

INDIANAPOLIS LAW CLUB

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Advocacy Tip of the Month:

We understand the **Indiana Supreme Court's** rule, adopted this year, requiring attorneys to use one of five fonts in filings, and at least 12-point type. Legibility and some uniformity are vital.

IN THE NEWS: Bill to Change Punitive Damages Law Passes House

House Bill 1481 would dramatically change the allocation of punitive damages awards in Indiana. Under the current allocation, 25% is paid to the plaintiff, 75% to the state victim compensation fund, and any attorney's fee must be paid out of the 25% awarded to the plaintiff. House Bill 1481 reverses the allocation, with 75% to the plaintiff, 25% to the state victim compensation fund, and attorney's fees may be taken out of the entire award with the percentage taken from the state portion in the same percentage as that contracted for between the attorney and the plaintiff. The bill has passed the House and is now being considered in the Senate. If it passes, this would be first major change to punitive damages law in Indiana since the passage of Indiana's Tort Reform Act in 1995.

1. Summary Judgment Procedure. *Filip v. Block*, 858 N.E.2d 143 (Ind. Ct. App. 12/11/06)(Riley)

John and Valaria Filip, owners of an apartment building in Knox, Indiana, sued their insurance agent, Carrie Block, and her agency, 1st Choice Insurance Agency, after a fire and discovered that their insurance coverage, as procured by Block, was inadequate. Block and 1st Choice moved for summary judgment on August 1, 2005. The Filips filed their response two months later, on October 6, 2005. Defendants moved to strike the response as untimely which was granted by the trial court. The motion for summary judgment was also granted.

One of the issues presented on appeal was whether the plaintiffs could rely on the entirety of the materials designated by defendants on the motion for summary judgment or only the evidence specifically referenced in defendants' memorandum of law. The Court holds that the entirety of the evidence designated may be considered and not just the evidence referenced in the memorandum. Summary judgment reversed.

In the opinion, the court provides detailed instructions regarding how it wants summary judgment papers to be drafted. Quoting from *Pierce v. Bank One – Franklin, NA*, 618 N.E.2d 16, 19 (Ind.Ct.App. 1993), the *Filip* court states:

“[T]he better practice is to clearly and succinctly state the factual issues and the pertinent parts of the record which are directly relevant to those issues in their motions or responses, not necessarily in the supporting briefs. While T.R. 56 does not set out a specific form and while a brief or memorandum may be submitted in support of the motion, succinctly listing every issue of material fact and supporting each listing with a precise reference to the relevant section of the record would greatly assist the trial judge and this court in correctly ruling upon such motions. In short, a party should file a list of the factual matters which are or are not in dispute, a specific designation to their location in the record, and a brief synopsis of why those facts are material. The brief or memorandum in support of or in opposition to the summary judgment motion would then be helpful to further enlighten the court as to the law supporting their position. . . .
...[T]he main designation of evidence should take place in the motion and response, with the accompanying briefs or memoranda playing merely a supporting, persuasive role.”

Lessons:

1. For the summary judgment movant:
 - a. Expand the summary judgment motion to include a list of each material fact not in dispute, a specific designation of the evidence supporting each fact, and a brief synopsis of why those facts are material.

- b. The brief/memorandum is “merely a persuasive tool to enlighten the court as to the party’s arguments.” *Elliott v. Allstate Ins. Co.*, 859 N.E.2d 696, 699 n. 2 (Ind.Ct.App. 1/9/07)(affirming the *Filip* guidance)
2. For the summary judgment respondent:
 - a. File two documents, not one.
 - b. The first document should be the “Response” and should include a list of each material issue of fact and a designation of evidence supporting each.
 - c. The second document should be the brief/memorandum limited to argument.
3. Designations of evidence should be set forth in the motion and response; disregard prior case law that found acceptable a separate filing of designation or designating in the brief/memorandum.

2. Retaliatory discharge. Meyers v. Meyers, 861 N.E.2d 704 (Ind. 2/21/07)(Dickson)

Paul Meyers (“Paul”) sued his employer, Meyers Construction, Inc., for unpaid wages and for wrongful discharge, alleging that he had been fired for asserting his wage claim. The trial court dismissed the wrongful discharge claim based on the employment at will doctrine. The Court of Appeals reversed and the Supreme Court granted transfer.

The primary issue addressed by the Supreme Court was the scope of the retaliatory discharge exception to the employment at will doctrine. In *Frampton v. Cent. Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), the Court recognized a retaliatory discharge exception to the employment at will doctrine for an employee who had been discharged for asserting a worker’s compensation claim. In *McClanahan v. Remington Freight Lines*, 517 N.E.2d 390 (Ind. 1988), the exception was extended to protect a truck driver who was fired for refusing to haul a load in Illinois that exceeded the amount allowed by Illinois law.

In this case, the Court holds that the exception does not extend to a retaliatory discharge for asserting a wage claim. The Court indicates that the exception would only be applied when (1) there is a specific statutory basis (in *Frampton*, the Court had relied on statutory language prohibiting an employer using any “device” to avoid its worker’s compensation obligations); or (2) when the employee is terminated for refusing to violate a legal obligation that carries potential penal consequences to the employee. If the exception is to be made broader, it will need to be by legislative act.

Lessons:

1. The employment at will doctrine will govern almost all employee firings; the exceptions are few and narrowly drawn.
2. An employee fired for asserting his right to unpaid wages, has no wrongful discharge claim.
3. An employee fired for asserting his right to worker’s compensation (including replacement wages), has a wrongful discharge claim.

3. Negligent Infliction of Emotional Distress under Bystander Theory; Smith v. Toney, 2007 WL 739867 (Ind. 3/13/07)(Boehm)

Eli Welch was killed in a collision with a truck on I-70 near Plainfield around 3:50 a.m. Amy Smith, Welch’s fiancée, was not in the vehicle but drove by the crash scene around 6:10 a.m. and saw the “smashed-up” vehicle. Smith sued the truck driver and trucking company for negligent infliction of mental distress. The defendants moved for summary judgment. Before ruling on the motion, the federal district court certified questions to the Indiana Supreme Court.

The Supreme Court holds:

- (1) A fiancée does not meet the relationship requirement to assert a bystander claim for negligent infliction of emotional distress. In the absence of a blood relationship (children, parents etc.), a marriage license is required.
- (2) The proximity requirement for asserting a bystander claims is met only if the plaintiff has learned of the incident by having witnessed the injury or the immediate gruesome aftermath.
- (3) The proximity requirement is both a matter of time and circumstance.
- (4) Determinations of the relationship and proximity requirements are questions of law for the court to decide, not for the jury.

Although the decision was unanimous, Justices Sullivan and Rucker concurred, refusing to adopt the bright-line marriage test set forth in Justice Boehm's majority opinion. They agree that the fiancée relationship of Welch and Smith doesn't qualify but they would leave open the opportunity to sue for other non-married persons who have a relationship "of long duration marked by financial interdependence, intimacy, and other characteristics of the spousal relationship."

Lessons:

1. In assessing a bystander claim for negligent infliction of emotional distress, make sure that the relationship and proximity requirements are both met.
2. The Court has narrowed the scope of the bystander rule, excluding claims by persons who are "analogous to a spouse" as previously suggested in *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000).
3. This ruling would appear to exclude any bystander claim by persons in gay relationships.

4. Defamation; Parody Defense. *Hamilton v. Prewett*, 860 N.E.2d 1234 (Ind.Ct.App. 2/6/07)(Baker)

Paul Hamilton, owner and operator of a water conditioning business in Daviess County, sued Morgan Prewett for defamation based on a website that Prewett authored. The website refers to a Paul Hamilten (changing one letter in the name) who has a water conditioning business and includes statements such as the following:

- "I have a Master's Degree in Water Conditioning from Smartass University, a prestigious mail order college."
- "I have several methods of attracting women . . . When my employees are installing a unit at a place where their (sic) is a woman at home, I like to get the target alone and tell her that she doesn't have to 'pay for this.' A couple of winks and boom, you have another sucker hooked."
- "The Mayor of the town is terrified of me because I am so smart, but occasionally I do have to put him in his place."
- The website indicates that "Hamilten" engages in unfair trade practices like advertising a low price for salt but then selling customers only the first bag at the low price and inflating the price on additional bags—noting that few people buy just one bag.
- The website includes purported testimonials in which claims are made that Hamilten's water can cure severe facial disfigurement, attract women, and greatly increase the drinker's intelligence quotient.

Prewitt moved to dismiss Hamilton's complaint and for summary judgment. The trial court granted the motion and Hamilton appealed. The Court of Appeals noted "that Hoosiers either do not have a parodistic sense of humor or do not file lawsuits over instances of parody

because Indiana case law does not address the issue.” It does now and the rule is that parody will provide a defense to a defamation claim. The court relies upon the U.S. Supreme Court observation in *Hustler v. Falwell*, 485 U.S. 46 (1988), that parody “could not reasonably be understood as describing actual facts...” and concludes, therefore, by definition, parody cannot constitute the “the false statement of fact” that a defamation claim requires.

By footnote, the court left open the possibility that with “actual malice” a defendant might still be liable although this seems hard to reconcile with the court’s statement that a parody can never provide the “false statement of fact” that is required for a defamation claim.

In a lengthy concurring opinion, Judge Najam argues that that there should not be a blanket exemption in the law of defamation for parody. He believes that the majority has employed a false dichotomy and that what matters is whether the facts support a defamatory imputation. Parody, according to Judge Najam, should be an effective defense only when the jest in its entirety cannot reasonably be interpreted as stating or implying any false fact, but that conclusion does not mean that parody and defamation are mutually exclusive. The fact that a statement may be uttered in jest does not necessarily insulate that statement from an action for defamation.

Prewitt sought attorney fees pursuant to Indiana’s Anti-SLAPP Statute, I.C. 34-7-7-1. This statute applies to “Strategic Lawsuits Against Public Participation,” that is, to meritless suits intended to silence an opponent’s speech on a public issue or an issue of public importance. The statute provides for recovery of attorney’s fees and costs by a defendant who prevails on a motion to dismiss. The court denied a fee award to Prewitt, finding that Hamilton’s suit was not an attempt to silence Prewitt’s speech on a public issue or issue of public importance.

Lessons:

1. Parody is a defense to defamation.
2. The Anti-SLAPP statute provides an opportunity to recover attorney fees in applicable cases.
3. Websites provide an abundance of opportunities for litigation.

5. Relation Back. Porter County Sheriff Department v. Douglas Guzorek, 857 N.E.2d 363 (Ind. 11/28/06), rehearing denied, 2007 WL 662218 (Ind. 3/6/07)(Boehm)

Rita Guzorek sued Officer Joseph Falatic of the Porter County Sheriff Department after an auto accident even though, pursuant to the Tort Claims Act, the only non-immune party she could sue was the Sheriff Department itself. Guzorek did not move for leave to add the Sheriff Department until after the two-year statute of limitations period had run. The court allowed Guzorek to amend her complaint and then the Department moved for summary judgment on statute of limitations grounds. Guzorek argued that the amended complaint adding the Department related back to the filing of the original complaint.

This argument depends on whether the Department “knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against [it].” Trial Rule 15(C)(2). In this circumstance, the mistake was one as to the applicable law concerning the identity of the proper party. The Department argued that a narrow view of mistake should apply; that it should only cover mistakes of fact; that when the mistake is one of law as to who may be held liable, that is not a mistake as to the “defendant’s identity” under the rule.

On this issue, the trial court sided with Guzorek; the Court of Appeals sided with the Department; the Supreme Court voted 3-2 in favor of Guzorek citing two Seventh Circuit opinions that appeared to support the same position. When the Seventh Circuit backed away from those decisions in *Hall v. Norfolk S. Ry. Co.*, 469 F.3d 590 (7th Cir. 11/9/06), identifying

them as “outliers,” the Department moved for a rehearing. The Supreme Court wrote a new opinion but the vote was still 3-2 in favor of Guzorek, still rejecting the narrower view of relation back that prevails in the federal courts, including the Seventh Circuit.

Justices Shepard and Sullivan dissented, arguing that the majority view “eviscerates the mistake of identity requirement” and that the Court should “remain consistent with the federal courts’ interpretation of the mistake of identity requirement.”

Lessons:

1. Relation back under Indiana Trial Rule 15(C)(2) applies when there has been a mistake of the defendant’s identity based on a misunderstanding of law; not so under the same language in Rule 15(c)(3) of the Federal Rules.
2. A majority of the Supreme Court is willing to take a minority position on an issue of law when, in their view, the result is more consistent with the rule’s intent and will facilitate a decision on the merits rather than throwing a party out for what is, in essence, a procedural mistake.

6. Contributory Negligence; Harmless Error. Penn Harris Madison School Corporation v. Howard, 861 N.E.2d 1190 (Ind. 3/1/07) (Sullivan)

David Howard, a 17 year-old student at Penn High School, suffered serious injuries when he fell from an apparatus designed to make Peter Pan fly during a rehearsal for the musical. Suit was brought against the school corporation for David’s injuries and resulted in \$200,000 verdict. The Court of Appeals reversed and the Supreme Court granted transfer.

The Supreme Court’s opinion focuses on two instructions used by the trial court. The first instruction stated that in deciding whether Howard was guilty of contributory negligence, the jury must determine whether he had exercised the “reasonable care that a person of like age, intelligence, and experience would ordinarily exercise under like or similar circumstances. The law in Indiana, however, is that children over the age of 14, absent special circumstances, are chargeable with exercising the standard of care of an adult. It was deemed error for the court to instruct that the standard of care was to be based on “a person of like age.”

The Court concludes, however, that this error was harmless because virtually every witness had described Howard as “intelligent, mature and responsible.” An incorrect instruction will not warrant a new trial unless the complaining party shows a “reasonable probability that substantial rights of the complaining party have been adversely affected.” Here the jury would have concluded the “reasonable care of a person of like age, intelligence and experience” would be that of an adult. [Note: Chief Justice Shepard dissented on this issue, finding it less than clear that the jury would not have applied a more lenient standard in light of the erroneous instruction.]

The trial court also gave a last clear chance instruction. The instruction correctly stated the law with respect to last clear chance but the Supreme Court found there was no evidence in the record sufficient to warrant issuing the instruction, that is, no evidence that the high school had the last opportunity to avert the accident. But for the same reason, the Court finds the error to be harmless.

Lessons:

1. The standard of care for kids over 14 is the same as for adults.
2. There’s little chance of reversible error for giving an instruction when there is no evidence to support it.

7. Jury Questions During Deliberations. Ronco v. State of Indiana, 2007 WL 662227 (Ind. 3/6-07)

During jury deliberations in this criminal case, the jury submitted a question about a specific instruction. The court responded with a note asking the jury to reread the instruction. One juror responded that he still did not understand, that he felt that he needed to hear the instruction again, and said “it was going to be a long night.” Based on this comment, the judge declared that the jury had reached an “impasse” under Jury Rule 28 and directed that the jurors be brought back into the courtroom. The judge then reread two of the instructions and asked if that cleared up the confusion. The foreman had follow-up questions which the judge answered, commenting on the meaning of one of the instructions. The jury returned to their deliberations and the defendant was convicted.

On appeal, the defendant argued that the trial judge had erred by ruling that the jury had reached an impasse, by not reading all of the instructions upon rereading two of the instructions, and by commenting further on the meaning of one of the instructions. The Supreme Court agreed that an impasse had not occurred for the purposes of Jury Rule 28 but the Court finds nonetheless that the trial judge’s handling of the situation was appropriate. In so ruling the court relies upon Ind. Code 34-36-1-6 which provides that if during deliberations, “the jury desires to be informed as to any point of law arising in the case,” then, “the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.”

Lessons:

1. There’s no need to reread the instructions all the way through as in the past when the jury has a question about the law.
2. The judge may also answer a question posed by the jury about the law that extends beyond the language in the instructions.
3. In the event of a real impasse, the court has power to inquire of the jurors about how the court and counsel can assist them and “may direct that further proceedings occur as appropriate.”

8. Incredible Dubiosity Rule. Fajardo v. State of Indiana, 859 N.E.2d 1201 (Ind. 1/16/07)(Dickson)

Fajardo was charged and convicted of child molesting based upon the testimony of an 11 year-old child victim. On appeal, Fajardo argued that the conviction should be reversed for insufficient evidence and relied upon the “incredible dubiosity” rule. Generally, assessing witness credibility is left to the exclusive judgment of the jury and not a matter for appellate consideration. There is, however, a recognized exception:

“If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant’s conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.”

Love v. State, 761 N.E.2d 806, 810 (Ind. 2002).

The defendant here argued that the child’s testimony was “vacillating, contradictory and uncertain.” The Supreme Court agreed that there were “equivocations, uncertainties and inconsistencies” in her testimony but that “they are appropriate to the circumstances presented,

the age of the witness, and the passage of time between the incident and the time of her statements and testimony. And there is clear, unequivocal testimony from the child that establishes the necessary elements of the charged offense.” In these circumstances, the testimony “was not so incredibly dubious or inherently improbable that no reasonable person could believe it.”

Lesson: There are times when a jury’s assessment of witness credibility will be overturned but only in the rare circumstances that satisfy the “incredible dubiousity rule.”

9. Qualified Settlement Offer. *Scott v. Irmeger*, 859 N.E.2d 1238 (Ind.Ct.App. 1/17/07)(Matthias)

Jill Scott sued Jeremy Irmeger after she was bitten by the Irmeger’s dog. Irmeger’s homeowner’s carrier, Indiana Farmer’s Mutual Insurance Company, provided counsel to defend the case. A qualified settlement offer was made for \$15,000 by the defense prior to the jury rendering a defense verdict on the dog bite claim. Irmeger then moved for attorney’s fees pursuant to the qualified settlement offer statute which caps such fees at \$1,000. The trial court granted the fee award and Scott appealed.

The issue on appeal is whether Irmeger “incurred” the fee as that term is used in the statute when Farmers Mutual was actually paying the bill. The Court of Appeals concludes that for purposes of the QSO Statute, the relevant inquiry is whether a party has incurred attorney fees, not who pays the fees on behalf of the party. The court also finds that this conclusion is supported by public policy considerations, since many defendants have their attorney’s fees paid by their automobile or homeowners insurance carriers and if the QSO did not apply in such situations, it would not serve its purpose of encouraging rational valuations and settlements prior to trial in small cases.

Judge Sharpnack dissents, noting that the QSO Statute is in derogation of the common law rule (that each party must bear its own attorney fees) and as such, must be strictly construed. Sharpnack believes that the insurance carrier, not Irmeger, incurred the fees in question and therefore, no recovery under the QSO Statute can be sustained.

Lesson: Insurance carriers can take advantage of the QSO Statute when providing a defense to an insured.

10. Quantum Meruit for Attorney Fees. *Carr v. Pearman*, 860 N.E.2d 863 (Ind.Ct.App. 1/31/07)(Sharpnack)

Attorney Joseph Pearman assisted his nephew, Gerald Sison, following a serious auto accident by gathering and preserving evidence to be used in a lawsuit. He did not obtain a signed contingency fee agreement but did explain to Sison’s parents that his work was usually performed pursuant to a contingency fee agreement. Sison subsequently hired attorney Dave Foelber to work on the case and a contingency fee agreement was signed which stated, “We also understand that Joseph Pearman has done a good deal of work in preparing this case and we will work with him and you in determining fair compensation for those efforts.” Later, a third attorney, Bruce Carr, was brought into the case with another written contingency fee agreement. The case ultimately resulted in a settlement for \$2,000,000 and Foelber and Carr received a fee of \$800,000.

Pearman sued Foelber and Carr claiming that he was entitled to a portion of the fee under a theory of quantum meruit. Quantum meruit is an equitable doctrine that prevents unjust enrichment by permitting one to recover the value of work performed if used by another and if valuable. A jury trial resulted in a verdict in favor of Pearman in the amount of \$100,000. Carr

appealed and argued, among other things, that Pearman's claim should be void as contrary to public policy since he violated Rule 1.5(c) of the Rules of Professional Conduct by failing to obtain a written contingency fee agreement. The Court of Appeals holds that even when no written contingency fee agreement is obtained and although an oral contingency fee agreement is "invalid," an attorney who has provided services that benefited a client may recover under quantum meruit. Judgment affirmed.

Lessons:

1. You can still get paid even when you violate the Rules of Professional Responsibility.
2. If you take over a contingency case from another attorney, get a waiver of fees or an agreement up front regarding division of the fees. Such a fee sharing agreement needs to be in writing and should divide the fee in proportion to the services provided. Rule 1.5(e) of the Rules of Professional Conduct.

11. Legal Malpractice; Privity. *Querrey & Harrow, Ltd. v. Transcontinental Ins. Co.*, 861 N.E.2d 719 (Ind.Ct.App. 2/19/07)(Hoffman)

The law firms, Query & Harrow, Ltd. and Sanders Pianowski, LLP, were sued by Transcontinental Insurance ("CNA") for malpractice in defending a catastrophic trampoline injury case. CNA, the excess insurer, claimed that the defense lawyers failed to timely raise a non-party defense and this failure contributed to the defendants' insurers paying \$6.3 million to obtain a settlement, much more than they should have had to pay. The law firms moved for summary judgment on the grounds that they were not in privity with CNA as an excess insurer and that privity is required to assert a legal malpractice claim.

The issue is one on which there is a split of authorities in other states. The Court of Appeals holds that privity will be required and cannot be circumvented by a claim of equitable subrogation. This holding is based on the court's concern with a lawyer's undivided duty of loyalty to the client and the principle that a cause of action for legal malpractice be nonassignable.

Lesson: Only clients may sue a lawyer for malpractice with one narrow exception--for beneficiaries of a will that was not properly drafted.

12. Service of Process. *LePore v. Norwest Bank Indiana, N.A.*, 860 N.E.2d 632 (Ind.Ct.App. 1/25/07)(Riley)

Norwest Bank sued David LePore for defaulting on a consumer credit contract for a snowmobile. The bank obtained a default judgment which LePore challenged on appeal based on lack of proper service of process. The bank argued that it had provided the required service when the Sheriff left a copy of the summons and complaint at LePore's residence. Leaving the complaint and summons at a defendant's residence is recognized by Trial Rule 4.1 as a proper step in serving process but will not be sufficient unless, in accordance with T.R. 4.1(B), the summons is also sent by first class mail to the defendant's last known address and this fact be shown upon the return.

The bank failed in performing the latter step, sending the summons by certified mail instead of first class. The certified mailing was returned with a handwritten note: "moved left no address." LePore, however, had not moved. Relying on T.R. 4.15(F), the Court of Appeals finds that the bank's actions "substantially complied with T.R. 4.1(B) and were reasonably calculated to inform LePore that an action had been instituted against him" and therefore, were not legally insufficient. The Court also found applicable T.R. 4.16(B)(2) which states: "A

person who has refused to accept the offer or tender of paper being served thereafter may not challenge the service of those papers.” Default judgment affirmed.

Lessons:

1. Close enough counts in horseshoes and sometime for service of process.
2. You cannot avoid successful service of process by refusing tendered papers.

13. Admissibility of Documents Used to Refresh Recollection; Police Reports. *Gault v. State of Indiana*, 861 N.E.2d 728 (Ind.Ct.App. 2/23/07)(Crone)

Gault was convicted of possessing 494.77 grams of cocaine. On appeal, he argued that the trial court had erred when it refused to require production of a police report that had been used to refresh the recollection of a police officer. Rule 612 of the Indiana Rules of Evidence provides: “If, while testifying, a witness uses a writing or object to refresh the witness’s memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.” The unusual wrinkle here is that the report was used to refresh recollection during cross-examination by defense counsel.

The State argued that Gault was not an “adverse party” in this circumstance since the refreshing occurred during his counsel’s cross of the witness. The Court of Appeals agreed, finding that Gault was not entitled to production under Rule 612.

The Court further finds, however, that the document should have been produced. The Court explains that generally police reports are considered privileged work product since the police are regarded as investigators for the prosecutor. The work product privilege, however, can be waived and was found to be waived here when the prosecutor voluntarily handed the document to the police officer during cross examination to refresh the witness’s recollection. The court further finds that this error was harmless in light of substantial evidence of the defendant’s guilt.

Lessons:

1. Police reports are ordinarily protected by the work product privilege.
2. The privilege can be waived by offering a privileged document to a witness to refresh his recollection.

14. Suing with a Fictitious Name. *Doe v. Town of Plainfield*, 860 N.E.2d 1204 (Ind.Ct.App. 2/6/07)(Sharpnack)

In 2002, the Town of Plainfield adopted an ordinance prohibiting individuals listed on the Indiana Sex Offender Registry from using the town’s parks and recreational areas. The plaintiff, having previously been convicted of child exploitation and possession of child pornography, sued the Town of Plainfield claiming that the ordinance was unconstitutional. The plaintiff sought to proceed anonymously but the trial court denied his request to do so.

On interlocutory appeal of this ruling, the Court of Appeals looks to federal case law in deciding this issue of first impression in Indiana. The court concludes that there is a presumption in favor of disclosure of the plaintiff’s name. This presumption, however, can be overcome by consideration of a number of factors relevant to whether the customary practice of disclosure should yield to the plaintiff’s privacy concerns.

In this decision, the court specifically considers five factors: (1) Whether the plaintiff is challenging a governmental activity (Doe was doing just that); (2) whether the plaintiff risked suffering injury if identified (Doe submitted an affidavit that he and his six year-old son had been the subject of threats and acts of violence); (3) whether there is any prejudice to the opposing party (the court found no reason to believe the Town of Plainfield would be prejudiced); (4)

whether there is any public interest in the identity of the particular person who brought the case (the court indicated that the use of pseudonym will not interfere with the public's right or ability to follow the case); and (5) the extent to which the identity of the litigant has been kept confidential (although Doe had used his real name in a letter to Plainfield's Chief of Police threatening to sue, nothing in the letter connected him to this suit).

Finding that all five factors favored anonymity, the Court reversed the trial court and ordered that Doe could pursue the case anonymously.

Lessons:

1. Choosing to litigate in Indiana does not always mean that there must be public disclosure of the plaintiff's identity.
2. An anonymous substitute name, most often John or Jane Doe, is referred to as a "fictitious name" or "anonym."

15. Duty to Clear Sidewalks of Ice and Snow. *Denison Parking, Inc. v. Davis*, 861 N.E.2d 1276 (Ind.Ct.App. 2/28/07)

Barbara Davis was injured when she fell on an icy sidewalk adjacent to a Denison Parking facility. Davis sued Denison claiming that Denison was negligent for failing to clear ice and snow from the adjacent sidewalk. Denison moved for summary judgment on the ground that it owed no duty to Davis to clear the sidewalk. The trial court denied the motion but certified the issue for interlocutory review.

The Court of Appeals holds that: (1) there is no common law duty to clear ice and snow from an adjacent public sidewalk; (2) the municipal ordinance that required Denison to clear ice and snow from the sidewalk was enacted for the benefit of the municipality, not for the protection of people using the sidewalk, and gives rise to no duty to the users of the sidewalk; and (3) the fact that Denison's office manual requires employees to clear sidewalks from ice and snow also gives rise to no duty of care to the users of the sidewalk. Reversed and remanded with instructions to grant motion for summary judgment to Denison.

In a concurring opinion, Chief Judge Kirsch cautioned that in his view, the result might be different if the person who falls is an invitee of the business (and the sidewalk provides the method of ingress and egress to the business) rather than a third party pedestrian simply walking down the sidewalk.

Lessons:

1. There is little risk of liability to a third party pedestrian for failing to clear snow and ice from a sidewalk.
2. You could still be cited for an ordinance violation and fined \$50.

16. Judicial Notice. *United States v. Boyd*, 475 F.3d 875 (7th Cir. 1/30/07) and *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir. 2/14/07)

In these two decisions, Judge Posner engages in self-help to acquire additional information about the cases. In each case, he goes on the internet to obtain satellite photos of the vicinity in question and appends these satellite photos to his opinion. In the *Boyd* case, the photo is of downtown Indianapolis. In *Gilles* the photo is of the campus of Vincennes University. In the *Boyd* case, Judge Posner also visits a website to obtain additional factual information about the ammunition that the defendant used, finding that it would "perforate 48 layers of Kevlar body armor." He also observes that "there are published statistics on accidents from random shooting" and cites to an article containing these statistics.

All of these facts appear to inform Judge Posner's judgment that Boyd, by firing six shots into the air in downtown Indianapolis, had violated the statute that makes it a crime when a person, while armed with deadly weapon, recklessly performs an act that creates a substantial risk of bodily injury to another person.

In the *Gilles* case, Judge Posner visits the website of the plaintiff, Brother Jim Gilles, an evangelist, and reports: "Gilles gives the following account of his salvation. As a result of Satan's machinations, he devoted himself as a youth to drugs, sex, booze, and rock and roll. At a rock and roll concert at which the well known band Van Halen performed, singer David Lee Roth shouted to the crowd: 'Not even God can save your soul at a Van Halen concert!' Gilles saw the light, called on God to save him and thus refute Roth, and was saved."

Presumably, Judge Posner's reliance on these materials would be subject to Rule 201 of the Federal Rules of Evidence with respect to judicial notice of adjudicative facts. A court may take judicial notice of certain facts whether requested or not but the facts need to meet the stringent standards of Rule 201: "either (1) generally known with the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Incidentally, if a court, including an appellate court, takes judicial notice of facts improperly, a party can request a hearing on the issue. In the absence of prior notification, the request may be made after judicial notice has been taken.

Lessons:

1. Courts are using the internet to gather additional facts to help inform their judgment about cases.
2. Consider getting a satellite photo and putting in into evidence in every federal court case. Judge Posner appears to like them. In *Boyd*, after noting his distress "at the sloppiness with which the case has been handled by both sides," Judge Posner found particularly unforgivable the fact that "no satellite photo (available fee of charge from Google) was placed in evidence to indicate the physical surroundings."

P.S.: Judge Posner appears to have taken some interest in our fair state. In *Boyd*, he refers to Monument Circle as "the Times Square of Indianapolis (but a very tame and quiet Times Square)." And in *Gilles*, he reports that Vincennes University is "the oldest institution of higher education in Indiana (founded in 1806 by future President William Henry Harrison before Indiana was admitted to statehood)."

Advocacy Tip of the Month:

Effective January 1, 2007, all appellate briefs in Indiana are required to be printed in one of five acceptable fonts: Arial, Courier, Courier New, CG Times or Times New Roman and shall be 12-point or larger in the text and footnotes. Ind. App. Rule 43(D).

The Seventh Circuit's Practitioner's Handbook for Appeals has some different guidance about fonts. (p. 76 *et seq*). The Seventh Circuit prefers but does not require typefaces like those that are commonly used in books such as Century and Bookman or any typeface with the word "book" in it. Times New Roman is specifically discouraged, saying it's appropriate for quick reads like newspapers but not for briefs. For briefs, the Seventh Circuit suggests that you use a "more legible typeface."

Excerpts from *JCW Investments, Inc. v. Novelty, Inc.*, 2007 WL 817673 (7th Cir. 3/20/07)(Wood)

Meet Pull My Finger® Fred. He is a white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants. Fred is a plush doll and when one squeezes Fred's extended finger on his right hand, he farts. He also makes somewhat crude, somewhat funny statements about the bodily noises he emits, such as "Did somebody step on a duck?" or "Silent but deadly."

Fartman could be Fred's twin. Fartman, also a plush doll, is a white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants. Fartman (as his name suggests) also farts when one squeezes his extended finger; he too cracks jokes about the bodily function. Two of Fartman's seven jokes are the same as two of the 10 spoken by Fred. Needless to say, Tekky Toys, which manufactures Fred, was not happy when Novelty, Inc., began producing Fartman, nor about Novelty's production of a farting Santa doll sold under the name Pull-MyFinger Santa.

Tekky sued for copyright infringement, trademark infringement, and unfair competition and eventually won on all claims.

Somewhat to our surprise, it turns out that there is a niche market for farting dolls, and it is quite lucrative. Tekky Toys, an Illinois corporation, designs and sells a whole line of them. Fred was just the beginning. ...By the time this case arose, in addition to Fred, Tekky's line of farting plush toys had expanded to Pull My Finger® Frankie (Fred's blonde, motorcycle-riding cousin), Santa, Freddy Jr., Count Fartula (purple, like the Count on Sesame Street), and Fat Bastard (character licensed from New Line Cinema's "Austin Powers" movies), among others. By March 2004, Tekky had sold more than 400,000 farting dolls.

We look at the dolls themselves to determine substantial similarity.... the similarities between Fred and Fartman go far beyond the fact that both are plush dolls of middle-aged men sitting in armchairs that fart and tell jokes. Both have crooked smiles that show their teeth, balding heads with a fringe of black hair, a rather large protruding nose, blue pants that are identical colors, and white tank tops. On the other hand, Fartman has his name emblazoned in red across his chest, his shoes are a different color from Fred's, as is his chair, and Fartman wears a hat. In the end, despite the small cosmetic differences, the two dolls give off more than a similar air.

It is not the idea of a farting, crude man that is protected, but this particular embodiment of that concept. Novelty could have created another plush doll of a middle-aged farting man that would seem nothing like Fred. ...To see how easy this would be, one need look no further than Tekky's Frankie doll, which is also a plush doll, but differs in numerous details: he is not sitting, and he has blond hair, a tattoo, and a red-and-white striped tank. Frankie is not a copy of Fred. Fartman is. We have no trouble concluding that the district court properly granted partial summary judgment to Tekky on the issue of liability for copyright infringement.