# The Tyra Law Firm, P.C.

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## Welcome to Elizabeth Steele

The Tyra Law Firm, P.C. welcomes Elizabeth H. Steele as our newest attorney.

Elizabeth graduated with honors from DePauw University in 2008 with a major in Psychology and a minor in Spanish. She was a member of Kappa Alpha Theta Fraternity and was also selected to join Phi Beta Kappa. She attended Indiana University Maurer School of Law in Bloomington where she was a member of the *Federal Communications Law Journal* and participated in the Sherman Minton Moot Court Competition. She graduated in 2011, clerking for two years on the Indiana Court of Appeals for the Honorable Nancy H. Vaidik before joining the Tyra Law Firm to practice insurance defense and insurance coverage. Elizabeth is a member of the Indiana State Bar Association and the Defense Trial Counsel of Indiana.

An avid tennis player, Elizabeth won a national doubles title for DePauw University in 2004. She still plays frequently, and she also enjoys spending time with her friends and family, including her one-year-old niece who is already showing great promise as a future litigator.

**Inside this issue:**




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## CO-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FOR ICY SIDEWALKS

*Pier 1 Imports v. Acadia Merrillville Realty, et al.*
Indiana Court of Appeals, July 3, 2013

Carolyn Harris slipped and fell on an ice-covered sidewalk in front of a store operated by Pier 1 Imports. Pier 1 leased its retail space from Acadia. The lease required Acadia to keep the sidewalk free from snow and ice. Acadia had contracted with Boyd Construction to clear snow and ice from the sidewalk.

Harris filed a negligence claim against Pier 1, Acadia, and Boyd Construction. All three defendants moved for summary judgment. The trial court entered summary judgment in favor of Acadia and Boyd Construction, but denied Pier 1's motion. The trial court subsequently denied Pier 1's motion to correct error with regard to the entry of summary judgment in favor of the other two defendants. The Court of Appeals found summary judgment in favor of Acadia and Boyd Construction was inappropriate, and reversed and remanded for further proceedings.

On appeal, Acadia and Boyd Construction initially argued that because Pier 1 did not contest their motions for summary judgment, the issue had been waived. The Court, however, stated that Pier 1 did not have a realistic opportunity to object to the motions because it had been pursuing its own motion.

As to the merits of the motions for summary judgment, the Court found that whether Acadia discharged its duty of care by merely contracting with Boyd Construction is a matter for the jury to decide. Therefore, because there were still genuine issues of material fact, the Court found the trial court erred in granting summary judgment.

**KeyPoint:** A party does not have to oppose a co-defendant's motion for summary judgment to preserve the right to later object to the dismissal of the co-defendant. The practicality of this decision is that one co-defendant does not have to worry about arguing its own motion for summary judgment while at the same time arguing against a co-defendant's motion for summary judgment.

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## EVIDENCE OF HANDLING OF SIMILAR CLAIMS IN BAD FAITH SUIT

*Auto-Owners Ins. Co. v. C&J Real Estate, Inc.*
Indiana Court of Appeals, August 15, 2013

C&J submitted a hail damage claim to its insurer, Auto-Owners. After investigating the claim, Auto-Owners found the roof in question was not damaged. C&J filed suit against Auto-Owners for breach of contract, bad faith, and breach of good faith and fair dealing. During discovery, C&J sought information from Auto-Owners regarding its handling of previous hail damage claims, as well as information about Auto-Owner's reserves. Auto-Owners refused to provide the requested information. The trial court granted C&J's motion to compel, and Auto-Owners moved for interlocutory appeal.

On appeal, the Court observed that the admission of certain evidence could be prejudicial to C&J's breach of contract claim, but possibly relevant to the claims for bad faith and for breach of good faith and fair dealing. But, because the Court said the trial court could address the admissibility issue at trial, and noted that perhaps the trial court could bifurcate the issues, the third party information sought by C&J was discoverable. Therefore, the Court upheld the order on the motion to compel.

The Court also addressed Auto-Owner's objection to disclosing reserves. The Court distinguished third party claims and first party claims against insurers. In the instant case, which was a first party claim, the Court of Appeals found the insured was essentially asking for

information about its own policy. Therefore, the Court also upheld the order on the motion to compel with regard to the reserve information.

**KeyPoint:** In a first party breach of contract and bad faith claim against an insurer, evidence of prior handling of similar claims, as well as the reserves for the current claim, can be discoverable.

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## FAILURE TO MITIGATE IS NOT COMPARATIVE FAULT

*Marshall Banter v. Joshua Sheets*
Indiana Court of Appeals, July 16, 2013

Marshall Banter stopped to make a left turn, when Joshua Sheets struck the rear of Banter's car. Banter alleged negligence against Sheets, and at trial, Sheets conceded his liability in causing the accident, but argued that Banter failed to mitigate his damages. Despite Sheets' admission of liability, the jury's verdict found Banter to be 70% at fault, so Banter filed a motion to correct error. The trial court granted the motion, finding that the evidence did not support the comparative fault allocation. A new trial was held, and the jury's verdict again found Banter to be 70% at fault. Banter again filed a motion to correct error, but the trial court denied that motion.

The Court of Appeals reversed. The jury instruction given by the court stated in part: "If you find a plaintiff failed to use reasonable care to minimize any of the damages he alleges he has sustained and that failure was a proximate cause of any of the damages he claims, then such conduct would constitute fault to be assessed against the plaintiff." However, the Court of Appeals found that language to be a misstatement of the law.

Since Sheets conceded liability for the accident, the question of fault was not before the jury; the only question was the amount of damages. As the Indiana Supreme Court held in *Kocher v. Getz* in 2005, the issue of mitigation of damages only goes to the amount of damages awarded to the plaintiff, and not to the issue of apportioning fault. Therefore, the trial court's instruction allowing the jury to consider Banter's failure to mitigate his damages in its fault determination was erroneous. The Court of Appeals reversed and remanded for a new trial.

**KeyPoint:** Under the Comparative Fault Act, failure of a plaintiff to mitigate his damages can only be considered by the fact-finder when determining the damage award, not when apportioning fault.

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## PREMISES LIABILITY: "DANGEROUS CONDITION"

*Gasser Chair Co. v. Marlene J. Nordengreen, et al.*
Indiana Court of Appeals, June 21, 2013

Nordengreen alleged that while she was playing slots at the Horseshoe Casino, her chair "came down and caught the back of her leg." The 3300 chairs at the casino, manufactured by Gasser Chair Co., feature an adjustable seat height controlled by a gas cylinder. The gas cylinders are known to eventually wear out. Gasser had provided instructions to Horseshoe regarding inspection of the cylinders. Horseshoe reportedly inspected the chair daily. One-half of one percent of the 3300 chairs "appeared to have issues with the gas cylinders." There had been prior incidents of the gas cylinders "failing" at Horseshoe, though there had been no reported injuries. An inspection after Nordengreen's accident showed that the chair's cylinder had failed.

The trial court granted summary judgment to Horseshoe on Nordengreen's claim that the casino had constructive notice of a dangerous condition. The Court of Appeals affirmed.

The Court of Appeals observed that an invitor is not the insurer of the invitee's safety, and before liability may be imposed on the invitor, it must have actual or constructive knowledge of the danger. The Court pointed to the low percentage of chairs that had "issues" with the cylinders, none of which had previously resulted in injuries, and also that a cylinder failure did not result in "a collapse all at once." Therefore, the Court concluded that as a matter of law, Horseshoe did not have constructive notice that the chairs presented a "dangerous condition."

Keypoint: This decision certainly can be used by premises-liability defense counsel and claim professionals to argue that even when there have previously been a very small number of problems with a condition on the premises, it does not mean the premises owner had constructive notice of a dangerous condition. The rulings by the trial court and Court of Appeals in this case deviate from holdings in other Indiana premises-liability cases that *any* history of previous problems with a condition (even if the condition had not previously resulted in injury) would mean a fact question to take to a jury.

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## PREMISES LIABILITY FOR CRIMINAL ACTS

*Mary Santelli v. Abu Rahmatullah*
Indiana Supreme Court, August 28, 2013

Santelli was murdered during the course of a robbery at a motel by Joseph Pryor, a former maintenance man at the motel. Rahmatullah owned the motel, and the motel had not done a background check when it first hired Pryor. Pryor subsequently confessed to the crimes and was sentenced to 85 years in prison.

The Estate of Santelli filed a lawsuit against Rahmatullah for breaching his duty of care to Santelli, and Rahmatullah asserted a nonparty defense as to Pryor. The jury awarded a $2 million verdict to the Estate, and allocated 1% of fault to Santelli, 2% of fault to Rahmatullah, and 97% of fault to Pryor. The Estate filed a motion to correct error, and asked for a new trial because the trial court instructed the jury to allocate fault among Santelli, Rahmatullah, and Pryor without also instructing the jury on the "very duty" doctrine. The motion to correct error was granted in part and denied in part. Both parties appealed.

On appeal, the substantive issues first involved the Estate's contention that the "very duty" doctrine was not abrogated by Indiana's enactment of the Comparative Fault Act ("the Act"). When the Act became law, it eliminated (in most instances) the theory of contributory negligence. However, the "very duty" doctrine states that "if the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."

The Court of Appeals concluded the "very duty" doctrine had not been abrogated by the Act, and ordered the trial court to instruct the jury on the "very duty" doctrine at the new trial, so that the premises owner could be jointly and severally liable with the criminal for the criminal act itself (*see* Jerry Padgett's article about the Court of Appeals decision in the Spring 2012 issue of the Newsletter).

The Court of Appeals' rationale was that when someone is injured by an intentional tort and another person negligently failed to protect against the risk of the intentional tort, the jury will still likely assign the majority of the fault to the person committing the intentional tort, who is normally insolvent. This leaves the person who negligently failed to protect the plaintiff with minimal liability, and severely impacts the injured plaintiff's ability to recover any compensation from his or her harm. As the Court stated, combining the allocation of fault of the criminal defendant with the negligent defendant imposes liability where there is insurability.

On transfer, the Indiana Supreme Court vacated the Court of Appeals' decision and affirmed the trial court's original judgment assessing only 2% of the comparative fault on the motel owner.

The Supreme Court held that Indiana is in the minority of states which allow both negligent acts and intentional acts to be included in the concept of "fault" for purposes of allocating comparative fault. Therefore, it was proper for the judge to instruct the jury that it could allocate fault on the murderer, Pryor. The Court further held that joint and several liability was abrogated by the Comparative Fault Act, so making Rahmatullah jointly and severally liable for Pryor's criminal acts is prohibited by the Act.

**Keypoint:** The *Santelli* case has been closely followed by the defense bar and liability insurance carriers over the last two years for two reasons. First, making premises owners jointly and severally liable for criminal activity on their premises (including lodgings, retail outlets, all other commercial facilities, and even homeowners) would dramatically increase their exposures, with significant ripple effects on underwriting and claim handling. Second, this was an important test case for the new composition of the Indiana Supreme Court, which would have appeared to shift somewhat in a more pro-plaintiff direction last year. However, on both counts, carriers and premises owners have reason to breath a bit easier.

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## PROTECTING THE CARRIER'S SUBRO RIGHTS

*Consolidated Insurance Company v. National Water Services, LLC*
Indiana Court of Appeals, August 27, 2013

National Water Services obtained employee dishonesty insurance coverage through Consolidated. The policy provided that National Water Services would transfer to Consolidated any rights of recovery against a third party for any loss it sustained.

National Water Services filed a lawsuit against its employee David Arnold for misappropriation of funds. National Water Services and Arnold ultimately reached a settlement as part of that litigation. Subsequently, National Water Services filed a claim with Consolidated as part of its employee dishonesty coverage. However, Consolidated denied the claim.

National Water Services filed a complaint against Consolidated, and Consolidated filed an Answer and Third Party Complaint. In its Answer, Consolidated asserted the affirmative defense that National Water Services failed to preserve Consolidated's subrogation rights. Also, in its Third Party Complaint against Arnold, Consolidated alleged Arnold's actions were covered by the employee dishonesty insurance coverage, and that National Water Services suffered damages as a result.

In Arnold's responsive pleadings, he argued that all claims against him had been released as a result of his settlement agreement with National Water Services. Consolidated moved for a judgment on the pleadings and claimed National Water Services destroyed its subrogation rights by settling with Arnold and thereby extinguishing any other causes of action. The trial court denied Consolidated's motion.

The Court of Appeals reversed. The Court found that National Water Services destroyed Consolidated's right of subrogation by settling its claim against Arnold. As such, National Water Services'

breach of contract discharged Consolidated from any obligation to provide coverage to National Water Services.

**KeyPoint:** An insurer may be relieved from providing coverage to an insured if the insured impairs the carrier's subrogation rights. Essentially, what happened in this case is no different than, for example, an insured failing to provide timely notice of a claim to its insurer.

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## TIMELY TORT CLAIM NOTICE

*John W. Schoettmer, et ux. v. Jolene C. Wright, et al.*
Indiana Supreme Court, August 27, 2013

John Schoettmer was involved in an auto accident with Jolene Wright on November 24, 2008. Unbeknownst to Schoettmer at the time, Wright was an employee of a governmental entity, South Central Community Action Program, Inc., and was acting within the scope of her employment at the time of the accident. Schoettmer received a letter from South Central's insurance carrier in an attempt to settle the claim, and later gave a recorded statement to the insurance agent. He was informed that his claim could not be settled until medical treatment was complete. Four months later, Schoettmer's treatment was complete and he signed a release to give the insurance company access to his medical records. Schoettmer was offered a settlement, but he declined the offer and retained counsel. Efforts at a settlement failed, so Schoettmer and his wife brought suit against both Wright and South Central.

South Central moved for summary judgment due to Schoettmer's alleged failure to comply with the Indiana Tort Claims Act notice requirement. The trial court granted summary judgment, and the Court of Appeals affirmed the decision.

The Indiana Supreme Court, however, reversed the trial court's decision. The Indiana Tort Claims Act states that a tort claim against a government entity is barred unless the entity is given notice of the claim within 180 days of its occurrence. The Schoettmers admitted that they failed to comply with the notice requirement, but argued that even if South Central had no direct notice, equitable estoppel should apply to bar its use of the notice requirement defense.

The Court agreed with Schoettmer's estoppel argument. In order to claim equitable estoppel, the party must show: (1) lack of knowledge and of the means of knowledge as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based upon the conduct that changes his position prejudicially. There was evidence that the Schoettmers did not know South Central was subject to the ITCA until the answer was filed, South Central's insurance agent told Schoettmer it was in his best interest to wait until his treatment was finished before settling his claim, and Schoettmer failed to act because of his reliance on that statement. As a result, the Court found a genuine issue of fact as to whether the Schoettmers should be allowed to present evidence of estoppel, and reversed.

**KeyPoint:** Failure to comply with the ITCA's 180-day notice requirement may not bar a claim when the government entity's insurance carrier suggested that the claimant wait on making a claim. This is a fact-sensitive issue, however, relying on a three-part test, so it will be less likely to be an issue that can be dispose of on summary judgment going forward.

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## WHEN FAILURE TO INCLUDE FILING FEES IS FATAL

*Natasha F. Hortenberry v. Thomas Palmer*
Indiana Court of Appeals, August 15, 2013

Thomas Palmer and Natasha Hortenberry were in a car accident, and Palmer filed suit against Hortenberry. Palmer's counsel mailed the Complaint, Appearance, Summons, and check to the clerk of the Clark Circuit Court. The filing fee check, however, was for $137 instead of $139. Twelve days later, Palmer's counsel was notified of the deficiency, and he mailed a check – not via

certified mail – for $2 the next day. The Complaint was therefore not considered filed until the $2 check was received, and by that time, the statute of limitations had run on the claim. Palmer filed a motion to treat the Complaint as filed before the statute of limitations ran, which was granted. Not realizing the motion had already been granted, Hortenberry's counsel filed a response to the motion, Palmer replied, and Hortenberry again responded. The trial court heard arguments on the motion, and determined that an inadvertent clerical error should not prevent Palmer from his day in court.

The Court of Appeals reversed, citing Trial Rule 3. The rule states when a civil action is considered commenced, and specifically requires "payment of the prescribed filing fee or filing an order waiving the filing fee." Palmer argued that he substantially complied with the filing fee requirement by tendering payment that was just $2 short. However, the Court of Appeals found that our Supreme Court's decision in *Boostrom v. Bach* and its progeny was controlling in this case and that Trial Rule 3 creates a bright-line rule that promotes the legislative policy behind statutes of limitation.

*Ann L. Miller, et ux. v. Glenn L. Dobbs, D.O., et al.*
Indiana Supreme Court, July 30, 2013

Ann Miller suffered a massive stroke two weeks after Dr. Dobbs performed her cesarean section and tubal ligation. Almost two years later, the Millers filed a proposed medical malpractice complaint with the Indiana Department of Insurance via certified mail, but failed to include the $7 filing fee. The Millers then filed a complaint against Dr. Dobbs and his medical group in the Dearborn Superior Court within the statute of limitations.

When the IDOI discovered that the filing fee was missing, it sent the Millers' attorney a letter stating that the proposed complaint would not be considered filed until it had received the filing fees. The Millers' attorney sent a check by first-class mail the day it received the IDOI's letter, and the IDOI received the check three days later. It re-file stamped the proposed complaint for that day, which happened to fall outside the statute of limitations. The defendants moved for summary judgment on the affirmative defense of the statute of limitations. The trial court granted the motion, and the Court of Appeals reversed.

The Supreme Court agreed with the Court of Appeals, finding that the proposed complaint was timely filed, despite the missing filing fee. In coming to this decision, it cited to the "Statute of Limitations" chapter of Indiana's Medical Malpractice Act, which states that "a proposed complaint . . . is considered filed when a copy of the proposed complaint is delivered or mailed by registered or certified mail to the commissioner." Since the Millers' proposed complaint was mailed by certified mail before the statute of limitations ran, it was considered timely filed on that date.

The Court determined that since the provision concerning filing fees was located in a different chapter of the statute, the filing fee is not an essential part of the filing a proposed complaint. The Court also looked to the language of the statute that says that filing fees "must accompany each proposed complaint filed," and determined that the filing fees merely accompany, but are not an actual part of the complaint. Finally, the Court noted that the public policies of preventing stale claims and providing notice to the parties were not at issue here, as the Millers had filed a complaint in the Dearborn Circuit Court within the statute of limitations. The summary judgment for Dr. Dobbs and his medical group was therefore reversed and the case was remanded.

**KeyPoint:** Failure to comply with the filing fee requirement is fatal to a complaint filed in civil court, but not to a proposed complaint filed with the Indiana Department of Insurance. While these rulings appear to be inconsistent, the location of the language concerning filing fees and the precise wording used in the relevant statutes has been determined to be the key distinction, creating a bright-line rule in civil court but not when it comes to the Medical Malpractice Act.

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## Update on Office Move and New Administrative Assistant

As previously reported, The Tyra Law Firm moved a half-block from 334 N. Senate Avenue to our new office at 355 Indiana Avenue on August 30.

As we go to press with this issue of the newsletter, we have worked out the bugs regarding internet, e-mail, and the phone system. Our new furniture just arrived. After all the details of the move are finished and the new office space looks the way we want, we'll be including photos of the new office in the Fall newsletter.

We are also very happy to announce the addition of Laura Fifty as our new receptionist and administrative assistant. Laura will also be featured in the Fall newsletter.

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