manner that would increase his danger, and there was no designated evidence to the contrary. Therefore, the trial court did not err in granting Caesars' motion for summary judgment.

KeyPoints: The duty a business owner owes to its customers can change depending on the actions taken by the customer. In particular, if a customer does something, such as enter a restricted area, the business owner may be excused from liability despite whatever injury the customer may sustain.

Jerry M. Padgett
jerry.padgett@tyralaw.net

PRODUCT LIABILITY

John Gresser, et al. v. Dow Chemical Co.
Indiana Court of Appeals, April 30, 2013

Reliable Exterminators inspected a home, found evidence of termites, and applied Dow Chemical's termiticide, Dursban TC. This product is registered with the EPA according to the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The Gressers purchased the home thirteen months later. They noticed a "very strong odor in the house," but purchased it anyway. The Gressers reported continual health problems from the time they moved in.

The Gressers filed a product liability suit against Dow and a negligence claim against Reliable. The trial court granted summary judgment for Dow and Reliable, both of which had argued FIFRA and EPA approval preempted their state-law product liability claim. The trial court denied Reliable's motion for summary judgment regarding the negligence claim.

The Indiana Product Liability Act holds a manufacturer liable for a defective product, but the manufacturer is not liable under the Act if the product "complied with applicable codes, standards, regulations, or specification established, promulgated, or approved by the United States or Indiana, or by an agency of the United States or Indiana." Therefore, EPA approval of Dursban TC under FIFRA provided Dow with a defense as a matter of law. The Court of Appeals affirmed the trial court's grant of summary judgment to Dow, but not Reliable.

The Court of Appeals also rejected Reliable's argument it had no duty toward future purchasers of the home, and therefore sustained the Gresser's claim that Reliable was negligent in over-applying the termiticide. The Court also affirmed that Reliable may be liable for punitive damages, because there was sufficient evidence to go to the trier of fact regarding gross negligence.

KeyPoint: In any product liability claim, look for approval of the product by a state or Federal agency, and consider whether Federal pre-emption applies. It may not apply to non-manufacturer defendants who may have used or applied the product incorrectly.

Kevin C. Tyra
kevin.tyra@tyralaw.net

RELEASE OF EXCESS CARRIER

United States Fidelity and Guaranty v. Warsaw Chemical Co.
Indiana Court of Appeals, May 23, 2013

Warsaw Chemical discovered soil and groundwater contamination in the late 1980's, and made a liability claim to his carrier, USF&G, in 1990. USF&G asserted a number of grounds on which it denied coverage. In 1992, USF&G paid Warsaw Chemical $25,000 in exchange for a release of claims or demands related to the contamination remediation.

In 2007, Warsaw Chemical filed suit against USF&G, contending that the release did not operate to release coverage for Warsaw Chemical's excess policies with USF&G.

The 1992 release identified four USF&G primary policies in effect from 1986 to 1989 in its recitals (the "whereas" clauses at the beginning). It did not explicitly identify the excess USF&G policies in effect in that time period. The release stated in part that "In consideration for the payment of $25,000, receipt of which is hereby acknowledged, Warsaw releases, acquits, and forever discharges USF&G . . . from any further claims, demands, causes of action, damages, . . . or losses of any kind and nature . . . arising from, or in any way related to, the pollution and contamination of the soil and groundwater in, upon or adjacent to the Warsaw facility in Warsaw, Indiana."

The trial court granted summary judgment for Warsaw Chemical, rejecting USF&G's argument that the release covered the excess policies as well as the named primary policies.

The Court of Appeals reversed, holding that the operative language is the releasing language quoted above, not the recitals. It does not matter that the recitals imply that only the primary policies are being released, when the releasing language is unequivocal that Warsaw Chemical is releasing USF&G for all coverage claims whatsoever.

KeyPoint: Although this worked out in the end for USF&G, it does show that any perceived ambiguity in a release can cause problems later on. Anyone drafting a release should make every effort to cover all the bases you can think of, in this case including explicit reference to excess policies.

Kevin C. Tyra
kevin.tyra@tyralaw.net

TORT CLAIM NOTICE AND CARRIER SPOLIATION

Michael Lyons, et al. v. Richmond Community School Corp.
Indiana Court of Appeals, May 8, 2013

Megan Lyons was a high school student with Down syndrome, which caused her to swallow her food at times without sufficiently chewing it. The school knew of this condition, and assigned paraprofessionals to supervise Megan at lunch time and cut her food into smaller pieces. Unfortunately, Megan choked on a sandwich and subsequently died from oxygen deprivation. The paraprofessional assigned to Megan that day had not supervised Megan previously at lunch, was not aware of her special needs, and had not cut up her food into pieces.

After this incident, the school's food service coordinator, who was not present at the time of the incident, held a meeting with the cafeteria workers to discuss HIPAA privacy laws, and instructed the cafeteria workers they would be fired if they discussed the incident outside of the school. There was also a video surveillance system, which covered

the cafeteria, which was temporarily preserved on a hard drive for approximately 90 days. However, when Indiana Insurance, the school's insurer, was notified of the incident and began its investigation, it was never disclosed that this video existed. The video then expired without being preserved.

A little more than a year later, Megan's parents filed a notice of tort claim against the school, and filed their complaint five months later. During the course of the suit, the Lyonses sought discovery from Indiana Insurance. However, the trial court granted Indiana Insurance's motion to quash. The trial court also eventually granted the school's motion for summary judgment on all claims. The Court of Appeals reversed in part and affirmed in part the trial court's rulings.

On appeal, the first issue was whether the Lyonses' tort claim was untimely. The Lyonses argued that their delay in discovering a potential claim existed against the school extended their deadline to file their tort claim notice. The Court found that based on the designated evidence, there was a genuine issue of material fact whether in the exercise of due diligence, the Lyonses could have learned of the school's alleged acts or omissions before the notice deadline. Therefore, summary judgment for the school should not have been entered.

However, the Court found there was no fraudulent concealment by the school regarding the events leading up to and immediately after the choking incident. The Court also found the Lyonses had not substantially complied with their requirements under the Tort Claims Act.

Additionally, the Court found the trial court erred in granting summary judgment on the issue of contributory negligence. But, the Court concluded the trial court did not err in granting summary judgment on the Lyonses' claims that the school was liable under 42 U.S.C. § 1983 for violation of their constitutional rights.

Finally, as to the Lyonses' claims against Indiana Insurance, the Court found Indiana Insurance did not owe the Lyonses a duty to preserve the video footage of the incident when Indiana Insurance was not even aware of the existence of the video. The Court also concluded Indiana Insurance did not owe the Lyonses a duty to investigate the incident. As such, the Lyonses did not have a valid spoliation claim against Indiana Insurance.

KeyPoints: Under the discovery rule, and for a tort claim against a governmental entity, a claimant has 180 days from the day he or she discovers through the exercise of ordinary diligence, or could have discovered, an injury occurred as a result of another person's tortious act. However, if either knowledge of the injury or knowledge of the causation of that injury is not discovered until after the 180 days, the deadline may be extended.

Also, an insurer's duty to investigate stems from its contract with its insured, and not through any special relationship with a third-party claimant. And, an insurer cannot be said to have breached a duty to preserve evidence if it does not even know it exists.

Jerry M. Padgett
jerry.padgett@tyralaw.net

ONE HUNDRED YEARS OF TYRAS IN AMERICA

Jan, Kevin, and Amy Tyra, along with Amy's husband and Jan and Kevin's son, Adam, attended a family reunion in June in Allendale, NJ, with a couple dozen family members to celebrate the one hundredth anniversary of when Kevin's grandmother, Francziska, and eldest aunt, Valerka (then six years old) arrived from Poland at Ellis Island to join Kevin's grandfather, Adam Lukasz Tyra, to start their new life in America.

The Tyra Law Firm, P.C.

334 North Senate Avenue

Indianapolis, Indiana 46204