The Tyra Law Firm, P.C.

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CONGRATULATIONS TO JENNIFER AND JERRY

LUKE HAS A NEW SISTER!

Jerry and Jennifer Padgett are the proud parents of baby girl Kara, born on July 27. Kara was also welcomed by her 3 year old brother, Luke. Kara weighed 8 pounds, 5 ounces and was 20 1/4 inches at birth.

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ATTORNEY FEES UNDER ADULT WRONGFUL DEATH ACT

Jeffery McCabe v. Indiana Department of Insurance
Indiana Supreme Court, June 29, 2011

Hematology-Oncology of Indiana, P.C. v. Hadley Fruits
Indiana Supreme Court, June 29, 2011

Indiana Patient's Compensation Fund v. Beverly Brown
Indiana Supreme Court, June 29, 2011

McCabe filed a medical malpractice claim against his mother's medical providers after her death. The medical providers settled, which allowed McCabe access to the Indiana Patient's Compensation Fund for additional compensation. The trial court granted partial summary judgment to the Fund, and found the Adult Wrongful Death Statute ("AWDS") did not provide for the recovery of attorney fees. The Court of Appeals affirmed.

To the contrary, recent Court of Appeals decisions in *Fruits* and *Brown* concluded attorney fees were recoverable under the AWDS (see our Fall 2010 Newsletter for an analysis of those decisions). Therefore, the Indiana Supreme Court granted transfer in *McCabe* to resolve this apparent conflict, and held that attorney fees are recoverable under the AWDS.

In support of its argument that the AWDS does not provide for attorney fees, the Fund argued there is no legislative intent to allow for attorney fees when Indiana's other wrongful death statutes specifically provide for attorney fees. The Fund also argued the phrase "may include but are not limited to" in the AWDS should not be interpreted to presume legislative intent for the recovery of attorney fees.

However, the Court concluded that "may include but are not limited to" does include the availability of attorney fees, along with all other elements of damages generally available under Indiana's general wrongful death statute. Specifically, the Court noted that the AWDS designates two types of damages that are not recoverable. Consequently, the Court concluded the legislature likely would have also included attorney fees within this category of excluded damages if it truly intended to prohibit the recovery of attorney fees under the AWDS.

The Supreme Court decided *Fruits* and *Brown* in conjunction with *McCabe*. In *Fruits*, the Court applied the same principles from *McCabe*, and held that the trial court's award of litigation expenses was authorized by the AWDS. In *Brown*, the Court affirmed the trial court's judgment awarding damages for expenses of administration, attorney fees, and loss of services under the AWDS.

Keypoint: Whatever confusion may have existed previously as to whether attorney fees are recoverable under the AWDS has definitively been eliminated. The phrase "may include but are not limited to" in the AWDS with regard to what damages are recoverable does include attorney fees. Therefore, in valuing wrongful death claims, one should consider the potential attorney fees of the estate in pressing the claim.

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HAZARDOUS CONDITIONS: STATUTE OF REPOSE?

Cynthia Perdue v. Greater Lafayette Health Services
Indiana Court of Appeals, June 8, 2011

Cynthia was injured when she tripped and fell in a hospital parking garage. The ramp blended in with the floor around it and there were no signs or markings to make clear where the ramp began and ended. Cynthia sued for negligence. The hospital filed a motion for summary judgment, arguing that Cynthia's claim was barred by the statute of repose, Indiana Code Section 32-30-1-5, which bars claims that are not brought within ten years of the date of substantial completion of the improvement. The hospital ramp had been built more than ten years prior to Cynthia's fall.

The trial court granted summary judgment on behalf of the hospital. Cynthia argued that her complaint did not allege negligence due to design or construction of the ramp. Instead, the complaint claimed the hospital was negligent in failing to use reasonable care in maintaining its premises in a safe condition and warning her of a hidden harm.

The Indiana Court of Appeals reversed, denying summary judgment to the hospital. The Court found that the statute of repose was created to protect engineers, architects, contractors, and others who design and construct improvement to real property from open-ended liability related to their work. The hospital in this case had a duty to repair dangerous conditions on the premises or to warn invitees of their danger. This duty was separate from any duty the hospital had to construct or design the ramp.

Keypoint: The duty of a premises owner to repair dangerous conditions or warn invitees of the dangerous condition is not subject to the ten-year statute of repose.

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INSURANCE COVERAGE: ESTOPPEL TRUMPS LATE NOTICE

Michael Ashby, et al. v. The Bar Plan Mut. Ins. Co.
Indiana Supreme Court, June 21, 2011

Attorney Bruce Davidson had claims-made professional-liability insurance with The Bar Plan. Ashby and O'Brien retained Davidson for bodily-injury claims, then later brought claims against Davidson for legal malpractice. Davidson made himself scarce, so the claimants made their professional-liability claims directly to The Bar Plan, and later filed legal-malpractice suits against Davidson.

The Bar Plan brought a dec action, arguing it had no coverage for the claims because Davidson did not personally notify The Bar Plan of the claims, as required by the policy, even though the claimant themselves provided notice to the company. The Indiana Supreme Court agreed, holding that because the policy requires notice by the insured himself, Davidson's failure to do so was a breach of policy obligations that would void coverage.

However, in this instance, The Bar Plan could be estopped from voiding coverage for the Ashby and O'Brien claims because The Bar Plan sent letters to the claimants implying there was coverage for the claims. The Bar Plan never sent reservation of rights letters, and never indicated to the claimants there was a problem with coverage. This could be an estoppel because if the carrier had notified the claimants of this problem, they might have been able to locate Davidson and get him to provide the notice himself. The failure to notify the claimants of a potential coverage issue therefore prejudiced the claimants. This was a fact question that precluded summary judgment for The Bar Plan.

Keypoint: This decision highlights the importance of the carrier providing notice to claimants and/or insureds of potential coverage problems as early as possible, preferably by a well-drafted and thorough reservation of rights letter, to avoid loss of coverage defenses.

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PLAINTIFF'S VERDICT, ZERO DAMAGES

Raymond Flores v. Juan Gutierrez
Indiana Court of Appeals, August 10, 2011

Gutierrez rear-ended Flores' vehicle. Flores claimed back and neck injuries, although he had a history of treatment for similar complaints eight years earlier. A Lake County jury entered a verdict for Plaintiff Flores, but awarded zero damages. Flores appealed that verdict as illogical, and also appealed certain rulings by the trial court. The Court of Appeals affirmed.

Regarding the zero-damages award, the Court observed that Flores' appeal assumes that the jury was required to believe Flores' evidence, including the testimony of his treating physician, that the auto accident caused Flores' claimed injuries. However, there was evidence that whatever neck and back problems Flores had could have been the same as his previous problems, and therefore there was some evidentiary basis to support that verdict, even though the defense presented no expert evidence to contradict the opinions of the treating physician. The jury was free to disbelieve the physician's opinions without contradictory expert opinions, because the potential connection between the previous problems and the post-accident problems did not necessarily require medical expertise, especially because Flores had made contradictory statements about his pre-accident medical history.

The Court also affirmed the trial judge's decision to allow the defense to show the jury a photograph of little or no visible damage to Flores' vehicle after the accident. The photograph "had some tendency to prove or disprove facts relating to his personal injury claim." Among other things, it hurt Flores' argument that his own treating physician admitted that when he was assessing Flores' condition, he inquired into the extent of vehicle damage. The Court commented on "the commonsense relationship between property damage and personal injury." The Court also observed that the reverse can be true as well: significant vehicular damage may be probative of serious injury.

Keypoint: This case illustrates a phenomenon we sometimes see in Indiana: even when the defendant is clearly at fault, such as in a rear-end accident, the jury may still find a way to rule in favor of the defendant, or award very low damages, especially if there is something about the plaintiff the jury doesn't like. It also emphasizes that, where possible, it is useful at the beginning of a bodily-injury investigation (particularly one involving soft tissue) to obtain a photograph of the claimant's vehicular damage.

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PREMISES LIABILITY IS A SLIPPERY ISSUE

Brenda Bell v. Grandville Cooperative, Inc.
Indiana Court of Appeals, June 10, 2011

On a February afternoon, Bell arrived at her daughter's apartment complex to babysit her granddaughter. The apartments were owned and managed by Grandville. That day, the temperature was in the 40's. Bell did not notice any ice or melting water, however, piles of snow had been melting during the day and re-freezing in patches on sidewalks and parking areas during the night. As a result, ice had formed where Bell parked her car, and maintenance had placed ice melt on that spot earlier in the day. During that afternoon, the maintenance supervisor performed an ice check around 4:30 p.m., and did not put any more ice melt down after not finding any ice. Maintenance personnel left for the day at 5:00 p.m. Bell's daughter returned from work around midnight. While Bell did not see any ice when walking to her car, she fell on a patch of ice that formed near the front of her car, and was taken to the hospital for her injuries.

Bell sued Grandville for negligently maintaining the apartment complex premises. Grandville moved for summary judgment on the grounds it had not breached a duty to Bell, and the trial court granted the motion. The Court of Appeals reversed and remanded.

In looking at previous appellate decisions involving similar facts in which the property owner had prevailed on summary judgment, the Court distinguished this case by pointing out this was not a case where there was a sudden change in weather or where ice formed with little warning. Instead, there was a pattern of ice forming in the parking lot in the days leading up to Bell's incident, yet Grandville did nothing to counteract the possibility of the ice formation later in the evening. The Court also noted that whether there has been a breach of a duty is generally a question of fact that should not be resolved by summary judgment. As such, the

Court found there was a question of fact as to whether Grandville had actual or constructive knowledge of a dangerous condition on its premises, and whether Grandville acted reasonably in response to that knowledge.

Keypoint: When a property owner has knowledge of a pattern of events, *e.g.* ice melting and re-freezing, the property owner will be expected to reasonably act based on that knowledge and take all necessary actions to prevent the situation from occurring.

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REDUCTION OF SUBROGATION LIENS

Jonathan Wirth v. American Family Mutual Insurance Company
Indiana Court of Appeals, June 1, 2011

Thomas Kornelik v. Mittal Steel USA, Inc., et al.
Indiana Court of Appeals, August 10, 2011

Wirth was injured in a motor vehicle accident. He was insured by American Family, and American Family paid Wirth's medical expenses of $1969.26. Wirth filed a negligence claim against the tortfeasor, and ultimately settled for $3,500.

Wirth and American Family could not agree on the amount of reimbursement for his medical expenses, and Wirth filed a complaint seeking a determination from the court. As part of that complaint, Wirth moved for summary judgment, and asked the court to find that American Family was not entitled to any part of his settlement. The trial court denied this motion. American Family subsequently filed its own motion for summary judgment, and requested a declaration that it was entitled to repayment of its subrogation lien less the statutory reduction for attorney fees. The trial court granted this motion, and Wirth appealed.

Wirth argued that because the right of subrogation does not exist until the entire debt has been satisfied, and because he valued his claim was actually worth $8,000, American Family therefore had no subrogation rights because his settlement was less than the value of the claim. However, the Court found that because Wirth executed a full and final settlement agreement that encompassed all of his claims against the tortfeasor, he had no other outstanding collectible losses. As such, American Family has full subrogation rights after Wirth collected his entire settlement from the tortfeasor.

In addition, Wirth argued that even if American Family is entitled to subrogation, the trial court should have examined the total value of the claim and made a determination as to the percentage of reduction to which American Family would be subrogated. In looking to prior case law addressing reductions of the subrogation amount, the Court stated the main issue is whether the settlement was reasonable under the circumstances, and not whether the settlement equaled what would have been awarded if the case had gone to trial. Here, the Court found Wirth failed to designate any evidence demonstrating his settlement was reasonable and that American Family's subrogation rights should be reduced by comparative fault issues or any problems that the tortfeasor may have had in satisfying a judgment. Therefore, the Court concluded American Family was entitled to complete repayment of its medical lien.

The Court of Appeals subsequently issued its opinion in *Kornelik*, which addressed the similar issue of a reduction of a lien in the context of a worker's compensation claim. Specifically on this issue, the Court found the trial court properly refused to reduce the amount of the worker's compensation lien in the same proportion that Kornelik's recovery was reduced when he settled with a third-party tortfeasor for substantially less than the value of his claim. Moreover, Kornelik settled without the consent of his worker's compensation carrier, and the Court found there is a bar from seeking any lien reduction in this situation.

Keypoint: When an injured insured subsequently settles their claim with a third-party tortfeasor, even if the settlement is for less than what the claimant contends is the value of the claim, the insurer will be entitled to seek recovery of their lien if the settlement agreement is a full and final release of all claims. Furthermore, the insured must have evidence that some set of circumstances would have factored into a possible reduction in the amount he may have received at trial for there to be a valid request for the insurer to discount the amount of their lien. Finally, there will be no reduction in a worker's compensation lien if the insured settles a claim without first receiving consent from the insurer.

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SEPARATE CLAIMS FOR SPOLIATION OF EVIDENCE

Howard Regional Health System v. Jacob Gordon b/n/f/ Lisa Gordon
Indiana Supreme Court, August 10, 2011

Lisa Gordon gave birth to a son at Howard Community Hospital. The baby, Jacob, was later found to have a number of serious health problems. Lisa filed a claim for damages with the Indiana Department of Insurance against the hospital, as required by the Medical Malpractice Act. During discovery, it became clear that a number of medical records regarding Lisa's medical care during her labor were missing.

Lisa amended her complaint to include a spoliation claim against the hospital, and filed a motion for partial summary judgment against the hospital on the spoliation claim. The trial court granted Lisa's motion for partial summary judgment, holding that the hospital's failure to maintain the records "ha[d] created a significant gap in the records that would allow a medical panel or a factfinder to determine whether the care that was provided . . . met the relevant standard." Upon appeal, the Indiana Court of Appeals affirmed.

The Indiana Supreme Court has held that, when a party fails to maintain records relevant to a lawsuit, another party to the litigation cannot sue for failure to preserve the records. *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 350 (Ind. 2005). The court in *Gribben* stated that courts can deter a party from intentionally destroying evidence through discovery sanctions such as the giving of a jury instruction stating that evidence which one party has destroyed or rendered unavailable was unfavorable to that party. The court in *Gribben* said that a cause of action for spoliation may be available when the party destroying the evidence is not a party to the litigation.

Since Indiana law does not recognize a separate cause of action for spoliation of evidence by a party to the suit, the Indiana Supreme Court held that Lisa's partial summary judgment motion should have been denied.

Keypoint: There is no separate claim for spoliation of evidence against a party to the suit that lost evidence relevant to the lawsuit, although the claimant may seek sanctions, including an adverse jury instruction, against the offending party.

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UIM: OFFICER KILLED DIRECTING TRAFFIC

Argonaut Ins. v. Estate of Sarah Jones
Indiana Court of Appeals, August 25, 2011

Deputy Sarah Jones was dispatched to the scene of a slide-off on a winter's night, where the tow-truck driver asked her to block traffic while he pulled out the slide-off vehicle. While Deputy Jones was doing this, and standing some 104 feet from the police cruiser she had set up to block traffic, motorist Myers struck and killed Deputy Jones. Myers' liability limits were $50,000. The sheriff's department had an underinsured-motorist policy with Argonaut with limits of $1,000,000 per incident.

However, Argonaut argued in its motion for summary judgment in the ensuing litigation that the UIM coverage was not implicate because the accident did not involve "using" the sheriff's department cruiser, and there was an exclusion for claims by the insured's employees.

The trial court rejected Argonaut's motion, and the Court of Appeals affirmed. First, the Court stated that Deputy Jones, as an employee of the insured sheriff's department, was not a "stranger" to the UIM policy, and was therefore entitled to a favorable interpretation of UIM policy language. "Use" of the covered vehicle is not defined in the UIM policy. Because Deputy Jones had deployed her cruiser with its emergency lights on to assist her in directing traffic and securing the scene, she was "using" the vehicle even though she was some 104 feet away from it at the time of the accident.

The Court also observed that providing coverage in this situation would be consistent with "the reasonable expectations of the parties" as to what UIM coverage would be provided to a sheriff's department.

Finally, the Court rejected Argonaut's argument that the policy excludes coverage to an injury to an employee arising out of or in the course of employment. The exclusion appears to refer to worker's comp exclusivity; that is, it applies to a liability claim by the employee against the sheriff's department, not a claim for UIM coverage arising from injury caused by a third party. To say that deputies did not have UIM coverage while using cruisers in the course of their employment would mean illusory coverage (that is, if there is no UIM coverage in this situation, in what situation would there be coverage?).

Keypoint: The Indiana appellate courts continue to interpret UM/UIM coverage fairly broadly, in support of the public policy behind the UM statute, including a fairly broad concept of what constitutes "use" of a covered vehicle. In addition, the courts continue a recent trend to apparently give as much weight to "the reasonable expectations of the parties" as they do to the actual terms of the policy.

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WORKER'S COMP: INJURY AT LUNCH

Betsy Waters v. Indiana State Univ.
Indiana Court of Appeals, August 4, 2011

Waters, who was employed by ISU making custom draperies for dormitories, weighed approximately 360 pounds and had chronic problems with diabetes and with her knees.

Waters attended an annual employee appreciation luncheon at a cafeteria on campus, which was not a required event, but the employees remained on the clock while attending the luncheon. The only seating in the cafeteria was in booths.

At the conclusion of the luncheon, Waters had difficulty getting out of the booth. She felt a "pop" and sharp pain while doing so, and was later diagnosed with fractured right femur.

The Worker's Comp Board agreed with ISU that the injury while exiting the cafeteria booth was not "a risk associated with her employment," but rather was an "injury personal to her," and therefore not compensable.

The Indiana Court of Appeals reversed. While acknowledging that Waters' pre-existing conditions made her more susceptible to being injured, a condition of her work environment, the cafeteria booth, also contributed to her injury. The injury was therefore compensable.

Keypoint: This is not a new rule in Indiana worker's comp, but it bears repeating: even though characteristics of a worker (including obesity, smoking, and prior health problems) were a major factor in the injury, the injury is still probably compensable if a condition of the work environment was a contributory factor.

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We're Moving! (Well, About Ten Feet)

Effective October 14, The Tyra Law Firm, P.C. will be moving from the North Suite of The Emelie Building, where we have been for the last four years, to a larger office across the hall, known as the West Suite of The Emelie Building.

All contact information (phones, fax number, e-mail addresses, and the building address) will remain the same.

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