The Tyra Law Firm, P.C.

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REPRESENTING A CHURCH IN A CASINO?

On June 1, 2012, Kevin Tyra represented Brotherhood Mutual Insurance Company as subrogee of the Plymouth Wesleyan Church against various defendant contractors in oral argument before the Indiana Court of Appeals at the Belterra Casino in Florence, IN. The oral argument was held in conjunction with an Indiana State Bar Association conference at the casino's conference center.

The issue was whether a waiver-of-subrogation clause in the original construction contract could bar the P&C carrier's claim for damage to the gym floor of the building the contractors had constructed, when the gym floor was not part of the contractors' "Work," and the part of the contract containing the waiver clause was never given to the church. The gym floor was water-damaged when the sprinkler system ruptured about one year after the building was completed.

On July 13, 2012, the Court ruled in favor of Brotherhood Mutual, essentially holding that the damaged gym floor was outside the contractors' scope of work, so Brotherhood Mutual's suit could proceed.

Inside this issue:

Expert Testimony by a Nurse	2
Hotel Liability	2
Tort Claims Act and Appropriate Notice	3
Indiana Guest Statute	4
Workers Comp Claim and Prior Settlement	5
Forum Non Conveniens	6
UIM Setoffs	6

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EXPERT TESTIMONY BY A NURSE

Michael Curts v. Miller's Health Systems, Inc. aka Miller's Merry Manor
Indiana Court of Appeals, August 15, 2012

Dorothy Curts was involved in an accident while in the care of Miller's Merry Manor ("the Manor"), and passed away a day later. Michael Curts ("Curts") filed a lawsuit against the Manor for wrongful death, breach of contract, and negligent infliction of emotional distress. A medical review panel under the Indiana Medical Malpractice Act found in favor of the Manor. The Manor then moved for summary judgment based on the panel opinion. In response, Curts designated the opinion of Theresa Weitkamp, a registered nurse and nursing home administrator. Weitkamp concluded that the Manor breached the commonly accepted standard of care, and that as a result Dorothy Curts sustained her fatal injuries. The trial court granted the Manor's motion for summary judgment, and the Court of Appeals affirmed.

The Court noted that previous case law established that even though nurses are qualified to serve on medical review panels and members of medical review panels can be called to testify, Indiana Evidence Rule 702 prevents nurses from qualifying as experts regarding medical causation. However, the Court stated that in situations such as this one (*i.e.* whether a nursing home failed to meet its standard of care and whether injuries from a fall caused the patient's death), it is possible that some nurses have sufficient expertise to qualify as an expert witness. As such, the Court refused to find that all nurses cannot quality as an expert to testify as to breach of the standard of care and causation, and instead noted the determinative question is whether the nurse has sufficient expertise with the factual circumstances giving rise to the injuries.

Despite this, the Court found Curts did not present sufficient evidence that Weitkamp's expertise qualified her to provide opinions on breach of standard of care and causation. The Court also rejected Curts' argument that common sense supports a conclusion that the Manor breached the standard of care and caused Dorothy's death. As a result, the Court found Curts failed to establish the existence of a genuine issue of material fact.

KeyPoint: A nurse may provide expert testimony as to breach of the standard of care and causation, but it has to be within a set of facts where the nurse has sufficient expertise. However, these situations likely will not involve complex medical causation issues.

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HOTEL LIABILITY

The Estate of K. David Short v. Baymont Inns & Suites
Indiana Court of Appeals, July 31, 2012

David Short did not act peculiar as he checked in to the Baymont Inns & Suites. That night, Seth Devine was the only employee on duty at the Baymont. In the middle of the night, and unbeknownst to Devine, Short left the hotel. The temperature that evening was below freezing. A surveillance camera recorded him returning at 3:20 a.m. at a side door entrance, and while Short appeared to have problems with his key card, he collapsed and struck his head against the wall. The video surveillance system was located in the general manager's office, which was next to the front desk. An employee arrived at 7:00 a.m. and found Short lying on the ground. Short was pronounced dead from complications of acute alcohol intoxication and coronary artery disease. Cold exposure was a significant condition contributing to Short's death, but was not the underlying cause of his death.

The Estate filed a lawsuit against Baymont for wrongful death. Devine testified he does not walk around the building to make routine or periodic inspections. He also testified that he glanced at the video monitor displaying the sixteen surveillance camera feeds on occasion, but never noticed Short. Baymont moved for summary judgment, and the trial court granted this motion. The Estate appealed, and the Court of Appeals affirmed.

The Court noted that an individual has no duty to aid or protect another person, even if he knows that person needs assistance. However, one of the exceptions to this rule is that an innkeeper has a duty to its guests to provide first aid after it knows or has reason to know a guest is ill or injured. The Estate argued Devine could have checked the doorways or more closely inspected the video surveillance monitor, and that Short's death was obviously foreseeable. Baymont argued a distinction exists between what Baymont should have known and what the Estate claims Baymont should have done. Baymont also argued Short's collapse was not foreseeable and it had no reason to suspect he might collapse in the middle of the night.

In affirming the entry of summary judgment, the Court of Appeals stated routine door checks were not part of Devine's duties, so he would have had no reason to proactively check the doors. As to the video surveillance system, the designated evidence was that Devine had been told the cameras were to deter potential crime, and there was no requirement for hotel employees to check the video monitor. Therefore, that Short could be seen on the video monitor was not enough to put Baymont on notice of his condition. As such, and because Baymont had no reason to know of Short's collapse, the trial court did not err in granting summary judgment.

KeyPoint: Unless a hotel knows, or through its standard practices and procedures should have reason to know, that a guest has been injured or needs assistance, the hotel will not be liable for the guest's injury.

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TORT CLAIMS ACT AND APPROPRIATE NOTICE

John W. Schoettmer, et ux. v. Jolene C. Wright, et al.
Indiana Court of Appeals, July 13, 2012

Wright was operating a vehicle within the scope of her employment for South Central, when she was involved in an accident with Schoettmer on November, 24, 2008. South Central is a private, nonprofit organization and was insured through Cincinnati Insurance at the time of the accident. After prior attempts to contact Shoettmer had been unsuccessful, Cincinnati sent a letter to him 35 days after the accident to inform him that they needed information from him to process his claim.

Schoettmer hired an attorney and sued Wright and South Central on October 6, 2010. Defendants asserted an affirmative defense that South Central is a political subdivision governed by the Indiana Tort Claims Act, and Schoettmer failed to provide notice to South Central in accordance with the Act, making his claim void. Schoettmer responded arguing substantial compliance, waiver, and estoppel. The trial court entered summary judgment for defendants on July 12, and Schoettmer appealed.

The Court of Appeals upheld the decision of the trial court. The Court first addressed whether Schoettmer's communications with Cincinnati Insurance were sufficient to substantially comply with the Act's notice provisions. In this case, Schoettmer never made an attempt to formally notify South Central or Cincinnati Insurance of a tort claim. Schoettmer argued that Cincinnati was an agent to South Central, and because Cincinnati had actual knowledge of the claim, notice should be inferred as to South Central. The Court ruled that absent an attempt at filing notice, actual knowledge on the part of the insurer and/or governmental entity is insufficient as a matter of law.

Shoettmer asserted that South Central waived the affirmative defense for lack of notice by not raising it in the initial answer and that the doctrine of estoppel should be applied to South Central because neither South Central nor Cincinnati Insurance informed Shoettmer of South Central's status as a government entity. As to waiver, the Court noted no prejudice was established because the 180-day time limit to file the tort claim notice had long passed when South Central filed its initial answer. Regarding estoppel, the Court said that Cincinnati Insurance and South Central never concealed South Central's status as a governmental entity. A party has no affirmative duty for a defendant to inform of its governmental status, and accordingly, South Central was not estopped from raising the affirmative defense for lack of notice.

KeyPoint: An insurer does not serve as an agent for a governmental entity for the purpose of receiving a Tort Claims Act notice. Neither an insurer nor governmental entity is required to affirmatively inform a plaintiff of its status as a governmental entity but cannot take active steps to conceal such status.

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City of Indianapolis v. Rachael Bushman
Indiana Court of Appeals, June 26, 2012

An Indianapolis police officer rear-ended Buschman's vehicle on July 25, 2008. On August 1, 2008, Buschman submitted a tort claim notice to the City that included her name, address, and phone number; the time and place of the accident; the police officer's name, date of birth, and driver's license number; the accident report number; and the investigating officer's number. The notice identified the damage to her vehicle and the estimated cost to repair. The only reference to bodily injury was the statement "No injuries."

When Buschman filed suit on July 9, 2010 for bodily injuries (which she contended emerged after she served the tort claim notice), the City moved for judgment on the pleadings on the basis that her tort claim notice was insufficient. The trial court denied the motion.

The Court of Appeals reversed. While rejecting "a formalistic approach," the Court held that Buschman's reference to "No injuries" completely failed to comply with the statutory requirement to identify "the extent of the loss" and "the amount of the damages sought." Ind. Code 34-13-3 -10. The court observed that Buschman could have served an amended tort claim notice within the 180 -day time limit after her injuries became apparent to her.

KeyPoint: While the claimant is given a lot of latitude regarding the description of damages in the tort claim notice, the complete absence of a category of damages in the notice will probably bar the claimant from pursuing those damages in litigation.

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INDIANA GUEST STATUTE

Robert Clark, Jr., et ux. v. Robert Clark, Sr.
Indiana Supreme Court, July 23, 2012

Robert Clark, Jr., age 46, was a passenger in a vehicle operated by his father, Robert Clark, Sr. After arriving to their destination, the son exited the vehicle to assist the father with pulling forward into a parking spot. Instead of braking, the father accidentally pressed down on the accelerator and hit the son. The son brought suit against the father claiming negligence, and the father raised the affirmative defense that he was not liable because of the Indiana Guest Statute. Both parties filed motions for summary judgment, with the trial court ruling for the father and the Court of Appeals reversing and holding for the son.

The Indiana Guest Statute prevents certain designated passengers from recovering damages resulting from ordinary negligence when such passen-

ger is being transported without payment *in or upon* the motor vehicle. It was undisputed the son was a designated passenger per the terms of the statute. However, the Indiana Supreme Court addressed whether the son was in or upon the motor vehicle for the purpose of the statute.

The Supreme Court held that the "in or upon" language was unambiguous and should be given its ordinary meaning and, therefore, finding the affirmative guest passenger defense inapplicable in this case.

KeyPoint: A passenger for the purpose of the Guest Statute is not "in or upon" the motor vehicle when he is outside of the vehicle and assisting the operator to park the vehicle.

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WORKER'S COMP CLAIM AND PRIOR SETTLEMENT

Dale Brenon v. The First Advantage Corp. d/b/a Omega Ins. Svcs.
Indiana Court of Appeals, July 27, 2012

Omega hired Brenon, a Wisconsin resident, to perform investigative services wherever Omega conducted business. While traveling on an assignment in Indiana, Brenon crossed the center line and caused a head-on collision with another vehicle. Brenon subsequently filed a worker's compensation claim in Wisconsin, and Omega challenged the claim on several grounds. However, Omega negotiated settlement agreements with two of its worker's compensation carriers to settle Brenon's claim in Wisconsin.

At the same time, and before the settlement agreements were accepted in Wisconsin, Brenon filed a worker's compensation claim for the same incident in Indiana, where Omega had coverage through a third insurance company. Omega moved to dismiss the claim on the grounds that the Indiana claim was precluded by the settlement of the claims in Wisconsin. The single hearing member dismissed Brenon's claim without issuing findings of fact or conclusions of law, and the full Board adopted the single hearing member's decision.

Brenon appealed, and another panel of the Court of Appeals remanded to the Board for a statement of specific findings of fact. The Board subsequently remanded the matter to the single hearing member for this purpose, who found Brenon's claim was barred by collateral estoppel. This decision was then adopted by the full Board. Brenon appealed, and the Court of Appeals reversed.

The Court first noted there does not appear to be any case law or statute in Wisconsin or Indiana that prohibits worker's compensation claims in multiple states. Looking to the settlement agreements signed in Wisconsin, the Court of Appeals also pointed out these agreements explicitly preserved Brenon's claim in Indiana. In fact, Omega could have included a provision in the Wisconsin settlement agreements that precluded the Indiana claim, but did not do so.

The Court of Appeals also rejected the Board's reliance on collateral estoppel because there had been no prior adjudication of facts in Wisconsin; rather, that claim was resolved through settlement. Therefore, the dismissal of the Indiana claim on the basis of collateral estoppel has no legal basis. The Court also noted the Board failed to address the fact that Brenon had reserved the right to pursue his claim in Indiana as part of the Wisconsin settlement agreement.

KeyPoint: The settlement of a worker's compensation claim in one state does not preclude a worker's compensation claim in a second state that is related to the same incident, especially where the settlement agreement preserves the right of the claimant to seek his claim in the second state.

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FORUM NON CONVENIENS

Dalmas Anyango v. Rolls Royce Corp., et al.
Indiana Supreme Court, July 30, 2012

In an unbelievable set of facts, Isaiah Omondi Otiena, a Kenyan citizen and student at the College of Rockies, was killed in British Columbia when a helicopter overhead lost power and fell on him. The pilot and two passengers were also killed. Otiena's parents filed suit against the helicopter manufacturer, the helicopter engine manufacturer, and the engine components manufacturer, in Marion County, Indiana for the wrongful death of their son. The helicopter engine was manufactured in Indiana by Allison (later purchased by Rolls Royce) and the engine components were designed at Honeywell's facility in Indiana. Representatives of the other three people killed subsequently sued the defendants in British Columbia.

The defendants moved to dismiss the Otienos' lawsuit on the basis that Indiana was an inconvenient forum compared to British Columbia. The defendants also filed a stipulation that they would submit to personal jurisdiction and waive any statute of limitations in British Columbia. The trial court granted the defendants' motion, and the Otienos appealed, arguing the trial court abused its discretion when it determined British Columbia provided an adequate forum in which to pursue their suit. The Court of Appeals affirmed the trial court decision.

Trial Rule 4.4(C) sets out a series of factors a court may consider to dismiss a claim due to another forum being more convenient, including the convenience of the parties to witnesses and any other factors having a substantial bearing upon the selection of a convenient, reasonable and fair place of trial. Although the trial court set forth many factors why the suit should be dismissed pursuant to 4.4(C), the Otienos only focused on the fact that they would recover significantly less under British Columbia law.

The Otienos argued that if the remedy in the alternative forum is so clearly inadequate and satisfactory, that it is no remedy at all and dismissal should be denied. The Indiana Supreme Court found that a fact pattern as presented in this case will permit, not require, a court to weigh the inadequacy of a remedy in the alternative forum. In upholding the trial court's decision, the Indiana Supreme Court ruled that a forum is adequate for the purposes of Trial Rule 4.4(C) as long as the parties will not be deprived of *all* remedies or treated unfairly.

KeyPoint: Trial Rule 4.4(C) motions will not be dismissed simply because the plaintiff would likely recover less in the alternative forum.

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UIM SETOFFS

Howard Justice v. American Family Mut. Ins. Co.
Indiana Court of Appeals, July 18, 2012

Wagner was at fault in an auto accident with Justice. Wagner's auto liability limits were $25,000. Justice had underinsured motorist coverage with American Family in the amount of $50,000 per person. He was also covered by worker's compensation at the time of the accident, and the worker's comp carrier paid Justice a total of $77,469.56 in benefits.

Justice's UIM policy provided in part that "The limits of liability of this coverage will be reduced by: 1. A payment made or amount payable by or on behalf of any person or organization which may be legally liable, or under any collectible auto liability insurance, for loss caused by an accident with an underinsured motor vehicle. . . . 3. A payment made or amount payable because of bodily injury under any worker's compensation or disability benefits law or any similar law."

American Family therefore denied Justice's UIM claim, arguing that not only were its limits reduced from $50,000 to $25,000 due to the payment of Wagner's liability limits, but also by the $77,469.56 in worker's compensation benefits. In other words, American Family argued that the worker's compensation benefits would be subtracted from the UIM limits, not from the claimant's total damages. Justice, on the other hand, argued that the worker's comp benefits were subtracted from his total damages, but his total damages far exceeded 100,000, so he should still recover on the unexhausted UIM limits. The trial court agreed with American Family and entered summary judgment in its favor.

The Court of Appeals reversed. The Court compared the policy language quoted above to the parallel language in the seminal case of *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524 (Ind. 2002), which stated, "Any amount payable for damages under this coverage shall be reduced by all sums paid or payable under any workers' compensation, disability benefits or similar law." In that case, the Supreme Court held that worker's comp benefits would reduce the total damages, not the UIM limits. Therefore, for example, if the UIM limits are $100,000, the worker's comp benefits were $50,000, and the claimant's total damages including pain and suffering are determined to be $200,000, the total damages are reduced only to $150,000, and the full UIM limits would still be paid.

No doubt American Family had thought it got around the *Beam* rule by deleting the phrase "for damages" from this clause, thereby converting it to subtraction from limits rather than damages. The Court of Appeals, however, seemed to conclude that the American Family policy language is effectively the same as the Wausau language, and held that the same result would occur. The Court therefore ordered the parties back to the trial court to determine Justice's total damages, from which the worker's comp benefits would then be subtracted to determine how much, if any, of the remaining $25,000 in available UIM limits might be awarded to Justice.

KeyPoint: Unless the limits language in the UIM policy makes emphatically clear that worker's comp and disability benefits are subtracted from the UIM limits rather than total damages, the courts will subtract from the damages. One would have thought that limitation was sufficiently expressed in the American Family policy, but obviously it needs to be made more explicitly.

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C'mon, Mitch, Get on the Stick!

In our Spring newsletter, we reported that Governor Mitch Daniels had appointed Mark Massa to replace the retiring Chief Justice, Randall Shepard, and that a replacement was pending for another retiring Supreme Court Justice, Frank Sullivan Jr. We had intended to discuss the changes more fully in this newsletter.

At this time, we are still waiting for the announcement of Governor Daniels' pick to replace Justice Sullivan. The field is down to three finalists. We will discuss the new composition of the Indiana Supreme Court, and what it means for the defense bar and the insurance community, in the next newsletter, assuming we have a full Court by then.

In the meanwhile, the governor has appointed Associate Justice Brent Dickson to become the Chief Justice, while Mr. Massa will serve as an Associate Justice.

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