



Volume XXII, No. 6  
February 15, 2010

FROM THE LAW OFFICES OF GARAN LUCOW MILLER, P.C.

# LAW FAX

MICHIGAN LAW - BLUE | INDIANA LAW - RED

[www.garanlucow.com](http://www.garanlucow.com)

Garan Lucow Miller, P.C. 1111 West Long Lake Road, Suite 300 Troy, Michigan 48098 248.641.7600

From the Co-Editors  
James L. Borin & Simeon R. Orłowski

## Write-offs in Indiana Bodily Injury Claims

**CONTRIBUTOR - DAVID A. WILSON<sup>1</sup>**

Following the Indiana Supreme Court's decision in *Butler v Department of Insurance* providing for recovery of *only* the portion of charges accepted by Medicaid, Medicare, and private insurance carriers in wrongful death cases, the Court considered the broader issue of write-offs in bodily injury cases not involving death. However, in *Stanley v Walker*, an entirely different, and far less definitive, approach was taken by the Court. Rather than holding that plaintiffs were not entitled to recover the written-off amounts, as with wrongful death cases, the Court began its analysis with the existing legal premise that an injured plaintiff is entitled to recover damages for medical expenses that were both necessary and reasonable. Rather than the rule being one of permitted recovery, the holding merely provided for conflicting sources of evidence for the jury to find the reasonable value of those medical services.

<sup>1</sup>Mr. Wilson is a Partner in the Firm's Indiana Office and can be reached at (219)756-7901 or [dwilson@garanlucow.com](mailto:dwilson@garanlucow.com)

**GARAN LUCOW MILLER, P.C.**

ANN ARBOR • DETROIT • GRAND BLANC • GRAND RAPIDS • LANSING • MARQUETTE • PORT HURON • TRAVERSE CITY • TROY

The Court first noted the continued applicability of the Indiana collateral source rule, which prohibits introducing evidence of compensation received by plaintiffs (payments by insurance carriers, Medicaid or Medicare) to reduce damage awards. The Court re-affirmed the applicability of the collateral source rule, but also provided that adjustments or accepted charges for medical services may be introduced into evidence without referencing insurance.

The Court also addressed, without seeming effect, Rule 413 of the Indiana Rule of Evidence. Rule 413 provides for admission of medical bills, to serve as *prima facie* evidence of the reasonableness and necessity of those charges. The Court held that where the reasonableness of medical bills is in dispute, the defense “may produce contradictory evidence to challenge the reasonableness of the proffered medical bills, including expert testimony.” In this manner, a jury would be presented evidence from which to determine “the proper measure of medical expenses, which was the reasonable value of such expenses, and not what the plaintiff was charged, nor actually paid.

*Stanley* was a bold change in Indiana law, but the effect has left many uncertain of its application for counsel (and by extension claims representatives presented with trial counsel’s strategy.) The simplest approach is for counsel to discuss agreement with plaintiff’s counsel as to charges that both agree are “reasonable”, accounting for write-offs, while preserving the ability to dispute that the charges are resulting from the original accident, or the necessity of treatment.

This certainly seems the most prudent approach for plaintiff’s counsel in a conservative venue. However, some plaintiffs’ counsel believe that the amount of medical charges is a good indicator of the seriousness of the claimed injuries, and won’t agree to such arrangements. In such an event, defense counsel is confronted with possible strategies to rebut the total charges.

While most courts are reluctant to award attorneys’ fees in Indiana, one approach would be to serve requests for admissions, seeking admissions that the reduced amounts constitute the reasonable amount of medical charges, as well as companion admissions that the plaintiff is not legally obligated to repay amounts reduced or written off. Some plaintiffs’ counsel might decide that it would be more prudent to admit the reasonableness of the charges. However, even for those who deny the reasonableness of the charges, fewer still would have any basis to deny that the plaintiff would not be obligated to repay the amounts reduced or written off, which ultimately would prove damaging to the plaintiff at trial.

For those remaining obstinate plaintiffs’ counsel seeking recovery of total charges, it is at this stage that defense counsel should consider expert testimony and, when applicable, buttressed with publications such as “Fee Facts.” One might consider, as part of a larger Independent Medical Examination, testimony from the selected expert that the reduced charges are reasonable. A lesser approach would be a records review where the same inquiry was asked. If successful at trial, a Motion could then be made for the costs associated with bad faith denials to Requests for Admissions, but absent the most egregious denials, counsel aren’t likely to recover the fees and costs with the expert.

Perhaps the best approach, for counsel, is to merely cross-examine Plaintiff’s expert. While this is not the most effective approach, and many agree that the *Stanley* decision doesn’t readily provide a clear-cut approach, the damaging effect to a plaintiff’s case is the same. After a jury is

presented with two conflicting totals for medical charges, and further, admissions if obtained, that the plaintiff is neither obligated for, nor required to repay, the amounts reduced or written-off, plaintiff's counsel is then in the difficult position of requesting a jury to award those non-incurred damages. Not only will most jurors not make such an award, this approach for plaintiff's counsel results in damaged credibility on every aspect of plaintiff's alleged case, and conversely, opens the argument from defense counsel that plaintiff is seeking damages he or she haven't even incurred.

While *Stanley* might present interesting challenges in defense of litigated claims, the effect for claims professionals is fairly straight-forward. In claims where charges are written off by Medicaid, Medicare, and agreements with private insurance carriers, claims representatives should offer to pay only the amounts written-off or reduced.

\*\*\*\*\*

**OUT-OF-CONTROL, RIDERLESS MOTORCYCLE STRIKES AND  
INJURES MOTOCROSS SPECTATOR STANDING NEXT TO PARKED VAN --  
NO-FAULT COVERAGE HELD NOT APPLICABLE:**

***Since risk of spectator injury existed before the van was parked,  
it cannot be said that parking the van CAUSED this unreasonable risk.***

**CONTRIBUTOR - DANIEL SAYLOR<sup>2</sup>**

In *May/Eddy v Titan Insurance Company*, Court of Appeals No. 287250 (January 28, 2010), the Court of Appeals had occasion to closely examine the No-Fault Act's parked vehicle exclusion and the exception applicable to vehicles "parked in such a way as to cause unreasonable risk of the bodily injury which occurred."

On a summer night in 2002, the young plaintiff, thirteen-year-old Joshua Eddy, attended an evening of motorcycle races with several neighbors and friends. The motocross event was held on a modified horse-racing track at the county fairgrounds. There were grandstand seats available for the spectators or, for an additional parking fee, guests could park their cars on the grass near the "pit area" at one end of the race track.

After the car in which the group had arrived was parked back in the grassy area, Joshua exited the vehicle and walked with the others closer to the race track where another friend, Josh Duits, was watching from the vantage-point of his wheelchair situated on the extended lift-ramp of his handicapped-equipped van. In order to allow Josh to see the racing motorcycles better, the van was parked perpendicular to the track, about 60 feet from a corner where a straightaway

<sup>2</sup>Mr. Saylor is a Partner in the Firm's Detroit Office and can be reached at (313)446-1530 or [dsaylor@garanlucow.com](mailto:dsaylor@garanlucow.com)

ended with a 90-degree turn. To prevent spectators from going any closer to the track, a snow fence and a line of straw bails were placed between the track and the pit area.

As Joshua Eddy was standing near the handicap van next to his friend's wheelchair lift, one of the racing motorcycles suddenly left the track and headed in their direction. The throttle had become stuck on full speed, and the rider had fallen off. The uncontrolled motorcycle crashed into the Josh Duits' wheelchair lift, knocking him back into the van. The back end of the cycle then flew up and struck Joshua Eddy in the head, causing a severe brain injury.

A claim for no-fault benefits was made on Joshua's behalf against Titan Insurance, the insurer of Joshua's mother and step-father. Titan denied the claim on grounds that, notwithstanding the presence of the parked van, Joshua's injury did not arise out of "the use of a motor vehicle as a motor vehicle" so as to trigger no-fault coverage. The motorcycle's involvement likewise did not trigger coverage, since the No-Fault Act expressly defines "motor vehicle" to exclude motorcycles. Moreover, since the van was parked at the time, Titan contended that the Act's parked vehicle exclusion directly precluded the claim for no-fault benefits.

In response, Plaintiff maintained that one of the exceptions to the parked vehicle exclusion applied:

"The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred." MCL 500.3106(1)(a).

The ensuing litigation was protracted. The trial court granted summary disposition in favor of Plaintiff Eddy on two separate occasions, each of which was followed by unsuccessful attempts by Titan to obtain appellate review. Finally, after another insurer was added to the case on grounds of Joshua Eddy's dual-residency with his father (which issue had to be tried to a jury), a judgment was entered and Titan finally took its appeal as of right.

The dispositive question turned out to be whether the handicap van's involvement in Joshua's injury was such as to bring the accident under no-fault insurance coverage. Titan argued that the parking of the van near the end of the racetrack's straight-away section arguably put racing motorcyclists at risk -- but the injury in this case was not sustained by a motorcyclist. Titan argued that a *distinct* risk existed for any spectator watching the race from the end of the straightaway: If a motorcyclist were to lose control and come speeding into the spectator area, a spectator could be severely injured. *This* risk, Titan argued, existed independent of whether or not a motor vehicle happened to be parked among the spectators.

The Court of Appeals agreed with Titan and reversed the finding of no-fault insurance coverage. "[A]ny risk of plaintiff being injured by an out-of-control motorcycle was not a risk created by the parked motor vehicle." (Opinion, p 9 -- Judges Zahra and Jansen, quoting Titan's brief). The Court's two-to-one majority held that the trial court erred in its failure to adhere precisely to the plain language of the statute, which requires not merely that there *be* both a parked vehicle and an unreasonable risk, but that the parked vehicle be the *cause* of the unreasonable risk. "[T]he [trial] court's opinion suggests that [the statute] is satisfied if a vehicle is simply parked unreasonably close to a known danger and someone is injured by that danger." (Opinion, p 10).

Here, since even plaintiff conceded that “there was a risk that spectators would be hit by a runaway motorcycle” and that this risk “applied to people in the stands and to people parked in other areas around the track,” it was clear that the risk was *not* created by the subject van:

“In other words, the risk was present before the van was parked. If the risk was present before the van arrived, it cannot be maintained that the van caused the risk of harm.” (Opinion, p 10).

In dissent, Judge William Murphy opined that the risk of injury to Joshua Eddy is the only risk that mattered, and it was the parking of the Duits’ handicap van that caused *this* risk, since Joshua would not have been standing in harm’s way were it not for his friend’s van being parked where it was:

“The ‘risk of the bodily injury [to Joshua] *which occurred*,’ §3106(1)(a) (emphasis added), did not exist before the van was parked, as absent the van, Joshua would not have been present at the accident scene.” (Opinion, Murphy, J., dissenting, p 4).

It was Titan’s contention, however, that this incidental level of causal relationship was insufficient to bring such a “risk” within the intended scope of no-fault insurance protection, and the majority agreed. For no-fault coverage to apply, the vehicle must be responsible for more than merely bringing people to a place of danger:

“[U]nder plaintiff’s interpretation, [the statutory exception] could arguably be satisfied if a vehicle is parked unreasonably close to a known crime area and a passenger steps outside and becomes the victim of a crime. Further, [the statute] could be satisfied in multitude of hypothetical situations where a vehicle is parked unreasonably close to a known natural danger, (i.e., geysers, tides, wildlife) and a passenger steps outside and is injured by that natural danger. In these situations, the manner in which the car is parked simply does not cause the risk of harm.” (Opinion, p 10).

The exception to the parked vehicle exclusion was thus held not to apply to Joshua Eddy’s accident, and, accordingly, the trial court’s summary disposition ruling against Titan was reversed. It is anticipated that plaintiff counsel will seek further review by the Michigan Supreme Court.

The Eddy case was defended on behalf of Titan Insurance by Garan Lucow Miller attorneys James Borin and Daniel Saylor.

**THE DANGER OF NO-FAULT ATTORNEY FEES  
MUST BE CAREFULLY ASSESSED THROUGHOUT THE CASE  
AND NOT SOLELY CONTESTED AFTER TRIAL**

**CONTRIBUTOR - DAVID COUCH<sup>3</sup>**

In November of 2009, Law Fax discussed the case of *Byers v State Farm*, an unpublished opinion from the Court of Appeals in which the plaintiff was awarded substantial attorney fees after the defendant conceded on the eve of trial that most outstanding benefits were owed and voluntarily paid the majority of the claim. That case was a reminder of the dangers of employing such a strategy. On February 2, 2010, the Court of Appeals released its unpublished opinion in the case of *Tinnin v Farmers Insurance Exchange*, a case which also involved an award of attorney fees and one which contains an important reminder for first party No-Fault claims handlers and defense counsel that the danger of attorney fees must be assessed throughout the case and not solely contested after a verdict has been entered.

Mr. Tinnin was struck by a vehicle while crossing the street. He sustained several injuries including a traumatic brain injury. The Defendant voluntarily paid No-Fault benefits for almost three years before discontinuing payments following two IMEs. A lawsuit followed in which Mr. Tinnin sought approximately \$90,000 in attendant care benefits as well as the payment of a handful of PM&R bills which together totaled only \$1,235.

At the conclusion of trial, the jury agreed with the defense position that the attendant care claim was not related to the accident. However, based upon the testimony of the Plaintiff's psychiatrist, as well as the recommendations earlier set forth by the Defendant's own IME physician, the jury found that the \$1,235 in PM&R bills were related and also awarded a small amount of overdue penalty interest pursuant to MCL 500.3142.

*Tinnin* is instructive not because of the findings set forth above, but because the trial court then agreed with the Plaintiff's request for attorney fees and awarded almost \$60,000 pursuant to MCL 500.3148. In short, the Defendant was being ordered to pay \$57,690 in attorney fees on \$1,235 in overdue medical bills. The attorney fee award was calculated at \$300 per hour for a case tried in the Wayne County Circuit Court. The Defendant was understandably vexed and appealed that portion of the ruling.

Importantly, the Court of Appeal affirmed the full award of attorney fees, holding that there is no authority which requires a trial court to apportion attorney fees where an insurer has unreasonably refused to pay certain benefits, even where its refusal to pay other benefits was found to not be unreasonable. The Court recognized that the Plaintiff's recovery of the PM&R bills

---

<sup>3</sup>Mr. Couch is a Partner in the Firm's Grand Rapids Office and can be reached at (616)742-5507 or [dcouch@garanlucow.com](mailto:dcouch@garanlucow.com)

constituted less than 2% of the overall damages sought at trial, yet the attorney fee award was for work performed on the case as a whole. However, there was no accurate way to apportion the work. Regardless, the trial court found that all of the claims and bills were “interrelated.”

Of importance to the trial court and the Court of Appeals were two factors: 1) the Defendant’s own IME report allowed that it would have been reasonable for the Plaintiff to continue seeing a physiatrist on an “as needed” basis to monitor his condition; and 2) the Defendant’s claims handler conceded at trial that had she been aware of the IME physician’s opinion in that regard, she would not have denied that portion of the claim.

In retrospect, the issue of the PM&R bills should have been revisited as soon the as the IME report was authored. If the inconsistency in the two positions within the defense could not have been reconciled, the bills likely should have been honored mid-suit. As long as they were not strategically paid on the “eve of trial,” as we saw in the *Byers* case, the likelihood of any penalty interest or attorney fees attaching to those bills would have been very small at that point.

\*\*\*\*\*

### Upcoming Seminars

**Business Law Seminar** scheduled for **Tuesday, March 23, 2010** at the **Troy Community Center**. Agenda will follow shortly, to register, please contact Eileen Carty at [ecarty@garanlucow.com](mailto:ecarty@garanlucow.com)

\*\*\*\*\*

**The annual Grand Rapids Breakfast Seminar** is scheduled for **Thursday April 15, 2010** at **Meijer Gardens**. Agenda will follow shortly, to register, please contact Lynn Beatty at [lbeatty@garanlucow.com](mailto:lbeatty@garanlucow.com)

\*\*\*\*\*

**Indy Seminar** is scheduled for **Monday, May 17th, 2010** at the **Hyatt Regency** in downtown Indianapolis. Agenda will follow shortly, to register, please contact Eileen Carty at [ecarty@garanlucow.com](mailto:ecarty@garanlucow.com)

*Announcing Our New Indiana Office*

*Garan Lucow Miller, P.C.  
Is Pleased To Announce*

*Gregory M. Bokota  
Jennifer L. McCloskey  
and  
David A. Wilson*

*have joined the firm as Shareholders in our new  
Merrillville, Indiana office.*

Gregory M. Bokota was founding partner at Bokota Wilson McCloskey & Long, P.C. In 1985, Mr. Bokota earned his B.A. from the University of Chicago with honors, and in 1991, he received his J.D. from Indiana University School of Law. Mr. Bokota concentrates his practice in the areas of insurance defense litigation and appellate law. Mr. Bokota is licensed in the State of Indiana and State of Illinois.

Jennifer L. McCloskey was founding partner at Bokota Wilson McCloskey & Long, P.C. In 1992, Ms. McCloskey earned her B.A. from Hillsdale College, and in 1995, she received a J.D. from Valparaiso University School of Law. Ms. McCloskey concentrates her areas of practice in the field of insurance defense, criminal law and premises liability. Ms. McCloskey is licensed in the State of Indiana.

David A. Wilson was founding partner at Bokota Wilson McCloskey & Long, P.C. In 1990, Mr. Wilson earned his B.A. from University of Central Florida, and in 1996, he received a J.D. from Valparaiso University School of Law. Mr. Wilson concentrates his areas of practice in the field of insurance defense litigation, commercial trucking and transportation defense, and is a member in TIDA. Mr. Wilson is licensed in the State of Indiana and State of Illinois.

---

**GARAN LUCOW MILLER, P.C.**

ANN ARBOR • DETROIT • GRAND BLANC • GRAND RAPIDS • LANSING • MARQUETTE • PORT HURON • TRAVERSE CITY • TROY

**Robert D. Goldstein of our Grand Blanc office, Timothy J. Jordan of our Detroit office, and Kelly M. Kluting of our Grand Rapids office, are licensed in the State of Indiana. They are also available for assignments in both the Indiana and Michigan offices.**

**\*\*\*\*\***

**Garan Lucow Miller, P.C., a full-service law firm since 1948, providing quality representation to a national clientele from the Great Lakes Region, is pleased to announce that it has opened an office in Merrillville, Indiana, to further facilitate your claim and litigation needs in Indiana and Illinois.**

**Barrister Court  
9211 Broadway  
Merrillville, Indiana 46410  
Phone: 219.756.7901  
Fax: 219.756.7902**

---

**GARAN LUCOW MILLER, P.C.**

ANN ARBOR • DETROIT • GRAND BLANC • GRAND RAPIDS • LANSING • MARQUETTE • PORT HURON • TRAVERSE CITY • TROY