The Tyra Law Firm, P.C.

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Jefferson award finalist

The Tyra Law Firm is pleased to announce that The Indianapolis Star has selected Kevin Tyra as one of five finalists for the 2008 Jefferson Award. The award recognizes commendable volunteer efforts benefiting the Indianapolis community.

Kevin was nominated for his work with the St. Vincent de Paul Society, a Catholic lay organization serving the poor. Since the late 1990's, Kevin had been a volunteer at the Society's Distribution Center and Food Pantry. In 2002, Kevin presented a proposal to the Society to develop a *pro bono* legal clinic, named after the nineteenth-century Paris lawyer who founded the Society, Frederick Ozanam. Kevin saw his first clients through the Ozanam Free Legal Clinic in December, 2002. Kevin has continued to serve as the volunteer Director of the Clinic since 2002.

The focus of the Clinic is to provide assistance to low-income individuals in areas such as landlord-tenant, debtor-creditor, and family law. The Clinic is located in the Society's new Pratt-Quigley Center in Indianapolis, which provides food pantry services to some 1,000 families per week. The Pratt-Quigley Center is the largest food pantry in the Midwest. In 2007, Kevin and his fellow volunteer attorneys served 89 clients/families.

The 2008 recipient of the Jefferson Award will be announced on March 28, 2008.

Kevin Tyra with Pratt-Quigley Center receptionist Kay Metzler, in the Legal Clinic office.

The Pratt-Quigley Center is located at 3001 East 30th Street, Indianapolis, Indiana.

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COVERAGE FOR HOME SELLER'S HAIL DAMAGE

American Family Mutual Ins. Co. v. Matusiak
Indiana Court of Appeals, December 31, 2007

American Family issued a homeowners policy to the Matusiaks. During the term of that policy, the Matusiaks signed a contract to sell their house to the Martins on March 25, 2005. An inspector found no hail damage to the Matusiak house roof on April 9, 2005. The Matusiaks' house sustained hail damage on April 22, 2005. The Martins closed on their purchase of the Matusiak house for the full agreed-upon price on May 17, 2005, at which time neither the Martins nor the Matusiaks were aware of the hail damage sustained on April 22, 2005.

The Martins discovered the hail damage in September, 2005, and notified the Matusiaks of it at that time. The Matusiaks advised the Martins they would file a damage claim with American Family, and they would pay the Martins their $1,000 deductible. American Family denied the Matusiak claim on the basis, among others, that the Matusiaks sustained no loss.

The Matusiaks filed suit against American Family for breach of contract and bad faith. American Family argued that because the Matusiaks sold their house for the full amount agreed upon with the Martins, the intervening hail damage was not a "loss" to the Matusiaks. Nevertheless, the trial court granted summary judgment in favor of the Matusiaks for the $8,643.00 estimated to repair the hail damage to the Martin roof. The Court of Appeals affirmed the judgment against American Family.

Notwithstanding the logic of American Family's argument, the Court of Appeals appeared to be most influenced by the promises the Matusiaks made to the Martins: "although this pledge (to pay to the Martins the proceeds of any insurance recovery from American Family) may not rise to the level of a binding contract, in our view this obligation establishes that the Matusiaks have been made unwhole such that they now require indemnity and that they will not benefit from any settlement paid by American Family." The Court of Appeals therefore concluded that "the Matusiaks established a cash value loss," and American Family therefore breached its insurance contract with them when it denied its claim.

The Court of Appeals did not speculate on what could happen if after American Family paid the claim, the Matusiaks decided to keep the money rather than giving it to the Martins. Since the Court had acknowledged that the Martins and the Matusiaks did not have a "binding contract" about the insurance proceeds, presumably the Martins could not force the Matusiaks to turn over the money. This would apparently leave the Matusiaks with a court-approved windfall at American Family's expense.

Key Point: The disturbing meaning of this opinion is that it may constitute precedent in Indiana that a property carrier may have an obligation to pay for a "loss" which is nothing more than the insured's impulse for generosity to someone else.

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FIRST-PARTY NEGLIGENT ENTRUSTMENT REJECTED

Bailey v. State Farm Mutual Automobile Ins. Co.
Indiana Court of Appeals, February 28, 2008

Bailey and Caudill spent the day running errands and performing chores, all the while consuming mass quantities of beer. At one point, while Bailey was driving Caudill's truck, Bailey lost control of the truck, causing it to crash.

Bailey filed a lawsuit against Caudill, and later an underinsured-motorist claim against State

Farm under the theory that Caudill had negligently entrusted Bailey with the truck.

While the Court agreed with State Farm that Bailey had insufficient evidence to prove all of the elements of negligent entrustment, the Court also addressed the issue of first-party claims of negligent entrustment (that is, negligently entrusting the vehicle to the plaintiff).

Under Indiana law, a third party can assert a claim for negligent entrustment of a motor vehicle against the entrustor when the third party is injured by an incapacitated driver. However, the Court noted that Indiana case law had never addressed whether the incapacitated driver could bring a claim for negligent entrustment against the person who entrusted the driver with the vehicle. In its analysis of this issue, the Court looked at the different policy reasons in support and in opposition to allowing such a first-party claim.

The Court concluded that based on the differing classifications of the two crimes, the Indiana legislature has implied that driving while intoxicated is inherently more culpable than permitting someone to drive while intoxicated. Therefore, the Court stated "it would seem to follow that one who drives while intoxicated is generally more at fault than one who permits another to drive while intoxicated." As such, the Court held that Indiana does not recognize a first-party claim for negligent entrustment of a motor vehicle to a voluntarily intoxicated adult.

Key Point: An intoxicated driver should not be able to benefit from their own intoxication. Not allowing a drunk driver to recover from those who allow them to drive drunk creates an incentive for the drunk driver to act more responsibly.

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INSURANCE AGENT NEGLIGENCE

Billboards 'N' Motion, Inc. v. Saunders-Saunders & Associates, Inc.
Indiana Court of Appeals, January 30, 2008

Billboards 'N' Motion, Inc. ("Billboards"), which sold advertising on billboard signs, had used Saunders-Saunders & Associates, Inc. ("Saunders") as their insurance agent for 15 years. Billboards informed Saunders of its intent to buy an electronic billboard, and Saunders advised that Billboards should purchase an additional insurance policy other than the one Billboards already had through Northern Insurance. However, Billboards bought the sign without buying the additional policy, and did not tell Saunders it had bought the sign. Subsequent to the purchase, Billboards initially decided to terminate the purchase of the sign, but ultimately decided to go through with the purchase after Saunders said it would insure the sign. However, Saunders never asked for any specifics about the sign and Billboards never provided this information to Saunders. A few years later, Billboards found the sign was missing some parts and reported the claim, but Northern Insurance denied Billboards' claim.

After Billboards filed a lawsuit against both Saunders and Northern Insurance, Saunders filed a Motion for Summary Judgment asserting that Saunders had no duty to procure insurance coverage because Billboards never provided the necessary information. In opposition, Billboards filed its own Motion for Summary Judgment, and claimed Saunders had breached its duty as Billboards' insurance agent. The trial court granted Saunders' Motion for Summary Judgment and denied Billboards' motion. On appeal, the Court of Appeals reversed the grant of summary judgment in favor of Saunders and affirmed the denial of Billboards' Motion for Summary Judgment.

The first issue was whether there had been a meeting of the minds between Billboards and

Saunders. The Court stated that a meeting of the minds on essential elements is generally required to form an insurance contract, but the Court also noted that a contract to procure insurance can be "implied based on past dealings between the parties even though the agent is given authority to ascertain some of the facts essential to the ultimate creation of the contract." As such, the Court held that a question of fact existed as to whether the past dealings between the parties implied a contract to procure insurance coverage.

The second issue was whether Saunders had a duty to obtain the necessary information from Billboards in order to procure insurance coverage. The Court stated that a longstanding relationship can be sufficient to impose a duty on an insurance agent to obtain additional necessary information in order to procure insurance coverage. Therefore, the Court analyzed several factors relevant to determining whether a longstanding relationship existed, including 1) the broker's exercise of broad discretion in servicing the insured's needs; 2) the broker's counseling of the insured concerning specialized insurance coverage; 3) the combination of the broker's declaration that he is a highly skilled insurance expert with reliance by the insured on the broker's expertise; and 4) the broker's receipt of compensation above the customary premium paid for his expert advice. The Court also noted the burden is on the insured to establish the existence of the longstanding relationship.

Looking to the facts in this case, the Court of Appeals found that whether the relationship between Billboards and Saunders established a duty on the part of Saunders to obtain the additional information necessary to procure insurance coverage for the sign included factual questions. As such, the Court held the trial court erred in granting Saunders' Motion for Summary Judgment.

Key Point: A duty to procure insurance coverage can be imposed on an insurance agent solely because of the length of his or her relationship with an insured. However, based on the factors listed by the Court, it appears that whether this duty will be imposed is a genuine issue of material fact that will preclude either side from getting summary judgment.

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[Note: On January 29, 2008, the Indiana Supreme Court also addressed the question of insurance agent negligence in *Filip v. Block*. That decision focused much more on procedural issues such as the statute of limitations, but to the extent the decision focused on the agent's duty to his client, the analysis was substantially the same as the *Billboards* decision, above. Regarding the statute of limitations, the Supreme Court held in *Filip* that the statute began running "when (the insured) discovered, or reasonably should have discovered, (the agent's) negligent failure to procure the insurance coverage they desired." In that case, because the nature of the coverage was apparent from the policy, the statute began running on the date the Filips originally received the policy.]

INSURANCE COVERAGE: PRE-NOTICE COSTS

Dreaded, Inc. v. St. Paul Guardian Ins. Co.
Indiana Court of Appeals, December 28, 2007

On November 17, 2000, Dreaded, Inc. received a claim letter from the Indiana Department of Environmental Management demanding that Dreaded conduct a site characterization of one of its sites to determine the extent of environmental contamination. Dreaded hired legal counsel and an environmental contractor to perform the site characterization. The contractor produced reports in 2001 and 2002, which Dreaded submitted to IDEM.

On August 29, 2003, IDEM sent a second claim letter ordering Dreaded to conduct further site investigation regarding contamination. On March 24, 2004, for the first time, Dreaded tendered an environmental liability claim to its carrier, St. Paul. St. Paul agreed to defend and indemnify prospectively, but refused to pay defense costs and expenses incurred prior to the date it received notice.

In the ensuing coverage litigation, the trial court granted summary judgment to St. Paul regarding pre-notice defense costs Dreaded had incurred.

The Court of Appeals began its analysis by citing Dreaded's non-compliance with the notice provision and the voluntary-payment provision. The Court observed that the voluntary-payment issue is subsumed into the late-notice issue. The Court noted that Dreaded had delayed for over three years in providing notice to St. Paul, there was no barrier to providing notice to St. Paul, not any legal justification for the delay. The Court therefore held as a matter of law that the delay in notifying St. Paul of the IDEM claim was unreasonable. The Court presumed prejudice to St. Paul since the delay was unreasonable.

However, the Court considered whether Dreaded had rebutted the presumption of prejudice to St. Paul. Dreaded showed that once St. Paul received notice, it continued to defend the IDEM claim in the same way that Dreaded had defended it, including retaining the same attorneys and the same environmental consultants. Therefore, there was a fact issue whether St. Paul was in fact prejudiced as a result of the delayed notice, and St. Paul was not entitled to summary judgment.

Key Point: Late notice, in some cases, may not be enough to void coverage. A significant factor is whether the carrier continues to defend the claim after notice the same way the insured had defended the claim before giving notice to the carrier.

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MEDICAL MALPRACTICE: INCURRED RISK

Spar v. Cha, M.D.
Indiana Court of Appeals, February 20, 2008

Obstetrician Jin S. Cha, M.D., performed a diagnostic laparoscopy on Brenda Spar to examine her fallopian tubes, during which procedure Spar's bowel was perforated, resulting in serious infection. Spar brought a malpractice claim, alleging negligence in the performance of the laparoscopy and failure to obtain informed consent.

One of Dr. Cha's defenses to the informed-consent issue was that Spar was aware of the risks of abdominal surgery because of her numerous previous surgeries; therefore, she incurred the risk of infection when she proceeded with the surgery. At trial, the jury entered a verdict for Dr. Cha. On appeal, Spar argued that Dr. Cha should not have been allowed to argue the defense of incurred risk, and that he should not have been allowed to present evidence of Spar's consent to previous surgeries.

The Court of Appeals reversed. The defense of incurred risk "demands a subjective analysis focusing on the plaintiff's actual knowledge and appreciation of the specific risk involved and voluntary acceptance of that risk." The Court concluded that "permitting a defense of incurred risk to defeat a claim the physician failed to obtain informed consent would undermine the policy promoted by the doctrine of informed consent," because it would "charge the patient with information a layperson is not expected to know."

Even if the evidence showed Spar did understand the risks involved in the laparoscopy and thereby "incurred the risk," it would not excuse the negligent performance of the procedure. That is, the patient did not incur the risk the physician would be negligent.

The Court also rejected the evidence that Spar had previously consented to similar procedures, which Dr. Cha offered to prove that Spar would have chosen to undergo this procedure regardless of the information provided to her. The Court agreed with Spar that the effect of the evidence was an attempt "to prove Spar has a propensity for risk-taking. As such, the evidence is inadmissible character evidence."

Key Point: Despite the Court's characterization of Dr. Cha's argument, it does make sense that if the patient understood the risks of the procedure, then any alleged deficiencies in the "informed consent" could not be a proximate cause of the damages, since the patient would necessarily be "informed." Nevertheless, this case is instructive that a medical provider should ensure he or she fully explains the procedure and the risks involved, regardless of whether the patient has undergone this type of procedure before.

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MEDICAL MALPRACTICE: SURGICAL STRICT LIABILITY

Ho, M.D. v. Frye
Indiana Supreme Court, February 21, 2008

Dr. Ho performed an abdominal surgical procedure on Loretta Frye. Before Dr. Ho closed the surgical incision, the surgical nurses confirmed that all sponges used during the surgery had been accounted for. However, a few months later, a sponge from that surgery was found in Frye's abdomen.

Frye filed a lawsuit against Dr. Ho. Frye filed a Motion for Summary Judgment, arguing that a surgeon is responsible as a matter of law for the removal of every sponge used during surgery, but the trial court denied this motion. The jury returned a verdict in favor of Dr. Ho. On appeal, the Court of Appeals reversed the trial court's denial of Frye's Motion for Summary Judgment, and found for Frye on the issue of liability as a matter of law.

The Indiana Supreme Court granted transfer. The Court addressed several issues in its decision. For our purposes, the most significant issue concerned whether the surgeon is automatically liable for a retained sponge.

The Supreme Court stated "it is for the jury to determine from the evidence whether the omission of certain treatment, like the failure to remove a lap-sponge used in the operation before the incision was closed, was or was not negligence." Therefore, the Supreme Court found that evidence of a surgeon's failure to remove a surgical sponge is merely evidence that can be used at trial to support a jury verdict of liability against the surgeon.

The Court noted that Dr. Ho was only required to produce expert evidence regarding standard of care in order to avoid summary judgment. Therefore, Dr. Ho's designation of expert testimony (which happened to come from Frye's subsequent treating surgeon) stating Dr. Ho's treatment met the applicable standard of care created a genuine issue of material fact. As such, the Supreme Court affirmed the trial court's denial of Frye's Motion for Summary Judgment.

Key Point: A surgeon will not be strictly liable for an incorrect sponge count by assisting surgical nurses, but may still be found to be negligent for the incorrect sponge count. Evidence of an incorrect sponge count is merely evidence that can be used at trial to try and prove the surgeon was negligent, but the surgeon is permitted to argue his conduct still met the applicable standard of care.

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WORKER'S COMP EXCLUSIVITY: SUPERVISOR'S ASSAULT

Eichstadt v. Frisch's Restaurants, Inc.,
Indiana Court of Appeals, January 31, 2008

Eichstadt worked for a Golden Corral restaurant, and her supervisor was Darrell Campbell. One day at work, Campbell slapped Eichstadt on her backside with a clipboard so hard that it lifted her off her feet. Campbell was subsequently fired for his actions. Eichstadt filed a lawsuit against Frisch's Restaurants, Inc. ("Frisch's"), which was the owner of the Golden Corral, as well as Campbell. Frisch's filed a Motion to Dismiss under Trial Rule 12(B)(1) and asserted that Eichstadt's injuries fell within the exclusive remedies of Indiana's Worker's Compensation Act. The trial court granted this motion, and the Court of Appeals affirmed.

The Court of Appeals first rejected Eichstadt's claim that the trial court applied an improper standard by requiring her to carry the burden of proving that Campbell's actions were not "accidental" under the Worker's Compensation Act. Once a defendant raises the issue of exclusivity under the Worker's Compensation Act, the burden shifts to the employee-plaintiff to prove that a claim exists outside its scope.

The Court also rejected Eichstadt's argument that her injuries did not occur by "accident," and therefore Campbell's intentional acts should be imputed to Frisch's. Under Indiana law, if an injury does not occur by accident, then the Worker's Compensation Act does not apply. The Court stated an injury occurs by "accident" only when neither the person injured nor the employer intended for it happen.

The Court listed two requirements in order to prove that an employer intended for an injury to occur. First, the employer itself must intend the injury, which does not include a supervisor or a manager. The second requirement is that the employer must have intended the injury or had actual knowledge that an injury was certain to occur. In this case, the Court noted there was no evidence that Frisch's, as a corporate entity, intended for Eichstadt to be injured.

However, the Court discussed two situations in which intent-to-injure will still be imputed to a legal entity. The first situation occurs when the corporation is the tortfeasor's alter ego, meaning the tortfeasor has ownership and control of the corporation. Alternatively, tortious intent can also be imputed to a legal entity if the corporation has substituted its will for that of the tortfeasor, which may be proven if the tortfeasor acted pursuant to a policy or decision made by the corporation's regular decision making channels by those with the authority to do so.

Looking to the facts of this case, the Court found that Campbell had no ownership or control of Frisch's, and there was no evidence that Campbell's actions were pursuant to any policy or corporate decision made by Frisch's. As such, the Court held the incident was an "accident" and therefore the trial court properly dismissed Eichstadt's claims for lack of subject matter jurisdiction.

Key Point: Proving that a corporate entity-employer intended for an employee's injury to occur so as to avoid the scope of the Worker's Compensation Act is a difficult burden. While an employee-plaintiff may be able to meet this burden in some situations, it is likely that most claims for injuries which occur at work will be considered "accidents" and therefore fall under the exclusive jurisdiction of the Worker's Compensation Act. What is unfortunate for claimants such as Eichstadt is that this leaves her with virtually no remedy when she is assaulted by a co-worker, but does not require medical care or time off work.

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UPCOMING SEMINAR:

"INSURANCE PRIMER"

Thursday, June 12, 2008

Noon to 2:00 p.m.

Education Center, 334 N. Senate Avenue

The Insurance Coverage Section of the Defense Trial Counsel of Indiana, of which Kevin Tyra is the Section Chair, will be conducting an "Insurance Primer" seminar. The primary target audience of the program will be defense attorneys who do not primarily practice in insurance coverage, or who may be relatively new to this area of practice. However, the program, which will provide an overview of insurance law and practice in Indiana, may be valuable to insurance professionals and others already familiar with insurance issues.

DTCI is applying for two hours of CLE credit for attendees of the program.

For more information, please contact Amy Heustis at 317-636-1304 or amy.heustis@tyralaw.net.

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