The Tyra Law Firm, P.C.

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Inside this issue:

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Welcome to Our New Neighbor

In January, the Kurt Vonnegut Memorial Library (www.vonnegutlibrary.org) opened in the suite next to The Tyra Law Firm in the Emelie Building. Kurt Vonnegut (1922-2007) was born and raised in Indianapolis, the son and grandson of architects whose work can still be seen in the city.

The library includes a variety of Vonnegut memorabilia and displays, including a sampling of the writer's artwork, the Purple Heart he was awarded from World War II experiences that led to the classic, *Slaughterhouse-Five*, as well as literature by Mr. Vonnegut, and examples of some of his favorite literature by other authors. So it goes . . .

DRAM SHOP ACT

Michael Gray v. D&G, Inc. d/b/a The Sandstone
Indiana Court of Appeals, December 3, 2010

Gray ate lunch and drank alcohol throughout the day at the Sandstone bar. His girlfriend, Vanessa Jave, who was working as the bartender that day, bought drinks for him and friends, and friends bought drinks for Gray. Gray continued to consume alcohol until 1:00 a.m. the following morning. Gray and Jave had planned for Jave to drive Gray to another bar after the Sandstone closed.

As the Sandstone was closing, Gray went outside while Jave remained inside working. Once outside, Gray decided to drive his motorcycle. As he went through an intersection, Gray struck a curb and lost control of his motorcycle. Gray wrecked the motorcycle and was injured as a result, but there were no other injuries or damages to any third party.

Gray claimed that Sandstone was liable under the Dram Shop Act. Sandstone argued that it did not have actual knowledge of Gray's intoxication, that Sandstone's actions were not the proximate cause of Gray's injuries, and that Gray was voluntarily intoxicated. The trial court entered summary judgment in favor of Sandstone. The trial court concluded that Gray's voluntary intoxication precluded any recovery. The Court of Appeals reversed the trial court.

Ind. Code § 7.1-5-10-15.5(c) provides that if a person who is at least 21 years of age suffers injury or death proximately caused by the person's voluntary intoxication, the person may not assert a claim for damages for personal injury or death against a person who furnished an alcoholic beverage that contributed to the person's intoxication. However, this exception does not apply if the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated and the intoxication was a proximate cause of the death, injury or damage.

Sandstone argued that the statute's use of the term "person" in subsection (c) referred to two different people; that is, the person who was intoxicated was not the same as the person injured, meaning that an intoxicated person could not avail himself of the exclusion.

The Indiana Court of Appeals disagreed and held that the person who is injured under the clause can be the same as the person who is voluntarily intoxicated. This means that voluntarily intoxicated persons can avail themselves of the exclusion to the clause so long as the person who furnishes the alcohol: 1) had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished; and 2) the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury or damage alleged in the complaint.

The Court stated that its interpretation was consistent with public policy and the goal of the Act itself which is to make "providers of alcoholic beverages liable for the reasonably foreseeable consequences of knowingly serving visibly intoxicated patrons."

Keypoint: Even the person who was overserved, and later injures himself due to his own intoxication, may be able to bring a claim under the Dram Shop Act.

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LANDLORD'S LIABILITY UNDER ELA

Samuel and Delores Neal v.
William and Elizabeth Cure et al.
Indiana Court of Appeals, November 24, 2010

William and Elizabeth Cure leased commercial property to a dry-cleaning tenant, Masterwear, who used perchoroethylene ("PCE") as a solvent. PCE is listed on the U.S. Toxic Substance and Disease Registry and has been shown to cause health problems in concentrations above certain levels. The Neals, who operated a business on property nearby developed health problems. The value of their property had been decreased by PCE in the soil and in the air inside their building.

The Neals sued Masterwear and the Cures for environmental contamination under the Environmental Legal Act ("ELA"), nuisance, trespass, and negligence. The Neals settled out of court with Masterwear. The Cures were granted summary judgment against the Neals on all four theories of liability. The Neals appealed.

The Indiana Court of Appeals affirmed summary judgment on all four counts. With respect to the nuisance and trespass counts, the Court noted that there was no evidence that the Cures had actual knowledge of or participated in the contamination acts of Masterwear.

Under the ELA, liability arises only for one who "caused or contributed" to the release of the hazardous substance. The Neals argued that the Cures' "inaction" contributed to the release. The Court concluded, however, that the term "contribute" must be more than mere "inaction." The goal should be to hold accountable all parties "responsible for creating contamination." There was no evidence that the Cures actually took part in or acted in concert with Masterwear in bringing about the contamination. The Court held that the ELA does not permit an action against landlords who by all accounts were not involved in the alleged release of the hazardous substances and had no knowledge of the release.

On their theory of per se negligence, the Neals argued that the Cures' tort duty arose from Ind. Code 13-30-2-1, which prohibits releasing or allowing the release of contaminants or waste, and 327 IAC 2-6-2 which required the owner of a commercial facility that has a spill to communicate the spill to IDEM, and to act to clean up the contamination. However, the Court determined that the statute provides no private right of action. Since the Neals are seeking personal damages as opposed to equitable relief, the statute does not apply.

Keypoint: Landlords are not vicariously liable for environmental damage caused by tenants.

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MATERIAL MISREPRESENTATION

Allied Prop. and Cas. v. Linda Good
Indiana Court of Appeals, November 24, 2010

Good neglected to include her cancellation history when she filled out an Allied homeowner's application in 2002. A fire destroyed her home in 2003. Allied denied the fire claim based on the material misrepresentations in the application, arguing that it would not have issued the policy if it had known the truth about the cancellation history.

In Good's breach of contract action, the trial court denied Allied's motion for summary judgment. The Court of Appeals reversed, noting that it was uncontradicted that the application specifically asked whether "coverage was ever declined, cancelled, or non-renewed," and that Good failed to note prior cancellations. The Court rejected Good's semantic argument that "ever" refers only to the policy in effect at the time she submitted the application, and instead agreed with Allied that "ever" refers to the applicant's entire insurance history.

It was also uncontradicted that Allied would not have issued the policy if it had known about the cancellations, so the misrepresentations were "material." Allied was not obligated to conduct its own search to confirm that the information Good provided was correct.

Keypoint: The Indiana appellate courts generally continue to issue reasonable rulings favorable to carriers on coverage issues (except when it comes to the pollution exclusion clause, discussed in the next case), including holding insureds responsible for material misrepresentations. In this case, it is noteworthy that Good testified that she simply interpreted the question in a different manner than did the carrier, but the court still held it was a misrepresentation.

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POLLUTION EXCLUSION

State Automobile Mut. Ins. Co. v. Flexdar, Inc, et al.
Indiana Court of Appeals, November 22, 2010

Trichloroethylene leaked from Flexdar's manufacturing plant and contaminated subsoil and groundwater. The Indiana Department of Environmental Management ordered a cleanup. Flexdar requested defense and indemnification from its CGL carrier, State Auto. In State Auto's declaratory judgment action, the trial court entered summary judgment in favor of Flexdar. The Court of Appeals affirmed.

The trial court and Court of Appeals agreed that the "absolute" pollution exclusion clause in the State Auto policy was ambiguous and unenforceable. Essentially, the clause stated that "This insurance does not apply to . . . 'bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured; . . . Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

The Court of Appeals discussed at length the history of Indiana appellate decisions which held that the pollution exclusion clause was ambiguous and therefore unenforceable, including *American States Ins. Co. v. Kiger* (Ind. 1996), *Seymour Mfg. Co., Inc. v. Commercial Union Ins. Co.* (Ind. 1996), *Travelers Indem. Co. v. Summit Corp. of America* (Ind.App. 1999), *Freidline v. Shelby Ins. Co.* (Ind. 2002), and *National Union Fire Ins. Co. of Pittsburgh, PA v. Standard Fusee Corp.* (Ind.App. 2009).

Essentially, the Court held that nothing has changed and the clause in this case is substantially the same as the clauses rejected in the previous "absolute" pollution exclusion clause cases.

Keypoint: CGL carriers can't catch a break on even the "absolute" pollution exclusion clause. Although others may consider the clause, quoted above, as being perfectly unambiguous and enforceable, the Indiana appellate courts continue a long trend of holding against the carrier on this issue. The CGL carrier should assume that any pollution claim against the insured is covered.

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PHARMACIST'S DUTY TO WARN

Christine Kolozsvari, et ux. v. Hooks SuperX, LLC, et al.
Indiana Court of Appeals, February 10, 2011

Christine Kolozsvaris suffers from, among other ailments, ulcerative colitis. Christine visited Dr. Doe's office for a pre-colonoscopy consultation. To ensure a clear view of the colon, Dr. Doe required Christine to take a laxative that would empty her colon. Dr. Doe prescribed OsmoPrep, a sodium phosphate-based laxative available in pill form.

Dr. Doe's office phoned in the prescription to a CVS pharmacy where Christine routinely took all of her prescriptions and which had a complete record of all such medications. Among these medi-

cations was Lisinopril, an ACE inhibitor Christine used at the time to treat hypertension. CVS's monograph for OsmoPrep instructs patients to contact a physician if they will use Lisinopril while also taking OsmoPrep.

While Kelley Branchfield, the pharmacist filing the prescription, was working to prepare the prescription, a notice appeared on the computer screen with a warning that the use of OsmoPrep posed a risk of renal failure because of Christine's age. Branchfield dismissed the warning without conveying its content to Christine. Christine consumed the OsmoPrep and experienced some tingling in her fingers and forearms.

Christine returned to CVS for the second round of OsmoPrep. And again, as Branchfield was filling the prescription, a second computer-generated notification alerted her that the prescribed dose of OsmoPrep would exceed the amount ordinarily considered safe in such a short period of time. Again, Branchfield dismissed the notice and filled the prescription without notifying Christine of the warning's content. Christine also told a pharmacy technician about the sensations in her arms and fingers. She was told that OsmoPrep did not cause the sensations. Christine took the second round of OsmoPrep as directed. The next morning she awoke with her whole body "buzzing" and vibrating. She was diagnosed with kidney failure.

Christine brought actions against Dr. Doe, CVS and Branchfield. The trial court granted CVS and Branchfield's motion for summary judgment on the theory they had no duty to warn Christine of the dangers posed by OsmoPrep or to decline to fill the prescription.

Christine appealed. The Indiana Court of Appeals overturned the trial court's decision. Branchfield had information that gave rise to a duty to exercise professional judgment as required under the statutes which govern pharmacies and pharmacists. The Court specifically held that CVS and Branchfield owed a duty of care to Christine either to warn Christine of the side effects of OsmoPrep or to withhold the medication in accordance with Indiana Statutory law and rules of the Pharmacy Board.

Keypoint: Pharmacies have a duty to provide known warnings or withhold medication where filling the prescription might harm the health and safety of a patient.

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PLAINTIFF'S FAULT IN CRASHWORTHINESS CLAIM

Nicholas Green v. Ford Motor Company
Indiana Supreme Court, February 8, 2011

Green was rendered a quadriplegic in a single-vehicle accident while driving a Ford Explorer. Green filed suit in federal court, alleging defects in the vehicle's restraint system. Green filed a motion in limine to exclude evidence of his own alleged negligence that initially caused the vehicle to leave the road. Ford argued the trier of fact should consider Green's fault in causing or contributing to the accident. The District Court certified the issue for consideration by the Indiana Supreme Court.

The question was whether the finder of fact shall apportion fault to the person suffering the injuries when that alleged fault relates to the cause of the accident in a crashworthiness case alleging enhanced injuries under the Indiana Products Liability Act ("IPLA"). The Supreme Court explained that the crashworthiness doctrine extends a manufacturer's liability to situations where the defect did not cause the accident itself, but instead increased the severity of the injury. The Supreme Court noted that the IPLA and the Comparative Fault Act require considerations of the fault of all persons who cause or contribute to cause the harm.

Therefore, the Supreme Court concluded that in a crashworthiness case under the IPLA with an allegation of enhanced injuries, a claim by the plaintiff to only seek damages for the enhanced injuries does not preclude the trier of fact from considering evidence of the plaintiff's actions reasonably alleged to have contributed to the injuries. But, the Supreme Court further stated that from that evidence, the trier of fact still must determine whether any such conduct satisfies the proximate cause requirement.

Keypoint: Even though the damages sought by a plaintiff are only for those injuries that were made more severe than they otherwise would have been due to a product defect, the jury can still assess fault to the plaintiff for causing or contributing to the situation that caused the injuries in the first place.

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PREEMPTION OF FAILURE TO WARN CLAIMS

Jodi McGookin v. Guidant Corp.
Indiana Court of Appeals, January 21, 2011

McGookin's daughter was born with a heart defect. A Guidant pacemaker was installed a few days after her birth to help remedy the defect. The labeling on the pacemaker had been approved by the FDA. While the device performed as it was designed to do, the daughter passed away approximately a year later.

McGookin's suit against Guidant asserted that the labeling inadequately warned of a lack of testing of its features on small children. Guidant moved for summary judgment on the grounds that McGookin's claims were preempted by the FDA approval of the pacemaker. The trial court allowed McGookin to proceed to the extent the claims were premised on a violation of FDA regulations, as well as combining the remaining allegations into one cause of action under the Indiana Products Liability Act. At trial, the jury entered a defense verdict on all claims.

The Indiana Court of Appeals affirmed. The issue on appeal was whether federal regulations preempted state common law claims. The Court found McGookin's claims were preempted by the Medical Device Amendments of 1976. Unlike the other cases that either had no preemption provision or contained a savings clause, the Court noted the MDA has an express preemption provision with no savings clause. As such, the Court found McGookin's claims were a prime example of an attempt to impose a standard of care in addition to the FDA's specific federal requirements.

Keypoint: Whether a plaintiff's claim will be preempted by federal law will likely be decided by the language of the applicable federal law. Specifically, the federal law must provide for preemption, and not contain a savings clause that still provides for a cause of action despite compliance with the federal law.

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UIM: PREJUDGMENT INTEREST

Kathy Inman v. State Farm Mut. Automobile Ins. Co.
Indiana Court of Appeals, December 30, 2010

Inman brought an underinsured motorist claim against her carrier, State Farm. In the course of the litigation, Inman made a settlement demand for the UIM limits. After a trial, the jury awarded her the limits on her UIM coverage. However, the trial court denied Inman's motion for prejudgment interest. The Court of Appeals reversed.

The Indiana Tort Prejudgment Interest Statute (Ind. Code 34-51-4-1, *et. seq.*) generally provides for an award of prejudgment interest, up to 48 months, at a rate between 6% and 10%, to a plaintiff who had made a settlement demand within one year of filing suit, if the amount of the demand did not exceed one and one-third of the amount of the judgment awarded.

The Court held that the TPIS applies to UIM claims because they are civil actions arising from tortious conduct; and that the award of prejudgment interest may exceed the UIM policy limits.

Keypoint: The UIM carrier should consider the exposure to prejudgment interest when evaluating the case after the claimant has made a qualifying settlement demand under the TPIS.

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VEHICLE PASSENGER NEGLIGENCE; REASONABLE MEDICAL CARE

Tracie Burton v. Donna Bridwell
Indiana Court of Appeals, November 12, 2010

Tracie Burton was a passenger in a vehicle driven by her husband which collided with a vehicle driven by Donna Bridwell. Burton observed just before impact that Bridwell was not going to stop. Burton sustained injuries as a result of this motor vehicle accident. Burton subsequently treated with pain management specialists and a chiropractor. Burton also completed six sessions of physical therapy, at which point she informed her therapist she had zero pain. Burton learned of a microsurgery group in Florida, and subsequently underwent eight surgical procedures there, despite the fact her previous physicians believed no further surgery was necessary.

Burton filed suit against Bridwell, and later named her insurer State Farm for an underinsured motorist claim. State Farm eventually paid Burton $100,000 in medical payments, and Bridwell's carrier paid its liability limit of $100,000 as well. Therefore, State Farm was entitled to a $200,000 credit toward any award of damages Burton received at trial.

At trial, the jury determined Burton and Bridwell were both 50% at fault. They awarded Burton $65,814.30 in damages, which was then reduced by 50% to $32,907.15. Due to State Farm's credit, the judgment was reduced to zero dollars. Burton filed a motion to correct error with regard to the assessment of fault against her as to the motor vehicle accident, as well as on the issue of whether the jury failed to award her damages for all of her medical treatment. The trial court denied the motion, and she appealed.

The Court of Appeals reversed in part and affirmed in part. The Court found the evidence regarding her fault was insufficient to demonstrate Burton, as the passenger, had the opportunity to see Bridwell's vehicle, appreciate that Bridwell was not going to stop, and warn her husband in enough time. Therefore, the Court concluded it was error to apportion any fault to Burton.

However, the Court found this error was harmless due to the issues surrounding Burton's damages. Even without the 50% reduction in Burton's damages award, it was still within the $200,000 credit owed to State Farm.

The Court found there was a basis in the evidence for the jury to determine the amount of damages awarded to Burton. Specifically, the Court found the jury was within reason to discount the testimony of the microsurgery surgeons who stated Burton needed the additional surgeries, as opposed to Burton's previous treating physicians who testified further surgery was unnecessary.

The Court distinguished this case from the recent Court of Appeals decision in *Sibbing v. Cave*. The Court noted that in *Sibbing*, the defendant had hired an independent expert to testify about whether the plaintiff's treatment was appropriate, which the Court in *Sibbing* stated was not permissible. Here, the only contrary testimony was provided by Burton's own treating physicians. The Court found that Burton's decision to proceed with the microsurgery despite what her treating physicians had stated "bears directly on the reasonableness of [Burton]'s decision to treat with Microspine and whether she exercised reasonable care in choosing her physician." The Court further noted there was no challenge to the necessity of Burton's medical treatment, and that the only challenge was to medical causation, which is permitted by *Sibbing*.

Keypoint: Generally speaking, the passenger in a motor vehicle should not be apportioned fault for a motor vehicle accident. In addition, when a plaintiff treats with one doctor, proceeds to treat with another doctor, and follows through on a course of treatment that the first doctor did not recommend, the defense should be able to challenge the reasonableness of this treatment.

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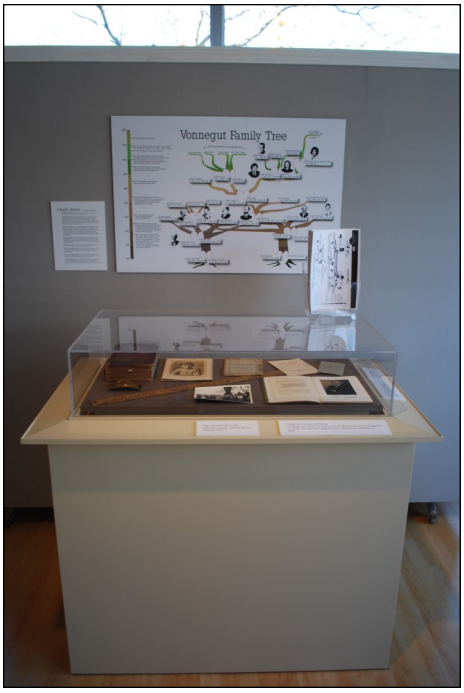
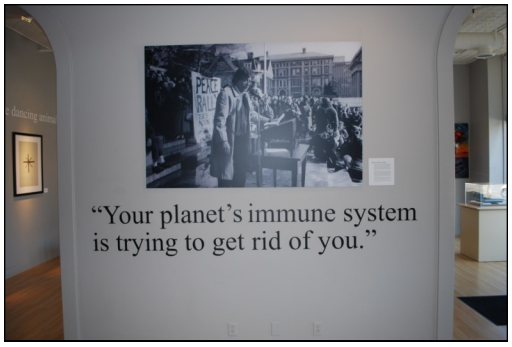
More exhibits from the Kurt Vonnegut Memorial Library.





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