

THARPE & HOWELL

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CONTRACTEE MAY BE LIABLE FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR

In *The Estate of Bunn, et al. v. Indiana Department of Transportation*, et al, the Indiana Court of Appeal recently held that the Indiana Department of Transportation (“INDOT”) may be held liable for the negligence of independent contractors.

In this case, the INDOT contracted with Pioneer Associates, Inc. (“Pioneer”) for the completion of a highway construction project (“the Project”). Pioneer then subcontracted a portion of the paving work to Brooks Construction Company (“Brooks”). On June 8, 2005, Brooks employees Robert P. Bunn (“Robert”) and Robert L. Bunn (“Bobby”), father and son, were engaged in paving work at the Project. An asphalt paver was pushing a dump truck loaded with asphalt, and the bed of the dump truck was moved into a raised position in order to empty asphalt. The truck bed came close enough to overhead power lines to allow both the dump truck and the asphalt paver to become energized. Robert was fatally electrocuted, with his son Bobby witnessing the incident nearby.

Robert’s Estate and Bobby brought suit against INDOT and others in relation to Robert’s death. The INDOT moved for Summary Judgment, contending it owed **no** duty to Robert or Bobby because they were independent contractors. The Trial Court ruled in favor of the INDOT and granted its Summary Judgment Motion on that basis. The Estate and Bobby appealed.

The Court of Appeal determined that in order for plaintiffs to recover under a negligence claim against the INDOT, they must establish that a duty was owed by INDOT; the INDOT breached that duty; and damages were proximately caused as a result. The Court of Appeal found that although, as a general rule, a contractee (such as the INDOT) is not liable for the negligence of an independent contractor, a duty will be imposed if one of five exceptions to the general rule of contractee non-liability exists. Those exceptions are: (1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal. The Court noted these five exceptions represent specific, limited situations in which the associated duties are non-delegable; encourage the employer of the contractor to participate in controlling work covered by any of the five exceptions in order to minimize

risk; and an injured worker's status as an employee of an independent contractor does not deprive that worker of the right to seek application of an exception to the rule of non-liability for torts of an independent contractor.

In the end, the Court of Appeal found that the INDOT could not avoid liability to employees of independent contractors on the basis of delegation of responsibility to others, and was not entitled to Summary Judgment based upon a lack of duty owed to Robert and Bobby. In rendering its decision, the Court also noted that the parties' contract provided the INDOT maintained the right to (without actually assuming responsibility for) make safety determinations in relation to the Project. The Trial Court's ruling on the Summary Judgment Motion was reversed.

NEVADA ANTI-STACKING RULES DO NOT APPLY IN
CASES OF CONCURRENT NEGLIGENCE

In *Dionicia Delgado, et al. v. American Family Insurance Group, et al.*, the Nevada Supreme Court recently held that when two drivers are concurrently negligent, an insured passenger can recover both liability **and** underinsured motorist benefits under a single policy of insurance.

In this case, Dionicia Delgado ("Dionicia") was injured in an automobile accident while riding as a passenger in a car owned and operated by Eunice Marcelino ("Marcelino"). Marcelino had attempted to turn left across lanes of northbound traffic when a northbound car, owned and operated by Toquanda Dean ("Dean"), struck Marcelino's car severely injuring Dionicia. Both drivers were negligent in relation to the crash.

Marcelino had liability coverage of \$50,000 per person, and underinsured motorist coverage of \$25,000 per person, through American Family Insurance Group ("American Family"). Dean's liability policy limit was \$15,000.

Dionicia offered to settle her claims with American Family for \$75,000 (the \$50,000 in liability coverage available, plus the \$25,000 in underinsured motorist coverage). Dionicia also offered to settle with Dean's insurance carrier for his limits of \$15,000. American Family denied Dionicia's underinsured motorist claim, stating that Marcelino's vehicle did not qualify as an underinsured vehicle according to the policy terms.

Dionicia (and her husband) filed suit against American Family alleging in relevant part that it had breached its contract by denying the underinsured motorist claim. In her Complaint, Dionicia alleged Marcelino's underinsured motorist policy created a contractual duty and obligation on the part of American Family to compensate Dionicia for injuries and damages caused by an underinsured motorist which, in this instance, was Marcelino (American Family's own insured). Thus, Dionicia grounded her breach of contract claim on the factual assertion that Marcelino's vehicle qualified as the underinsured motorist under Marcelino's own policy of insurance.

American Family filed a Motion for Summary Judgment, arguing Dionicia could not recover under the factual assertion that Marcelino's car was the underinsured motorist vehicle because the coverage endorsement in his policy excluded the car from qualifying as underinsured. In support of this argument, American Family cited previous Nevada Court decisions which preclude recovery under both liability and underinsured motorist coverage provisions in a single insurance policy.

Dionicia argued the coverage endorsement did not prohibit recovery because it only excluded vehicles covered under the insurance policy. She alleged the underinsured motorist claim was based on the *Dean vehicle* being underinsured (and not Marcelino's), and that her case was distinguished from the previous Nevada Court decisions which contain stacking prohibitions because, unlike the claimants in those cases, she was not seeking to recover under Marcelino's liability and underinsured motorist policies based on Marcelino's negligence alone. Instead, in addition to recovering under the liability policy for Marcelino's vehicle, she was seeking to recover underinsured motorist benefits based on *Dean's* joint negligence and the fact that the *Dean vehicle* was underinsured at the time the accident occurred.

The District Court granted American Family's Motion for Summary Judgment, finding that Marcelino's vehicle was not "underinsured" as defined by the terms of his policy and that previous decisions completely barred recovery for both liability **and** underinsured motorist benefits under a single policy of insurance. Dionicia (and her husband) appealed.

The Nevada Court of Appeal noted that, as an initial matter, American Family contended Dionicia's underinsured motorist claim was barred by the doctrine of judicial estoppel because she had named the wrong motorist in her Complaint. However, the Appellate Court disagreed with this assertion - since Dionicia did argue the correct underinsured motorist in her opposition to American Family's Motion for Summary Judgment - without objection from American Family.

In resolving the matter, the Appellate Court addressed an issue of first impression: whether in light of the previous Nevada Court decisions, a passenger who is injured in a two-car collision where **both** drivers are concurrently negligent - may recover liability benefits under the permissive driver's policy based on the permissive driver's negligence, and also recover underinsured motorist benefits under the same policy for the negligence of the *other* driver, whose vehicle is underinsured. In the end, the Court of Appeal determined that, so long as the passenger is injured by joint tortfeasors and is deemed an insured upon the occurrence of an accident, that passenger may recover under both the permissive driver's liability policy and the permissive driver's underinsured motorist policy - if the other tortfeasor driver is determined to be underinsured.

CARRIER CAN BE LIABLE TO INSURED FOR
DESTRUCTION OF EVIDENCE

In *Bryan Cooper v. State Farm Mutual Insurance Company*, the California Court of Appeal recently determined that an insurance company may be liable for failing to preserve evidence on behalf of an insured.

In this case, Bryan Cooper (“Cooper”), an insured of State Farm, was involved in a single car accident allegedly caused by a tread separation of the right rear tire. As part of the collision damage settlement with Cooper, State Farm acquired possession of the vehicle, including the subject tire, as provided for under the terms of the insurance contract. State Farm intended to pursue a subrogation claim and had the tire examined by experts who opined it was defectively manufactured. State Farm notified Cooper of the experts’ opinion; and Cooper sued the manufacturer - Continental Tire.

Cooper’s attorney notified State Farm of the importance of the tire to Cooper’s case against Continental Tire, and State Farm advised it would retain the tire. However, State Farm later disposed of the car and the tire. Cooper then sued State Farm for damages allegedly caused by its destruction of the tire contending that, as a result of State Farm’s conduct, he was unable to prove his product defect case against Continental Tire. The parties waived Trial by Jury and Cooper’s counsel made his opening statement. The Court thereafter granted State Farm’s Motion for Nonsuit.

The issue in the Motion for Nonsuit was whether Cooper could legally recover damages against State Farm for injuries sustained in the underlying automobile accident, or whether said recovery was, by its very nature, speculative. In granting State Farm’s Motion for Nonsuit, the Trial Court ruled that Cooper was legally precluded from recovering damages for the alleged destruction of the tire because he would be unable to show he would have prevailed in his case against Continental Tire – had the tire not been destroyed.

In the end, the Court of Appeal reversed the Trial Court’s ruling and remanded the matter for further proceedings. In rendering its decision, the Appellate Court held Cooper’s opening statement at Trial had set forth *prima facie* facts supporting the existence of a duty owed by State Farm to preserve the tire; and also set forth sufficient *prima facie* evidence to create a strong inference the tire was defective and, had it not been destroyed, Cooper would have been able to prove his case against the manufacturer of the tire.

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