

Appellate civil case law update

This article discusses two civil opinions issued by the Indiana Supreme Court in the month of November and two civil cases for which the Court had granted transfer. In November, the Indiana Court of Appeals issued 13 published civil opinions, which are also briefly summarized below. The full texts of all Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at <http://www.inbar.org> or on the Indiana Courts website, www.in.gov/judiciary/opinions.

INDIANA SUPREME COURT

In a dispute between a town and its neighboring district over water rights, the Indiana Supreme Court determined that the Town of Avon may regulate the White Lick Creek Aquifer



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The Town of Avon (“Avon”) and the West Central Conservancy District (“WCCD”) own properties that overlay an underground water supply known as the White Lick Creek Aquifer. Avon passed an ordinance that provided the Town sole authority to withdraw water from the Aquifer and sell it to third parties. The major legal dispute between the parties was whether the aquifer was a “watercourse.” The Indiana Supreme Court noted that the resolution of this issue was a fact-specific inquiry that required investigation into whether the aquifer had definable boundaries, the age of

the aquifer, and whether the water in the aquifer flowed. After analyzing the appellate record, the Court concluded that the White Lick Creek Aquifer was a watercourse under Indiana law.

The significance of the Court’s determination that the aquifer was a watercourse was that, pursuant to the Watercourse and the Park Resources Statutes, Avon had authority to regulate the taking of water from the aquifer. Therefore, because of Avon’s ordinance, the WCCD no longer had a common law right to use the groundwater in its aquifers as it saw fit without interference. *Town of Avon v. West Central Conservancy District*, 957 N.E.2d 598 (Ind. 2011).

The limitation period contained in the general statute of limitations should be used for medical provider’s reimbursement request for payment of outstanding bills for authorized treatment to an employer’s employee

Two years after the last payments were made to an injured employee, the Indiana Spine Group sought the balance of payments from the Worker’s Compensation Board. The Indiana Supreme Court noted two statutes of limitations in the Worker’s Compensation Act, Indiana Code Sections 22-3-3-3 and -27. The Court first noted that Section -3 plainly “refers to employee benefits, not payment to health care providers.” Similarly, Section -27 applies to changed conditions requiring a modification of an award of worker’s compensation benefits only. Therefore, the Court concluded that neither of the statutes of limitations contained within the Worker’s Compensation Act applied to medical providers seeking payment of outstanding bills for authorized treatment to an employer’s employee. The general

10-year statute of limitations, therefore, enumerated in Indiana Code Section 34-11-1-2, applied to the medical provider’s claims. *Indiana Spine Group, PC v. Pilot Travel Centers, LLC*, ___ N.E.2d ___ (Ind. 2011).

INDIANA COURT OF APPEALS

• A town may not terminate the employment of a marshal without conducting the removal and appeals procedures prescribed by Indiana Code Section 36-8 and adhering to the requirements of subsections (b) through (l) of Indiana Code Section 36-8-3-4. *Cook v. Atlanta*, 956 N.E.2d 1176 (Ind. Ct. App. 2011).

• An insurer was not estopped from using a statute-of-limitations defense against an insured’s claim where the insurer never made any promise to settle, did not discourage the insured from filing suit, did not discourage the insured from obtaining counsel and did not engage in otherwise egregious conduct. Thus, where an insurer merely informs the insured to contact it when the insured has completed her medical treatment, the insurer is not estopped from a statute-of-limitations defense. *Davis v. Shelter Ins. Co.*, 957 N.E.2d 995 (Ind. Ct. App. 2011).

• The Journey’s Account Statute, Indiana Code Section 34-11-8-1 and Indiana Trial Rule 60(B)(7) did not allow a litigant to continue an action that had been in the Marion Superior Court, the Indiana Court of Appeals, the Indiana Supreme Court, the United States Bankruptcy Court, the United States District Court and the Seventh Circuit Court of Appeals, where the initial complaint had been dismissed on the merits and the litigant failed to timely appeal the dismissal. The court affirmed an award of attorney fees granted pursuant to Indiana Code Section

35-52-1-1(b) and further awarded appellate attorney fees pursuant to Indiana Appellate Rule 66(E) for filing a frivolous or bad faith appeal. *Dempsey v. Belanger*, ___ N.E.2d ___ (Ind. Ct. App. 2011).

• Pursuant to the terms of a homeowner's insurance policy, the policy was voidable, rather than void at the outset, where the applicant made material misrepresentations. Where the insurer did not tender the policy premiums until after a final judgment had been entered and at least six years after refusing to pay the insured's claim, genuine issues of material fact were present regarding whether the insurer effectively rescinded the policy after discovering the insured's misrepresentations. *Dodd v. American Family Mut. Ins. Co.*, 956 N.E.2d 769 (Ind. Ct. App. 2011).

• The Roman Catholic Archdiocese of Indianapolis was not contractually obligated to continue paying for counseling and treatment due to an alleged abuse when it had been making such payments based solely upon a moral obligation. *Doe v. Roman Catholic Archdiocese of Indianapolis*, 958 N.E.2d 472 (Ind. Ct. App. 2011).

• The Indiana Court of Appeals affirmed the trial court's denial of a Motion to Compel Arbitration where the arbitration provision required the use of an arbitration forum that was no longer available. Specifically, the court held that where the express designation of a particular arbitration provider is "integral to the arbitration agreement," the provision is null and void if that provider is not able to hear the dispute. *Geneva-Roth Capital, Inc. v. Edwards*, 956 N.E.2d 1195 (Ind. Ct. App. 2011).

• Allegations of premises liability against a hotel for a bathtub slip-and-fall were dismissed where there was no evidence that the bathtub as

it existed at the time of the fall was unreasonably unsafe, as compared to bathtubs generally. *Hale v. SS Liquors, Inc.*, 956 N.E.2d 1189 (Ind. Ct. App. 2011).

• On rehearing, the Court of Appeals affirmed its original opinion and further held that a party not in control of an automobile at the time of an accident has no

premises liability. *Marks v. Northern Indiana Public Service Company*, ___ N.E.2d ___ (Ind. Ct. App. 2011).

• As a procedural matter, an expert's testimony should not be excluded on the basis that the expert was part of a panel and had

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expressed an opinion concerning the matter previously where the challenging party was not part of the earlier proceedings. Looking to the substance of this opinion, the Indiana Court of Appeals first noted that Indiana's Product Liability Act, Indiana Code Section 34-20-5-1, provides a rebuttable presumption that a product was

not defective and that the manufacturer or seller of the product were not negligent. However, because the court found "ample designated evidence" to support Plaintiffs' contentions, summary judgment was inappropriate. *Miller v. Bernard*, 957 N.E.2d 685 (Ind. Ct. App. 2011).

- A party-defendant may preserve a defense that a dismissed party-defendant is a nonparty for fault allocation, provided that the party-defendant gives sufficient notice by objecting to the trial court's dismissal. *Nationwide Ins. Co. v. Parmer*, ___ N.E.2d ___ (Ind. Ct. App. 2011).

- Service of process was not perfected where a party attempted to use an individual's parents' address that had been indicated on a loan application as a reference. The Indiana Court of Appeals held that Trial Rule 4.16 does not impose a duty on an individual's parents to inform the clerk or sheriff that an individual for whom service was attempted did not live with them. *Norris v. Personal Finance*, 957 N.E.2d 1002 (Ind. Ct. App. 2011).

- A personal representative of an estate who had sought disqualification from the presiding judge was removed "without delay" after a finding that the personal representative had distributed estate funds

without notice or consent from the trust beneficiaries. Because the personal representative was terminated in her representative capacity she did not have the authority to litigate any further on behalf of the Estate and the Trust – including the authority to prosecute an appeal of the removal or recusal orders. *Simon v. Simon*, 957 N.E.2d 980 (Ind. Ct. App. 2011).

- When landowners emptied a manure pit on their farm, the stench of rotten eggs and raw sewage caused their neighbors to become physically ill and polluted their neighbor's property when entering a stream that crossed the property line. The landowners' practice of emptying their pit continued for several years. Because the affected neighbors did not file a cause of action for negligence within the 2-year statute of limitations, those claims were barred. However, the 6-year statute of limitations for nuisance and trespass had not run due to the continued disposal of the waste storage. *Stickdorn v. Zook*, 957 N.E.2d 1014 (Ind. Ct. App. 2011).

TRANSFER ORDERS

- In *Robertson v. B.O. ex rel. Ort*, 949 N.E.2d 404 (Ind. Ct. App. 2011), a matter noted as one of first impression, the Indiana Court of Appeals held that the Indiana Patient's Compensation Fund "cannot be precluded from introducing relevant evidence on the compensable nature and event of a claimant's injury merely because the health care provider elected to settle the underlying medical malpractice claim and liability had been established by operation of [Indiana Code Section] 34-18-15-3." The Indiana Supreme Court has granted transfer.

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• In *Gill v. Evansville Sheet Metal*, 940 N.E.2d 328 (Ind. Ct. App. 2010), the Court of Appeals affirmed a trial court's grant of summary judgment barring a complaint pursuant to the Construction Statute of Repose, Indiana Code Section 32-30-1-5(d). The court noted that the Statute of Repose was designed to bar actions after a specific period of time had run from the occurrence of a specific event. Since the Plaintiff filed her complaint regarding allegations that her husband had been exposed to, and subsequently died from, asbestos more than 10 years after the substantial completion of a project time, it was barred. The Indiana Supreme Court has granted transfer. 🇺🇸

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