

INDIANA LAW UPDATE
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1. IN THE NEWS: “U.S. Legal Work Booms in India”

From the Washington Post Foreign Service, May 11, 2008:

GURGAON, India – Legal process outsourcing is being called the next big thing in Indian business. In the past three years, the legal outsourcing industry here has grown about 60 percent annually. According to a report by research firm ValueNotes, the industry will employ about 24,000 people and earn revenue of \$640 million by 2010.

Indian workers who once helped with legal transcription now offer services that include research, litigation support, document discovery and review, drafting of contracts and patent writing. The industry offers an attractive career path for many of the 300,000 Indians who enroll in law schools every year. India and the United States share a common-law legal system rooted in Britain’s, and both conduct proceedings in English.

“The new e-discovery rules sent American companies scurrying all over the place. Neither the corporates nor the law firms in America are geared to do this kind of work at short notice. And that is where the Indian players come in. We can bring together a large number of skilled lawyers in no time at all and at one-fifth the cost,” said Srinivas Pingali, executive vice president at Quattro.

“Ninety percent of a lawyer’s work is legal research and drafting, and all this can now be offshored to India,” said Russell Smith, who worked in a Manhattan law firm called SmithDehn before moving to India to set up an outsourcing company in 2006. “My people in India can do everything from here, except sign the opinion letter and appear in an American court,” he said.

2. Indiana Const. Education Clause; Justiciability – *Bonner v. Daniels*, 885 N.E.2d 673 (Ind. Ct. App. May 2, 2008)(Riley)

The Education Clause, encapsulated in Article VIII, § 1 of the Indiana Constitution provides: “Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.”

“Commencing with Indiana's Education Clause, and interpreting it in light of the clause's historical mandate and our sister states' persuasive precedents, we hold that Article VIII imposes a duty on the State to provide an education that equips students with the skill and knowledge enabling them to become productive members of society.”

“A constitutionally-mandated public education is not a static concept removed from the demands of an evolving world. Mere competence in the basics-reading, writing, and mathematics-is insufficient in the beginning days of the Twenty-First Century to insure that this State's public school students are fully integrated into the world around them. A broad exposure

to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in Indiana's economy.”

“In line with the United State Supreme Court, Indiana courts have specifically rejected the notion that the judiciary should refrain from action because the elected branches of government might not comply. Our supreme court eloquently phrased it as follows: “Where the question presented to a court is a judicial question, it would be sheer, inexcusable cowardice and a violation of duty for it to decline the exercise of its jurisdiction because of a lack of power to enforce its decree if other agencies of government should refuse to comply with it.” *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1, 27 (1912), *reh ‘g denied.*”

“We find that Bonner has made a cognizable claim that can be considered by the court. Assuming Bonner can submit proof of his claim, a court can grant a declaration that the General Assembly has not discharged its duty. Ultimately, what constitutes an education that is commensurate with contemporary requirements and which instills skill and knowledge into our students is a matter of fact subject to proof. Likewise, the effect of the General Assembly's current school financing system on attaining an education as envisioned by the Education Clause is a matter of fact subject to proof.”

Lessons:

1. The Indiana Constitution provides a right to an education commensurate with contemporary requirements.
2. Indiana courts may declare that the General Assembly has not discharged its duty to provide an education that meets these constitutional requirements.

Note: The Indiana Supreme Court will likely have the final say on these issues.

3. Open Courts Clause; Magna Carta – *Smith v. Indiana Department of Correction*, 883 N.E.2d 803 (Ind. April 9, 2008)(Boehm)

The Frivolous Claim Law and the Three Strikes Law, effective in 2004, are designed to screen and prevent abusive and prolific “offender” litigation in Indiana. The laws apply only to persons who are “committed to the department of correction or incarcerated in a jail.” The Three Strikes Law provides: “If an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under IC 34-58-1-2, the offender may not file a new complaint or petition unless a court determines that the offender is in immediate danger of serious bodily injury (as defined in IC 35-41-1-25).” I.C. § 34-58-2-1.

The Open Courts Clause of the Indiana Constitution states: “All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily and without delay.” Art. I, Section 12, Ind. Const.

“The right to petition the courts is absolute. This does not mean that meritless claims may not be summarily dismissed under the Frivolous Claim Law. It does mean that an individualized

assessment of each claim is required, and a claim cannot be dismissed on the basis of who presents it rather than whether it has merit.”

“Most other states have a constitutional provision declaring in one form or another that courts shall be open and a remedy is to be afforded according to the law. There is little direct evidence of the history or purpose of these provisions. Indeed, “[r]esearch published to date reveals little more than that the provision comes from the Magna Carta Chapter 40, as viewed through the lens of Sir Edward Coke's Second Institute.”

“Chapter 40 of the Magna Carta provides “to no one will we sell, to no one deny or delay right or justice.” Writing in 1671 (sic), Coke understood Chapter 40 to give all citizens the right of access to a “remedy by the course of the law” for “injury”:

“And therefore every Subject of this Realm, for injury done to him in *bonis, terris, vel persona*, by any other Subject, be he Ecclesiastical, or Temporal, Free or Bond, Man or Woman, Old or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the Law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.”

“Two distinct concepts are embedded in Coke's explanation of the Magna Carta. Chapter 40 speaks to the availability of a remedy for injury and also assures impartial and prompt administration of justice.”

“Although some jurisdictions have taken a more restrictive view of their open courts provisions, Indiana has given it a more generous interpretation. *Laramore* [observed that the second sentence of article I, section 12 also requires “unpurchased and impartial justice”: “This provision of our Constitution, while getting its substance, as similar provisions in other state constitutions do, from Magna Carta, may be a broader guaranty of free, unpurchased and impartial justice than the similar provision in that great instrument sought to establish.”

Lessons:

1. The Three Strikes Law violates the Open Courts Clause.
2. The Magna Carta and Sir Edward Coke continue to guide judicial decision-making in 21st Century Indiana.

Note: One of Coke's greatest contributions to the law was to interpret the *Magna Carta* to apply not only to the protection of nobles but also to all subjects of the crown equally. Coke died in 1634 and was not writing anything in 1671.

4. Due Process; Fundamental error – *Farley v. Allen County Child Services*, 883 N.E.2d 830 (Ind. App. April 2, 2009)(Barnes)

Following trial on a petition to terminate parental rights, the trial court ordered the Department of Health to conduct a further inspection of the parents’ home and provide a report

to the Court. After receiving and reviewing the post-trial report, the trial court terminated the parents' parental rights. On appeal, the father, Michael Farley, argued that he was denied due process when the trial court ordered this investigation and did not allow Farley an opportunity to cross examine the inspector or to respond to the contents of the report.

“Due process turns on the balancing of three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State’s chosen procedure; and (3) the countervailing governmental use of the challenged procedure.”

In considering these factors, the Court of Appeals found that “the trial court’s independent, off-the-record investigation and the failure to give Farley an opportunity to respond to the report created a high risk of error.” The Court of Appeals held that “a parent must be permitted to view the evidence used to support the termination of his or her parental rights and must be given an opportunity to respond to that evidence” and that in failing to do so as to the post-trial report, Farley’s due process rights were violated.

DCS argued that Farley waived this issue because he did not object to the order, file a motion to correct error, or otherwise bring the alleged error to the trial court’s attention. The Court of Appeals held: “Assuming for the sake of argument that Farley had an obligation to object to the trial court’s actions, we believe the trial court’s actions amounted to fundamental error. In order for this court to reverse based on fundamental error, the error must have been a clearly blatant violation of basic and elementary principles, and the harm or potential for harm therefrom must be substantial and appear clearly and prospectively. Here, not only did the trial court conduct an independent investigation, it did so without giving Farley an opportunity to respond. This is fundamental error.”

Lessons:

1. Due process precludes the trial court from relying on a factual investigation of its own without giving litigants notice and an opportunity to respond.
2. The doctrine of fundamental error is alive and well in Indiana, at least when there has been a blatant violation of basic due process rights.

5. Judicial Notice; Harassment by posting on MySpace – *A.B. v. State of Indiana*, 2008 WL 2031388 (Ind. May 13, 2008)(Dickson)

“A.B., a juvenile, appeals her adjudication as a delinquent child for her postings on the Internet site MySpace.com that, if committed by an adult, would constitute the criminal offense of Harassment. The Court of Appeals reversed, concluding that A.B.’s allegedly harassing messages were protected political speech.”

“As a preliminary matter, we note that the evidence presented at the fact-finding hearing was extremely sparse, uncertain, and equivocal regarding the operation and use of MySpace.com (“MySpace”), which is central to this case. The Commentary to Canon 3B of the Indiana Code of Judicial Conduct advises: “A judge must not independently investigate facts in a case and must consider only the evidence presented.” Notwithstanding this directive, in order to facilitate

understanding of the facts and application of relevant legal principles, this opinion includes information regarding the operation and use of MySpace from identified sources outside the trial record of this case.”

MySpace is “an online community that lets you meet your friends' friends.” Most aptly described as a social networking site, individuals can create “profiles” listing their interests in books, television, music, movies, and so forth, as well as posting pictures, music, and videos. [Footnote by the Court to: “MySpace, <http://www.myspace.com> (last visited March 31, 2008)”].

The offense of Harassment in the Indiana Criminal Code (§ 35-45-2-2(a)(4)) includes the following:

A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication:

- (4) uses a computer network ... or other form of electronic communication to
 - (A) communicate with a person; or
 - (B) transmit an obscene message or indecent or profane words to a person; commits harassment, a Class B misdemeanor.

“This posting was not viewable by the general public, and Mr. Gobert was able to view it only because R.B., the student who created the “profile,” eventually authorized him to access the “profile” during his investigation. We find no probative evidence or reasonable inferences to establish that A.B., when making her postings on her friend's private “profile,” had a subjective expectation that her conduct would likely come to the attention of Mr. Gobert. We conclude that there was insufficient substantial evidence of probative value to prove beyond a reasonable doubt that A.B. had the requisite intent to harass, annoy, or alarm Mr. Gobert when she made the postings.” Conviction reversed.

Lessons:

1. Although trial courts conduct independent investigations at their peril, the Supreme Court may do so, at least regarding matters available online that are likely not subject to reasonable dispute. *See* Ind. Evid. R. 201(a) on Judicial Notice.
2. When citing to a website, note the date last visited.

P.S. In another social network case involving Indiana students, the Indianapolis Star recently reported:

“Defamation and identity fraud lawsuits have become the latest weapons of choice for educators targeted by online tormentors. A fake online profile prompted a Roncalli High School dean to file just such a suit this week.

Cloaked in near-anonymity, the creator of the profile on Facebook used it to contact Roncalli students with inappropriate messages in Tim Puntarelli’s name, an attorney for the Archdiocese of Indianapolis said.

School officials came one step closer to unmasking the person’s identity Friday when a Marion County judge ordered the online social-networking site to turn over information identifying the user.”

6. Privilege for Statements in Quasi-Judicial Proceedings – *Hartman v. Keri*, 883 N.E.2d 774 (Ind. April 1, 2008)(Boehm).

IPFW students, Virginia Hartman and Suzanne Swinehart, filed formal complaints with Purdue's Affirmative Action Office alleging sexual harassment by Assistant Professor Gabe Keri. The students' complaints were filed pursuant to Purdue's antiharassment policy and procedures. Although the procedures expressly state they are “not those of a court of law,” they do contain many familiar elements. Complaints must be filed within 120 days of the incident. The respondent must be notified of the complaint and permitted to respond. An investigator is to conduct a “thorough fact-finding investigation,” including interviewing the complainant, the respondent, and pertinent witnesses. The parties are given an opportunity to appeal the investigator's determination to the President of Purdue.

Keri sued Hartman and Swinehart alleging libel, slander, and malicious interference with Keri's employment contract. Hartman and Swinehart moved for summary judgment, asserting that their complaints to the Affirmative Action Office were protected by an absolute privilege.

Indiana law has long recognized an absolute privilege that protects all relevant statements made in the course of a judicial proceeding, regardless of the truth or motive behind the statements. “The reason upon which the rule is founded is the necessity of preserving the due administration of justice.”

“Policies similar to Purdue's are commonly found in institutions of higher education. At least three states have held that communications to school authorities raising complaints against educators enjoy the same absolute privilege the law accords to statements in judicial proceedings. In reaching this conclusion courts have described the processes of the educational institutions as quasi-judicial. Hartman and Swinehart acted under the procedure Purdue established. Protecting their complaints with anything less than an absolute privilege could chill some legitimate complaints for fear of retaliatory litigation.”

“Citizens reporting suspected criminal activity to law enforcement enjoy only a qualified privilege, which subjects them to the risk of retaliatory civil litigation for malicious or unfounded charges. At first blush it may seem anomalous to grant a higher degree of protection to complaints made in the educational setting. But a current student is subject to academic discipline for abuse of the process. In practical terms this is a substantial deterrent to false reporting. Moreover, the need for protection is greater in the educational setting because the subject of the complaint—the educator—is in a position of authority over the student, so fear of retaliation presents a potential obstacle to open airing of grievances. For all these reasons, there is both a diminished need to deter false reporting and a greater need to encourage reporting than exists outside the educational environment.”

Lessons:

1. Disciplinary procedures outside courts of law are sometimes protected by an absolute privilege—a privilege broader than that available for swearing out a complaint to the police.
2. To obtain this immunity, the procedure should be “quasi-judicial.”

3. There is no ironclad rule for what is quasi-judicial. Purdue's process involved no formal hearing, no representation by counsel, and no cross-examination of adverse witnesses.

7. Rule 702; Exclusion of Expert Testimony – *Fueger v. Case Corporation*, 2008 WL 2067047 (Ind. Ct. App. May 16, 2008)(Bartean)

“Plaintiff-Appellant Wesley A. Fueger appeals from the trial court's order granting the motion to strike the expert affidavit of Walter Yeager, and the order granting the motion for summary judgment and entering final judgment, filed by and in favor of Defendants-Appellees Case Corporation.”

“Fueger suffered near fatal injuries on July 7, 2003 while working with a Case CNH 1845C Uni-Loader (“skid loader”) on his father's farm. In the complaint, Fueger alleged that Case had manufactured a defective and unreasonably dangerous skid loader.” Case moved for summary judgment and in opposition to the motion, Fueger submitted the expert affidavit of Yeager. Case moved to strike the affidavit and the trial court granted the motion, then granted Case's motion for summary judgment.

“Case argued below and here on appeal that Yeager, Fueger's expert, is not qualified to give an expert opinion and does not offer any reliable opinions. In *Lytle v. Ford Motor Co.*, 696 N.E.2d 465 (Ind.Ct.App.1998), this court noted:

Thus, where an expert's testimony is based upon the expert's skill or experience rather than on the application of scientific principles, the proponent of the testimony must only demonstrate that the subject matter is related to some field beyond the knowledge of lay persons and the witness possesses sufficient skill, knowledge or experience in the field to assist the trier of fact to understand the evidence or to determine a fact in issue.

“In his affidavit, Yeager opined that when the skid loader was placed in the stream of commerce, the skid loader had three engineering safety-design defects. The first had to do with the location of the on/off switch, the second with the seat bar control, and the third with the bucket controls”.

“Case challenged Yeager's qualifications as an expert, specifically arguing that Yeager was a rocket scientist [his degree was in aeronautical engineering], and that potential design defects in skid loaders were outside the area of Yeager's expertise.” In rejecting Case's position, the Court of Appeals found: “Case's interpretation of Evid. Rule 702 in this specific situation is too restrictive. Yeager's opinion was not a matter of ‘scientific principles’ under Evid. Rule 702(b), but was expert testimony based upon specialized knowledge.”

“Yeager is a certified professional mechanical engineer who examined the skid loader in question and offered his opinion about what he believed to be design defects in the skid loader. The gatekeeping inquiry in this situation is not like the *Daubert* analysis where scientific

principles are involved. Engineering is a recognized field of study. We conclude that the trial court erred by excluding Yeager's testimony and affidavit. Any challenge to Yeager's knowledge of what was state of the art in 1994, and any gaps in his knowledge of skid loaders could be exploited at trial through vigorous cross-examination and should not have been weighed by the trial court in a motion to strike and motion for summary judgment.”

“The opinions offered were not subject to a *Daubert* analysis, but were based upon specialized knowledge.”

Lessons:

1. A *Daubert* analysis need not be applied where an expert's testimony is perceived to be based upon the expert's skill or experience rather than on the application of scientific principles.
2. Anomaly: The less scientific the basis for an expert opinion, the less rigorous the analysis required for admission.

8. Motion for New Trial; Duty to Supplement Discovery – *Nature's Link, Inc. v. Przybyla*, 885 N.E.2d 709 (Ind. App. May 7, 2008)(Riley)

“On January 25, 2004, [Thomas] Przybyla, a Bloomington, Indiana police officer reported to the parking lot of the St. Charles Church in Bloomington in search of a suspicious vehicle. As he was twisting around to reach for his door handle to open his car door, Lester Anders (Anders), a Nature's Link's employee, who was plowing snow in the parking lot, backed his Ford pick-up truck with attached snow blade into the rear passenger side of Przybyla's squad car.”

“On September 23, 2005, Przybyla filed his Complaint alleging personal injuries due to Nature's Link's negligence. He based his claim on the aggravation of his preexisting degenerative disk disease. On March 13 through March 15, 2007 a jury trial was held. At trial, both parties stipulated to Przybyla's pre-existing degenerative disk disease. Dr. Weidenbener testified that, while Przybyla suffered from a pre-existing condition, his injuries from the 2004 collision aggravated his condition, causing him a permanent impairment rating of 8%, forced him to receive \$21,389.54 in reasonable and necessary medical care, and rendered him occupationally disabled from further service as a police officer.”

“Nature's Link's expert physician, Dr. Arthur Lorber (Dr. Lorber) submitted his written report approximately five weeks prior to trial and revised his report less than two weeks before the scheduled trial date. Deposed by Przybyla's counsel less than two weeks before trial, Dr. Lorber confirmed that his revised report contained all of his opinions concerning Przybyla's medical condition. Most notably, he concluded that Przybyla's back pain was, in large part, the result of prior automobile collisions in 2000 and 2001, and a fall in 2001.”

“During the second day of trial, after Przybyla had completed his case-in-chief, Dr. Lorber testified. While initially accepting the impairment rating assigned by Dr. Weidenbener, he qualified his statement by adding that most if not all of the permanent impairment rating should be attributed to his pre-existing degenerative disk disease. He described the degenerative

disk disease that Przybyla demonstrated prior to the current accident and diagnosed it, for the first time, as Scheuermann's Juvenile Idiopathic Disk Disease (SJIDD), a hereditary disease that leads to premature disk degeneration. Dr. Lorber added that, in his opinion, SJIDD is the primary cause of Przybyla's back pain. Przybyla did not object to this line of questioning.”

“On March 15, 2007, at the close of the evidence, the jury entered a verdict assessing fault between Przybyla and Nature's Link at fifty percent each, and awarding zero dollars in damages. Thereafter, on April 16, 2007, Przybyla filed a Motion for a New Trial” which was granted by the trial court.

“Nature's Link contends that the trial court erred in setting aside the jury's verdict pursuant to Indiana Trial Rule 60(B)(3) and granting Przybyla a new trial. Indiana Trial Rule 60(B)(3), which states in pertinent part

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, ..., for the following reasons:

(3) fraud ..., misrepresentation, or *other misconduct of an adverse party*;

A movant filing a motion for reasons ... (3), ... must allege a meritorious claim or defense.”

“Thus, to prevail on his allegation of misconduct, Przybyla is required to show that: (1) Nature's Link committed misconduct; (2) the misconduct prevented Przybyla from fully and fairly presenting his case; and (3) Przybyla has made a *prima facie* showing of a meritorious claim.”

“In August of 2006, Przybyla served an interrogatory on Nature's Link which called for, in pertinent part, all opinions and conclusions reached by any expert in the case. Answers to interrogatories must be responsive, full, complete and unevasive. Indiana's discovery rules are specifically designed to avoid surprise and a trial by ambush. Indiana courts have consistently rejected a gaming view of the litigation process and have instead instituted rules “the purposes of which are to provide parties with information essential to the litigation of all relevant issues, to eliminate surprise and to promote settlement, with a minimum of court involvement in the process.”

“It is clear that Nature's Link was aware of Dr. Lorber's materially revised medical opinion and subsequent change in intended testimony the day before trial. Nevertheless, Nature's Link never notified Przybyla or the trial court of this new development, but rather made a unilateral decision to reveal Dr. Lorber's SJIDD diagnosis for the first time during the doctor's testimony and after Przybyla had rested his case-in-chief. Ideally, Nature's link should have filed a supplemental answer to Przybyla's interrogatory; or at the very least, Nature's Link should have apprised the trial court or Przybyla of Dr. Lorber's SJDD diagnosis. Here, no effort was made at all.”

“Based on the foregoing, we find that the trial court properly ordered a new trial pursuant to T.R. 60(B)(3) after finding that Nature's Link's medical expert changed his diagnosis and opinion of Przybyla's injuries at trial without having previously disclosed this new diagnosis to Przybyla.”

Lessons:

1. If your expert develops a new opinion, supplement your discovery responses immediately.
2. If you get ambushed at trial, file a T.R. 60(B)(3) motion.
3. Be sure to serve an expert interrogatory.

9. Surprise Exhibits; Motion for New Trial – *Speedway SuperAmerica, LLC v. Holmes*, 2008 WL 2058241 (Ind. May 15, 2008)(Boehm)

“In this case the prevailing party at trial discovered potentially highly relevant and favorable evidence ten days before trial but did not communicate the discovery to the opposing party until the first day of trial. The evidence was admitted, but posttrial testing revealed that the evidence was not what it was represented to be. Under these circumstances, we hold that a motion to test the evidence filed within the time for a motion to correct error satisfies the diligence required of the opposing party to seek a new trial based on newly discovered evidence.”

The belated evidence was a pair of jeans that contained a stain that appeared to corroborate the plaintiff's account of his slip and fall accident at a Speedway truckstop. After trial, the jeans were tested and “A chemist's written report concluded that the stained areas did not contain diesel fuel, turpentine, or mineral spirits, but the jeans had been laundered with detergent. The chemist also testified that had diesel fuel, turpentine, or mineral spirits ever been present on the jeans, he would have expected to have seen evidence of them because he saw evidence of compounds of similar volatility. Examination of codes on the jeans' label revealed that the jeans had not yet been manufactured as of the date of Gerald's fall, June 1, 2000, and therefore could not have been worn on that date. The fabric was not in use until after November 2000, and this pair of jeans was manufactured in 2001 and was not available for sale before April or May 2001.”

“Trial Rule 59(A)(1) permits a party to file a motion to correct error to address “[n]ewly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial.” Trial Rule 60(B)(2) permits a party to move for relief on grounds of “newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59.”

“New evidence requires a new trial only when the party seeking relief demonstrates that:

- (1) the evidence has been discovered since the trial;
- (2) it is material and relevant;
- (3) it is not cumulative;
- (4) it is not merely impeaching;
- (5) it is not privileged or incompetent;
- (6) due diligence was used to discover it in time for trial;
- (7) the

evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

We conclude that the test results obtained by Speedway meet these requirements and require a new trial.”

“When a party is confronted with surprise evidence, ‘ordinarily the proper response is to move for a continuance.’ *O’Connell v. State*, 742 N.E.2d 943, 948 (Ind.2001). But Speedway’s surprise resulted from the plaintiffs’ attorney’s failure to mention the jeans until the morning of trial, even though he learned ten days earlier that the plaintiffs claimed the jeans existed, and learned the night before trial that the plaintiffs had located the jeans and would bring them to trial. Neither party followed the rules flawlessly. However, as between the two parties, the plaintiffs should not benefit from a situation they precipitated by day-of-trial identification of the jeans as an exhibit.”

“Speedway was informed of the jeans’ existence on the morning of trial and had no facts with which to challenge the plaintiffs’ representations about the jeans. Parties are understandably reluctant to request a continuance when the jury pool has already been assembled. A continuance at that point imposes a significant cost and inefficiency on the courts and the parties, and may be burdensome for other resources as well. Requiring such a motion to preserve remedies for an opponent’s belated springing of evidence on the day of trial gives the party discovering new evidence the ability to force the opponent to choose between seeking a continuance or going to trial with the untested evidence. Such a requirement rewards failures of the discovering party, whether failure to make timely disclosure was intentional or inadvertent.”

Lessons:

1. When trial exhibits are discovered shortly before trial, “parties considering offering them, and parties who have ongoing discovery obligations, are obligated to inform opposing counsel immediately.”
2. Trial by ambush is probably not a good strategy.
3. In opposing late exhibits, your options include:
 - i. Objecting to admissibility for failure of required disclosure.
 - ii. If overruled, moving for a continuance.
 - iii. If there was any delay by the opposing party in producing the exhibit and it is admitted, moving for a new trial based on misconduct pursuant to T.R. 60(b)(3) or if you develop rebuttal evidence post-trial, moving to correct error within 30 days pursuant to T.R. 59(A)(1) or if later, pursuant to T.R. 60(b)(2).

10. Jurisdiction; Trial Rule 12(B)(8) – *Irmscher Suppliers, Inc. v. Capital Crossing Bank*, 2008 WL 2154091 (Ind. App. May 23, 2008)(Crone)

“On December 21, 2006, under cause number 02D01-0612-MF-356, Irmscher filed in Allen Superior Court a complaint to foreclose a mechanics lien it had filed on certain real estate in Allen County. On January 5, 2007, under cause number 02C01-0701-PL-1, Capital Crossing filed in Allen Circuit Court a complaint to foreclose a mortgage” on the same real estate and later

added “Irmscher as a defendant to answer as to its interest in the real estate by virtue of its mechanics lien, which Capital Crossing alleged was ‘subject and subordinate to’ its mortgage.” Irmscher moved to consolidate the two causes but the motion was denied by the trial court.”

Irmscher argued that because it was first to file its foreclosure complaint, Judge Avery in Allen Superior Court had “exclusive jurisdiction over the foreclosure of all liens on the real estate” and that the trial court in the Capitol Crossing case should have deferred to Judge Avery’s exclusive authority.

“Over a decade ago, our supreme court stated, ‘The rule in Indiana is that jurisdiction over a case becomes exclusive in the court in which the case is first instituted.’ *Pivarnik v. NIPSCO*, 636 N.E.2d 131, 135 (Ind.1994). When two or more courts have concurrent jurisdiction over the same case, the jurisdiction of the court first acquiring such jurisdiction is deemed exclusive until the case is finally disposed of on appeal or otherwise.”

“This principle is implemented by [Indiana Trial Rule 12(B)(8)], which allows a party to move for dismissal on the grounds that the same action is pending in another Indiana court. This rule applies where the parties, subject matter, and remedies of the competing actions are precisely the same, and it also applies when they are only substantially the same. The parties in this case do not dispute that the actions in the Allen Superior Court and the trial court are the ‘same action’ for purposes of Trial Rule 12(B)(8).”

“In a recent case, our supreme court abolished the concept of “jurisdiction over a particular case” mentioned in *Pivarnik*:

Like the rest of the nation's courts, Indiana trial courts possess two kinds of “jurisdiction.” Subject matter jurisdiction is the power to hear and determine cases of the general class to which any particular proceeding belongs. Personal jurisdiction requires that appropriate process be effected over the parties.

Where these two exist, a court's decision may be set aside for legal error only through direct appeal and not through collateral attack. Other phrases recently common to Indiana practice, like “jurisdiction over a particular case,” confuse actual jurisdiction with legal error, and we will be better off ceasing such characterizations.

K.S. v. State, 849 N.E.2d 538, 540 (Ind.2006).

“The mere fact that the same action is being prosecuted simultaneously in two Indiana courts does not implicate jurisdictional concerns. As such, a party involved in the same action in two Indiana courts must file either a motion to dismiss one of those actions pursuant to Trial Rule 12(B)(8) or a responsive pleading asserting the defense to avoid waiving any claim of legal error in that regard.”

“Irmscher never filed either a motion to dismiss pursuant to Trial Rule 12(B)(8) or a responsive pleading asserting a defense to that effect as required by Trial Rule 12(H)(1)(b).

Accordingly, we conclude that Irmischer has waived any claim of legal error in Capital Crossing's prosecution of this foreclosure action in the trial court.”

Lessons:

1. When you have the first filed case, file your T.R. 12(B)(8) motion.
2. Don't rely solely on a motion to consolidate under T.R. 42
3. The notion of “jurisdiction over the case” is obsolete.

11. Legal Malpractice; Preserving objections to evidence; amending witness lists; setoffs – *Dennerline. v. Atterholt*, 2008 WL 2067030 (Ind. App. May 16, 2008)(Crone)

“Frederick W. Dennerline, III, and his law firm, Fillenwarth, Dennerline, Groth & Towe (“Dennerline”), appeal from a general jury verdict and judgment in favor of Jim Atterholt, Insurance Commissioner of the State of Indiana (“the Commissioner”), on the Commissioner's complaint against Dennerline for legal malpractice that resulted in the liquidation of the Indiana Construction Industry Trust (“ICIT”) and \$17,991,043 in unpaid healthcare bills for ICIT's beneficiaries.”

“ICIT was a Multiple Employer Welfare Arrangement (“MEWA”) formed in the late 1960s by a group of construction industry trade associations to provide healthcare benefits to their non-union employees. In July 2002, the Commissioner initiated rehabilitation proceedings against ICIT in the trial court. After the court found ICIT to be insolvent, the Commissioner initiated liquidation proceedings and then filed suit against numerous defendants to satisfy the unpaid healthcare claims of ICIT's beneficiaries”

The Commissioner sued Dennerline for legal malpractice, alleging that Dennerline: “Failed to advise ICIT and its trustees of the legal ramifications of operating without a Certificate of Registration from the Indiana Department of Insurance” and “Failed to advise ICIT and its trustees of the legal implications of its insolvent status, particularly its obligation to cease operating altogether, after Dennerline learned that leased ‘Precious Stones’ were listed as an asset on ICIT's financial statement and that ICIT was insolvent.”

“The Commissioner eventually settled with all defendants except Dennerline. Dennerline asserted a nonparty defense and named the settling defendants as nonparties. A jury trial began on August 21, 2006. On August 28, 2006, the jury returned a general verdict finding Dennerline 100% at fault for the claimed damages, which the jury found to be \$17,991,043.”

Peter Schroeder served as an expert witness for the Commissioner. “Dennerline filed a motion to strike Schroeder's affidavit on the basis that it failed to establish that he was familiar with the applicable standard of care. The trial court denied Dennerline's motion. Dennerline then filed a pretrial motion in limine to exclude Schroeder's testimony on the basis that he lacked sufficient expertise regarding ERISA and MEWA law to render opinions as to the applicable standard of care. The trial court also denied this motion.”

At trial, the Commissioner called Schroeder to testify and established his credentials as an expert witness. The Commissioner then elicited Schroeder's opinion that Dennerline breached

the applicable standard of care. Dennerline did not object to Schroeder's opinions during his testimony. The day after Schroeder testified, and after the Commissioner rested his case, Dennerline filed a motion to strike Schroeder's testimony, which the trial court denied. The Court of Appeals held that this was too late and that Dennerline waived any error in the admission of Schroeder's testimony.

In his answer and amended answer, Dennerline asserted as an affirmative defense that he was “entitled to set-off for damages the [Commissioner] sustained and for any compensation paid to or on behalf of the [Commissioner] from other sources.” In his motion for judgment on the evidence and to correct error, as well as on appeal, Dennerline has asserted that the Commissioner received over \$7 million in settlements from various nonparties and that he is “entitled to a set-off because Ind.Code § 27-9-3-9(b) does not allow a windfall recovery in excess of IDOI's liquidated damages.” The Court finds, however, that ‘under Indiana's comparative fault regime, where defendants are severally liable, ... a defendant who goes to trial [does not] get credit for amounts paid by nonparty defendants who settled the [plaintiff's] claims against them[.]’

Lessons:

1. When objecting to evidence, you must do so when offered. A motion in limine before trial does not preserve the issue and a motion to strike the next day comes too late.
2. In comparative fault cases, there is no setoff for settlements with prior defendants.
3. One further lesson was mentioned in a footnote:

“Indiana Appellate Rule 50(A)(2)(g) provides that an appellant's appendix in a civil appeal shall contain “*brief* portions of the Transcript, that are important to a consideration of the issues raised on appeal[.]” The Commissioner's citations to the page numbers of his appendix (rather than to the page numbers of the transcript itself, as in Dennerline's brief) made our review of the record especially burdensome. In cases like this, with numerous issues and a multivolume transcript, *it is far more helpful (not to mention far more economical) for all parties to cite to the transcript and not to include large portions of the transcript in their appendices. As a final consideration, it is also helpful for each volume of a multi-volume appendix to have a table of contents for the entire appendix.*”

12. Nunc Pro Tunc; Appeal deadline; Magistrate’s authority – *Johnson, Jr. v. Johnson*, 882 N.E.2d 223 (Ind. App. March 10, 2008)(Baker)

“Appellant-respondent James E. Johnson, Jr., appeals the trial court's nunc pro tunc order granting appellee-petitioner Marcia Johnson's motion to correct error regarding the parties' marriage dissolution decree.”

“Marcia and James married on February 12, 1996. The couple separated on July 8, 2005, and Marcia filed a petition for dissolution of marriage that same day. The trial court issued its decree of dissolution of marriage on October 10, 2006.”

On November 8, 2006, Marcia filed a motion to correct error and requested a hearing. A magistrate judge presided over the hearing on May 14, 2007, and ultimately informed the parties that she was going to “grant the Motion to Correct Errors....” However, the trial court did not enter an order granting the motion to correct error until August 1, 2007—seventy-nine days after the hearing—when it issued a nunc pro tunc amended decree of dissolution of marriage in favor of Marcia.

“A magistrate's authority to act is determined by statute. While a magistrate presiding over a criminal trial may enter a final order, there is no provision providing such authority for a magistrate in a civil proceeding. Rather, Indiana Code section 33-23-5-9 provides that, except in criminal proceedings, “a *magistrate* shall report findings” in an evidentiary hearing or trial and “the *court* shall enter the final order.” And Indiana Code section 33-23-5-8 explicitly provides that a magistrate “may not enter a final appealable order unless sitting as a judge pro tempore or a special judge. Even if a magistrate presides over a hearing and recommends findings and conclusions, “the *judge* must still perform the necessary judicial act of granting or denying the motion....” The magistrate had no authority to enter the order.”

In addition, the ruling came too late. The motion to correct error was deemed denied 30 days after the hearing pursuant to T.R. 53.3(A). The failure to act on a motion to correct error within the rule's prescribed time limits “extinguishes the court's authority to rule on the motion and any subsequent ruling is a nullity.”

“Even so, Marcia argues that the trial court was authorized to belatedly rule on her motion because it issued a “nunc pro tunc” order specifying that it was “reducing to writing the following order which was announced in open Court on May 14, 2007, and inadvertently not reduced to writing.” In other words, Marcia argues that the trial court's decision to issue the order “nunc pro tunc” saves the untimely motion.”

A nunc pro tunc order is “an entry made *now* of something which was actually previously done, to have effect as of the former date.” The purpose of a nunc pro tunc order is to correct an omission in the record of action that occurred but was omitted through inadvertence or mistake; however, the trial court's record must show that the unrecorded act or event actually occurred and a written memorial must form the basis for establishing the error or omission to be corrected by the nunc pro tunc order.”

“Here, there is no evidence that the trial court adopted the magistrate's oral findings and conclusions or otherwise granted Marcia's motion to correct error within thirty days of the hearing. Because there is no evidence that the trial court granted Marcia's motion within thirty days of the hearing, there was no basis in the record for the trial court to issue a nunc pro tunc order.”

“Marcia was required to file a notice of appeal within thirty days of her motion being deemed denied regardless of the fact that the trial court belatedly granted her motion. She did not. Because Marcia did not file a notice of appeal, we reverse the trial court's nunc pro tunc order and remand this cause to the trial court with instructions that it vacate the order and reinstate the original marriage dissolution decree.”

In dissent, Judge Darden writes: “Marcia asserts, and James does not dispute, that at the conclusion of the hearing, the trial court stated as follows:

I'm going to grant the Motion to Correct Errors in the following respects. The pension will be split 50/50, and I am going to ask [James' attorney] for you to prepare the Qualified Domestic Relations Order and ... I'm going to award [Wife] a Property Equalization Judgment in the sum of \$18,588.00.

It was James' attorney who failed to honor the obligation to which he had agreed, and I cannot accept a result that allows James to profit by that failure. Equity “looks to the substance and not the form,” and “a court of equity has the power to require that to be done which should have been done.”

Lessons:

1. Be pro-active in getting your rulings timely and from the right judge, even if opposing counsel has been asked to prepare the order.
2. Following the law doesn't always lead to justice.

13. Governmental Immunity – *City of Terre Haute v. Pairsh*, 883 N.E.2d 1203 (Ind. App. April 10, 2008)(Riley)

Pairsh alleges that on May 1, 2005, she tripped and fell while walking on a sidewalk in Collett Park in Terre Haute, Indiana. On May 31, 2006, Pairsh filed a Complaint for Damages against the City, claiming that she was injured as a result of the City's negligence. Pairsh alleged that “the sidewalk was dilapidated and had an uneven walking surface which caused her to trip and fall to the ground.”

A governmental entity is not liable if a loss results from the performance of a discretionary function. The City asserts that it is immune from liability arising from Pairsh's fall because the repair of the sidewalk in question is a discretionary function. “The issue of whether an act is discretionary and therefore immune is a question of law for the court's determination.”

Our supreme court has adopted the “planning-operational test” for determining whether a function is discretionary for purposes of the ITCA. *Id.* A governmental entity will not be held liable for negligence arising from decisions which are made at a planning level, as opposed to an operational level.”

Decker stated that because of the City's limited budget, the decision was made to prioritize the sidewalk repair and renovation. In prioritizing a sidewalk, Decker weighed the benefits of a specific sidewalk repair against the cost of the repair. Decker stated that he inspected sidewalks at Collett Park and determined that the sidewalks “did not constitute an immediate hazard to pedestrians warranting immediate reconstruction and repair” and that “there were more sidewalks that were of greater priority that needed to be repaired first at that time.”

Decker's affidavit reflects the exercise of official judgment and discretion, the weighing of alternatives, an assessment of competing priorities, the weighing of budgetary considerations, and the allocation of scarce resources, all of which are "planning activities" under the *Peavler* "planning-operational test." Pairsh did nothing to create a genuine issue of material fact as to discretionary function immunity.

MAY, Judge, dissenting.

The discretionary/ministerial distinction hinges on the demarcation between the decision to act and the acts or duties flowing from that decision. We determined the decision to establish a park and to equip it was a discretionary function of local government "emanating from which is the ministerial duty to use reasonable care in carrying out that decision." *Id.* Once the city opted to provide a playground and equip it, a ministerial duty arose to provide reasonably safe premises.

We presumably determined the Crown Point "comprehensive scheme" to renovate its sidewalks addressed in *Rutherford*, 640 N.E.2d at 754, was akin to the decision the city made in *Mills* to establish a park and provide a playground. By contrast, I believe the Terre Haute decision merely to "prioritize" sidewalk repair is more akin to Gas City's "ministerial" decision in *Mills* to choose and install playground equipment than its "discretionary" decision to build a park and provide a playground.

Lessons: By prioritizing repairs, cities can immunize as a discretionary function their failure to do routine maintenance.

14. Fiduciary duty of realtor; Disgorgement rule – *Nichols v. Minnick*, 885 N.E.2d 1 (Ind. April 29, 2008)(Boehm)

"We hold that a broker who breaches his fiduciary duty to disclose material information to his client loses his right to receive a commission for his services."

"In 1998, Bedford Hideaway Lounge, Inc. ("BHL") owned and operated the Hideaway Lounge, "a gentleman's club and bar" in Bedford, Indiana. In the spring of 1998, Tonda Beth Nichols, the owner of BHL, encountered some health problems and engaged real estate broker Rex David Minnick to sell BHL."

"Nichols signed a preprinted real estate listing agreement giving Minnick the exclusive right to sell BHL for \$245,000 and providing for a ten-percent commission to Minnick. Minnick showed the property to only one potential buyer, James Blickensdorf. Nichols and Blickensdorf entered into a "Stock Purchase Agreement." The agreement called for Blickensdorf to make a \$25,000 cash down payment and execute a five-year installment note for \$177,500.

The Stock Purchase Agreement provided that Blickensdorf would assume management of the Hideaway Lounge at closing, which took place on July 16, 1998. Blickensdorf soon experienced problems. He hired underage dancers, failed to pay taxes when due, bounced checks, and eventually failed to make payments due on the installment note. On June 12, 2002,

Nichols sued Minnick for the \$22,500 commission on the sale to Blickensdorf.

A real estate broker representing a seller has the duty to “[disclose] to the seller ... adverse material facts or risks actually known by the [broker] concerning the real estate transaction.” The parties agree that a buyer's creditworthiness is material to a real estate transaction and therefore a broker must disclose to the seller any loans the broker has made to the buyer to finance the purchase. The trial court found that Minnick did not disclose his loan of \$15,000 for the down payment. By failing to disclose the \$15,000 loan to Nichols, Minnick violated his duty to disclose material information known to him, namely, Blickensdorf's lack of cash.

Compensatory tort damages “are designed to place [the plaintiff] in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.” Restitution, on the other hand, may be measured by the defendant's gain and is therefore appropriate even when the plaintiff has suffered no demonstrable harm. By promoting the agent's integrity, the disgorgement rule facilitates the principal's trust on which the fiduciary relationship is grounded.

Although we agree that there is no proof of loss to support tort damages, we do not agree with the trial court's conclusion that disgorgement is not required. A fiduciary is required to disgorge any benefit from failure to disclose material information.

Lesson: The rule of disgorgement: The price of a violation of the fiduciary duty to disclose is forfeiture of the broker's right to compensation.

Note: What the broker actually received as his compensation was a \$22,500 note from Blickensdorf. Although the court ordered the note to be disgorged, it was probably not collectible.

15. Advocacy Tip of the Month: Pet Peeves of U.S. Supreme Court Justices

From a collection of videos on LawProse.org prepared by Bryan Garner and reported by Tony Mauro in Legal Times:

- Chief Justice John Roberts Jr., thinks lengthy citations to Web sites that are now common in briefs are an "obscene" distraction "with all those letters strung together," though he does not offer an alternative.
- Another bias: Roberts thinks the word "which" should be avoided almost every time. "It slows me down; it starts to sound like one of those old 19th century contracts -- 'which' and 'wherefore.'"
- Justice Stephen Breyer: "If I see [a brief that is] 50 pages, it can be 50 pages, but I'm already going to groan." On the other hand, he says, "If I see 30, I think, well, he thinks he has really got the law on his side because he only took up 30."

- Justice Anthony Kennedy hates when lawyers turn nouns into verbs by tacking on "-ize" at the end, as in "incentivize." Such showy, made-up words, he sniffs, are "like wearing a very ugly cravat."
- Typographical errors are a credibility killer, Scalia adds. "My goodness, if you can't even proofread your brief, how careful can I assume you are" in citing relevant cases?
- Garner thinks that taken together, the eight interviews reveal a "composite judicial personality" that places a premium on clear writing, getting to the point quickly and deleting legalese.
- Asked him to name the elements of a good writing style, Kennedy answered: "Lucid. Cogent. Succinct. Interesting. Informative. Convincing,"

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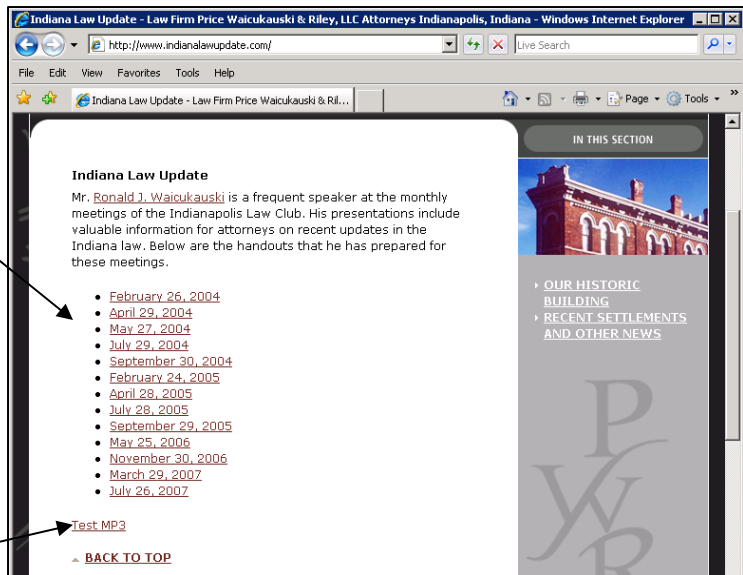
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