The Tyra Law Firm, P.C.

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Quarterly Newsletter

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CHANGING OF THE GUARD AT INDIANA UNIVERSITY

Denise Chavis' daughter, Paeton, graduated in June from Brebeuf Jesuit Preparatory School. Pictured at left are Pat, Paeton, Patrick, and Denise Chavis.

Paeton starts this month at Indiana University-Bloomington, majoring in Theatre.

Allison Tyra graduated this month with a Bachelor's Degree in Journalism from Indiana University, where she was also an editor, writer, and photographer for the Indiana Daily Student. Allison is pictured at right with Jan and Kevin Tyra.

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BAND CRASHES A NURSING HOME

Albert Gilbert v. Loogootee Realty, LLC
Indiana Court of Appeals, June 10, 2010

Gilbert was a resident of the Loogootee Nursing Center ("Loogootee"). The Charles Bruner Band ("the Band") generally performed on a monthly basis in a common area inside Loogootee's facility. Carroll Ledgerwood was a member of the Band. However, other than making space available, Loogootee had no control over the Band, the songs it performed, or setting up and dismantling its equipment. Loogootee did not pay the Band.

One day when the Band was scheduled to perform, Ledgerwood was backing into a parking space near the front door to unload his equipment. Gilbert was sitting on Loogootee's front porch. Ledgerwood's foot slipped off the brake and pushed the gas pedal, and the car jumped over the curb. Ledgerwood's car struck Gilbert and ultimately crashed through the wall.

Gilbert's guardians filed suit against Ledgerwood and Loogootee, under the theory that Ledgerwood was a gratuitous servant of Loogootee, and under the non-delegable duty exception to *respondeat superior*. The trial court granted summary judgment in favor of Loogootee. Specifically, the court found Ledgerwood was a gratuitous servant of Loogootee, but that he was not acting as a gratuitous servant at the time of the accident so that Loogootee could not be liable under vicarious liability. The trial court also found Loogootee was not liable under the non-delegable duty exception to *respondeat superior*. The Court of Appeals affirmed.

The gratuitous servant doctrine states that even though there is no direct evidence of a traditional employment agreement, the master will be bound by the acts of the alleged gratuitous servant when the master has the right to direct and control the conduct of the gratuitous servant. Because Loogootee had no control over the Band, and specifically the Band's transportation to and from Loogootee's facility, Loogootee exercised no control over the Band and therefore Ledgerwood was not a gratuitous servant at the time of the incident.

As to the *respondeat superior* claim, generally a principal will not be liable for the negligence of an independent contractor. However, there are a few exceptions to this rule, and in particular, when the principal is bound by law or contract to perform a specific duty, that duty is non-delegable and the principal will be liable for the independent contractor's negligence. The Court of Appeals compared liability under *respondeat superior* (where liability is imposed on the principal only for those acts that its employees commit within the scope of the employment relationship) to the common-carrier liability exception (where liability is imposed on the principal for any violation by its employee of the principal's non-delegable duty regardless of whether the act is within the scope of employment). Here, because Ledgerwood was not an employee of Loogootee, nor was he an independent contractor, the Court declined to extend responsibility to Loogootee for Ledgerwood's actions under either the non-delegable duty exception to *respondeat superior* or the common-carrier exception.

KeyPoint: Liability under the gratuitous servant theory requires the principal to have control over the gratuitous servant's actions. Likewise, for a principal to be liable under *respondeat superior* for a non-delegable duty, the person committing the negligent act still must be an independent contractor. And for the principal to be liable under the common-carrier exception, the person committing the negligent act must be an employee.

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MED MAL ACT: DERIVATIVE EMOTIONAL DISTRESS CLAIMS

Indiana Patient Compensation Fund v. Gary Patrick
Indiana Supreme Court, June 23, 2010

Christopher Patrick was injured in an automobile accident. At the time of the accident, he was unmarried with no dependents and living with his father, Gary Patrick. Due to the accident, Christopher suffered a broken wrist, broken nose, and abdominal trauma. He was admitted to the hospital but released the next day despite complaints by his father that Christopher continued to suffer from abdominal pain and swelling. That evening, Christopher began vomiting blood. Gary called 911, but by the time the ambulance arrived, Christopher was unconscious. The emergency personnel were unable to revive him. The cause of death was a ruptured colon from seatbelt trauma, which the medical providers failed to diagnose.

Gary, individually and as personal representative of Christopher's estate, brought a medical malpractice action against both the hospital and the treating physician. Gary also asserted a claim for his own emotional distress. Gary settled his claims against the health care providers. After settlement, Gary, individually, and as personal representative of Christopher's Estate, filed his petition for payment of excess damages with the Indiana Patient's Compensation Fund ("Fund").

The Fund moved for summary judgment on Gary's claim for emotional distress arguing that damages for emotional distress are not covered under the Adult Wrongful Death Statute ("AWDS") and even if they were, Gary's claim would still fail because he did not meet the "bodily injury" requirement of Indiana's bystander rule for recovering emotional distress damages. The trial court found that the AWDS applied to Gary's claim as personal representative of Christopher's Estate and also awarded him $600,000 for his emotional distress claim.

The Court of Appeals affirmed the trial court's ruling. The Supreme Court granted transfer. Gary agreed that he did not have a claim for emotional distress under the AWDS, but contended that he was entitled to bring a claim for emotional distress under the Medical Malpractice Act ("MMA").

The Court held that while the MMA does not require bodily jury or death of the claimant in a derivative claim such as Gary's emotional distress claim, it also does not enlarge the type of claims that may be brought. The Court, citing its ruling in *Chamberlain v. Walpole*, 822 N.E.2d 959 (Ind. 2005), stated that the MMA only allows a claimant to use the procedures provided therein to pursue a claim directly that would be pursued under the AWDS and the Survival Statute, respectively. The MMA, therefore, serves only as a procedural mechanism for claims of medical malpractice. The Court ruled that because claims for emotional distress are not allowed under the AWDS, Gary could not bring this type of derivative claim under the MMA.

KeyPoint: The Medical Malpractice Act does not create new causes of action that do not otherwise exist.

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NO MED MAL RECOVERY FOR INVOLUNTARY MEDICAL PROCEDURES

Larz Elliott v. Rush Memorial Hospital, et al.
Indiana Court of Appeals, June 11, 2010

A Rush County Sherriff's Deputy transported Elliott to the Rush Memorial Hospital to obtain blood and urine samples. The deputy told the hospital that he had a court order authorizing both. Elliott was unable to naturally produce any urine, so Dr. Sigma ordered Nurse Tressler to obtain a urine sample through catheterization. Elliott was subsequently handcuffed to a hospital bed, and

the urine sample. However, no medical exam was performed prior to the catheterization, no medical history was taken, and no risks were discussed with Elliott.

Elliott filed a proposed medical malpractice complaint with the Indiana Department of Insurance alleging claims of battery and negligence as a result of the catheterization. A trial court granted the Defendants' petition for preliminary determination of law with the trial court on the grounds that the proposed complaint failed to state a claim. The trial court further found the Defendants were immune from civil liability pursuant to I.C. § 9-30-6-6. Elliott appealed, and the Court of Appeals affirmed the dismissal.

The first issue was whether the proposed complaint fell within the purview of the Indiana Medical Malpractice Act. The Court looked at what is required for a physician-patient relationship, which is necessary to bring a claim under the Medical Malpractice Act, and stated the "patient" must voluntarily submit to medical services or benefit from those services. Concluding that Elliott did not consent to the catheterization and that Elliott did not benefit from the catheterization, since it was done only for law enforcement purposes, the Court found that Elliott was not a "patient" for purposes of the Medical Malpractice Act.

However, the Court also chose to address whether the immunity provided under I.C. § 9-30-6-6 was applicable in this case. In particular, this statute provides immunity when a health care professional obtains a bodily substance sample for law enforcement purposes after a drunk-driving stop, but makes this immunity conditional upon the satisfaction of several requirements provided within the statute. The Court found that all of these requirements must be satisfied in order for immunity to apply. Otherwise, the Court noted there would be broad sweeping immunity whenever a health care provider took a substance sample for law enforcement regardless of whether all the requirements were met, and that this clearly would contradict the intent of the legislature in drafting these requirements.

KeyPoint: There is no claim for medical malpractice where there is no physician-patient relationship. Also, when immunity from civil suit is provided for by Indiana statute under certain situations, all prerequisites for that immunity must be met before that immunity will apply.

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PREMISES LIABILITY FOR CRIMINAL ACTIVITY

The Kroger Co. v. LuAnn B. Plonski
Indiana Supreme Court, June 30, 2010

Customer Plonski was leaving a Kroger store in suburban Indianapolis with her groceries in the late afternoon. As she was placing the groceries in the trunk of her car, a young man ran up and the two of them fought over her purse. The mugger threw Plonski into the trunk of the car and began slamming the lid on her legs. Plonski managed to escape and the mugger ran off with her purse. Plonski filed suit against Kroger, alleging Kroger was negligent in protecting its customers against foreseeable hazards of third-party criminal activity.

Kroger filed a motion for summary judgment, arguing that it owed no duty to Plonski in relation to the mugging, that it breached no duty, and that its conduct was not the proximate cause of Plonski's injuries. Kroger attached affidavits from its managers attesting that this store was located in a low-crime area, with only one report of criminal activity occurring on the store's premises in the two years leading up to Plonski's mugging (in fact, a very similar attempted car-jacking one year earlier).

In Plonski's response to the motion, she did not directly refute the information regarding the low crime levels in the vicinity of the store. However, at the hearing on the motion for summary judgment one year later (the appellate decision does not explain why it took a year for the hearing), Plonski offered into evidence as a supplement to

her MSJ response police reports Kroger had produced in discovery eight months earlier, showing thirty police runs responding to criminal activity at the Kroger in the two years prior to Plonski's mugging.

The trial court then struck the Kroger affidavits, admitted the police reports into evidence, and denied Kroger's motion for summary judgment. The Court of Appeals affirmed.

The Indiana Supreme Court granted transfer, and affirmed the trial court, although it did not agree with how the trial court ruled on the police reports and affidavits. Evidence offered by the opposing party one year after her original response to the motion, and many months after it received the evidence it offered at the MSJ hearing, was extremely untimely and should not have been considered. And even if the police reports were properly considered to controvert the Kroger managers' affidavits, the proper result was not to strike the affidavits, but rather to find the conflicting evidence creating a material issue of fact, resulting in denial of the MSJ.

Turning to the merits of the claim, the Supreme Court held that a business establishment has a duty to use reasonable care to protect its customers from foreseeable injury caused by anyone (not just other patrons or guests) on their premises. What is a "reasonably foreseeable" risk to customers, insofar as it is an element of the proprietor's duty, is a question of law for the court. The Supreme Court found that the Kroger did not satisfy its burden at the summary judgment stage to show that the Plonski incident was not reasonably foreseeable, when a very similar incident had happened to a customer one year previously in the same parking lot.

The Court also rejected Kroger's arguments that it was entitled to summary judgment on the issue it did not breach a duty as a matter of law, and that its conduct was not a proximate cause of determination of the defendant's duty to the plaintiff, are generally a matter of fact for the jury to decide. Kroger did not demonstrate conclusively that it had taken reasonable precautions to protect its customers in the parking lot.

KeyPoint: A retail proprietor must evaluate the risks to its customers *anywhere* on its premises, including potential harm from third-party criminal activity. To prevail on summary judgment, the defendant has a high burden to show that it had taken all reasonable precautions to protect its customers in light of the history of criminal activity and other hazards at its location.

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UIM: USE OF TORTFEASOR'S PERSONA AT TRIAL

Russel Howard v. American Family Mut. Ins. Co.
Indiana Court of Appeals, June 17, 2010

Howell injured Howard in a vehicular accident in Kentucky. Howard initially sued Howell in Kentucky, then added an Underinsured Motorist claim against Howard's carrier, American Family, which had a $100,000 primary UM/UIM policy, and a $1M personal umbrella policy. Howard and American Family agreed that Howard would dismiss the UIM claim in Kentucky and refile it against American Family in Indiana. Howell's liability carrier, State Farm, tendered its $25,000 limits, and Howard dismissed Howell from the Kentucky suit. This left just the UIM suit against American Family in an Indiana court.

On the eve of trial, American Family moved to substitute Howell for itself as the named defendant at trial, and filed a motion in limine that American Family's name would not be mentioned at trial. The trial court granted these motions, and Howell pursued an interlocutory appeal.

On appeal, the Court of Appeals reversed on the grounds that there is no authority for substitution of a non-party tortfeasor as a nominal defendant in place of an insurer in a contract case.

The two noteworthy precedents the Court discussed are *Brown-Day v. Allstate Ins. Co.*, 915 N.E.2d 548 (Ind.App. 2009) and *Wineinger v. Ellis*, 855 N.E.2d 614 (Ind.App. 2006), *trans. den*. In *Wineinger*, the UM carrier, Shelter, agreed to pay any judgment entered against the uninsured driver, "even if such judgment exceeded the uninsured policy limits." In that case, the trial court granted Shelter's motion to substitute the driver as the sole named defendant, and prohibited any references to Shelter or insurance at trial. The Court of Appeals had affirmed these trial court rulings in *Wineinger*.

In *Brown-Day*, on the other hand, UIM carrier Allstate treated the UIM claim as one for breach of contract, limited to its policy limits. Therefore, the Court of Appeals in that case held that the trial court had committed error in allowing Allstate to substitute the previously-dismissed underinsured driver as the sole named defendant at trial.

In *Howard*, the court found that American Family had attempted the same thing: to substitute a dismissed tortfeasor driver in what remained a contract case for UIM benefits. The Court articulated the rule that "Indiana law provides no authority for substitution of a non-party tortfeasor as a nominal defendant in place of an insurer in a contract case, where the plaintiff seeks recovery of underinsured motorist benefits." Furthermore, the trial court erred in shielding the identity of American Family from the jury through American Family's motion in limine, though it would be proper "to exclude evidence of Howard's dealings with American Family to the extent they are irrelevant to matters to be tried or their relevance is substantially outweighed by the danger of unfair prejudice or confusion of the issues."

KeyPoint: If a UM/UIM carrier wants to pretend it is the uninsured/underinsured motorist at trial, it has to "pay" for the privilege by accepting unlimited exposure to the resulting judgment. Therefore, the carrier may want to pick-and-choose when to do this, based on what it expects the judgment to be in relation to its UM/UIM limits.

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WORKER'S COMP DOUBLE DIP

Travelers Indem. Co. v. Jerry Jarrells
Indiana Supreme Court, May 27, 2010

Jarrells was seriously injured while working on a construction site. At the time, he was an employee of LeMaster Steel Erectors, Inc., a subcontractor of R.D.J. Custom Homes, Inc., the general contractor. LeMaster's worker's compensation insurer, Travelers, paid worker's comp benefits for the accident, to and on behalf of Jerry.

Jarrells sued R.D.J. and Armando Delgadillo, another subcontractor, for the same injuries. He notified Travelers of the lawsuit and Travelers responded with a lien notice in the amount of $66,135.67 which represented the total amount paid out by Travelers pursuant to the accident. At trial, Jarrells presented evidence of the worker's compensation payments and testified that if he recovered in the lawsuit, he might have to reimburse Travelers for those payments. The jury valued Jarrells' damages at $925,000. Jarrells received $508,750, which represented 55% of the award after reduction for his own percentage of comparative fault along with that of non-party LeMaster. After Jarrells notified Travelers of the judgment, Travelers demanded reimbursement from Jarrells in the amount of $22,495.75, which

was calculated by reducing its $66,135.67 expenditure to account for comparative fault and a share of Jarrells' attorney's fee. Jarrells responded that Travelers was not entitled to any of the judgment proceeds because the jury "already reduced the award by the amount of the work comp benefits and the award should not be reduced further after judgment."

Travelers disagreed, contending that award had been calculated "assuming" a lien was to be paid. The trial court permitted Travelers to intervene but denied Travelers' claim. The Supreme Court granted transfer. The Supreme Court focused on what it called a "less than clear" jury instruction which told the jury to "consider" both the worker's compensation benefits paid as well as the obligation to repay and failed to give any instruction as to how the jury was to take the payments into consideration. Indiana Pattern Jury Instruction No. 11.07. The instruction was given pursuant to the Collateral Source Statute, which allows for the presentation of evidence regarding a plaintiffs' receipt of certain types of payments from sources other than the defendant; the goal being to prevent double recovery by the prevailing party.

The Supreme Court agreed that both parties presented plausible interpretations and held that the instruction should not be used in future trials. The Court found in Jarrell's favor, however, reasoning that more likely than not, after being given the amount necessary to deduct from its judgment for Jarrells to avoid a double recovery, the jury probably reduced its award by that amount rather than having gone through the more complex set of calculations necessary to figure out how much the award would need to be increased in order to properly account for a post-judgment lien. This was especially true given the fact that no evidence was presented to the jury on how to calculate the post-judgment lien.

The Court also noted that the purpose of the Collateral Source Statute is to prevent double recovery, a purpose which was emphasized in the final sentence of the instruction. The Court reasoned that it was therefore plausible that the jury followed the instruction by deducting the amount of worker's compensation payment from its verdict for Jarrells to ensure that Jarrells would not be receiving a double recovery.

The Court further ordered that "in future trials where the trier of fact find that evidence establishes that the plaintiff has received payment for some of the damages from other sources, the award should include those damages, but only to the extent that the evidence establishes an obligation to repay."

KeyPoint: The Collateral Source Instruction must be clear as to the method by which the jury is to "consider" lien evidence in its issuance of any award, and generally, the lien should be included in the judgment.

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HAVE YOU HEARD THE ONE ABOUT . . .

Actual statements from claimants describing their accidents:

- "Coming home, I drove into the wrong house and collided with a tree I don't have."
- "I was taking my canary to the hospital. It got loose in the car and flew out the window. The next thing I saw was his rear end, and there was a crash."
- "I was thrown from my car as it left the road. I was later found in a ditch by some stray cows."
- "As I approached the intersection, a stop sign suddenly appeared in a place where no stop sign had ever appeared before. I was unable to stop in time to avoid the accident."
- "I pulled away from the side of the road, glanced at my mother-in-law, and headed over an embankment."
- "The guy was all over the road. I had to swerve a number of times before I hit him."

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