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https://www.in.gov/judiciary/opinions/pdf/06191801cmg.pdf

Uninsured Motorist Benefits – Decedent Did Not Qualify as "Others We Protect" Within UM Endorsement

The phrase "others we protect" in an employer's commercial automobile insurance policy is not ambiguous when it is located close to another identical phrase that outlines who can be included in the coverage. In this case, an insured was mowing his lawn when an uninsured motorist veered off the road, struck, and killed him. When the decedent's estate sought coverage from his employer's automobile insurer, the insurer denied the coverage because the insured was not occupying the company's automobile at the time of the accident. The estate argued that coverage should be extended because the phrase "others we protect" is ambiguous but the court disagreed and ruled for the insurer.

b) Other Significant Decisions

Cox v. Evansville Police Dep't, No. 18S-CT-447 (Sept. 13, 2018)
https://www.in.gov/judiciary/opinions/pdf/09131801lhr.pdf

Cities May be Liable for the Sexual Assault Committed by Its Police Officers

The Supreme Court of Indiana defined the scope of employment to encompass the activities that the employer delegates to employees or authorizes employees to do, plus employees' acts that naturally or predictably arise from those activities. Thus, the scope of employment, which determines the *respondeat superior* liability of an employer, can include acts the employer explicitly forbids. The court explained that cities assign police officers duties of law-enforcement and community-protection, and with these duties police are vested the power to detain, arrest, frisk, seize and even use deadly force. Therefore, a city can be liable for police officer's tortious acts arising naturally or predictably from those duties and powers. If a police officer commits a sexual assault by misusing official authority, the assault is within the scope of employment and the city is liable.

Care Group Heart Hospital, LLC v. Sawyer, No. 49S05-1710-PL-671 (March 23, 2018)
https://www.in.gov/judiciary/opinions/pdf/03231801lhr.pdf

Employment Contract – "Any Termination of Employment" Means Any Termination, Regardless of the Reason.

The court ruled that a hospital did not breach its agreement to pay out an owner-member's ownership interest upon the owner-member's termination. The hospital discontinued and redeemed its owner-member's ownership interest after its closely affiliated medical group terminated the cardiologist's employment in violation of the medical group's employment

agreement. The cardiologist argued that his contract with the hospital was one in the same as his employment contract with the medical group, and because the medical group breached the employment agreement when it terminated him, the hospital also breached its agreement by paying out the ownership interest. However, the court disagreed because the cardiologist consistently acknowledged that the two entities were separate and, further, that separate contracts should be interpreted separately.

Esserman v. Indiana Department of Environmental Management, No. 49S02-1704-PL-00189 (Nov. 2, 2017)
https://www.in.gov/judiciary/opinions/pdf/11021702ggs.pdf

Governmental Immunity – Department of Environmental Management Immune From Whistleblower Act Claims

The court held that an employee of a state agency could not bring a claim against the agency based on a retaliatory discharge under the False Claims and Whistleblower Protection Act because the agency enjoys sovereign immunity from such actions. Here, the Department of Environmental Management employee spoke up about an alleged wrongful disbursement of the department's excess-liability trust fund and the department fired her. The court disagreed with the employee's argument that the legislature sought to abrogate common-law sovereign immunity in whistleblower situations by including all employers in the federal act. The court said the legislature would have included language indicating such intent if it had wished to waive immunity. Without this language in the statute, the department, although an employer, is entitled to sovereign immunity from non-tort claims based on statute, such as the Whistleblower Act violation that the employee claimed here.

c) Medical Malpractice Decisions

Gresk for Estate of VanWinkle v. Demetris, No. 49S02–1711–MI–686 (May 10, 2018)
https://www.in.gov/judiciary/opinions/pdf/05101801msm.pdf

Confidential Medical Reports of Child Abuse are Not Protected by Indiana's Anti-SLAPP Statute

A doctor reported her diagnosis of child abuse to the Department of Child Services. The parents of the child were successful in disproving this diagnosis and filed a medical malpractice claim against the doctor. The doctor utilized the anti-SLAPP statute as a defense, claiming reports of child abuse fall within its protections of free speech. The Supreme Court of Indiana disagreed. Because the doctor was required by law to file the report upon making such a diagnosis, the report was not in the furtherance of her right of petition or free speech. And, because the report was confidential, it was not made in connection with a public issue. Therefore, medical malpractice claims based on child abuse reports will generally not be able to obtain dismissal under Indiana's anti-SLAPP statute.

Sedam v. 2JR Pizza Enterprises, LLC, No. 39S05–1703–CT–171 (Oct. 31, 2017)
https://www.in.gov/judiciary/opinions/pdf/10311701mm.pdf

Labor and Employment – Negligent Hiring Claim Precluded When Employer Admits Employee Was Acting Within Scope of Employment

When an employer admits that an employee was acting within the course and scope of his or her employment, absent special circumstances, negligent hiring claims are precluded. Here, Pizza Hut admitted that its delivery employee was acting within the scope of employment when she rear-ended a person operating a scooter, causing him to be tossed onto the road, run over, and killed by another motorist. The estate of the scooter operator brought an action against Pizza Hut for negligent hiring and against the employee for negligent operation of her car. However, the court held that according to the doctrine of *respondeat superior*, a plaintiff is precluded from also bringing a negligent hiring claim in most circumstances when an employer admits the employee was acting within the scope of employment.

Roumbos v. Samuel G. Vazanellis & Thiros and Stracci, PC, No. 45S03–1710–CT–635 (April 12, 2018)
https://www.in.gov/judiciary/opinions/pdf/04121801ggs.pdf

Legal Malpractice – Premises-Liability Within Legal Malpractice

When a premises liability claim underlies a legal malpractice claim, a law firm has the burden of negating the proximate-causation element of the plaintiff's claim by negating an essential element of the underlying premises-liability claim. Here, the law firm failed to negate a business visitor's assertion that chords and wires on a hospital floor were not known and not obvious to her, causing her to slip and fracture her femur. The court held that the obviousness of a risk is a question sometimes able to be resolved on summary judgment, but not in this case. The court remanded the case to determine whether the chords and wires lying on the hospital floor posed an obvious or known tripping risk.

Campbell Hausfeld/ Scott Fetzer Co. v. Johnson, 2018 Ind. LEXIS 580, *1 (November 1, 2018)
https://www.in.gov/judiciary/opinions/pdf/11011801shd.pdf

Interpretation of Ind. Code § 34-20-6-4, "Misuse of a Product," Allowing Summary Judgment to a Product Manufacturer

A product user was seriously injured after using a tool designed by a manufacturer. He subsequently alleged the tool was defective in design and that the manufacturer failed to provide adequate warnings. The Supreme Court of Indiana ruled in favor of the manufacturer under Ind. Code § 34-20-6-4, "Misuse of a Product," in determining: (1) the user misused the tool by failing to follow its directions and such misuse served as a complete defense for the manufacturer; (2) the user's misuse was the cause of his injuries and that misuse could not have been reasonably expected by the manufacturer; and (3) the user could have avoided injury had he not used a cut-off disc or worn safety glasses, but he did not do so and his multiple failures to follow the instructions were the cause of his injuries and taken together, could not be reasonably expected by a manufacturer.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Argonaut Midwest Ins. Co. . v. DLC Servs., 95 N.E.3d 208 (Ind. Ct. App. 2017)
https://www.in.gov/judiciary/opinions/pdf/12121701cjb.pdf

The Presumption of Prejudice Stemming From a Delay in Notice Requires Rebuttal Evidence to Avoid Summary Judgment

The insurer was informed of a pending lawsuit against one of its insureds two years after the incident underlying the suit occurred and six months after the lawsuit was filed. The policy at issue contained a provision creating a duty to promptly notify the insurer in the event of a claim or suit. Under the language of the policy, without such notice the insurer had no duty to defend and could not be held liable. As a result of the delay in notice, the insurer filed for a declaratory judgment and sought summary judgment on the issue of coverage. The trial court denied summary judgment. The appellate court reversed. In doing so, the appellate court found the delay in notice created a presumption of prejudice against the insurer. This presumption required the insured to provide some evidence that in this instance the insurer was not actually prejudiced from the delay. However, the insured merely claimed that as a result of other insurance companies' investigations, the relevant evidence had been preserved. The insured did not designate any evidence supporting their claim. Therefore, the insured did not overcome the presumption of prejudice resulting from a delay in notice and the insurer was entitled to summary judgment.

Spina v. Owners Ins. Co., 97 N.E.3d 314 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/03261801cjb.pdf

Whether the Duty to Defend and Indemnify Exists is a Question of Law for the Court and the Insured is Not Entitled to a Jury for the Determination

Plaintiffs were sued by DirecTV for theft of DirecTV's programming, and defendants determined they had no duty to defend or indemnify and denied coverage. The plaintiffs brought suit against defendants for breach of contract and requested a jury trial. The issue of defendant's duty to defend and indemnify was bifurcated and the court ruled the defendant had no such duties. The plaintiff appealed claiming his constitutional right to a jury trial was violated and the appellate court disagreed. The appellate court affirmed, holding that whether or not a duty to defend or indemnify exists is a question of contract interpretation and interpretation of a contract is a matter of law for a court.

b) Employment Decisions

Family Christian World, Inc. v. Olds, 100 N.E.3d 277 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/04171803en.pdf

The Right to Direct and Control Means, Manner, and Method of Work Requires Evidence of Actual Control Exercised, Otherwise the Factor is Neutral

Plaintiff parents sued defendant for wrongful death of plaintiff's daughter while the daughter was working as a babysitter for the defendant. The defendants contended that the plaintiff's exclusive remedy was contained under the Worker's Compensation Act because the death arose out of the

course of employment. The defendants claimed they had the "power and right to direct and control the means, manner, and method" of the daughter's work, and filed for summary judgment. The appellate court determined that without evidence the defendants actually utilized this right and actually directed or controlled the daughter's work, the leading factor was neutral. Of the remaining factors: the daughter did not work exclusively for the defendant, worked irregular hours, had discretion whether to accept or reject jobs offered, and was paid by the job. Therefore, she was an independent contractor, not an employee, and the plaintiffs could sue for wrongful death.

Dish Network v. Marsh, 98 N.E.3d 140 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/04251801rra.pdf

An Appellate Court Can Overturn a Negative Judgment of the Worker's Compensation Board Only if There is no Probative Evidence Supporting the Boards Conclusion

The defendant denied Workers Compensation for the injuries sustained by the plaintiff in a car accident while on the job. The defendant denied the benefits based on the plaintiff's failure to use her seatbelt, which was required under the defendant's safety policy. The plaintiff was ejected from the vehicle during the accident and substantial evidence was presented to suggest the plaintiff was not wearing her seatbelt. However, based on the plaintiff's testimony that it was her practice to wear her seatbelt, and testimony from her and her friend that she sustained bruising consistent with seat belt use, the board concluded the plaintiff was wearing her seatbelt. The defendant appealed this decision, but because of this conflicting evidence the appellate court refused to overturn the board's determination.

c) Other Significant Decisions

Bunger v. Brooks, No. 45A05–1709–CT–2165 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/04171801jsk.pdf

Medical Malpractice – Patient's Expert Failed to Show that Patient Would not Have Gone Blind but for the Cataract Surgery

No medical malpractice claim exists when a patient with macular degeneration several years earlier cannot prove that his blindness was the complication of cataract surgery. In this case, a patient who suffered from macular degeneration argued that he was not informed about all the potential risks of cataract surgery, and if he had been he would not have gone forward with the surgery, and thus he would not be blind. However, the court found that the patient did not present evidence showing that cataract surgery creates a greater risk of vision loss. Further, the patient's expert failed to show what the patient's vision would have been had he not had the surgery because his prior eye issues could have accelerated, resulting in vision loss. Therefore, the court ruled in favor of the doctor and affirmed the lower court's determination that the patient failed to prove causation in the claim.

Dulworth v. Bermudez, 97 N.E.3d 272 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/03151801par.pdf

General Inclusive Language in a Release, Without Language Limiting the Release to Specific Parties, Acts to Release Third Parties

Three parties were driving in a row with party one in front, party two in the middle, and party three in the rear. Party one stopped abruptly. Party two stopped before colliding with party one. Party three rear-ended party two. Parties two and three settled and party two signed a release that contained language releasing the parties to the agreement and "all other persons." Party two then brought suit against party one for negligently causing the collision. Party one utilized the agreement between parties two and three as a defense. The court of appeals determined that because there was no language limiting the phrase "all other persons," the agreement released party one of liability. Therefore, general inclusive language in a release, without limiting language accompanying it, acts to release non-parties.

Stachowski v. Estate of Radman, 95 N.E.3d 542 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/03141801nhv.pdf

Statutes and Ordinances do not Create Duties Under the Doctrine of Negligence Per Se

Plaintiffs tenant sued defendant landlord for negligence in maintaining a handrail at the rental premises. Negligence has three elements: duty, breach and cause. Plaintiffs conceded that under common law landlords do not have a duty to maintain the rental property after the tenants take possession. However, plaintiffs argued that a local ordinance required defendant maintain the handrail and therefore defendant owed them a duty under negligence per se. The appellate court explained that negligence per se dealt with the breach element and not the duty element. A common law duty must exist and then courts may choose to adopt the standard of conduct set forth in a statute or ordinance as the standard of conduct required under the pre-existing duty. A party must already owe a duty of reasonable care without the statute and because the defendant in this case did not, negligence per se was inapplicable.

Poythress v. Esurance Ins. Co., 96 N.E.3d 663 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/02091801mgr.pdf

Electronic Signatures for Rejecting UIM Coverage Satisfies the Writing Requirement of Indiana Code 27-7-5-2

Plaintiff purchased car insurance through defendant. Plaintiff was injured as a passenger in a friend's vehicle and defendant did not compensate plaintiff for her injuries. Defendant was granted summary judgment. Plaintiff appealed arguing there was no written rejection of UIM coverage as required by Indiana law. The appellate court found an electronic signature on a form that rejected UIM coverage satisfied 27-7-5-2 and plaintiff, having electronically signed such a form, had lawfully rejected UIM coverage.

Zurich Am. Ins. Co. v. Circle Ctr. Mall, LLC, 2018 Ind. App. LEXIS 412 (November 7, 2018).
https://www.in.gov/judiciary/opinions/pdf/11071801ehf.pdf

Reaffirmation of Standard for Discoverability of Privileged Materials in Bad Faith Cases

During a bad faith lawsuit, a discovery dispute arose regarding whether documents in the insurance company's claim file were protected by the work-product doctrine and/or the attorney-client and/or insurer-insured privileges. The court of appeals refused to extend a new exception or standard, referring to the previously established standard for discoverability in *Hartford Financial Services Group, Inc. v. Lake County Park & Recreation Board*, 717 N.E.2d 1232 (Ind. Ct. App. 1999), and held the sought-after materials could be protected by evidentiary privileges. The court explained a simple assertion that an insured cannot otherwise prove a case of bad faith does not automatically permit an insured to rummage through the insurers' claims file.

Hamilton v. Steak 'n Shake Operations Inc., 92 N.E.3d 1166 (March 7, 2018)
https://www.in.gov/judiciary/opinions/pdf/03071803rra.pdf

Premises Liability and Foreseeability of Injuries

The Indiana Court of Appeals reversed a summary judgment in favor of Steak 'n Shake Operations, Inc., appearing to broaden the duties owed by property owners to business invitees. In *Hamilton*, the issue was whether Steak 'n Shake owed a duty to protect a customer shot in the face during a conflict with another patron.

The plaintiff was eating at a Steak 'n Shake restaurant with her brother when a group of individuals began taunting and verbally threatening them over a period of thirty minutes. Restaurant employees witnessed the escalation of the threats but did not take any action until it appeared a physical altercation was imminent. Moments after instructing both parties to leave, the altercation turned physical and the plaintiff was shot.

The trial court granted summary judgment in favor of Steak 'n Shake, determining the event was not reasonably foreseeable and, therefore, there was no duty owed to the patron. However, the appellate court reversed, stating: "[the] foreseeability analysis should focus on the general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected – without addressing the specific facts of the occurrence."

The *Hamilton* court used a very broad analytical framework, and determined the restaurant had knowledge of the escalating situation and should have known there was "some probability or likelihood" one of its patrons could be physically harmed.

Hoosier Ins. Co. v. Riggs, 92 N.E.3d 685 (March 7, 2018)
https://www.in.gov/judiciary/opinions/pdf/03071801mpb.pdf

Subrogation and Real Party in Interest

The Indiana Court of Appeals reversed a trial court ruling that a subrogated insurer was not a "real party in interest" for purposes of pursuing a breach of contract claim against its insured's tenant. The court held this type of subrogation action should be considered on a case-by-case approach, instead of there being an absolute rule, with consideration being given to the terms of the lease existing between the parties.

In *Hoosier*, a landlord's insurer sought to recover for fire damage allegedly caused by the defendant tenants. Pursuant to the lease agreement between the landlord and tenants, the premises were to be returned at the end of the lease term in as good condition as when the lease commenced, and the tenants were required to obtain fire insurance which listed the landlord as an additional insured under the policy.

In the underlying action, the trial court dismissed the breach of contract claim, determining that a subrogated insurer was not a landlord as defined by Indiana Code Section 32-31-3-3 and, therefore, was not a Trial Rule 17(A) "real party in interest" entitled to pursue a breach of contract claim.

Upon review, the Indiana Court of Appeals determined it was not a certainty the plaintiff was not entitled to any relief, as the lease needed to be considered to evaluate the parties' intent regarding the appropriate party to bear the risk of fire loss. The *Hoosier* court relied upon *LBM Realty, LLC v. Mannia*, which stated: "if a lease obligates a tenant to procure insurance covering a particular loss, such a provision will provide evidence that the parties reasonably anticipated that the tenant would be liable for that particular loss, which would allow another insurer who pays the loss to bring a subrogation action against the tenant."

The *Hoosier* court remanded and directed the trial court to analyze the lease and all other relevant and admissible evidence to determine the parties' expectations and weigh and balance the equities to determine the defendants' liability for the damage to the premises.

3. Federal Court Decisions

a) Insurance Coverage Decisions

Ranburn Corp. v. Argonaut Ins. Co., No. 4:16-CV-00088 (N.D. Ind. Mar. 28, 2018)

Defending Under a Broad Reservation of Rights and Subsequently Accepting Full Coverage for a Suit Does not Interfere With an Insurer's Right to Control Specific Aspects of the Defense

Indiana Department of Environmental Management brought an environmental claim against the plaintiff. The plaintiff notified their insurers, the defendants, and the defendants agreed to provide a defense for plaintiff under a reservation of rights. None of the defendant's reservations specifically reserved the right to control the environmental consultant assisting in the defense. After seven years of paying for the consultant hired by the plaintiff, the defendant's accepted full coverage of the suit and refused to continue to use the original consultant. The defendant's hired a new environmental consultant. The new consultant was refused access to the property and the

plaintiff continued using the original consultant. The defendants refused to pay the original consultant for their work and the plaintiff brought suit.

The district court determined that a waiver of rights required an affirmative act on behalf of the defendants. The broad reservation of rights letters issued by the defendants did not constitute such an affirmative act. Accordingly, the defendants did not waive their right to control the defense. Additionally, merely paying the defense costs while defending under a waiver of rights does not waive an insurer's right to withdraw its reservation of rights. Therefore, the defendant insurers had the right to take control of defense and decide which environmental consultant would work for the defense.