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# Indiana Tort Prejudgment Interest

December 12, 2012, aside from being a numerical fascination, was a very important day in Indiana law. The Indiana Supreme Court handed down four companion decisions all attempting to expound upon an aspect of the availability prejudgment interest in tort cases under Indiana law. The four cases are *Wisner v. Laney*, *Inman v. State Farm Mutual Automobile Insurance Company*, *Kosarko v. Padula*, and *Alsheik v. Guerrero*. The four opinions were unanimous amongst the five justices and the labor of authoring the opinions was equally split between Chief Justice Dickson and Justice David. Of the four decisions, what might properly be called the lead opinion, was undoubtedly *Kosarko v. Padula*.

## I. *Kosarko v. Padula*: TPIS Abrogates Common Law

*Kosarko* was a heavily followed case by the plaintiff's bar. Indeed, the Indiana Trial Lawyers Association (ITLA) wrote an *amicus curiae* brief to help guide the Court to the right conclusion. The case arose from a car accident in which the plaintiff sustained injuries. The plaintiff, Miss Kosarko, filed her case in February 2007. The following year, in March, she offered to settle her case for $100,000. The defendant made no response to the offer to compromise. Two years later, in March 2010, the plaintiff was victorious at trial and was awarded $210,000 by the jury for her injuries. Following the verdict, she sought petitioned the trial court to award her prejudgment interest in the amount of $79,627.40 and attorney's fees in accordance with the Tort Prejudgment Interest Statute (the "TPIS"). The

judge denied the motion concluding that Miss Kosarko's injuries "were of an ongoing and evolving nature and thus were not ascertainable within a time fram that justifies an award of prejudgment interest." On appeal, the Indiana Court of Appeals found that the trial court had "abused its discretion" – a standard that is explained more fully below – and reversed the trial judge.

In order to understand the holding of *Kosarko*, you must first understand the history of prejudgment interest in Indiana. The common law rule for prejudgment interest was established by the case *N.Y., Chi. & St. Louis Ry. Co. v. Roper*. In *Roper*, the Indiana Supreme Court created the "*Roper* standard" for awarding prejudgment interest. Specifically, "prejudgment interest could only be awarded by the trial court where the damages are 'complete' and 'ascertainable' as of a particular time and in accordance with fixed rules of evidence and known standards of value." Moreover, "interest was not permitted where the damages are 'incomplete' because the damages may be 'continuing and may even reach beyond the time of trial.'" Even worse, "prejudgment interest was not available in personal injury cases, cases of death by wrongful act, libel, false imprisonment, and cases where there is no standard of market or other value by which to measure the damages, nor in cases where punitive damages may be assessed, nor to those where the amount of recovery is fixed by statute."

In short, the prejudgment interest rule under common law was fairly draconian in its implementation. As a result, in 1974 the Indiana General Assembly created Indiana Code sections 24-4.6-1-101 through -103. The 1974 statute permitted "a prevailing party to collect prejudgment interest from the time of a demand until the time of judgment at a rate of 8% per annum." The 1974 statute was considered as only a supplement to the common law "*Roper* rule" that made prejudgment interest available "only where damages were complete and ascertainable." In 1988 the General Assembly created the TPIS. The TPIS allows prejudgment interest "in any civil action arising out of tortious conduct." However, in order for a claim to be eligible for prejudgment interest: (1) a plaintiff must "make a qualified written offer of settlement within one year of filing a claim" and the amount offered for settlement must not be more than one and one-third times the amount awarded at trial; and (2) the defendant must not have made a qualified settlement offer within nine months of the filing of the claim that was at least equal to two-thirds of the amount awarded at trial. If both prongs are satisfied, then a judge has the discretion to award prejudgment interest.

For further discussion of how the TPIS calculations work, *see* our prior blog post entitled Damages Pt. 6 – Availability of Prejudgment Interest.

The issue before the Supreme Court was whether the 1988 TPIS acted to

replace the common law "*Roper* rule" or just to supplement it. The court decided, after analysis of the statute, that it did, in fact, replace the common law rule. As such, the trial judge erred when he applied the common law "*Roper* rule" analysis to Miss Kosarko's case. That means, it is no longer of any import whether the injuries were ongoing or whether the damages could be calculated at the time the offer was made. Moreover, the limitations on certain cases, such as personal injury and wrongful death cases, is no longer in force.

## II. *Inman*: TPIS applies to UIM Claims

In another case addressing the TPIS, the court was asked to determine whether the statute applied to an insured suing his insurer for failure to pay a claim pursuant to the insurance policy's underinsured motorist ("UIM") coverage. Miss Inman's case, like Miss Kosarko's, arose from a traffic accident. Miss Inman collected the policy limit of $50,000 for her injuries against the negligent driver who caused the collision. With injuries that exceeded the amount recovered, she petitioned her insurance provider, State Farm, for payment of an additional $50,000 under the UIM coverage of her policy.

Miss Inman filed a case against State Farm to recover under her UIM coverage on March 11, 2009. Three months later, on June 14, she offered to resolve the case for $50,000. After trial, the jury awarded Miss Inman the $50,000 that she sought. She then asked the judge to award prejudgment interest in accordance with the TPIS. The judge denied her motion without explaining his reasoning. Miss Inman appealed that denial. On appeal, the Court of Appeals found that the trial court had erred in not awarding the interest sought.

The case was then taken up by the Indiana Supreme Court. Before the court, State Farm argued that:

> (1) the TPIS does not apply to a contract action by an insured against an insurer for the recovery of benefits under a UIM policy, and, (2) even if the TPIS does apply to such actions, public policy prohibits an award of prejudgment interest in excess of the UIM policy limits in the absence of bad faith.

In response to the first contention, the court found that State Farm's view of the TPIS was too narrow. "The TPIS declares that the statute applies to 'any civil action arising out of tortious conduct.'" Moreover, the court found that "a UIM action . . . is a prototypical example of a 'civil action arising out of tortious conduct.'" This is because the claim "arises out of the automobile collision" and the insurer, in denying coverage, steps into the shoes of the negligent driver that caused the

accident.

As to the second contention, the court analogized the TPIS to the Medical Malpractice Act. In the medical malpractice context, the court has held before that interest is not governed by the cap on recovery under the Medical Malpractice Act. Following its prior logic, the court found that UIM policy limits have no impact upon the award of interest, either pre-judgment or post-judgment. With regards to the argument that whatever purpose is served by operation of the TPIS is also served by the duty of the insurer to act in good faith, the court found that the proof of bad faith is quite difficult and that it may well have been a decision made by the General Assembly to provide a less difficult bar to recovery. The court decided that such a public policy concern was to be decided by the General Assembly, and by passage of the TPIS it had spoken on the matter.

Though the court's decision was largely to the benefit of Miss Inman, ultimately she was not able to recover the interest she sought. The TPIS creates a discretionary power for a judge to award prejudgment interest. It does not, however, create a duty upon the judge to do so. Thus, review of a denial is made under an "abuse of discretion" standard. In Miss Inman's case, the judge had made no explanation of his decision. As such, because the decision to award the interest was within his discretion and there was no evidence that he based his decision upon erroneous application of the law, she was not entitled to interest.

Compare this result, for a moment, to *Kosarko*. In *Kosarko*, the court found that there had been an abuse of discretion and reversed the trial judge. The difference in *Kosarko* that allowed the Supreme Court to reverse the trial judge's decision from *Inman* is a small, but important distinction. In *Inman* the court did not state what its basis was, just that he was not awarding the interest. That is something the judge was allowed to do. However, in *Kosarko* the judge explained his decision and that decision was predicated upon an incorrect understanding of the law. As such, the judge had not exercised his discretion but had stated that he did not understand the law to allow him to do so. A somewhat important note, the trial judge in *Kosarko* could still deny the award of prejudgment interest despite the hard work by Miss Kosarko and her counsel. I sincerely hope that the Honorable Judge Gerald Svetnoff would exercise his discretion to award Miss Kosarko the interest that she sought.

## III. *Wisner v. Laney* & *Alsheik v. Guerrero*: Timing of Notice

The last two cases are similar enough so as to merit simultaneous discussion. They both sought to address an issue of timing with regards to the notice that must be provided by plaintiff of an offer to settle in accordance with the TPIS. Recall, the

TPIS requires a plaintiff, among other things, to make a settlement offer within one year of filing a claim. In *Wisner v. Laney*, the plaintiff filed her case on November 26, 2002. However, it was not until April 6, 2005 that she sent a settlement offer to the defendant. Clearly, this is outside of the one-year window. Nevertheless, if this were as clear-cut as that it would not have been a case decided by the Indiana Supreme Court. Where matters got more interesting was when the plaintiff dismissed her suit in 2006 only to re-file it in 2007. Now we have the question of whether the 2005 offer was actually outside the one-year window.

The trial judge found that her offer was not within the one-year window because he concluded that the statute required filing of the claim prior to the offer of settlement. The Court of Appeals disagreed with the trial court and found that the one year requirement was a cut off and that the offer could be made at any time prior to the filing of the complaint, just not any time after one year from the filing of the complaint. The Supreme Court agreed. Nevertheless, Miss Laney was not awarded the prejudgment interest that she sought. This was because the court found that the one-year clock began on the date that the claim was first filed. Thus, she would have had to issue an offer of settlement within one year of November 26, 2002.

The *Alsheik v. Guerrero* decision frequently cites to *Wisner*. Thus, it only makes sense to discuss the two together. *Alsheik* arose from a medical malpractice case. Like Miss Laney, Miss Guerrero's case was dismissed after filing and re-filed at a later date. The case was first filed on May 29, 2002. Thereafter, on January 9, 2003 Miss Guerrero voluntarily dismissed her claim. Shortly after that, on April 21, 2003, Miss Guerrero sent a settlement offer to the former and future defendant. Finally, in February 2006, she re-filed her case. After trial, and a verdict of $1,165,000 in her favor, Miss Guerrero sought an award of prejudgment interest. The judge held that the offer did not meet the statutory requirements.

The Supreme Court reversed, and found that not only did the offer meet the statutory requirements but that it also was made within the one-year window. Because the judge denied the award because he did not think the offer met the statutory requirements, the Supreme Court was able to send the issue back to him to decide whether interest should be awarded.

## IV. What to Take from These Four Cases

So what do we take from these four cases. I believe a good summary is:

(1) the common law "*Roper* rule" has been replaced by the TPIS;
(2) the TPIS claim applies in any civil action arising out of tortious conduct"

including suits against an insurer for UIM coverage;

(3) a settlement offer can be made at any point prior to the filing of a claim; and

(4) that the ultimate decision to award prejudgment interest is within the sound discretion of the trial judge.

In addition to these four concepts, the court also provides good practical advice when sending an offer to settle pursuant to the TPIS. "The better practice for lawyers in the future would be to cite the statute in the settlement letter and make it very clear that the letter is intended to invoke the statute, including the sixty-day settlement window and the possibility of prejudgment interest."

There is one more very important piece of advice provided in *Wisner*.

> Professionalism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and civility are the mainstays of our profession and the foundations upon which lawyers practice law. The public expects it. Fellow lawyers expect it. Our profession demands it.

The case also dealt with acts of indefensible unprofessionalism.

Join us again next time for further discussion of developments in the law.

**Sources**


- *Wisner v. Laney*, ___ N.E.2d ___, No. 71S03-1201-CT-7 (Ind. Dec. 12, 2012).
- *Wisner v. Laney*, 953 N.E.2d 100 (Ind. Ct. App. 2011), *trans. granted.*
- *Inman v. State Farm Mut. Auto. Ins. Co.*, 981 N.E.2d 1202 (Ind. 2012).
- *Inman v. State Farm Mut. Auto Ins. Co.*, 938 N.E.2d 1276 (Ind. Ct. App. 2010), *trans. granted*.
- *Kosarko v. Padula*, 979 N.E.2d 144 (Ind. 2012).
- *Kosarko v. Padula*, 960 N.E.2d 810 (Ind. Ct. App. 2011), *trans. granted.*

- *Alsheik v. Guerrero*, 979 N.E.2d 151 (Ind. 2012).
- *N.Y., Chi. & St. Louis Ry. Co. v. Roper*, 176 Ind. 497, 507, 96 N.E. 468, 472 (1911).
- *Poehlman v. Feferman*, 717 N.E.2d 578 (Ind. 1999).
- Indiana Tort Prejudgment Interest Statute (the "TPIS") – Ind. Code chapter 34-51-4.
- Indiana Medical Malpractice Act – Ind. Code article 34-18.