The Tyra Law Firm, P.C.

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Welcome to Jon Zarich

The Tyra Law Firm, P.C. welcomes Jonathon M. Zarich as our newest attorney.

Jon was awarded his bachelor's degree with honors from Indiana University in 2004. He was a legislative assistant to the Indiana House of Representatives for two years. Since 2006, he has been employed in the government affairs area at the Insurance Institute of Indiana. He graduated from Indiana University Law School at Indianapolis in 2010. Jon currently serves as the Vice President of Government Affairs and Counsel with the Insurance Institute of Indiana in addition to practicing in insurance defense and insurance coverage with The Tyra Law Firm.

Jon is married to Katie Zarich, who is the Deputy Director for Public Affairs at the Indianapolis Museum of Art. They are expecting their first child.

BATHTUB SLIP AND FALL

Clayter Hale v. SS Liquors, Inc., et al.
Indiana Court of Appeals, November 15, 2011

SS Liquors ("SS") owns and operates a Hampton Inn. Hale, a guest at this hotel, slipped and fell in the bathtub. Hale did not notice any anti-slip devices or rubberized circles on the bottom of the bathtub. However, Hale did not know what caused him to slip and fall. Several months before this incident, SS had contracted with Safe Step to apply a chemical to all of its bathtubs that raised the pore of the tub to create an etch.

Hale filed a negligence lawsuit against both SS and Safe Step, and claimed his fall was the result of an excessively slick bathtub surface and lack of proper handrails. Hale retained NTA, Inc., an engineering company, to inspect and test the bathtub. NTA found the bathtub surface had a pattern of grey circles extending in four lines down the length of the tub, and that this pattern appeared to be intended as texturing. NTA concluded that the bathtub complied with the appropriate safety standards. Another engineer retained by Hale, Richard Hicks, reviewed NTA's report and compared it to Hale's deposition testimony. Hicks did not inspect the bathtub. Despite this, Hicks concluded the circle pattern noted by NTA must not have been representative of the bathtub in which Hale was injured, and that the circle pattern was most likely placed in the bathtub after Hale's incident.

The trial court granted motions for summary judgment filed by both SS and Safe Step. The Court of Appeals affirmed this decision. In doing so, the Court addressed Hicks' conclusions that the bathtub may or may not have had the pattern of grey circles at the time of Hale's fall, and found this to be a red herring. The Court noted this was pure speculation, because neither NTA nor Hicks addressed whether the bathtub would have met the code requirements if it did not have this circle pattern. The Court also noted NTA's report conceded slippage in a bathtub could still occur even with this circle pattern, and therefore a risk of falling still exists even in something that complies with industry safety standards. The only evidence was that the bathtub became slippery while Hale showered, something which the Court stated is an inherent risk of showering, and that there was no evidence SS or Safe Step did anything that unreasonably increased that risk.

In sum, the Court stated Indiana law requires a plaintiff to present some evidence of what caused a fall as well as what the premises owner did or failed to do that increased the risk. This is doubly true when the fall occurs in a shower, which necessarily involves a slippery surface.

Keypoint: Recent case law has been clear that just because a plaintiff slips and falls does not equate to liability for the premises owner. This case solidifies this point, and clearly demonstrates a plaintiff must be able to point to what specifically made them fall, especially in a situation where there is already a risk for falling.

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DISMISSAL AS DISCOVERY SANCTION

Rickey Whitaker v. Travis Becker
Indiana Supreme Court, January 18, 2012

Rickey Whitaker sued Travis Becker for injuries he allegedly sustained when Becker rear-ended Whitaker's vehicle. Becker's attorney requested information regarding plaintiff's medical treatment. Becker's counsel wrote Whitaker's lawyer on three separate occasions, reminding him that his responses to discovery were overdue. Whitaker's lawyer did not respond to any of the letters. Becker's counsel filed a motion to compel discovery, which the trial court granted. Whitaker's attorney served his client's discovery responses on June 15, 2009. The responses provided misleading and false information, stating that plaintiff had not treated recently for his

injuries and had postponed surgery because of lack of medical insurance. Both Whitaker and his attorney signed the responses.

Three days after the discovery responses were served, Whitaker's lawyer mailed Becker's counsel a letter stating that plaintiff was undergoing surgery that same day. Whitaker and his doctors had been preparing for surgery through visits in April and at the beginning of June, which contradicted the sworn discovery responses.

Becker filed a motion for sanctions, and Whitaker failed to respond. Becker argued that the surgery undermined the value of a physical examination in helping to determine whether the accident or Whitaker's preexisting degenerative disc disease caused his bulging disc condition. The court found that Whitaker's actions in depriving Becker of the chance for an independent medical examination caused "significant and material prejudice." The court also determined that the loss of evidence could not be cured by a sanction less severe than dismissal. The court found Whitaker and his attorney had supplied "deceptive interrogatory answers" and had done so "in bad faith."

Whitaker filed a motion to correct error. For the first time, he attached numerous exhibits that he argued demonstrated that Becker's insurance company knew of the need for surgery as early as 2008.

The Indiana Supreme Court noted that dismissal or default judgment may be appropriate as a discovery sanction when a party fails to respond to discovery requests on time, the trial court granted an order to compel discovery, and the party violated the order to compel by failing to respond. Such sanctions are also appropriate when a delinquent party responds to discovery requests in an incomplete or misleading way.

Keypoint: Dismissal of case is appropriate as a sanction when plaintiff's counsel provided false and misleading discovery responses. The claim professional should also be aware that prejudicial misinformation in pre-litigation investigation may be an appropriate basis for denying a claim.

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ESTOPPEL OF STATUTE OF LIMITATIONS BY LIABILITY CARRIER

Janice L. Davis v. Shelter Insurance Cos., et al.
Indiana Court of Appeals, November 21, 2011

On January 3, 2008, Davis was involved in a vehicular accident with Culver. Davis was insured by Shelter, and Culver was insured by State Farm. Shelter paid for Davis' medical care arising from the accident. A State Farm representative contacted Davis, and informed her that she was not to call State Farm until her treatment was completed and she was ready to settle her claim.

On June 6, 2008, Shelter gave State Farm a medical payment subrogation package, which State Farm paid. In November 2008, Shelter informed State Farm that Davis had resumed treatment. Shelter also incorrectly told Davis that the statute of limitations for her claim was three years, rather than two.

A State Farm representative spoke with Davis by phone on January 8, 2009. Davis said she would provide medical documentation when she was ready to settle her claim. The representative told Davis she was responsible for proving her claim, and Davis responded that she was a case manager so she was familiar with the law. No discussion of the statute of limitations occurred in this conversation. Shortly thereafter, Shelter informed State Farm that Davis was still treating, that Shelter would send a final subrogation notice when treatment was completed, and requested that State Farm not contact Davis, because she felt like she was being harassed by their periodic phone calls. No further action was taken before the statute of limitations ran on January 3, 2010.

On March 11, 2010, Davis asked State Farm to settle her claim. State Farm informed her that the statute had run. Davis filed suit against Culver, Shelter, and State Farm. The trial court granted summary judgment to State Farm and Culver on the statute of limitations issue.

The Court of Appeals affirmed, rejecting Davis' argument that State Farm was barred by equitable estoppel from asserting the statute of limitations defense. In equitable estoppel, one's own acts or conduct prevent the claiming of a right to the detriment of another party who was entitled to and did rely on the on the conduct. In this situation, the conduct of the insurer must be of a sufficient affirmative character to prevent inquiry or to elude investigation or to mislead and hinder; that is, something more than "mere investigation and negotiation."

The Court explained the two-part test to determine the availability of equitable estoppels against a liability insurance carrier asserting the statute of limitations. The first part is a determination that the insurer had engaged in (1) a promise to settle; (2) discouraging the claimant from filing suit; (3) discouraging the claimant from obtaining counsel; or (4) otherwise egregious conduct. The second part of the test is to determine whether, under the totality of the circumstances, the insurer's conduct has induced the claimant to delay timely action, and the claimant's reliance on the insurer's statements or actions was reasonable.

In this case, the Court determined that Davis did not meet the first part of the test. State Farm's only action was to tell Davis to contact them when she was done with her medical treatment. In addition, even if Davis had met the first part of the test, she failed the second part of the test as well. State Farm did not induce Davis to delay timely action, and any reliance by Davis on State Farm's statements, to the extent it supposedly delayed Davis from acting on her claim, was not reasonable.

Keypoint: The pre-suit claim representative must always be careful in communications with the third-party claimant, particularly regarding discussions of settlement and the claimant's rights to obtain counsel and file suit. If there are any such discussions or written communications that may be construed as later estopping the carrier from asserting the statute of limitations, the representative should explicitly advise the claimant that there is a two-year statute of limitations running from the date of the accident, and the carrier is not waiving its rights under the statute.

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EXPERT TESTIMONY FOR MEDICAL CAUSATION

Henry Bennett v. John Richmond
Indiana Supreme Court, January 31, 2012

Bennett rear-ended Richmond's vehicle. Richmond sued Bennett for injuries sustained to his back and neck as a result of the collision. Richmond had also experienced headaches and memory loss after the accident but had not been diagnosed with a brain injury. Dr. McCabe, a psychologist, performed a neuropsychological evaluation. Per this process, Dr. McCabe reviewed Richmond's medical records, interviewed his wife, and performed a series of neuropsychological tests, ultimately leading him to conclude that Richmond "experienced" a traumatic brain injury as a result of the accident.

Bennett objected to Dr. McCabe as an expert witness multiple times throughout the trial, contending a psychologist was not qualified to testify as to the cause of a brain injury. The trial court allowed the testimony, which resulted in a $200,000 judgment for Richmond.

On appeal, the Court of Appeals reversed, stating that although psychologists are not *per se* unqualified to testify on issues of medical causation, Dr. McCabe did not meet the criteria established by Indiana Evidence Rule 702 requiring qualifications based on certain knowledge, skill, experience, training, or education. The Indiana Supreme Court agreed in approach but reversed the result saying the trial court did not abuse its discretion by allowing Dr. McCabe's testimony.

The Supreme Court noted neither the criteria for qualifying under Rule 702 nor the purpose of admitting the evidence to assist the trier of fact supported a *per se* rule prohibiting psychologists from testifying as to medical causation. Rather, the Court noted any issues Bennett had regarding Dr. McCabe's testimony were matters of weight and credibility, not McCabe's qualifications to give it.

Reginald Person v. Carol Shipley
Indiana Supreme Court, January 31, 2012

In *Person v. Shipley*, the Court similarly extended the reach of Rule 702. Shipley, driving a car, rear-ended Person's tractor trailer. Person claimed injuries to his neck and lower back. Shipley retained Charles Turner, Ph.D., to testify during trial as to the likelihood the accident caused Person's injuries. Person objected to the admission of Turner's testimony on the basis his education in mechanical and biomedical engineering did not qualify him to testify as to accident reconstruction or medical cause of injury.

Similar to *Bennett*, the Indiana Supreme court ruled in favor of Turner's testimony being admissible. Again eschewing a *per se* rule, the Court looked to whether the two components of Rule 702 were met, separating questions of a person's qualifications to testify from the credibility of the testimony.

Keypoint: Although jurisdictions are split as to whether a person must be a medical doctor to be qualified to testify on medical causation, the Indiana Supreme Court has opted against a *per se* rule on the same, instead granting trial courts significant flexibility on Indiana Evidence Rule 702. Defense cross examination will become a key component to ensure expert testimony is properly perceived by the trier of fact.

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PARENTS' CLAIMS FOR EMOTIONAL DISTRESS

Steven Spangler v. Barbara Bechtel, et al.
Indiana Supreme Court, December 13, 2011

Heidi Brown presented to St. Vincent Randolph Hospital for delivery after she went into labor. However, the baby died *in utero* prior to delivery. Subsequently, Brown and Spangler (the father) filed suit against the defendants for negligent infliction of emotional distress ("NIED") as a result of medical negligence in the provision of obstetrical care and treatment. The trial court granted summary judgment in favor of Bechtel, the nurse-midwife who managed Brown's pregnancy, and the Center, Bechtel's employer (as well as the hospital, who had filed its own motion), and found there was no claim for emotional distress under the Child Wrongful Death Act ("CWDA") because an unborn child is not a "child" under the CWDA. The trial court also found there was no valid claim for NIED because there was no allegation of a negligently inflicted injury on another as required under the modified impact rule, nor was there a direct impact. The Court of Appeals reversed this ruling.

Upon transfer, the Indiana Supreme Court found a claim for NIED after experiencing the stillbirth of a child is not barred by the CWDA. Bechtel and the Center argued that because they were not qualified providers under the Indiana Medical Malpractice Act ("MMA"), the claim for emotional distress is governed by the CWDA. However, the Court stated it is inconsistent to argue the CWDA is the vehicle for recovery following the death of a child, but that the CWDA does not apply because the unborn child is not a "child" under the CWDA. The Court also relied on previous case law that provided for actions for emotional distress by mothers who suffered a miscarriage notwithstanding the CWDA.

The Supreme Court also disagreed with the trial court's conclusion that the plaintiffs cannot identify any negligently inflicted injuries. The

Court stated the death of an unborn child is an injury to that child, and just because the unborn child victim cannot seek recovery does not preclude a claim for NIED.

Finally, as to the hospital's motion for summary judgment, the Supreme Court rejected the argument that the plaintiffs were precluded from asserting a NIED claim under the MMA because the unborn child should not be considered a "patient" under the MMA. Instead, the Court found there is a valid claim for emotional distress from experiencing the stillbirth of a child as a result of alleged medical malpractice.

Keypoint: Simply because a child has not been born will not prevent a claim for negligent infliction of emotional distress by the parents as a result of medical negligence.

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PATIENT COMPENSATION FUND SETOFFS

Indiana Patient Compensation Fund v. Robin Everhart
Indiana Supreme Court, January 20, 2012

Everhart's husband died in the hospital after suffering injuries in a motorcycle accident with a semi-truck. Everhart filed suit against the truck driver and his employer, and eventually settled for $1.9 million. Subsequently, she amended the complaint to name the treating emergency department physician at the time of her husband's death. Everhart settled with the physician for the maximum amount allowable under the Indiana Medical Malpractice Act, which then allowed her to seek additional compensation from the Indiana Patient Compensation Fund ("PCF").

The claim against the PCF went to trial. The trial court found Everhart's husband did not suffer a cardiac arrest until after arriving at the hospital, and accepted the opinion of Everhart's expert that her husband would have had an 80% chance of survival with proper medical care. The PCF asked the trial court to reduce any award of damages by 20% to account for the chance Everhart's husband still would have died.

In addition, the PCF argued it was entitled to a set-off equal to the payments Everhart received in her settlements. However, after finding Everhart's losses exceeded $3.15 million, the trial court refused to reduce its award of damages, and awarded Everhart the maximum $1 million from the PCF allowed under the statute. On appeal, the Court of Appeals reversed the trial court's ruling. The Indiana Supreme Court accepted transfer, and affirmed the trial court's award of $1 million.

The calculation of damages in an increased-risk case is the total amount of damages ordinarily allowed in a wrongful death case multiplied by the difference between the pre-negligence and post-negligence chances of survival. However, the Supreme Court decided against addressing whether the issue of increased risk of harm entitled Everhart to damages in proportion to that increased risk because there were other grounds for affirming the trial court's decision.

Specifically, the Supreme Court noted the trial court found the total awards did not equal the total amount of Everhart's injuries. It also noted medical malpractice claims still fall under the umbrella of contributory negligence, and therefore joint and several liability still applies. In this situation, the one-satisfaction doctrine provides that when a jury returns a verdict against a jointly and severally liable defendant after another jointly and severally liable defendant has settled, the court should reduce the amount of damages awarded by the jury by the amount already recovered in settlement. As a result, Everhart's damages of at least $3.15 million should have been reduced by the $1.9 million she received in settlement from the truck driver, and the $250,000 Everhart received from the physician. Disregarding the PCF's arguments that Everhart's damages should be reduced by the 20%, the Supreme Court stated Everhart was left with $1 million in uncompensated damages, which is exactly the maximum amount Everhart was allowed to recover from the PCF.

Keypoint: The one-satisfaction rule allows a plaintiff to receive a full recovery but prevents the plaintiff from receiving more than a full recovery. However, it will not be used to reduce the amount recovered by the plaintiff to less than a full recovery.

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TORT PREJUDGMENT INTEREST

Margaret Kosarko v. William Padula
Indiana Court of Appeals, December 30, 2011

Kosarko sued Herndobler in February 2007 for injuries sustained in an auto accident. Herndobler died while the case was pending and was replaced by Padula as the administrator of his estate. Kosarko presented Padula with a settlement offer in March 2008 in the amount of $100,000, which was denied by Padula. A March 2010 trial returned a jury verdict for $210,000. A motion for prejudgment interest filed by Kosarko was denied by the trial court on the basis that damages were not ascertainable in the relevant time frame between the settlement offer and the verdict.

The Court of Appeals reversed the trial court decision, finding an abuse of discretion. The Court relied on the standard that prejudgment interest is allowable when the damages are capable of being determined by a known standard, such as fair market value. It ruled that even though the plaintiff presented additional medical bills after the initial settlement offer was made, none of those bills were disputed and no indication of fraud or unnecessary treatment was present. In short, Padula had sufficient time to consider the medical expenses before the case went to trial.

In a dissenting opinion, Judge May wrote to uphold the decision of the trial court. She discussed the common law standard that damages must be complete and ascertainable in order for prejudgment interest to be available. The relevant question in this case is whether Padula could have made that determination when the settlement offer was made. Given that an additional $40,000 of medical expenses were claimed by Kosarko a year after the initial settlement offer, the damages were not complete, and the trial court did not abuse its discretion in ruling for Padula.

Keypoint: This case changes the considerations of defendants when make settlement decisions and the impact of prejudgment interest. The case is pending transfer to the Indiana Supreme Court and guidance from that body would be helpful in addressing the Court of Appeals' rejection of an established common law standard.

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WORLD'S WORST PROSPECTIVE JUROR

According to news reports, Susan Cole, 57, of Denver, arrived for jury selection in June looking purposefully disheveled, wearing curlers in her hair and mismatched shoes. She told the judge she "broke out of domestic violence in the military" and had "a lot of repercussions," including PTSD. The judge released her from jury duty.

Ms. Cole's plan unraveled four months later when she bragged on a local radio talk show about how she faked mental illness to get out of jury duty. It was Ms. Cole's misfortune that the very same judge was listening to the show.

The Denver district attorney has charged Ms. Cole with perjury and attempting to influence a public servant.

Hopefully, Ms. Cole's case will go to a jury trial.

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