The Tyra Law Firm, P.C.

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Quarterly Newsletter

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DTCI Annual Conference

At Work . . .

The Annual Conference of the Defense Trial Counsel of Indiana on the Indiana University campus on November 19-20 included a two-hour continuing mediator education presentation moderated by Kevin Tyra with panelists Denise Page and Ross Rudolph (top photo). The program included ten video vignettes illustrating mediation ethics issues. Performers in the videos included our own Jerry Padgett and Elizabeth Steele. (continued on back page)

Bottom photo: Denise, Ross, and Kevin with conference chair Renee Mortimer.

BYSTANDER RULE

Ray Clifton v. Ruby McCammack

Indiana Supreme Court, September 21, 2015

Ray Clifton lived with his son Darryl, and Darryl helped take care of his father. One morning, Darryl left the house on his moped. Approximately 15 minutes later, another vehicle struck and killed Darryl. Ray was at home watching television when he saw a news report about a fatal accident involving a moped. Knowing that the accident happened in an area where Darryl always drove, Ray had a bad feeling that Darryl was involved in the accident. The news story did not provide any photos or video of the accident, or any details about the victim.

Ray drove to the scene, and saw Darryl's moped on the ground with a body covered with a white sheet next to it. Ray never approached the body, but recognized Darryl's shoes sticking out from under the sheet. Ray left the immediate scene, and spoke with a police officer who confirmed Darryl was the victim. Ray did not see the removal of Darryl's body, and the scene had been cleaned by the time he returned.

Ray sued McCammack for negligent inflection of emotional distress ("NIED"). McCammack admitted to negligently causing Darryl's death, but moved for summary judgment on the grounds that Ray did not meet the requirements to recover on a NIED claim. The trial court granted McCammack's motion, and found Ray failed to meet the temporal and circumstantial requirements for an NIED claim. The Court of Appeals reversed the trial court, entered summary judgment for Ray, and remanded for a trial on the question of damages. The Indiana Supreme Court granted transfer.

The Supreme Court affirmed summary judgment for McCammack. The Court reviewed the requirements for the bystander rule, which serves as the basis for a NIED claim. Specifically, the bystander rule requires a temporal requirement (that is, the claimant has to arrive at the scene of the incident in question immediately after it happens) and a circumstantial requirement (that is, the scene must be viewed as it was at the time of the incident, and the claimant cannot have been informed of the incident before viewing the scene).

As the bystander rule applied in this case, the Supreme Court noted that Ray did not review the scene essentially as it was at the time of the accident. Ray learned of the accident before arriving at the scene. The Court pointed out that the trigger for emotional distress must be the near-contemporaneous experience of the incident itself, and not through prior knowledge before arriving at the scene. For these reasons, Ray failed to meet the requirements to recover damages for a NIED claim.

KeyPoint: While there are multiple ways in which someone may be traumatized upon learning a loved one has been involved in an accident, many of these do not necessarily create a claim for emotional distress. Limits on what constitute a valid NIED claim are necessary in order to preclude limitless litigation, and courts will not permit recovery if those requirements are not met.

Jerry M. Padgett

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"DEPENDENT" UNDER THE WRONGFUL DEATH STATUTE

Robbie Lomax v. Jennie L. Michael

Indiana Court of Appeals, October 26, 2015

Edward Lomax was not married and did not have any children. He had lived with his nephew, Robbie, on and off since Robbie was a child. In 2005 or 2006, Edward moved in with Robbie and his wife on a permanent basis. In December 2010, Edward was riding his bicycle when he was struck from behind and killed by a vehicle driven by Jennie Michael. Robbie Lomax, Edward's nephew, filed suit as an individual and as the personal representative of Edward's estate.

The trial court granted partial summary judgment on the grounds that Robbie did not qualify as the next of kin to Edward under the Indiana General Wrongful Death Statute. Robbie appealed, arguing that there was a question of fact whether he was a dependent next of kin, and the Court of Appeals reversed.

The Court observed that "proof of dependency must show a need or necessity of support on the person alleged to be dependent…coupled with the contribution of such support by the deceased." The Court explained that this standard does not require that the next of kin be totally dependent, and there does not need to be a legal obligation for the decedent to support the next of kin. What is necessary to find is "partial and mutual dependency" between the decedent and the next of kin in order to find that that relationship exists.

In this case, Edward contributed a significant portion of his monthly government benefits to the household expenses. He also helped with other expenses at times, and would help with the household chores. While Edward was living with Robbie, Robbie and his wife were struggling financially, so the Court concluded that a reasonable trier of fact could conclude either that Robbie was dependent on Edward or that he was not a dependent next of kin.

KeyPoint: A claimant may be considered a "dependent next of kin" under the General Wrongful Death Statute even if not totally dependent on the decedent.

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EVIDENCE CREATED FOR LITIGATION

Eric Brazier d/b/a Brazier Painting v. Maple Lane Apts. I, LLC

Indiana Court of Appeals, October 22, 2015

Maple Lane Apartments hired Eric Brazier to do interior painting work on an as-needed basis. Property manager Sue Papaj would contact Brazier to let him know about vacant apartments to be painted. Brazier occasionally performed additional work around the complex such as cleaning gutters, painting common areas, and exterior painting. Brazier would typically handwrite his invoices and submit them to Papaj, who reviewed them and initialed if she approved them for payment. The invoices were then sent to Maple Lane's corporate office in Chicago for payment.

In 2010, Maple Lane stopped using Brazier. Brazier was told to finish up the last of his work and submit all final invoices. A few months later, Brazier brought Papaj approximately 100 invoices for exterior work he claimed to have done on every building in the complex. Papaj, however, claimed that Brazier was never asked to do the work and in fact did not do the work.

Brazier filed suit against Maple Lane, seeking payment of the outstanding invoices—a total of $63,995. Attached to the Complaint was a summary of the invoices, as well as 114 allegedly unpaid invoices.

Throughout the litigation, Brazier and his attorney referred to the invoices attached to the Complaint as "copies" of the invoices that he submitted to Maple Lane and Papaj. At trial, however, it was discovered that the "copies" were actually created by Brazier and his counsel for the purpose of litigation. The trial court excluded them from evidence. The trial court entered judgment for Maple Lane and determined that sanctions against Brazier and/or his counsel were appropriate for misleading the court.

The Indiana Court of Appeals affirmed. The Court upheld the trial court's judgment in favor of Maple Lane. Since the case was essentially a "he said-she said" case, the Court deferred to the trial court's judgment as to who was telling the truth.

Because it became clear during the trial that the invoices were created after the fact and in anticipation of litigation, the Court held that it was not error to exclude them from evidence.

Finally, the Court upheld the entry of sanctions against Brazier and/or his counsel. Under Rule 11(A), every pleading or motion must be signed by an attorney, constituting "a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay." Because Brazier and his attorney represented that the "copies" of the invoices were authentic, the Court held that the evidence showed that Brazier's counsel knowingly misrepresented and/or failed to correct any misrepresentation regarding those invoices from the day litigation began. As a result, it was not an abuse of discretion for Brazier's counsel to have to pay a small percentage of

her attorney's fees generated from this case.

KeyPoint: Evidence created for the purposes of litigation must be represented as such.

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GUEST STATUTE

Sheila Sasso, et al. v. State Farm Mut. Auto. Ins. Co.

Indiana Court of Appeals, September 11, 2015

Sheila Sasso, an Illinois resident, called her mother, Mary, a resident of Crawfordsville, Indiana, and asked if she would like to go to the Parke County, Indiana, covered bridge festival. The next day, Mary drove Sheila in Mary's car to the festival. Sheila paid $50 for gas and bought Mary lunch. Mary was involved in an accident and Sheila was injured. Sheila filed a negligence claim against Mary.

State Farm filed a declaratory judgment action. The trial court granted summary judgment to State Farm, holding that Sheila was precluded from recovery by Indiana's Guest Statute, which generally bars a negligence claim against a family member providing gratuitous transportation. Sheila appealed, arguing that she was not a guest because she paid for the transportation, and that the Guest Statute is unconstitutional.

On appeal, the Court held that Indiana case law was clear that the Guest Statute applied. The payment exception in the statute had always been interpreted to mean that a passenger had to compensate the driver "in a substantial and material or business sense[,] as distinguished from [a] mere social benefit or nominal or incidental contribution to expenses[] of the trip." Simply paying for some gas is not enough to constitute a payment under the Guest Statute, so the Court held that the statute applied to Sheila, barring her claim.

Sheila also raised multiple issues challenging the constitutionality of the Guest Statute. Sheila first argued that it violated the Fourteenth Amendment, but the Court noted that this argument had already been disposed of by the Supreme Court of the United States. Sheila also argued that the Guest Statute violated the open courts provision of the Indiana Constitution, which the Indiana Supreme Court and Seventh Circuit had explicitly held not to be the case.

Her next argument was that the Guest Statute violated her right to equal privileges and immunities under the Indiana Constitution. The Court held that the Guest Statue meets the requisite standard – since no suspect classification is involved, the classification just must not be arbitrary or unreasonable. The Guest Statute treats close family members of the motor vehicle operator differently from other guests in the vehicle. One of the policies behind that distinction is to prevent potentially collusive lawsuits, which the Court held made this distinction reasonable. Finding no issues with the Guest Statute, constitutional or otherwise, the Court upheld the trial court's grant of summary judgment.

KeyPoint: (1) Giving a driver gas money is not sufficient to constitute a "payment" under the Guest Statute; and (2) the Guest Statute is not unconstitutional.

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LEGAL MALPRACTICE COVERAGE: KNOWN CLAIM

The Bar Plan Mut. Ins. Co. v. Likes Law Office, et al.

Indiana Court of Appeals, October 15, 2015

Whitaker retained the Likes Law Office ("LLO") to represent him in a lawsuit he filed against Becker. The parties conducted written discovery, and Becker filed a motion to compel after Whitaker's discovery responses were several months overdue and LLO never responded to any inquiries about their status. The trial court granted the motion, and LLO eventually provided the responses. Becker then filed a request for sanctions and asked for a dismissal of the lawsuit due to false and misleading answers in Whitaker's interrogatory responses. The trial court granted the motion, and found LLO had provided deceptive interrogatory responses in bad faith. Whitaker appealed the ruling, and the Court of Appeals reversed the trial court. On transfer, the Indiana Supreme Court reversed the Court of Appeals' decision, and affirmed the trial court's dismissal of the lawsuit.

LLO's legal malpractice insurance was through

The Bar Plan. Whitaker filed a lawsuit against LLO for legal malpractice based on the dismissal of his lawsuit. Bar Plan denied coverage to LLO. LLO then filed its Answer to the legal malpractice lawsuit, and added Bar Plan as a third-party defendant. Bar Plan moved for summary judgment, and LLO filed a cross-motion for summary judgment. The trial court granted LLO's motion and denied Bar Plan's motion.

The Court of Appeals reversed the trial court's decision. Bar Plan argued there was no coverage because at the time LLO signed a renewal application for its legal malpractice policy it had knowledge or should reasonably have known the trial court's dismissal of Whitaker's lawsuit could give rise to a legal malpractice claim. The Court of Appeals noted that LLO's policy required it to notify Bar Plan if it became aware of a specific act or omission while providing legal services that may give rise to a claim. As such, Bar Plan argued LLO did not properly notify it of the potential for a legal malpractice lawsuit. LLO responded by stating that at the time it applied for the policy renewal, the Court of Appeals had reversed the dismissal of Whitaker's lawsuit and consequently there was no known potential claim.

The Court concluded that it was reasonable to expect a legal malpractice claim based on the dismissal of Whitaker's lawsuit. The Court of Appeals further pointed out that LLO was put on notice by Becker's petition for transfer to the Supreme Court of the possibility of a legal malpractice claim if the Supreme Court ruled against Whitaker. Therefore, when LLO signed his renewal application while the Supreme Court decision was pending, LLO should have disclosed the potential legal malpractice claim to Bar Plan. As a result, the Court found that LLO's failure to provide timely notice precluded coverage under Bar Plan's policy.

KeyPoint: It is imperative to disclose any potential bases, including pending appellate decisions, for a legal malpractice claim when applying for and/or renewing legal malpractice insurance coverage. More broadly, this decision is an example of the tendency of Indiana courts to enforce the known risk doctrine.

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LIABILITY COVERAGE DEFENSES

Founders Ins. Co. v. Mark May, et al.

Indiana Court of Appeals, September 18, 2015

Founders Insurance Co. issued an auto policy to Mark May. Pamela Coomer was in a relationship with May. She sometimes drove his truck, typically as his "designated driver," even though she did not have a valid driver's license. Coomer took May's truck on one occasion without his permission and caused a fatal accident with a bicyclist, who was not covered by any uninsured or underinsured coverage. The decedent's estate filed suit against Coomer and May.

Founders filed a declaratory judgment action asserting it did not have liability coverage for the accident because Coomer was a non-permissive user under policy language that "We do not provide Liability Coverage for an 'insured' . . . using a vehicle without a reasonable belief that the 'insured' is entitled to do so," as well as an endorsement excluding coverage for a non-licensed driver. The trial court granted Founders summary judgment as to May and Coomer, but not as to the decedent's estate.

The Indiana Court of Appeals described the issue in this case of first impression as "Does an insurer which has no duty to provide coverage benefits to its insured pursuant to the plain terms of the insurance contract nonetheless have to pay damages to an injured third party who has no independent source of insurance?" The Court's answer was no, and held that Founders was entitled to summary judgment as to all parties.

The estate had argued that allowing Founders to deny liability coverage would defeat the purpose of the Indiana financial responsibility law. The Court rejected this argument, observing that "our financial responsibility statute is not a compulsory insurance statute and does not represent a policy of providing compensation to all victims of motor vehicle accidents."

In the absence of a statutory mandate, an auto carrier and its insured are free to contract, including

exclusions or limitations on the scope of coverage provided. This includes the clear and unambiguous exclusions in the Founders policy. Although in this case the result is harsh because the bicyclist did not have uninsured motorist coverage, "it is neither logical nor consistent with the law of contracts that the enforceability of a contract of insurance depends on the status of the person with whom the insured is involved in a collision."

KeyPoint: Policy limitations and exclusions are enforceable against third parties who would otherwise benefit from the policy.

The case is pending transfer to the Indiana Supreme Court.

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MEDICAID REDUCTIONS NOT ADMISSIBLE

Mary Patchett v. Ashley Lee

Indiana Court of Appeals, November 19, 2015

One of the most important Indiana legal developments in recent years for insurance carriers and the defense bar was *Stanley v. Walker,* 906 N.E.2d 852 (Ind. 2009), which essentially held that reductions and write-offs in the plaintiff's medical bills, negotiated between the health insurance carrier and the medical provider, are admissible at trial to show the "reasonable value" of the medical care.

In this case, Lee sued Patchett for injuries sustained in an auto accident. Lee had health coverage under the Healthy Indiana Plan (HIP), which is a Medicaid program. Lee's medical providers incurred expenses totaling $87,706.36. HIP paid the providers a total of $12,051.48 in full satisfaction of her bills.

The trial court granted Lee's motion *in limine* prohibiting introduction into evidence of the lower figure as a violation of the Collateral Source Rule. That Rule, found at Ind. Code Section 34-44-1-2, prohibits among other things admission into evidence of "collateral source payments made by any agency, instrumentality, or subdivision of the state or the United States that have been made before trial to a Plaintiff as compensation for the loss or injury for which the action is brought . . ."

In addition, the trial court found that there was no evidence presented that the HIP reductions were based on the "reasonable value" of the medical services provided rather than "political and budget concerns." The trial court also observed that, unlike rates negotiated between a health insurance carrier and a medical provider, Medicaid and Medicare rates are imposed by governmental fiat, leaving the provider only the options of participating or not participating. This also demonstrated that the Medicaid/Medicare rates were not evidence of "reasonable value."

The Indiana Court of Appeals affirmed, agreeing with the trial court's analysis, with an emphasis on distinguishing negotiated discount rates by health insurance carriers from imposed rates by governmental agencies.

KeyPoint: While it is true that Medicaid/Medicare rates are lower than the negotiated rates of the major health carriers, is there really that much difference between Medicaid/Medicare rates being "imposed" on a provider, and the rates a major health carrier can effectively "impose" on the provider by sheer market power? And the other flaw in this decision is that it ignores the other half of the equation: What is the justice in allowing a plaintiff to leave a jury with the impression his medical expenses were $87,000 when they were really $12,000?

At press time, the deadline to petition for transfer to the Indiana Supreme Court had not yet expired, but we may assume sooner or later this case will be heard by the Supreme Court.

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PRE-SUIT DEPOSITIONS

Cleveland Range, LLC. v. Lincoln Ft. Wayne Assoc., LLC

Indiana Court of Appeals, September 4, 2015

Indiana Trial Rule 27 provides for circumstances under which a party may petition a court to order a deposition prior to the filing of a complaint. Sometimes we receive inquiries from clients about when a deposition may be ordered before suit for any number of reasons, including for example a deposition of a third party in an SIU file, or to get more information from a claimant or a third party in a pre-suit liability investigation.

In this case, Lincoln Ft. Wayne Associates obtained a pre-suit order to take the depositions of three of Cleveland Range's witnesses in a dispute over a cost-sharing agreement relating to environmental contamination. The witnesses' ages ranged from sixty-seven to seventy-eight years old. The dispute, once suit was filed, was expected to take years to reach resolution. However, Lincoln Ft. Wayne Associates did not yet want to file suit because it might adversely affect the parties' working relationship and interfere with the voluntary participation of the Indiana Department of Environmental Management in the investigation and remediation. It therefore sought to preserve the witnesses' testimony in the meanwhile.

The Indiana Court of Appeals affirmed, holding that under these facts, Trial Rule 27 allows perpetuation of testimony that may otherwise be lost, considering the ages of the witnesses, and legitimate reasons suit could not or should not yet be filed. On the other hand, a party is not allowed to use Trial Rule 27 to conduct a "fishing expedition" to discover grounds for a lawsuit. "Rule 27 is not a substitute for discovery; it is available in special circumstances to preserve testimony that could otherwise be lost. The rule is to be used when a witness' testimony might become unavailable over time, and not to provide a method of discovery to determine whether a cause of action exists."

KeyPoint: As a practical matter, despite the strict limitations on allowing a pre-suit deposition identified in this case, one could still find a friendly trial judge who may order the deposition outside those limitations, and probably the worst the judge might do is simply deny the petition. On the other hand, there could still be the possibility that the third party, or the claimant, would seek sanctions or attorney fees arguing that the proponent knowingly sought an order it knew was not properly allowed by the trial rule. Except for perpetuation of testimony that may otherwise be lost, it is probably best to forego any attempts to use this rule.

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UNTIMELY COUNTERCLAIMS

Denna Delacruz and Barry Barger v. Paul Wittig

Indiana Court of Appeals, August 27, 2015

Reserve sheriff deputies Delacruz and Barger were assaulted and injured while investigating a disturbance at a party. Their alleged assailant, Wittig, was arrested. Delacruz and Barger subsequently filed a lawsuit against Wittig. Over two years after the incident occurred, Wittig filed a counterclaim alleging Delacruz and Barger had used excessive force during the arrest.

Delacruz and Barger moved to dismiss the counterclaim as untimely, but the trial court denied the motion. On interlocutory appeal, the Court of Appeals reversed and found the counterclaim was barred by the two year statute of limitations for personal injury claims.

The Court of Appeals noted that the statute of limitations begins to run from the date of the injury, which meant that Wittig's counterclaim was untimely filed. However, the Court further noted that Indiana Trial Rule 13(J) provides a rescue mechanism for otherwise time-barred counterclaims if they diminish or defeat the opposing party's claim, which is a counterclaim in recoupment.

The Court of Appeals disagreed with Wittig that his counterclaim diminished or defeated Delacruz's and Barger's personal injury claims. As such, Wittig's counterclaim was subject to dismissal for being untimely filed.

KeyPoint: Counterclaims that stem from the same set of facts as an underlying personal injury claim must be filed within two years of the incident. However, the trial rule that allows for the rescue of an otherwise untimely-filed counterclaim in recoupment only applies if the situation involves claims by both parties to the same amount of damages.

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DTCI Annual Conference

. . . And At Play

Amy Tyra and Elizabeth Steele on the pub crawl on Kirkwood Avenue off the IU campus on the first night of the conference, with Elizabeth's fiancé, Mike Schmitt.

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