The Tyra Law Firm, P.C.

Quarterly Newsletter

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Welcome to New Associate Matthew Kavanagh

We are very pleased to welcome Matthew Kavanagh to the firm. Matthew comes to us from clerking with the Civil Litigation Division of the Indiana Attorney General's Office.

Matthew graduated from the Indiana University McKinney School of Law in December, 2016, and passed the Indiana Bar earlier this year.

Matthew, and his wife, Jonna, live in Carmel, Indiana with their twenty month old son, Finnlin, and their dog, Max. Matthew and his family enjoy spending time in downtown Indianapolis, and taking their son to various parks in Hamilton County.

NEW STATE MINIMUM AUTO LIMITS

House Enrolled Act 1033, which takes effect on July 1, 2017, raises the state minimum auto liability limits from 25/50/10 to 25/50/25 as of July 1, 2018 and requires that auto policies issues after June 30, 2017 provide at least $25,000 of property liability coverage. The requirement for proof of financial responsibility by a person involved in an accident who did not have valid insurance goes up from $40,000 to $50,000 on July 1, 2018.

GENERAL CONTRACTOR LIABILITY

Michael Ryan v.
TCI Architects/Engineers/Contractors, Inc.
Indiana Supreme Court, April 26, 2017

TCI entered into an agreement to serve as general contractor on renovations at a Gander Mountain store in Lafayette. The design-build form contract between TCI and Gander Mountain generally outlined the extent of TCI's obligations regarding safety on the site.

TCI's subcontractors included Craft Mechanical, which sub-subcontracted with Romines Sheet Metal. The TCI-Craft subcontract placed the burden of worker safety on Craft. The Craft-Romines sub-subcontract called for Craft to assume toward Romines the same responsibilities that TCI assumed toward Craft, and charged Romines with the responsibility of implementing safety precautions and complying with applicable laws.

Ryan, while working on the project as an employee of Romines, fell from the top of an 8-foot ladder. Ryan asserted that the ladder was the only one available, and it was too short to allow him to safely perform his overhead work. Ryan sued TCI and Craft. The trial court granted TCI's motion for summary judgment. The Indiana Court of Appeals affirmed summary judgment for TCI.

The Supreme Court reversed, in favor of Ryan. The Court started with the long-standing principles that a general contractor ordinarily owes no duty of care to a subcontractor's employee, because a general contractor has little or no control over the means and manner a subcontractor employs to complete the work, but the general contractor may assume the duty through contract.

The Supreme Court then held that in this case, TCI assumed a non-delegable duty of care for all workers on the site through the terms of the standard design-build contract between TCI and Gander Mountain, which provided among other things, under the heading "Design-Builder's Responsibility For Project Safety," that TCI "recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to . . . all individuals at the Site, whether working or visiting . . ." Furthermore, TCI was to "designate a Safety Representative with the necessary qualifications and programs related to the Work," and the Safety Representative was to make routine daily inspections of the Site and hold weekly safety meetings with subcontractors and others.

The Gander Mountain contract further provided that TCI explicitly agreed that it "shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction." Taken together, these provisions convinced the Court that TCI undertook a duty of care toward subcontractor employees such as Ryan, regardless of any attempts to shift that responsibility in other contracts and subcontracts.

KeyPoint: With the injured worker's employer usually immune from tort liability under worker's comp exclusivity, the focus shifts to the liability of others, such as the premises owner and the general or prime contractor. General contractors should be very careful about undertaking safety-related duties, as Indiana courts are receptive to arguments to provide another deep pocket for an injured worker, especially considering Indiana has some of the lowest worker's compensation benefits in the country.

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PREMISES LIABILITY

Elizabeth Roumbos v. Samuel G. Vazanellis, et al.
Indiana Court of Appeals, February 24, 2017

Roumbus was at St. Anthony's Hospital visiting her husband when she tripped over some wires in his room that were running flush along the floor and under a table. Roumbus hired a law firm to represent her in a negligence claim against the hospital, but the law firm failed to file her complaint within the relevant statute of limitations. Roumbos filed a complaint for legal malpractice against the law firm. At issue in the legal-malpractice claim was the viability of her underlying negligence claim against the hospital.

Roumbos testified that, prior to her fall, she saw the wires and consciously tried to avoid them so she would not fall. The law firm moved for summary judgment, arguing that had it filed the complaint against the hospital in a timely manner, Roumbus "would have been no better off than its alleged negligence had placed her." The law firm argued that the hospital did not breach its duty of care to Roumbus, and, thus, it did not matter that it did not timely file the complaint because, had the law firm done so, the hospital would have been entitled to summary judgment against her given the fact that she had knowledge of the alleged dangerous condition prior to falling.

The standard in Indiana applicable to a landowner's liability to a business invitee provides that a landowner is liable to harm to invitees if the landowner: (1) knew or by the exercise of reasonable care would have discovered the dangerous condition, and should have realized that it involved an unreasonable risk of harm to invitees; (2) should have expected that an invitee would not discover or realize the danger, or would fail to protect herself from the danger; and (3) failed to exercise reasonable care to protect the invitee against the danger. *Section 343 of the Restatement (Second) of Torts.*

However, Section 343(A)(1) also provides that "[a] possessor of land is not liable to his invitees for physical harm caused to them by an activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness," and continues by qualifying the circumstances under which landowners are not liable for known or obvious risks by stating that, despite the invitee's knowledge or the obviousness of the risk, liability may attach if "the possessor should anticipate the harm despite such knowledge or obviousness."

The court concluded that the law firm was required to designate evidence that showed that the hospital could not have reasonably anticipated that, despite actual prior knowledge of the dangerous condition of wires, an invitee might forget about the condition and later be injured by it. The law firm failed to designate any such evidence. Accordingly, the court held that it was not entitled to judgment as a matter of law and reversed the trial court's entry of summary judgment.

KeyPoint: Even though a business invitee had knowledge of a dangerous condition, a landowner/possessor may, nonetheless, be liable if it anticipated that the dangerous condition would cause harm to an invitee notwithstanding its known or obvious danger and failed to protect the invitee against it.

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PRIOR DUI CONVICTION

Danny Sims v. Andrew Pappas, et ux.
Indiana Supreme Court, May 11, 2017

Sims seriously injured Andrew Pappas in an auto accident while Sims was driving drunk. Pappas and his wife asserted theories of negligence, gross negligence, recklessness, and willful and wanton misconduct. Sims admitted that he was intoxicated at the time of the collision. Additionally, although objecting on grounds of relevance, he admitted to two prior alcohol related offenses.

Sims' attorney sought to exclude evidence that Sims was involved in prior automobile collisions, and Sims' driving record. At trial, Sims admitted fault for the collision and that he was intoxicated

at the time. Pappas moved to introduce evidence of Sims' driving record. Sims objected arguing that it was "more prejudicial than probative." The trial court overruled Sims' objection on the grounds that he had admitted the violation in his responses to plaintiffs' requests for admissions. The jury awarded Pappas $1,444,000.00 in compensatory damages and $373,500.00 to his wife for her loss of consortium claim. Additionally, the jury awarded $182,500.00 in punitive damages for a total award of two million dollars.

After judgment, Sims argued: (1) the evidence regarding his prior convictions was improperly admitted; (2) the award for punitive damages was excessive and constituted a violation of the Due Process Clause of the Fourteenth Amendment; and (3) the verdict was unsupported by the evidence and was excessive. The trial court denied Sims' motion. The Court of Appeals agreed with Sims and reversed and remanded for re-trial.

The Supreme Court initially addressed the issue of whether the evidence of Sims' prior convictions was wrongfully admitted. The Court held that, because the evidence of Sims' prior convictions had at least some tendency in demonstrating whether his conduct at the time of the collision was "a conscious and voluntary act committed in reckless disregard of the consequences of others," it was, in fact, relevant on the issue of punitive damages only. However, Rule 403 provides, in part, that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Additionally, Rule 404(b), generally applied in in the context of criminal law, states that "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

The Court determined, however, that the "policy rationales" that exclude such evidence in a criminal case do not apply to punitive damages claims in a civil case because the purpose of punitive damages is to punish the wrongdoer and deter him from future misconduct. Further, the Court found that the remoteness in time to the collision of the prior offenses did not affect the admissibility of the evidence; the remoteness of a prior offense is a matter of the weight to be determined by the jury, not a matter of admissibility. The Court therefore held that the trial court did not abuse its discretion in admitting the evidence of Sims' prior convictions.

KeyPoint: A defendant's prior OWI conviction(s) is likely to be found relevant and admissible in a motor vehicle collision case for the limited purpose of proving punitive damages. Therefore, bifurcation of claims or damages issues should be considered.

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ROAD RAGE COVERAGE

The Estate of Robert Curtis, Sr. v. GEICO
Indiana Court of Appeals, March 10, 2017

Curtis' vehicle bumped into Matovich's parked vehicle but Curtis did not stop. Matovich pursued Curtis's vehicle. Matovich and Curtis exited their vehicles and Curtis approached Matovich aggressively. Curtis chest bumped Matovich, who retreated to the rear of his truck, with Curtis following. Matovich then put his hand out and Curtis made contact with Matovich, walking into his outstretched hand; Curtis's eyes rolled up, his arms went limp, and he collapsed. Curtis eventually died.

Curtis's Estate filed a wrongful death suit against Matovich. GEICO, Matovich's automobile insurance company, reserved the right to later deny coverage. The parties settled for judgment against Matovich in the amount of $357,868.45, and Matovich was to assign any and all claims he may have against GEICO as a result of the matters contained within this litigation. The trial court entered judgment in favor of Curtis. GEICO filed a declaratory judgment action alleging that the incident was not covered by the policy.

The trial court granted GEICO's motion for summary judgment. The trial court found that coverage did not exist because the injuries did not arise

out of Matovich's ownership, maintenance or use of the insured motor vehicle within the meaning of the coverage clause of the policy. Furthermore, Matovich's physical contact was not causally connected to the use of his motor vehicle.

The Court of Appeals affirmed. The phrase "ownership, maintenance, and use" of a vehicle, in the context of an insurance policy, means "being caused by use of" the vehicle. Therefore, an accident arises out of the ownership, maintenance, and use of a vehicle only if such ownership, use, or maintenance is the incident's "efficient and predominate cause." If a vehicle's use is only tangentially related to an incident, coverage does not exist under such a clause. The court concluded that the reasonable expectations between GEICO and Matovich at the time they entered into the policy would not have included coverage for a physical altercation that merely happened to occur near the covered vehicle.

KeyPoint: An event that starts with road rage does not necessarily trigger auto liability coverage after the participants exit their vehicles.

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SIR EXHAUSTION

Walsh Const. Co. v. Zurich American
Indiana Court of Appeals, March 28, 2017

Walsh, a general contractor, hired Roadsafe Traffic Systems, Inc., to be Walsh's subcontractor in the construction of a traffic exchange. Roadsafe's work obligations included providing a safe traffic pattern through the work zone. Walsh's contract with Roadsafe required Roadsafe to indemnify Walsh for any liability resulting from Roadsafe's failure or negligence in its work and to procure a commercial generally liability insurance policy ("CGL policy") that named Walsh as an additional insured on a primary and non-contributory basis.

Roadwork's CGL policy with Zurich included an endorsement that added as additional insureds any person and organization where required by contract, such as Walsh. Roadsafe's policy included a $500,000-per-occurrence self-insured retention endorsement ("SIR"). The SIR made Roadsafe responsible for payment of all damages and defense costs for each occurrence until it had paid damages equal to the $500,000 Per Occurrence amount.

Maczuga was injured while driving through the work zone's traffic pattern. Maczuga filed a complaint against Walsh claiming that Walsh had negligently created an unsafe traffic pattern. Walsh filed a third-party complaint against Roadsafe seeking indemnification, and filed a complaint for declaratory judgment against Zurich, alleging that Zurich had a duty to defend and indemnify Walsh.

The trial court granted summary judgment for Zurich, stating that no person or entity had sued or even made a claim against Roadsafe and the SIR required the insured to pay the first $500,000 of costs and damages of any claim before Zurich became obligated to pay out on the policy. Walsh appealed the ruling.

The Court of Appeals affirmed the trial court. Self-insured retention is defined within the SIR endorsement as "the amount or amounts which [Roadsafe] or any insured must pay for all compensatory damages and pro rata defense costs which [Roadsafe] or any insured shall become legally obligated to pay because of damages arising from any coverage included in the policy." In light of the plain language of the CGL policy and SIR endorsement, Zurich had no obligation to Walsh under the CGL policy until Roadsafe exhausted the $500,000 SIR.

KeyPoint: A CGL policy does not cover additional insured persons or entities until the named insured has satisfied the amount of the SIR endorsement.

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UNDOCUMENTED STATUS

Noe Escamilla v. Shiel Sexton Co.
Indiana Supreme Court, May 4, 2017

Escamilla, an undocumented immigrant from Mexico, slipped on ice on the job, causing a permanent disability. He sued the general contractor, Shiel Sexton (any claim against his own employer would be barred by the doctrine of worker's comp exclusivity). Escamilla's economist and vocational rehabilitation experts projected a lifetime earning capacity based on his earnings for six years in the United States leading up to his accident. Shiel Sexton challenged the assumption that Escamilla, as an undocumented immigrant, would remain in the United States rather than potentially being deported at any time, in which case the standard for lost income potential would be the much lower amount he would likely have earned in Mexico.

The trial court allowed Shiel Sexton to present evidence of Escamilla's undocumented status, and excluded the opinions of the economist and vocational rehabilitation experts because they did not take into account Escamilla's status. The Court of Appeals affirmed.

The Supreme Court reversed, in favor of Escamilla. The Court started by emphasizing that undocumented immigrants have the same access to Indiana courts to pursue decreased-earning-capacity claims as anyone else.

The Supreme Court then held that generally, an immigrant's status is not relevant to his personal-injury claim; and even if it were relevant, the danger of unfair prejudice to the claimant would outweigh the relevance of the status.

The Court observed that proving the likelihood the plaintiff will be deported is made difficult by shifts in national immigration policy, and opportunities the plaintiff may have to adjust his immigration status.

The Court therefore concluded that while immigration status may be relevant, a plaintiff's unauthorized immigration status is inadmissible unless the proponent shows by a preponderance of the evidence that the plaintiff will be deported, due to the risk that admitting evidence of the plaintiff's status would carry a high risk of confusing the issues and there is some risk of unfair prejudice.

The Court also reversed on the exclusion of the opinions by Escamilla's experts, concluding that rather than excluding their testimony, Shield Sexton's proper remedy was to vigorously cross-examine them on the assumptions on which they developed their opinions.

KeyPoint: Generally, a plaintiff's unauthorized immigration status is inadmissible unless the proponent shows by a preponderance of the evidence that the plaintiff will be deported.

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WORKER'S COMP: INTERVENING CAUSE

Matthew Ward v. Lowe's
Indiana Court of Appeals, May 9, 2017

Ward was struck by a car in 1995, resulting in varicose veins and venous insufficiency in his leg. On July 6, 2010, he fell while working at Lowe's, fracturing his left large toe. His physician concluded that Ward's varicose veins in his left leg put him at risk for deep vein thrombosis ("DVT"), as immobilization is a known cause for DVT. Lowe's provided medical care through the end of 2010. On July 31, 2010, Ward developed bilateral pulmonary emboli ("PE's") and a DVT in his lower left leg. In October of 2010, a doctor noted improvement of his PE's. He returned to work with no restrictions and zero impairment in December 2010. Ward continued to take Coumadin until March of 2011, at which time the clots in his lungs were gone though he still had a number of clots in his left leg.

In December, 2011, Ward took a job at a Wal-Mart that he described as "very [labor] intensive." He started having chest pain and shortness of breath at work. He was diagnosed with "acute to subacute left PE" and DVT and he would need lifelong anticoagulation.

Ward filed a claim with the Worker's Comp Board in September, 2012. An IME concluded that most of the medical treatment he had received since the 2010 work injury, including the injury at Wal-Mart, was as a result of the injury at Lowe's. A hearing member denied his application, concluding that Ward had failed to show that the May 2012 episode was caused by his work accident and that it was most likely related to an "idiopathic aggravation of his condition and/or his extensive physical labor at this job in 2012." The Full Board adopted the hearing member decision.

The Court of Appeals affirmed, finding there was "a reasonable inference that Ward decided to stop taking Coumadin even though he was aware that he suffered from unresolved DVT that could lead to future PE's." The Board was permitted to make the determination that Ward's decision to not take his medication and to perform labor-intensive work were intervening causes of the 2012 PE's. The court also rejected Ward's argument that he should prevail because he presented an expert opinion on causation and Lowe's did not, holding that there are many ways for the defense to refute an expert's opinion without the opinion of another expert.

KeyPoints: (1) The lack of ordinary care of a plaintiff can be an "independent intervening agency" that breaks the "chain of causation;" and (2) The testimony of an expert witness is not required to refute another expert's opinion.

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ACCOUNTANT MALPRACTICE: ECONOMIC LOSS RULE

Magic Circle Corp., et al. v. Crowe Horwath, LLP
Indiana Court of Appeals, March 8, 2017

Magic Circle retained Crowe Horwath ("Crowe") to provide auditing services, but Magic Circle managers provided inaccurate information to the Crowe auditors. Crowe did not discover the inaccuracies for five years. Subsequently, Magic Circle was sold at a loss.

Magic Circle filed suit against the former managers and Crowe. The trial court dismissed the suit against Crowe based on the economic loss rule and exculpatory provisions in the engagement letters.

The Court of Appeals reversed. The definition of the economic loss rule is that "damage from a defective product or service may be recoverable under a tort theory if the defect causes personal injury or damage to other property, but contract law governs damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected."

However, exceptions to the economic loss rule have included lawyer malpractice, breach of a duty of care owed to a plaintiff by a fiduciary, breach of a duty to settle owed by a liability insurer to the insured, and negligent misstatement. The Court held that accountant malpractice is another exception to the economic loss rule. Therefore, Magic Circle should be allowed to pursue recovery of economic losses it sustained as a result of Crowe's negligence.

As to the provisions in the engagement letters which exculpated Crowe for misrepresentations by Magic Circle managers, while the provisions did apply to the misrepresentations themselves, they did not exculpate Crowe for its failure to use "professional skepticism" in evaluating the information provided.

Finally, the limitation of liability clause in the engagement letters did not justify dismissal for Crowe, because the limitations clause did not apply to gross negligence, which Magic Circle had alleged against Crowe.

KeyPoint: Allegations of negligence arising from a business relationship usually raises multiple issues at the intersection of tort and contract, especially regarding exculpatory or limitations clauses in the parties' contract.

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Best Wishes to Elizabeth Schmitt

In April, Elizabeth Schmitt informed the firm that she would be leaving to take a position with another Indianapolis firm.

We wish Elizabeth all the best in this next step in her legal career.

Matthew Kavanagh (see the front page) will be taking over Elizabeth's caseload.

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