The Tyra Law Firm, P.C.

Summer 2008 **Quarterly Newsletter** Volume 1, Issue 4

A New Addition

CONGRATULATIONS TO JENNIFER AND JERRY AND WELCOME TO LUKE!

Jerry and Jennifer Padgett are the proud parents of a baby boy, Luke. Jennifer delivered Luke on July 7, and both mother and son are doing well. Lucas weighed 6 pounds, 9 ounces and was 18 ¾ inches at birth.

Jennifer and Jerry now get to experience first-hand the challenges of balancing parenthood with practicing law, Jerry with The Tyra Law Firm, and Jennifer with Zeigler Cohen & Koch, another Indianapolis insurance-defense firm.

Jerry, Luke and Jennifer Padgett

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

ATTRACTIVE NUISANCE

Beth Kopczynski, et al. v. David Barger, et ux.
Indiana Supreme Court, June 4, 2008

Six-year-old Bryan Barger was jumping, unsupervised, on a trampoline in the family's enclosed backyard. He invited several neighborhood children to join him on the trampoline, including Beth Kopczynski's daughter, Alisha. Alisha injured her knee while playing on the trampoline. Alisha's mother sued the Bargers on premises liability and attractive nuisance theories. The trial court granted summary judgment to the Bargers, accepting their argument that Alisha was a trespasser. The Court of Appeals affirmed.

The first issue before the Supreme Court was whether, under the totality of the circumstances, the Bargers gave Alisha reason to believe that they were willing to allow her on their land. Alisha had never actually met Bryan's parents. The Court reversed the summary judgment on the premises-liability issue because a factual question remained whether the invitation by an unsupervised six-year-old would give twelve-year-old Alisha a reasonable belief she had the Bargers' permission to enter their property and play on the trampoline.

The second issue was whether, regardless of whether Alisha has a reasonable belief that she had permission to enter the Bargers' backyard, the trampoline constituted an attractive nuisance. The risks in using a trampoline may not be obvious to children, particularly one such as Alisha who had never used one before, thereby creating a factual issue that defeated summary judgment on the attractive-nuisance issue.

Keypoint: As the Supreme Court pointed out in its opinion, the key factor in this accident was the failure of the Bargers to supervise Bryan while he was playing on the trampoline, thereby allowing the sequence of events leading to Alisha's injury. Parents who fail to properly supervise their children, even in their own backyards, run the risk of increased liability for attracting neighborhood children and the resulting injuries.

Kevin C. Tyra
kevin.tyra@tyralaw.net

INSURANCE COVERAGE: LATE NOTICE, ETC.

Tri-Etch, Inc., et al. v. Cincinnati Ins. Co.
Indiana Court of Appeals, July 24, 2008

This case has visited the Indiana appellate courts several times since the 1997 tragedy in which security service Tri-Etch failed to respond to a late-night alarm triggered when a robber abducted a liquor store employee and beat the employee to death. Tri-Etch had $1 Million liability policies with Scottsdale Insurance Company and with Cincinnati Insurance Company, and a $2 Million umbrella policy with Cincinnati. Cincinnati contended that Tri-Etch did not notify it of the events surrounding the employee's murder until six years later. Scottsdale defended Tri-Etch; Cincinnati denied coverage and filed a Federal coverage dec action, which was later dismissed.

In the state-court coverage case the Estate and Tri-Etch then filed against Cincinnati, the trial court granted summary judgment to Cincinnati, holding that the Cincinnati policies provided coverage for this claim, but the notice Tri-Etch gave to Cincinnati "was unreasonably late as a matter of law," and therefore Cincinnati suffered prejudice by late notice.

The Court of Appeals reversed, focusing on Cincinnati's acknowledgement in the summary-judgment phase that even if it had received timely notice of the claim and the suit, it still would have denied coverage on the basis that the loss was not an "occurrence" under the policy. Cincinnati would not have done anything

differently in response to the underlying claim and suit even with timely notice. Therefore, the Court held, as a matter of law Cincinnati did not suffer prejudice from the late notice.

The Court also affirmed the trial court's holding that the Cincinnati policies provided coverage for this claim, because the events constituted an "occurrence." That is, the failure of Tri-Etch to respond to the alarm was an accident, rather than what Cincinnati characterized as a "business act." Therefore, Cincinnati had coverage for the claim and was obligated to pay the balance of the Estate judgment that Scottsdale had not already paid, and to reimburse Scottsdale for one-half of the defense costs incurred since the date Cincinnati received notice of the claim and the suit.

Keypoint: The late-notice defense to third-party coverage requires a showing of prejudice, which fails if the carrier would have denied coverage on other grounds anyway.

Kevin C. Tyra
kevin.tyra@tyralaw.net

MEDICAL EXPERTS

Jeffrey L. Cain, M.D. v. Richard Back, et ux.
Indiana Court of Appeals, July 21, 2008

Suzette Back was admitted to the hospital when she was twenty-nine weeks pregnant, experiencing abdominal cramps and decreased fetal movement. The nurses monitoring her condition reported their observations to Suzette's OB-GYN, Dr. Cain, who ordered Suzette admitted overnight for observation. During the night, the fetal heart rate went down, and an ultrasound indicated low amniotic fluid and a possible defect in the fetus' abdominal wall, so Dr. Cain ordered Suzette's transfer to another hospital fifteen miles away, which was better able to care for the fetus. During the transfer, the fetus died.

In the ensuing malpractice trial, which resulted in a $800,000 verdict for the Backs, the trial judge excluded the expert opinions of two of the other physicians who provided care to Suzette and the fetus on the night the fetus died. Dr. Cain had offered their opinions at trial that Dr. Cain had acted reasonably and that he had met the applicable standard of care in his decision to transfer Suzette that night.

The Court of Appeals distinguished between "expert opinions" under evidence rule 702 and "lay opinions" under evidence rule 701, on the basis that (1) a lay opinion is based on the perception of the witness, while an expert opinion is not; and (2) expert opinions are subject to pretrial disclosure requirements under Trial Rule 26(B)(4), but lay opinions are not. Dr. Cain had not previously disclosed the expert opinions of these two physicians.

The Court reasoned that although a significant part of the two physicians' opinions were based on their own perceptions that night, their opinions about whether Dr. Cain met the standard of care necessarily calls upon their medical knowledge, and was properly excluded as expert opinions not previously disclosed by the defense.

The defense also sought unsuccessfully to have admitted at trial letters the Backs' counsel had sent to the two physicians. The letters said in part that "any expert testimony that is unnecessary in describing your care in this case which is adverse to Mrs. Back will be considered a breach of that relationship of trust." The trial court excluded the letters because there was no indication either physician was actually intimidated from testifying for Dr. Cain.

The Court of Appeals noted first that there was no evidence of actual intimidation, so the letters were not relevant on that issue. The Court then considered whether the letters were relevant on the issue of whether the Backs' attorney sent the letter because they were aware of the weakness of

their case. However, the Court of Appeals held that the letters from the Backs' attorney were apparently intended to improperly influence the physicians, but not necessarily intended to be intimidating. Therefore, the trial judge did not abuse his discretion in excluding the letters from evidence.

Keypoint: Other treating physicians may offer expert opinions about the care the defendant provided to the plaintiff, but they must be disclosed in a timely manner under Trial Rule 26(B)(4).

Unfortunately, it appears from this decision that a letter from counsel intended to "improperly influence" a witness gets a free pass from the court, so long as the letter is not actually "intimidating."

Kevin C. Tyra
kevin.tyra@tyralaw.net

MEDICAL MALPRACTICE: "OPENING THE DOOR"

Michael A. Linton, M.D. v. Lawanda Davis
Indiana Court of Appeals, June 3, 2008

Dr. Linton delivered a stillborn baby to Lawanda Davis. The ensuing medical review panel ruled that Dr. Linton failed to comply with the appropriate standard of care, which was a factor in the resultant damages. In addition, the Medical Licensing Board conducted an investigation based on complaints from eleven of Dr. Linton's obstetrics patients, and placed Dr. Linton on indefinite probation.

In the subsequent litigation with Davis, Dr. Linton moved to exclude references to the Board's decision. The trial court held that the Board's decision would be admissible under certain circumstances, including if Dr. Linton testified as to the standard of care.

At trial, Davis called Dr. Linton as a witness in her case-in-chief, and asked Dr. Linton whether he believed he adhered to the standard of care. He replied in the affirmative. Davis then offered into evidence the Board decision. The jury entered a verdict against Dr. Linton in the amount of $1,400,000.

Dr. Linton appealed, arguing that the admission of the Board decision confused the jury and prejudiced his case, emphasizing that the Board never ruled specifically on the Davis case, and the Board's procedural rules and safeguards are not as strict as those of a trial court.

First, the Court of Appeals held that Davis was allowed to ask Dr. Linton whether he believed he met the standard of care. Second, once he gave an expert opinion regarding his compliance with the standard of care, he could be impeached by evidence regarding the status of his licensure, although the specific findings of the Board should not be admitted into evidence.

Nevertheless, Dr. Linton argued that Davis should not be allowed to open the door to this impeachment by asking for Dr. Linton's expert opinions, which Dr. Linton would not have offered on his own.

The Court agreed that "a party is forbidden from placing a witness on the stand when the party's sole purpose in doing so is to present otherwise inadmissible evidence cloaked as impeachment." The Court recited long passages from Davis' examination of Dr. Linton, and concluded that Davis was not merely trying to get the Board decision into evidence; rather, much of it appeared to be an "attempt to clarify Dr. Linton's medical procedures and decisions" while managing Davis' labor and delivery.

Keypoint: Although the Court of Appeals chose to see Davis' efforts as something other than a subterfuge to get the Board decision into evidence, it is clear that the questions about standard of care were designed solely for that purpose, and to impeach Dr. Linton on issues that he would not have brought up on his own.

Defense counsel can still take steps to avoid or minimize the damage, including careful preparation of the physician to avoid the trap. Nevertheless, it is unfortunate that the Court would condone, even encourage, one side to force the other to open the door to issues in this way.

Kevin C. Tyra
kevin.tyra@tyralaw.net

"PREVAILING PARTY"

Kirk Reuille v. E.E. Brandenberger Construction, Inc.
Indiana Supreme Court, June 24, 2008

Reuille and E.E. Brandenberger Construction executed a construction contract for a new home. The contract included a provision regarding dispute resolution that said the "prevailing party" shall be entitled to reasonable costs and expenses, including attorney fees. Several years later, Reuille filed a breach of contract claim. The case ultimately settled at mediation as to all issues except for fees, which was reserved for judicial resolution. After mediation, Reuille moved for costs and expenses, but the court found for Brandenberger and stated Reuille was not a "prevailing party." Reuille appealed the decision, and the Court of Appeals affirmed the trial court's decision. The Indiana Supreme Court granted transfer.

Reuille argued he was the "prevailing party" because he received all the relief he had asked for in his Complaint. Brandenberger contended Reuille was not the "prevailing party" because no judgment had been entered.

The Supreme Court first noted the contract between the parties did not define "prevailing party." As such, the Court looked to Black's Law Dictionary, and found that the definition of "prevailing party" contemplates a trial on the merits and an entry of judgment.

The Court also pointed out that mediation is meant to remove some of the contentiousness of litigation, and that it is unlikely the parties would intend for a mediation settlement to result in one party being determined a "prevailing party."

The Court concluded by stating a bright line rule: in the absence of a definition of "prevailing party" in a contract, only when a judgment is entered will one party be able to recover for costs and expenses as the "prevailing party." Therefore, the Supreme Court affirmed the lower court decisions.

Key Point: To be a "prevailing party," you must receive a judgment in your favor.

Jerry M. Padgett
jerry.padgett@tyralaw.net

PRODUCT LIABILITY: DEFECTIVE WARNINGS

Jim Kovach, et al. v. Alpharama, Inc. et al.
Indiana Court of Appeals, June 16, 2008

The Kovachs' 9 year old son underwent a surgical procedure, after which a nurse administered codeine in liquid form through the use of a graduated medicine cup that, when full, held 30 ml. The nurse stated she gave the child only the 15 ml of codeine he was prescribed, but the boy's father stated he saw the cup and it was full. Later that day, the boy went into respiratory arrest and was pronounced dead from asphyxia due to an opiate overdose. The autopsy revealed more than double the recommended amount of codeine in his blood.

The Kovachs filed suit against the various manufacturers and distributors of the measurement cup ("the Cup Defendants"), alleging two claims under the Uniform Commercial Code ("the UCC") and two claims under the Indiana Product Liability Act ("PLA"). The Cup Defendants moved for summary judgment. The trial court granted the motion for summary judgment.

The Kovachs appealed the grant of summary judgment.

The Court of Appeals first looked to the Kovach's claims under the PLA. The Court stated that as to the Kovach's strict liability claim, it could have been reasonable for a warning to have been included with the cup to let users of the cup know to be careful when dispensing precise doses of medications. Therefore, the Court stated the Kovachs established the cup was defective.

The Court of Appeals found there was a genuine issue of material fact regarding the Kovachs' first UCC claim, breach of the implied warranty of merchantability, as to whether the cup was fit for its ordinary purpose. A recent Indiana Supreme Court decision abolished the vertical privity requirement between the consumer and manufacturer for this type of claim. However, the Court determined the Cup Defendants failed to develop an argument against the Kovach's claim regarding this issue, and therefore found there was a genuine issue of material fact.

The Kovachs also tried to persuade the Court to extend the abolishment of the vertical privity requirement to their second UCC claim, breach of the implied warranty of fitness for a particular purpose. While the Court noted the Cup Defendants once again failed to develop an argument against this claim, it declined to extend the holding of the previous Supreme Court decision, and found it was limited only to the implied warranty of merchantability. As the Kovachs had no evidence establishing privity for this claim, the Court found there was no genuine issue of material fact as to this claim.

As to the issue of causation for all claims, the Kovachs argued a presumption that an adequate warning would be read and heeded. The Court found there is a presumption of causation when a warning is inadequate or missing, and therefore held the Kovachs had established a genuine issue of material fact as to causation.

Key Points: A defective warning creates a presumption of causation, an important element of a plaintiff's prima facie case is satisfied. As seen in this case, even though a product is used by one person on behalf of someone else, a defective warning can still create liability when the person who did not use the product is injured.

It would not be surprising if the Cup Defendants petitioned the Indiana Supreme Court for transfer.

Jerry M. Padgett
jerry.padgett@tyralaw.net

RESCUE ME: INJURIES SUSTAINED WHILE HELPING OTHERS

Star Transport, Inc. v. Hervey Byard
Indiana Court of Appeals, August 12, 2008

While driving a truck for Star Transport in the evening, the driver got stuck on a concrete post at a street corner. The driver tried backing up several times to loosen the truck from the post, which caused traffic congestion. Several nearby residents came out to help direct traffic. Byard, one of the residents, went to the back of the truck to stop cars before attempting to pass the truck. While directing traffic, Byard was hit by a drunk driver.

Byard sued Star Transport, the truck driver, and the drunk driver. At trial, the court gave the jury the rescue doctrine instruction over the objection of defense counsel, and also refused to give Star Transport's proposed pattern jury instruction on incurred risk. The jury found Star Transport and its driver to be 75% at fault, the drunk driver 5% at fault, and Byard to be 20% at fault. Star Transport and its driver appealed the giving of the rescue doctrine instruction and the denial of their proposed instruction on incurred risk.

The Court of Appeals stated the underlying policy for the rescue doctrine is to encourage Good Samaritans. Therefore, the Court concluded it was

logical to encourage people at accident scenes to help avoid further accidents by voluntarily directing traffic. Otherwise, those people might not help out if they felt they would be unable to recover for injuries suffered while providing this assistance. As such, the Court found Byard was a "rescuer," and affirmed the trial court's provision of the rescue doctrine instruction.

As to the denial of the incurred risk instruction, the Court of Appeals stated that while the jury did not receive the actual instruction, it did receive instructions on, among other things, comparative fault, proximate causation, intervening causes, and a pedestrian's duty to maintain a proper lookout. The Court noted these are all factors that form the basis of a defense of incurred risk, and found that while the actual phrase "incurred risk" was not used, the principles of it were still related to the jury. Therefore, the Court affirmed the denial of the incurred risk instruction.

Key Point: The rescue doctrine has now been extended to cover those who are helping out at an accident scene to prevent any further injuries or damage from occurring. This broadens the scope of who can be found to be a "rescuer," and further extends the exposure for liability to those whose negligence initially caused the rescue situation.

Jerry M. Padgett
jerry.padgett@tyralaw.net

WORKER'S COMP EXCLUSIVITY

Procare Rehab Services of Community Hospital v. Janice Vitatoe
Indiana Court of Appeals, June 18, 2008

While Vitatoe was working as a nurse for Community Hospital, she fell and hurt her leg. Vitatoe underwent physical therapy for this injury at Procare Rehab Services ("Procare"), which was a division of Community Hospital. Vitatoe filed a worker's compensation claim for her injury. The following year, Vitatoe filed a proposed medical malpractice complaint with the Department of Insurance against Procare. The following month, Procare moved to dismiss the medical malpractice complaint, and argued that Vitatoe's exclusive remedy was against Community Hospital under the Worker's Compensation Act. The motion to dismiss was denied, and Procare appealed.

On appeal, Procare cited to caselaw that bars the courts from hearing any common law action brought by an employee against the employer for the same injury, and that any new injury or aggravation of the original injury as a result of medical treatment is considered arising out of the course of employment for the purposes of the Worker's Compensation Act.

Vitatoe argued her alleged negligent treatment was received at a separate facility from her employer, and therefore the injuries did not arise out of the course of her employment with Community Hospital.

The Court held that if an employee's injury, which was suffered during the course of employment, is aggravated by treatment for that injury, regardless of where, when, by whom, and for however long, the injury caused by that treatment will be deemed as a matter of law to have arisen out of and in the course of employment for the purposes of the Worker's Compensation Act. Therefore, the Court of Appeals reversed the denial of Procare's motion to dismiss.

Key Point: Any injury sustained by a health care provider's employees can only be addressed through the Worker's Compensation Act, so long as the treatment was provided by the employer. Not only are direct injuries covered by worker's compensation, but any injury secondary to treatment for the initial injury, regardless of how far down the line that treatment may occur, can only be covered by worker's compensation.

Jerry M. Padgett
jerry.padgett@tyralaw.net

THE LAST WORD

A truck driver had held a grudge against lawyers for years since his bitter, and expensive, divorce. The grudge went so far that the driver would aim for any lawyers he might see along his route.

One day, the driver stopped to pick up a hitchhiking priest. Further down the route, the driver saw a lawyer walking on the sidewalk. Instinctively, the driver bore down on the lawyer. But, realizing a priest was riding with him, at the last second, the driver veered back into his lane. Nevertheless, as they passed the lawyer, the driver heard a loud "THUMP."

Terribly embarrassed, the driver said, "Father, I have to confess that for a moment there, I was actually trying to hit that lawyer."

The priest replied, "That's alright, my son. I got him with the door."

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