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ADVOCACY TIP OF THE MONTH: Cultivate your ethos.

NOTE: The contents of this handout consist primarily, but not completely, of words taken directly from the appellate court opinion with citations generally omitted. Anyone intending to rely upon the opinion should consult the published decision.

IN THE NEWS: Summer associate hiring plummets 44%

ABAJournal.com, July 21, 2010

A survey of 114 law firms chronicles the tough job market for summer associates, finding a 44 percent drop in the number hired this year. The law firms hired an average of 31 summer associates this year, down from 55 last year, the Am Law Daily reports. In raw numbers, the largest drop came at Skadden, Arps, Slate, Meagher & Flom, which hired 79 summer associates this year, compared to 223 last year. In percentages, the largest cut was at Ballard Spahr, which eliminated its summer program, followed by Cravath, Swaine & Moore, which cut its program by 81 percent.

Plain English jury instructions now available (but only to Lexis subscribers)

TheIndianaLawyer.com, July 22, 2010; Indiana Judicial Center

The Indiana Model Civil Jury Instructions, which were prepared by the Civil Instructions Committee of the Indiana Judges Association and are written in plain English, are now available. The instructions use the most simple and straightforward way to express an idea to increase comprehension, compliance and satisfaction with the jury process.

The Civil Instructions Committee hired Elizabeth Francis, PhD who is a Professor of English and Judicial Studies at the University of Nevada at Reno. Dr. Francis is an expert in teaching plain English principles.

An example of how the new instructions are clearer can be seen in the instruction on direct and circumstantial evidence. The old instruction used complex terms like “inference,” and “deduction,” and stated, “Circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts.”

The new instruction uses plainer terms, stating in part, “Circumstantial evidence is indirect proof of a fact.” The new instruction then gives an illustration: “For example, direct evidence that an animal ran in the snow might be the testimony of someone who actually saw the animal run in the snow. On the other hand, circumstantial evidence that an animal ran in the snow might be the testimony of someone who only saw the animal’s tracks in the snow.”

It’s up to each judge to decide whether to use the plain English instructions. Currently the instructions are only available to those with a subscription to LexisNexis online. Later this year, the instructions will be published in book format available to Lexis subscribers and at select law libraries. CLE programs for lawyers are planned for October.

1. Collateral source payments; *The Travelers Indemnity Company of America v. Jarrells* - 927 N.E.2d 374 (Ind. 5/27/2010) (Boehm)

Jerry Jarrells was seriously injured at a construction site. Travelers paid worker's compensation benefits of \$66,135.67. Jarrells sued R.D.J. Custom Homes, the general contractor and Armando Delgadillo, a subcontractor, for the same injuries. He notified Travelers of the lawsuit, and Travelers responded with a notification of its statutory lien in the amount of \$66,135.67.

The jury returned a verdict in favor of Jarrells, valuing his total damages at \$925,000. The jury assigned 55% of the fault to R.D.J., producing an award of 55% of \$925,000, or \$508,750. After Jarrells notified Travelers of the judgment, Travelers demanded reimbursement from Jarrells in the amount of \$22,495.75. Jarrells responded that Travelers was not entitled to any of the judgment proceeds because the jury "already reduced the award by the amount of the work comp benefits and the award should not be reduced further after judgment."

Travelers then moved to intervene. The trial court permitted Travelers to intervene, and Travelers moved for summary judgment. The trial court denied that motion and granted summary judgment to Jarrells rejecting Travelers' claimed lien. The trial court ruled that Travelers' requested relief would impose a double setoff on the recovery because the jury had already deducted the worker's compensation benefits from the gross award. The Court of Appeals reversed with instructions to enter judgment for Travelers and determine the value of its lien. We granted transfer.

The common law collateral source rule prohibited presentation of evidence that a plaintiff in a personal injury action had received payments from sources other than the defendant. In 1986 Indiana enacted the Collateral Source Statute, Indiana Code § 34-44-1-1 *et seq.* (2004). The stated purposes of the statute are to enable an accurate assessment of the "prevailing party's pecuniary loss" and to provide "that a prevailing party not recover more than once from all applicable sources for each item of loss sustained." The statute specifically addresses worker's compensation benefits, and provides that presentation of evidence of worker's compensation benefits is permitted to establish "proof of the amount of money that the plaintiff is required to repay."

In this case, the trial court gave the pattern jury instruction:

If you find that Jerry Jarrells is entitled to recover, you shall consider evidence of payment made by some collateral source to compensate Jarrells for damages resulting from the accident in question. In determining the amount of Jarrells' damages, you must consider the following type of collateral source payments: Payments for worker's compensation. In determining the amount received by Jarrells from collateral sources, you may consider any amount Jarrells is required to repay to a collateral source and the cost to Jarrells of collateral benefits received. Jarrells may not recover more than once for any item of loss sustained.

This instruction was tendered by Jarrells and was accepted by the court without objection. We find this instruction confusing and hold that it should not be used in future

trials. By directing the jury to “consider” the worker's compensation benefits paid and also to “consider” the obligation to repay, the instruction is less than clear how the jury is to take these payments into consideration.

Travelers urges us to accept the Court of Appeals' interpretation of the judgment. We concede the possibility that the jury included the amount of worker's compensation payments made to Jarrells in its award based on its assumption that he would have to repay Travelers for those payments. We think, however, this is less likely.

The trial court is in the best position to determine what the jury may have intended. The jury was informed of the amount of the worker's compensation payments necessary to deduct from its judgment for Jarrells to avoid a double recovery. That amount, \$66,135.67, was presented at trial. No evidence was presented to the jury regarding the actual amount that Jarrells would be required to repay to Travelers if Travelers asserted a lien, and there was no instruction as to the rules governing this calculation. The jury therefore could not have determined how much to add to the judgment if it wanted to provide for Jarrells' repayment to Travelers as opposed to “considering” it by eliminating the damages already covered by worker's compensation benefits.

The stated purpose of the Collateral Source Statute is to prevent double recovery. This purpose was emphasized to the jury. It is therefore plausible that the jury followed the instruction by deducting the amount of the worker's compensation payments from its verdict for Jarrells.

The trial court's order denying Travelers' motion for summary judgment and granting summary judgment in favor of Jarrells is affirmed.

Lessons:

1. The pattern collateral source instruction has been disapproved; do not use it.
2. In the absence of clear evidence or a clear instruction as to what must be repaid, the introduction of evidence of collateral source payments may have the effect of nullifying liens on judgments.

2. Economic loss doctrine; *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.* - 2010 WL 2594314 (Ind. 6/29/2010) (Sullivan)

The Indianapolis-Marion County Public Library (“Library”) seeks to hold two subcontractors and an engineer responsible for negligence in rendering their respective services during the renovation and expansion of its downtown Indianapolis library facility. According to the library, there were several construction and design defects in the Library parking garage. The Library maintains that curing the defects and their effects caused it to sustain damages of approximately \$40 to \$50 million. The Defendants moved for partial summary judgment, arguing that the negligence claims against them were barred by the so-called “economic loss rule.” The trial court agreed and granted the Defendants' motions for partial summary judgment. The Court of Appeals affirmed.

Indiana cases hold that the defendant is not liable under a tort theory for any purely economic loss caused by its negligence. This rule precluding tort liability for purely economic loss—that is, pecuniary loss unaccompanied by any property damage or personal injury (other than damage to the product or service itself)—has become known as the “economic loss rule” and its applicability is the central issue in this appeal. The Library contends that the nature of its losses take this case outside the economic loss rule. This

requires that we return to the corollary to the economic loss rule the so-called “other property rule.”

Gunkel and the cases preceding it made clear that “damage from a defective product or service may be recoverable under a tort theory if the defect causes personal injury or damage to *other* property.” Here the product or service that the Library purchased was the renovated and expanded library facility itself. Any damages alleged to have resulted from the Defendants’ negligence were to the “product” the Library purchased, not to “other property.” The economic loss rule applies.

The Library further argues for a narrow construction of the economic loss rule where an imminent risk of danger implicates safety concerns for the public. On the facts of this case, we hold that the economic loss rule applies notwithstanding the presence of imminent risk of danger.

The Library argues that as a matter of policy, the economic loss rule should not be applied to engineers and design professionals. To be sure, certain professionals-lawyers being the prime example-are liable in tort for negligence that causes purely economic loss, whether or not in privity of contract with a plaintiff. We recognize that there are situations where it would be unjust not to allow plaintiffs to proceed in tort against an engineer or design professional for purely economic loss where no contract exists nor could exist between the parties.

Our default position in Indiana is that *in general*, there is no liability in tort for pure economic loss caused unintentionally. But Indiana courts should recognize that the rule is a *general* rule and be open to appropriate exceptions, such as (for purposes of illustration only) lawyer malpractice, breach of a duty of care owed to a plaintiff by a fiduciary, breach of a duty to settle owed by a liability insurer to the insured, and negligent misstatement. We find that none of the Library’s authority involves a major construction project owner seeking to recover in tort from engineers or design professionals with whom the project owner, though not technically in privity of contract, is connected through a network or chain of contracts among the owner, contractors and subcontractors, engineers and design professionals, and others in which they allocate their respective risks, duties, and remedies. We believe that the reasons for applying the economic loss rule to all participants in such a network or chain of contracts in a major construction project are compelling, whatever that rationale might be for not applying the economic loss rule to design professionals in other settings or contexts.

Gerger Restatement Draft § 8(3)(c)(i) provides that no exception to the economic loss rule is merited where “the plaintiff reasonably could have, by contracts with the defendant or through an intermediary, protected itself from the loss.” We believe this principle is applicable to the facts of the case before us. We see no reason why the Library could not-and perhaps pending collateral litigation will prove that it did-reasonably protect itself from loss by contracts with the Defendants or through an intermediary. But we need not decide this case on a principle quite so broad. We hold instead that there is no liability in tort to the owner of a major construction project for pure economic loss caused unintentionally by contractors, subcontractors, engineers, design professionals, or others engaged in the project with whom the project owner, whether or not technically in privity of contract, is connected through a network or chain of contracts. This is the Library’s situation here and the economic loss rule applies. We affirm the judgment of the trial court.

Lessons:

1. The “economic loss doctrine” is a *general* rule that precludes claims in tort in the absence of injury to a person or injury to property.
2. The “other property rule” requires that the injury to property (for purposes of the economic loss doctrine) must be property *other* than the product furnished by the defendant.
3. Claims for malpractice against engineers and design professionals, unlike lawyers, are not generally exempted from the economic loss doctrine.

3. Economic loss doctrine; negligent misrepresentations; *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 2010 WL 2594312 (Ind. 6/29/2010) (Sullivan)

In January 2006, a buyer of real property secured a mortgage loan from lender Texcorp. Prior to the release of funds, Texcorp contracted with Integrity to prepare a title commitment. Based on its title search, Integrity issued a title commitment which indicated that the title search had uncovered no judgments against the seller of the real property.

Integrity's title search had not revealed a 1998 foreclosure judgment on the property from LPP Mortgage and in August 2006, LPP filed suit against the owner of the property and Texcorp to enforce and foreclose the 1998 judgment lien. Subsequently, U.S. Bank succeeded to Texcorp's interests and intervened in the action. U.S. Bank filed a third-party claim against Integrity.

Integrity has argued at every stage of this litigation that it was not in contractual privity with U.S. Bank. This is a critical point. Were there to be a contract between Integrity and U.S. Bank, the parties in all likelihood would be relegated to their contractual remedies. Given the absence of privity, we turn to U.S. Bank's tort claim.

A defendant is not liable under a tort theory for any purely economic loss caused by its negligence. However, the economic loss rule admits of certain exceptions for purely commercial loss in several special circumstances. The precise issue presented here concerns the exception of negligent misrepresentation: whether the issuance of a title commitment and subsequently issued title insurance policy give rise in Indiana to a tort cause of action for negligent misrepresentation against a title insurer or commitment issuer, separate and apart from the contractual obligations of the title policy.

We have not had occasion to address this precise issue, but liability for the tort of negligent misrepresentation has been recognized in Indiana. In fact, we have said “negligent misrepresentation may be actionable and inflict only economic loss[.]” citing Restatement (Second) of Torts § 552. Professor Mark P. Gergen provides some helpful considerations relevant to determining the existence of a tort duty for negligent misrepresentation as part of a recent project of the American Law Institute.

the usual cost and difficulty of ensuring the accuracy of the information ...; the usual size of the loss if the information is false; whether the actor is compensated for supplying the information; whether the actor is in the business of supplying the information; whether imposing liability is likely to dry up a source of useful information because the expected cost of liability is disproportionate to the expected benefit to the actor of supplying the information ...; the ability of the recipient to determine the accuracy of the information itself; whether the actor affirmatively vouches for the accuracy

of the information or its use of care in supplying the information; whether people in the circumstances of the case usually could and generally do determine responsibility for such loss by contract; whether other bodies of law are better suited to determining the actor's liability; the superiority of the actor's knowledge or expertise; whether the information is given deliberately; whether the information is given in response to a request by the claimant; the specificity or generality of the information; whether the misstatement is by commission or omission; whether the information is supplied to guide the claimant in a transaction with another; and whether the relationship between the actor and claimant is adversarial or advisory.

Applying these factors, we conclude that Integrity had a duty under Restatement § 552 to communicate the state of a title accurately when issuing its preliminary commitment. Title searches are frequently required in situations involving transactions in which the state of the title must be known accurately or the customer will foreseeably suffer harm that is both certain and direct.

Integrity should have known that Texcorp (U.S. Bank's predecessor in interest), in closing the loan to buyer, would act in justifiable reliance on the statement in the preliminary commitment that title was free and clear of any encumbrances. The other factors advanced by Professor Gergen also suggest finding a duty in tort on these facts. Here, the relationship between Integrity and Texcorp was of an advisory nature. Integrity had superior knowledge and expertise, was in the business of supplying title information, and was compensated for the information it provided to Texcorp. Integrity deliberately provided specific information in response to a request by Texcorp, to guide Texcorp in its transaction with a third party, and Integrity affirmatively vouched for the accuracy of the information. On these facts, we are convinced that applicable tort law permits U.S. Bank's tort claim to go forward.

Lessons:

1. A lender (not in privity) may sue a title search company for negligent misrepresentation if it fails to uncover a defect in the title.
2. Negligent misrepresentation is an exception to the economic loss doctrine but only when the parties are *not* in privity.
3. In analyzing whether there is a tort duty for negligent misrepresentation, consider the Gergen factors.

4. Summary judgment; proprietor's liability for parking lot assault; *The Kroger Co. v. Plonski* - 2010 WL 2605726 (Ind. 6/30/2010) (Rucker)

Lu Ann Plonski parked her car on the parking lot immediately adjacent to a Kroger food store on the westside of Indianapolis and entered the store. When she finished shopping, Plonski, with purse in hand, proceeded onto the lot. A man grabbed Plonski and her purse. The man then picked Plonski up, threw her in the trunk of the car and began slamming the trunk lid on her legs. When the man looked away Plonski jumped out of the car and ran into Kroger seeking assistance. The man left the scene with Plonski's purse. Claiming injuries as a result of the assault, Plonski filed a complaint for damages against Kroger.

Kroger filed a motion for summary judgment. As a part of its motion Kroger designated, among other things, the affidavits of three Kroger employees: the Risk Manager, the Safety Manager, and the Head Cashier. The affidavits of the Risk Manager and Safety Manager asserted in essence that the Kroger store is located in a part of the city that has a reputation for low levels of criminal activity and that in the two-year period before October 2, 2003, there was only one report of criminal activity occurring on the store's premises. The affidavit of the Head Cashier essentially alleged that the assailant who attacked Plonski was not a guest or patron of the Kroger store.

As a part of discovery, Kroger provided Plonski with sixty pages of police reports evidencing over thirty responses to criminal activity occurring on the Kroger premises within a two-year period of the date on which the Plonski assault occurred. At the May 8, 2008 hearing on Kroger's motion for summary judgment Plonski moved to introduce the police reports as a "supplement" to her previously filed response to Kroger's summary judgment motion. On grounds of timeliness Kroger objected and the trial court denied the motion.

Plonski received the documents after she had tendered her response in opposition to Kroger's motion for summary judgment. As a general proposition it is improper for a court to grant summary judgment while reasonable discovery requests that bear on issues material to the motion are still pending. After receiving the police reports, Plonski did not ask for additional time to conduct further discovery or otherwise respond to Kroger's submissions.

Seizing on language contained in *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048 (Ind.2003), that "the law clearly recognizes that proprietors owe a duty to their business invitees to use reasonable care to protect them from injury *caused by other patrons and guests* on their premises ...," Kroger contends it owed no duty to protect Plonski in that her injuries were caused by an unknown assailant that was neither a patron nor a guest of Kroger. Kroger reads *Bartolini* too narrowly. Although the assailants in that case happened to have been patrons of the establishment, this does not mean that a proprietor's duty of care to its business invitees is limited to harm caused only by other patrons or guests.

Rather, we declared more broadly that "[l]andowners have a duty to take reasonable precautions to protect their invitees from foreseeable criminal attacks" and that "the duty to exercise reasonable care extends to keeping its parking lot safe and providing a safe means of ingress and egress." Here, as the moving party in this summary judgment action, Kroger has the burden of demonstrating that as a matter of law the criminal assault on Plonski was not foreseeable. The materials Kroger submitted simply do not satisfy this burden.

Summary judgment is rarely appropriate in negligence actions. And this is so because "negligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person-one best applied by a jury after hearing all of the evidence." In this case Kroger has persuaded us no differently.

Lessons:

1. A proprietor's duty to protect patrons from criminal assault is *not* limited to assaults by other patrons and guests.
2. The defendant will be held to a high standard to demonstrate that an assault was not foreseeable; evidence of one prior assault within the last two years may be

- sufficient to raise an issue for trial on foreseeability.
3. Pending discovery requests that bear on a summary judgment motion present a compelling reason for extending the deadline for response.
 4. Don't wait until the hearing to submit supplemental evidence; that is likely to be too late.

5. Voter ID Law; Equal Privileges and Immunity clause; *League of Women Voters of Indiana, Inc. v. Todd Rokita* - 2010 WL 2605734 (Ind. 6/30/2010) (Dickson)

The sole plaintiffs in this case, the Indiana State and Indianapolis chapters of the League of Women Voters, brought this action seeking a declaratory judgment that the Indiana Voter ID Law violates Article 2, Section 2, and Article 1, Section 23 of the Indiana Constitution. The trial court granted the defendant's motion to dismiss, concluding that the Voter ID Law did not violate either constitutional provision. The Court of Appeals reversed. We granted transfer.

Determining that this case presents only facial challenges to the constitutionality of the Voter ID Law, we now affirm the trial court's dismissal of the complaint, but without prejudice to future as-applied challenges by any voter unlawfully prevented from exercising the right to vote. It is within the power of the legislature to require voters to identify themselves at the polls using a photo ID.

The plaintiffs contend that the Voter ID Law violates the Equal Privileges and Immunities Clause of the Indiana Constitution. Ind. Const. art. 1, § 23. The plaintiffs' complaint alleges two examples of unequal treatment claimed as violations of Section 23:(1) requiring photo identification of in-person but not mail-in absentee voters, and (2) exempting from the photo identification requirement voters residing in state licensed care facilities at which a precinct polling place is located.

A statute may result in different treatment for different classifications of people without offending Section 23 if both (a) the disparately treated classifications are rationally distinguished by distinctive, inherent characteristics, and (b) such disparate treatment is reasonably related to such distinguishing characteristics.

Critical attributes distinguish the identified disparately treated classes, especially the practicability of requiring and efficaciously utilizing photo identification for mail-in absentee voters, in contrast to in-person voters. For ballots received by mail, there is no opportunity for an election official to personally compare the voter with the voter's photo identification to verify identity. Legislation is not constitutionally deficient for failing to impose an unenforceable, useless requirement.

The plaintiffs assert multiple arguments with respect to the Voter ID Law's provision regarding certain voters living and voting in state licensed care facilities. In light of the relatively extremely small number of voters excluded from the photo identification requirement under this exception, even if arguably violative of Section 23, we find that it represents a minor and insubstantial disparity permissible under Section 23.

Lessons:

1. Different treatment for different classifications of people will not violate the Equal Privileges and Immunities clause if both (a) the classifications are rationally distinguished by inherent characteristics and (b) such disparate treatment is reasonably related to such distinguishing characteristics.

2. There is a *de minimis* exception to the requirements of the Equal Privileges and Immunities clause.

NOTE: The Court of Appeals opinion in this case (which was vacated) is the one as to which Governor Mitch Daniels commented: "It's a preposterous decision, an extreme decision and came in this case from a judge who's been reversed before and I expect it to happen again. This decision will be a footnote to history, eventually."

6. Shareholder derivative claims; *In re ITT Derivative Litigation* - 2010 WL 2571875 (Ind. 6/28/2010) (Shepard)

This decision was rendered on a certified question from the U.S. District Court for the Southern District of New York.

"Derivative actions" are suits asserted by a shareholder on the corporation's behalf against a third party because of the corporation's failure to take some action against the third party. Derivative actions are brought in order to redress an injury sustained by the corporation or to enforce a duty owed to the corporation.

The present suit is a derivative action, on behalf of ITT, brought by ITT shareholders Robert Wilkinson and Anthony Reale against all ITT directors. Wilkinson and Reale filed suit in District Court seeking to recover the criminal fines and penalties that ITT was required to pay because it exported military technology to various countries in violation of U.S. State Department restrictions on the export of technical data. The plaintiffs allege that the directors violated fiduciary duties by failing to monitor and supervise management of the Night Vision unit.

Wilkinson did not make any demand on ITT's board to pursue the claims, and has argued this lack of demand should be excused as futile. The District Court held that the plaintiffs failed to allege facts demonstrating that the defendants were unable to consider a demand with independence and disinterest because the plaintiffs did not show "that a majority of the Director Defendants face a substantial likelihood of liability for consciously failing to fulfill their fiduciary duties." The District Court dismissed Wilkinson's claim with prejudice.

Reale, on the other hand, did make a demand on ITT's board to pursue the asserted claims. In response, the board appointed a Special Litigation Committee (SLC) to consider whether the corporation should pursue the claims in question. The SLC's determination shall be presumed to be conclusive unless the shareholder can demonstrate that the SLC was not disinterested. The District Court concluded that the three independent, outside directors appointed to the Special Litigation Committee were not "disinterested" for the purposes of Indiana Code § 23-1-32-4.

The court based its conclusion on Indiana Code § 23-1-32-4(d)(1) of the Indiana Business Corporation Law ("BCL"), which provides that directors named in a derivative suit remain "disinterested" if they are named in the action "only on the basis of a *frivolous or insubstantial claim* or for the sole purpose of seeking to disqualify the director ... from serving on the committee." The court reasoned that "frivolous or insubstantial" means that unless it could be shown that the claim against the SLC was frivolous, the SLC's work must be disregarded.

We take a different view. Under subsection (d)(1), directors or other persons

named in a derivative suit remain “disinterested” if they were joined “only on the basis of a frivolous or insubstantial claim or for the sole purpose of seeking to disqualify the director or other person from serving on the committee.” The plaintiffs have understandably concentrated on the word “frivolous,” but that does not give due consideration to “insubstantial.” And the disjunctive, “or,” listing in Indiana Code § 23-1-32-4(d)(1) demonstrates legislative intent to establish distinct or alternative statutory provisions.

Overall, BCL provisions make it more difficult to find a director liable and to bring a derivative suit. The BCL’s strong preference that directors, not shareholders, control corporate rights applies equally in the “demand excused” and “demand refused” scenarios. In both instances, the shareholders must show that the directors face a substantial likelihood of personal liability on the claims to establish that a director is “not disinterested.”

Lessons:

1. The Indiana Business Corporation Law, as construed by the Indiana Supreme Court, sets a high bar for maintaining a derivative suit.
2. As a prerequisite to a derivative suit, a shareholder must submit a demand on the directors to assert the claim unless the demand would be futile--which requires showing that a majority of the directors face a substantial likelihood of personal liability on the claim, thereby demonstrating the directors are “not disinterested”.
3. If the demand is made and rejected by a special litigation committee of the directors, the derivative claim will also be precluded unless the same showing of “substantial likelihood” is made.

7. Right to an impartial trial judge; *Everling v. State* - 2010 WL 2690350 (Ind. 7/8/2010) (Shepard)

A jury found appellant Steven W. Everling guilty of three counts of child molesting and two counts of sexual misconduct with a minor. Although Everling raises several grounds for reversal, we address only whether the judge's conduct during the trial deprived him of a fair trial.

Prior to trial, Everling’s counsel, Zaki Ali, moved for a change of judge in five criminal proceedings in which he was defense counsel because he had filed a complaint with the Indiana Commission on Judicial Qualifications. The motion for change of judge alleged that Judge Spencer “cannot be fair and impartial under the Judicial Cannons [sic] and shall remove himself from all of counsel's cases.” The court denied the motion. Ali then petitioned this Court for writ of mandamus and prohibition, asking that we direct Judge Spencer to grant his request for a change of judge. We denied Ali's request for an emergency writ. [NOTE: In September 2009, Judge Spencer resigned while under investigation for misconduct by the Indiana Commission on Judicial Qualifications]

A trial before an impartial judge is an essential element of due process. In assessing a trial judge's partiality, we examine the judge's actions and demeanor while recognizing the need for latitude to run the courtroom and maintain discipline and control of the trial. The conduct to which Everling points as showing the court's partiality can be categorized as comments to counsel, comments in front of the jury, uneven tolerance of late filings, and erroneous rulings.

Wishing that it were otherwise, we conclude that taken together, Judge Spencer's comments and procedural rulings demonstrate a lack of impartiality. What matters here is not the legal question but the general demeanor taken with defense counsel. These comments were adversarial if not condescending, and they certainly communicated to the jury that Ali was a less than competent attorney. They were improper and most likely gave the jury an unfavorable impression of the defense.

Everling also points out that the court regularly assisted the prosecution in making and responding to objections. While the court's interventions may have made the proceedings somewhat more efficient, their context and one-sidedness convince us they were improper and gave an impression of partiality.

We cannot ignore the cumulative effect of disparaging comments throughout the course of proceedings, both in front of and away from the jury, simply because each of them would otherwise not suffice to reverse. The court's comments reveal a prejudice against Ali and his client.

On the first day of trial, Ali identified Dr. Philip Merk as a medical witness for the defense to testify as to the absence of evidence of injury reflected in photographs that the State first provided 12 days before trial. The Court granted the State's motion to exclude Dr. Merk's testimony due to late disclosure. Because Merk's testimony would have been so important and Ali's illness excuses his delay to a great extent, we conclude excluding him was an abuse of discretion.

The cumulative result of Judge Spencer's comments, exclusions, and general demeanor toward the defense was a trial below the standard towards which Indiana strives. We reverse and remand for a new trial.

Lessons:

1. A judge's course of conduct, showing prejudice against counsel, may deny a party his right to a fair trial even when no single ruling or comment would have been sufficient by itself.
2. A judge can abuse his discretion in refusing to allow witnesses who have not been identified timely.
3. If you make a complaint about a judge to the Indiana Commission on Judicial Qualifications, don't expect the Supreme Court to use its mandamus power to protect you in proceedings before the judge.

8. Emotional distress claims in medical malpractice case; *Indiana Patient Compensation Fund v. Patrick* - 929 N.E.2d 190 (Ind. 6/23/2010) (Sullivan)

A father brought a claim under the Adult Wrongful Death Statute for his son's death caused by the negligence of medical providers following an automobile accident. The father also brought a derivative claim under the Medical Malpractice Act for his own emotional distress. The trial court awarded Father \$600,000 for his emotional distress claim. The Fund appealed the award for Father's emotional distress. The Court of Appeals affirmed the trial court's judgment.

The Fund argues that claims under the MMA require bodily injury or death, and that Father cannot recover for his emotional distress without bodily injury. The MMA, however, does not contain a requirement for bodily injury for derivative claimants.

The MMA serves as a procedural mechanism for claims of medical malpractice. A

derivative claimant can only pursue claims that are allowed at common law or under applicable statutes; the MMA does not create new causes of action that otherwise do not exist. Thus, whether Father has a claim for emotional distress depends not upon the MMA, but on the AWDS. Because claims for emotional distress are not allowed under the AWDS, Father may not bring this type of derivative claim under the MMA.

For the sake of clarity, we make a final observation: were the claim underlying the MMA action one for which damages for emotional distress are available, the MMA does not preclude derivative claims of emotional distress by persons whom the law refers to as “bystanders.” Several cases have made explicit reference to the availability of damages for emotional distress in MMA cases.

Lessons:

1. A “bystander” may not sue for emotional distress in medical malpractice cases when the patient’s claim arises under the Adult Wrongful Death Statute.
2. A “bystander” may have an emotional distress claim in medical malpractice cases not resulting in death.

9. Medical malpractice; negligent infliction of emotional distress for stillborn infant; *Spangler v. Bechtel* - 2010 WL 2916473 (Ind.Ct.App. 7/27/2010) (Brown)

Steven Spangler and Heidi Brown (collectively, “Parents”) appeal the trial court's grant of motions for summary judgment in favor of St. Vincent Randolph Hospital (“Hospital”) and Barbara Bechtel, nurse-midwife, and Expectations Women's Health and Childbearing Center (Bechtel and Expectations collectively, “Midwife”).

Brown was admitted to the Hospital in active labor. Dr. Beauchat delivered a stillborn infant girl named Skyleigh Donae L. Spangler. There were attempts to resuscitate Skyleigh for twenty-five minutes, but it became evident that the infant died while Brown was in labor.

We discuss separately: (1) whether Parents have a claim for negligent infliction of emotional distress; and (2) whether Parents may bring a claim under the Medical Malpractice Act.

In *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind.1991), the Indiana Supreme Court abrogated the traditional “impact rule” in favor of the “modified impact rule,” explaining:

When ... a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person ... a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.

In *Groves v. Taylor*, 729 N.E.2d 569 (Ind.2000), the Court declared, in what is known as the “bystander rule,” that:

[W]here the direct impact test is not met, a bystander may nevertheless establish “direct involvement” by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child,

grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tortuous [sic] conduct.

Parents' claimed emotional damages, directly related to Brown's stillbirth, are of the kind and extent normally expected to occur in a reasonable person and are not likely speculative, exaggerated, fictitious, or unforeseeable. Accordingly, we conclude that Parents possess a valid claim for negligent infliction of emotional distress based upon Brown's direct involvement in the stillbirth.

Having determined that Parents possess a valid claim, we next examine whether they may assert their claim under the Medical Malpractice Act. In order to bring a claim under the Act there must be an injured patient. *Bolin* makes clear that "a 'patient,' defined as it is in the Act as 'an individual,' must be a living person," and an unborn child does not meet that statutory definition.

In arriving at our conclusion, we find persuasive an argument advanced by Parents that "if an unborn child is not a separate 'person' under our laws, then the unborn child must be a part of mother, both physically and legally...." In *Modaber v. Kelley*, 348 S.E.2d 233 (Va.1986), the court adopted the view that "in tort litigation [] an unborn child is a part of the mother until birth," and that an "injury to an unborn child constitutes injury to the mother and that she may recover for such physical injury and mental suffering associated with a stillbirth."

We hold that a mother who suffers a stillbirth due to medical malpractice qualifies as an injured patient and satisfies the actual victim requirement under the Medical Malpractice Act regardless of whether the malpractice resulted in injuries to the mother, the fetus, or both, and Parents may assert a claim for negligent infliction of emotional distress under *Shuamber's* modified impact rule.

It is unclear whether Spangler (the father) has a valid claim for negligent infliction of emotional distress. We note, however, that even if Spangler does have a valid claim under the bystander rule, both Spangler's claim and Brown's claim together are entitled to a single damage cap because there was only one "actual victim" of malpractice from which the negligent infliction of emotional distress claims derive.

Lessons:

1. A stillborn infant is not a "patient" and has no medical malpractice claim.
2. The mother of a stillborn infant may sue for negligent infliction of emotional distress due to medical malpractice pursuant to the modified impact rule.
3. It is unclear whether the father may also sue under the bystander rule but it is clear that together the mother and father are subject to a single cap.

10. Dismissal for failure to prosecute under T.R. 41(E); *American Family Insurance Co. v. Beazer Homes Indiana, LLP* - 2010 WL 2571842 (Ind.Ct.App. 6/28/2010) (Brown)

The sole issue argued on appeal is whether the trial court abused its discretion in dismissing American Family's claim pursuant to Indiana Trial Rule 41(E). American Family argues that "[w]ithin 60 days of Superior Court 14 receiving the case, counsel for American

Family discovered that the summons [to Maddox] had never been issued, contacted the court, and caused the summons to be issued, all before the trial court's call of the docket 'notice," and that its "actions, bringing in an additional defendant necessary for complete adjudication of the case, showed cause to the trial court prior to the May 15, 2009 hearing that the action should not be dismissed under Rule 41(E)."

American Family states that "other activity not reflected in the court's chronological case summary was taking place in this case, including both [American Family] and [Beazer] providing documents to other counsel in response to discovery requests." American Family further argues that "it is undisputed that counsel for American Family contacted the trial court by telephone and confirmed that its recent action was sufficient to remove the case from the call of the docket" hearing set for May 15, 2009.

The burden of moving the litigation is upon the plaintiff, not the court. We generally balance several factors when determining whether a trial court abused its discretion in dismissing a case for failure to prosecute. These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the degree of the plaintiff's personal responsibility; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part.

We view dismissals with disfavor, and dismissals are considered extreme remedies that should be granted only under limited circumstances. We decline to attribute to American Family responsibility for any delays which may have occurred in issuing a summons upon Maddox in this case. The record does not reveal a history of an egregious pattern of deliberate delay on the part of American Family or that American Family defied any court orders. We also observe that dismissal under the circumstances of this case is inconsistent with Indiana's oft-stated policy of having cases decided on their merits whenever possible.

For the foregoing reasons, we reverse the trial court's order dismissing American Family's claim.

Lessons:

1. Dismissal for failure to prosecute under T.R. 41(e) will generally require a pattern of delay.
2. Where there is significant activity before the "call of the docket", dismissal is inappropriate.
3. Don't rely on oral assurance from the court staff that the case will be removed from the call of the docket; get it in writing before you fail to show.

11. Dismissal out of comity to foreign litigation; *Brightpoint, Inc. v. Pedersen* - 2010 WL 2605221 (Ind.Ct.App. 6/30/2010) (Najam)

Brightpoint, Inc. ("Brightpoint") and Brightpoint Europe A/S ("BPE"), a Danish corporation and wholly owned subsidiary of Brightpoint, appeal the trial court's dismissal of their complaint against Steen F. Pedersen, a Danish citizen. In his motion, Pedersen

asserted that a substantially similar action was pending in the Danish court system and that the Marion Superior Court lacked personal jurisdiction over him. The court granted Pedersen's Motion to Dismiss both out of comity to the pending Danish litigation and due to a lack of personal jurisdiction over Pedersen.

Courts in other jurisdictions have concluded that where an action concerning the same parties and the same subject matter has been commenced in another jurisdiction capable of granting prompt and complete justice, comity ordinarily should require staying or dismissal of a subsequent action filed in a different jurisdiction, in the absence of special circumstances.

Factors this court has considered in addressing comity questions include whether the first filed suit has been proceeding normally, without delay, and whether there is a danger the parties may be subjected to multiple or inconsistent judgments. We also believe it appropriate to look for guidance from cases interpreting Indiana Trial Rule 12(B)(8), which expressly permits dismissal of a lawsuit where another action already is pending in another *Indiana* state court. Under that rule, a second action "should be dismissed where the parties, subject matter, and remedies are precisely or even substantially the same in both suits."

Brightpoint and BPE first assert that, because Brightpoint is a party to the Indiana litigation but not to the Danish litigation, the two proceedings do not involve the same parties. We cannot agree. As this court recently noted in discussing Indiana Trial Rule 12(B)(8), while "each action contained other parties, ... the presence of those other parties was irrelevant to the Trial Rule 12(B)(8) requirement that each action contain the same parties."

Second, Brightpoint and BPE argue that the Danish litigation and the Indiana litigation do not involve substantially identical subject matter. Specifically, Brightpoint and BPE contend that "the Indiana litigation is more complex, involving additional claims not otherwise asserted in the Danish action." But while the allegations in the two courts are not identical, there is "clear and substantial overlap in the subject matter." As such, we cannot say that comity was improperly applied in light of the subject matter of the two litigations.

Last, Brightpoint and BPE contend that Pedersen's litigation before the Danish court was not the first-filed litigation and, instead, their Indiana litigation was first filed. Pedersen filed his arbitration action against BPE on March 23, 2009. On May 1, BPE filed its response, asserting, among other things, that the proper venue for Pedersen's action was the Danish court system. Accordingly, on May 12, Pedersen withdrew his arbitration action and immediately refiled that claim on May 13 in the Danish court system. Meanwhile, on April 28, Brightpoint and BPE filed their substantially similar action in Indiana, although they did not give notice of that action to Pedersen until August 2. It was not against the logic and effect of those facts and circumstances for the trial court to consider Pedersen's March 23 arbitration filing the date of first filing.

The Indiana litigation and the Danish litigation involve the same parties, substantially identical subject matter, and substantially similar remedies. We cannot say that the trial court abused its discretion when it granted Pedersen's Motion to Dismiss based on comity.

Lessons:

1. Indiana courts will dismiss a claim out of comity to earlier-filed foreign litigation

involving the same parties, substantially identical subject matter and substantially similar remedies.

2. In determining what matter is first-filed, the court may look at a related arbitration claim and when the defendant was served.

12. Victim – Advocate privilege; *In re subpoena to Crisis Connection, Inc., State v. Fromme* - 2010 WL 2783876 (Ind.Ct.App. 7/15/2010) (Crone)

Crisis Connection, Inc., is a nonprofit organization that provides services, including counseling, to victims of domestic violence and sexual assault. In connection with a criminal case in which Ronald Keith Fromme is the defendant, Crisis Connection was ordered to produce records to the court for an *in camera* review. Crisis Connection appeals, requiring us, as a matter of first impression, to interpret Indiana's victim-advocate privilege and to determine whether it must be limited by a criminal defendant's constitutional rights.

Indiana Code § 35-37-6-9 provides, in relevant part:

(a) The following persons or entities may not be compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative, or administrative proceeding:

(1) A victim.

(2) A victim advocate or victim service provider unless the victim specifically consents to the disclosure in a written authorization that contains the date the consent expires.

Indiana Code § 35-37-6-1 defines “confidential communication” as follows:

(a) As used in this chapter, “confidential communication” means any information:

(1) exchanged between a victim and a victim advocate in the course of the relationship between the victim and the victim advocate;

(2) exchanged or disclosed in a support group in which a victim is or was a participant; or

(3) exchanged in the presence of a third person who facilitates or facilitated communication between a victim and a victim advocate.

Fromme argues that application of the privilege violates his constitutional rights. While the State undoubtedly has an important interest in protecting the victim-advocate relationship, a defendant's rights guaranteed by the Sixth Amendment are also of great importance. The need to discover exculpatory evidence and effectively cross-examine witnesses is especially apparent in sex offense cases, which often hinge on witness credibility and which carry heavy potential penalties. The State clearly has a constitutional obligation to turn over to defendants material exculpatory evidence in its possession. *Brady v. Maryland*, 373 U.S. 83, 87(1963). There is no *Brady* violation here, because the information Fromme seeks has never been in the State's possession. Nevertheless, the State has, by statute, prevented Fromme from receiving potentially exculpatory information by making certain evidence categorically unavailable to him.

When a defendant's constitutional rights are implicated, the legislature cannot shield potentially exculpatory evidence from all judicial scrutiny. The interest in privacy asserted by Crisis Connection, while important, is not strong enough to bar an *in camera* review of its records. We conclude that an *in camera* review may be required when defendants satisfy the following three-step analysis: (1) there must be a sufficient designation of the items sought to be discovered (particularity); (2) the items requested must be material to the defense (relevance); and (3) if the particularity and materiality requirements are met, the trial court must grant the request unless there is a showing of "paramount interest" in non-disclosure.

While we acknowledge that the three-step test has not always been applied to privileged information, we now conclude that it provides a useful framework for balancing the victim's interest in privacy with a defendant's constitutional rights. We affirm the trial court's order for an *in camera* review.

Lessons:

1. By statute, communications between a victim and a victim advocate or by a victim in a support group are not discoverable and may not be compelled.
2. The victim-advocate privilege is limited in criminal cases by a defendant's compulsory process right and a court may be required to review privileged material *in camera* for exculpatory evidence.

13. The Tort Claims Act and private companies; *Harrison v. Veolia Water Indianapolis, LLC* - 929 N.E.2d 247 (Ind.Ct.App. 6/29/2010) (Barnes)

The sole restated issue before us is whether Veolia Water Indianapolis, LLC ("Veolia") is entitled to summary judgment because it is a political subdivision of the State, and Harrison failed to give it notice of his claim against it in accordance with the Indiana Tort Claims Act ("ITCA"). The City of Indianapolis ("City") has a contract with Veolia for the operation, management, and maintenance of the city's water utility for approximately \$40 million per year, plus incentive payments. Veolia is a wholly-owned subsidiary of Veolia Water North America, which in turn is a subsidiary of Veolia Environment, a French corporation with multi-billion dollar annual revenues.

Tort claims against the State and its agencies and political subdivisions are governed by ITCA. Any claim against a political subdivision of the State is barred unless a plaintiff files notice with the "governing body of that political subdivision" within 180 days after a loss occurs. It is undisputed that Harrison did not provide any such notice to Veolia. While acknowledging that it does not fall under the express statutory definition of a "political subdivision," Veolia asserts nonetheless that it is sufficiently akin to a governmental entity or political subdivision of the State that it is entitled to ITCA's procedural protections.

Indiana courts have recognized limited circumstances in which private entities named as a defendant in a tort lawsuit may enjoy the benefits of ITCA. Our supreme court has held, "When private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and are subject to the laws and statutes affecting governmental agencies and corporations." *Ayres v. Indian Heights Volunteer Fire Dep't Inc.*, 493 N.E.2d 1229, 1235 (Ind.1986). At issue in *Ayres* was whether a volunteer fire department with an annual budget of \$27,500 was

protected by ITCA. Our supreme court held that it was.

In *Metal Working Lubricants Company v. Indianapolis Water Company*, 746 N.E.2d 352 (Ind.Ct.App.2001), this court concluded that the Indianapolis Water Company (“IWC”) was a governmental agency and that it enjoyed common law immunity from liability with respect to claims regarding firefighting. Obviously, Veolia wishes us to apply the *Metal Working* holding directly to it, IWC's practical successor, and conclude that Veolia is a governmental entity for purposes of ITCA as well. We decline to do so.

The most fundamental basis for this holding is that the courts of Indiana have *never* recognized the provision of utility services as a power or function “governmental in nature” that gave rise to sovereign immunity, even when a governmental unit was operating the utility.

We also do not believe extending ITCA's protections to Veolia, particularly with respect to an “ordinary” tort claim, would be consistent with ITCA's apparent purposes. Simply put, we cannot discern a legislative intent to shield or provide special protections to for-profit enterprises, including ones that are part of a multi-national, multi-billion-dollar conglomerate, because they provide services to a governmental entity. We hold that Veolia is not a political subdivision of the State for purposes of ITCA. The trial court erred in concluding otherwise.

Lessons:

1. A tort claim notice may be required as to some private groups such as a volunteer fire department; do not assume that just because an entity is a private company that the ITCA does not apply.
2. Although prior case held that the Indianapolis Water Company was a governmental agency that enjoyed common law immunity as to some claims, the successor to IWC, Veolia, is not entitled to ITCA protection.

14. Tortious interference with a contract; *Bragg v. City of Muncie* - 2010 WL 2605361 (Ind.Ct.App. 6/30/2010) (Baker)

Appellants-plaintiffs John Bragg and his company, Built On Foundation, Inc., (collectively, Bragg), appeal the trial court's grant of summary judgment in favor of appellee-defendant City of Muncie (City) and the Muncie Housing Authority (MHA), claiming that a genuine issue of material fact exists regarding Bragg's claim for tortious interference with a contract.

On November 1, 2004, Charles Weatherly, MHA's Executive Director, entered into a written agreement with Bragg. Pursuant to the terms of the proposed agreement, MHA was to purchase Bragg's real estate for \$36,000 and hire Bragg as the developer for the project. On March 23, 2005, the City's then-Mayor, Dan Canan (hereinafter referred to as Mayor), first learned of the November 1, 2004, document that Weatherly and Bragg had executed. Shortly thereafter, the Mayor contacted Jerry Thornburg-the director of Community Development-and inquired whether he knew about the contract and whether it had been approved by MHA's Board members (Board). When Thornburg denied any knowledge of the agreement, the Mayor's concerns heightened. He questioned various terms of the contract, particularly the provision that required MHA to reimburse Bragg for the infrastructure work. The Mayor was also concerned about the legality of the agreement because MHA had not first engaged in a bidding process. Finally, the Mayor questioned the

estimated cost of \$90,000 for twenty-four homes, or a little over \$2 million, how MHS would pay the amounts owed, and whether there might be a negative impact on funding the Millennium Place project.

At a special meeting of the Board, Commissioner Gavin Greene moved to nullify the contract. Three Commissioners voted in favor of the motion and two voted against it. The elements of tortious interference with a contract are: (1) the existence of a valid and enforceable contract; (2) the defendant's knowledge of the existence of the contract; (3) the defendant's intentional inducement of the breach of contract; (4) the absence of justification; and (5) damages resulting from the defendant's wrongful inducement of the breach.

We also note that a plaintiff must prove the absence of justification by establishing that “the interferer acted intentionally, without a legitimate business purpose, and the breach is malicious and exclusively directed to the injury and damage of another.” The overriding question in deciding whether the defendant's actions were justified is “whether the defendant's conduct has been fair and reasonable under the circumstances.” In short, a legitimate reason for the defendant's actions provides the necessary justification to avoid liability.

The Mayor's concerns about the validity of the contract and whether the Board was aware of the contract and had approved the same are certainly legitimate business concerns about the potential negative implications that the proposed agreement might have on the City's \$48 million Millennium Place project. Therefore, the City's actions that precipitated the repudiation of the purported contract were justified and motivated by legitimate concerns. Because Bragg has failed to establish the “absence of justification,” which is a required element of tortious interference, we conclude that the trial court properly granted the City's motion for summary judgment.

Lessons:

1. With regard to the “absence of justification” element in a tortious interference claim, the “overriding question” is whether the defendant's conduct has been “fair and reasonable.”
2. A legitimate reason for the interference will provide the necessary justification to avoid liability.

15. Legal malpractice insurance coverage; *Ashby v. Davidson* - 2010 WL 2770243 (Ind.Ct.App. 7/14/2010) (Kirsh)

Michael Ashby and Randy O'Brien, collectively (“the Clients”), appeal from the trial court's order granting summary judgment in favor of The Bar Plan Mutual Insurance Company (“Bar Plan”) in the Clients' legal malpractice action against the Bar Plan's insured, C. Bruce Davidson, Jr. (“Davidson”). [NOTE: The malpractice claim appears to have been well-founded since Davidson was disbarred and then embarked on a multi-state crime spree involving numerous bank robberies for which he is now incarcerated in the federal bureau of prisons.] The dispositive issue presented in this appeal is whether the trial court erred by granting summary judgment in favor of Bar Plan.

Bar Plan argues that even though it received actual written notice of the Clients' claims, there is no coverage under the policy because Davidson, the Insured, did not supply the written notice to Bar Plan and that Davidson did not receive a demand from the Clients

within the policy period.

Here, by the terms of the policy, Davidson was the person required to provide written notice to Bar Plan but was running from the law as a result of the multi-state crime spree he had commenced upon abandoning his law practice. For the same reason, Davidson was unavailable to receive demands from the Clients within the policy period. The Clients themselves provided actual notice of their claims against Davidson to Bar Plan within the policy period.

Under the facts of this case, notice provided by Davidson to Bar Plan was an impossibility. Further, Bar Plan received notice that was both “timely” and “true” as those terms are set out in *Paint Shuttle*. Bar Plan has been able to investigate and defend the Clients' claims against the insured after receiving prompt, actual written notice of the claims. It seems to us that the purpose behind the notice provision at issue here has more to do with the ability of the carrier to investigate and defend against claims in a timely manner than with the ability of a carrier to deny coverage because actual notice was supplied by the wrong individual, *i.e.*, “gotcha.” We decide as a matter of law that the actual notice Bar Plan received from the Clients was proper. We reverse.

Lesson: The failure of a defendant attorney to give notice of a legal malpractice claim will not defeat coverage when the client provides actual notice to the carrier.

16. Attorney fees in wrongful death claim; *McCabe v. Commissioner, Indiana Dept. of Ins. as Administrator of the Indiana Patient's Compensation Fund - 2010 WL 2831059 (Ind.Ct. App. 7/20/2010) (Mathias)*

Appellant-Petitioner, Jeffery H. McCabe, appeals the trial court's grant of partial summary judgment in favor of Commissioner, Indiana Department of Insurance as Administrator of the Indiana Patient's Compensation Fund (“the Fund”), in which the trial court found that attorney fees and expenses incurred by the attorney representing the personal representative of a wrongful death estate are not recoverable damages under Indiana's Adult Wrongful Death Statute (“AWDS”).

Indiana has three separate causes of action for the wrongful death of an individual, a general wrongful death statute (“GWDS”), a statute pertaining to the wrongful death of children (“CWDS”), and the AWDS, a statute pertaining to the wrongful death of adults. The important difference among them for the purposes of this appeal is that, although the GWDS and the CWDS specifically provide for reasonable attorney fees, the AWDS is silent on the matter. Despite the lack of language in the AWDS permitting the recovery of reasonable attorney fees, McCabe argues that the open-ended phrase “may include but are not limited to” in subsection (c)(3) of the AWDS should be interpreted to allow recovery of reasonable attorney fees.

Initially, we address McCabe's reliance on our court's decision in *Hillebrand v. Supervised Estate of Large*, 914 N.E.2d 846 (Ind.Ct.App.2009). The *Hillebrand* panel stated: Both sections of the wrongful death act list the damages as “may include but are not limited to the following.” See I.C. §§ 34-23-1-1; -2(c)(3). Because this list of recoverable damages in a wrongful death action is expressly illustrative and not exclusive, we interpret the statute to allow in every situation—regardless whether the decedent leaves a widow or widower, dependents or dependent next of kin—the recovery of the reasonable costs of

administering the decedent's estate and compromising the action, including attorney fees.

For the reasons expressed below, we disagree with the *Hillebrand* panel's conclusion that reasonable attorney fees are recoverable under the AWDS.

In *Butler v. Indiana Department of Insurance*, our supreme court concluded: The "include but not limited to" phrase does not expand the class of such necessitated expenses. We believe that allowing the recovery of attorney fees under the AWDS would do just that, expand the circumscribed damages defined by the General Assembly. Unless and until the AWDS is amended to mirror the CWDS and the GWDS, we can only conclude that the General Assembly clearly intended to disallow claims for attorney fees under the AWDS.

Our conclusion that the language of subsection (c)(3) does not compel the recovery of reasonable attorney fees and expenses under the AWDS is also consistent with the general rule that wrongful death statutes must "be construed strictly *against the expansion of liability.*" For all of these reasons, we conclude that attorney fees and expenses incurred by the personal representative's attorney are not recoverable damages under the Adult Wrongful Death Statute.

Lessons:

1. Attorney fees are not recoverable in actions under the Adult Wrongful Death Statute.
2. The Court of Appeals will not always follow recent decisions by another panel.
3. In light of the conflict within the Court of Appeals, this looks like an issue the Indiana Supreme Court might resolve.

17. Contingency fee agreement; *In the Matter of Luis E. Solis - 2010 WL 2696518* (7th Circuit 7/9/2010) (Hamilton)

The legal profession has not treated debtor Luis Solis well. The secretary of an attorney who settled Solis' workers' compensation claim stole nearly half of the amount he was owed. Then a second attorney whom Solis had hired to recover the rest of the stolen settlement-appellant Joseph O'Callaghan-asserted an attorney fee claim for a percentage of the entire amount of the settlement, including the portion that Solis had already been paid before he hired that second attorney. The legal issue in this appeal is whether the second attorney "recovered" money for his client when he established the client's entitlement to the sum of money already in the client's possession. Appellant O'Callaghan insists that the answer is yes. We disagree. Under the terms of the contingent fee agreement in this case, O'Callaghan is entitled to a percentage of only the money he actually recovered from other parties, not a percentage of the money Solis had received earlier.

Lesson: In the absence of clear contract language, a contingency fee agreement does not allow an attorney to collect a percentage fee by establishing the client's right to keep money already in the client's possession.

ADVOCACY TIP OF THE MONTH: Cultivate your ethos.

From *Classical Rhetoric and the Modern Lawyer*, Litigation (Winter 2010)

by Paul Mark Sandler, JoAnne A. Epps and Ronald J. Waicukauski

(to be reprinted in the September 2010 "Best of ABA Sections" issue of GPSolo Magazine)

Aristotle viewed *ethos* as the most important aspect of argument. He defined “*ethos*” as the character of the advocate *as perceived by the listener*. What qualities will boost your *ethos*? Integrity, intelligence, friendliness, sincerity, conviction, professional appearance, and enthusiasm, among others. Aristotle identified integrity as the most important of these. Creating the impression that you are a person of honesty enhances your ability to persuade. Admitting unfavorable facts, a bit of self deprecation, and demonstrating a sense of fair play can help win you points for integrity, as will avoiding *ad hominem* attacks and extreme positions.

Similarly, a knowledgeable advocate will appear to be intelligent, organized, well-prepared--and, hence, persuasive. To engender good will, be courteous and civil, do not talk down to your audience, and use *voir dire* to establish a rapport with the jurors. How you dress and move about the courtroom, your enthusiasm, and your sincerity will also affect your *ethos*. It is important to appreciate that during a trial your *ethos* can rise *and* fall. The goal, of course is to establish a high *ethos* early on and maintain it.

ONE FINAL DECISION: Here’s the full opinion by Judge J. H. Gillis of the Michigan Court of Appeals in *Fisher v. Lowe*, 333 N.W.2d 67 (1983):

We thought that we would never see
A suit to compensate a tree.
A suit whose claim in tort is prest
Upon a mangled tree's behest;
A tree whose battered trunk was prest
Against a Chevy's crumpled crest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care.
Flora lovers though we three,
We must uphold the court's decree.
Affirmed.

Footnote 1: Plaintiff commenced this action in tort against defendants Lowe and Moffet for damage to his "beautiful oak tree" caused when defendant Lowe struck it while operating defendant Moffet's automobile. The trial court granted summary judgment in favor of defendants pursuant to GCR 1963,117.2(1). In addition, the trial court denied plaintiff's request to enter a default judgment against the insurer of the automobile, defendant State Farm Mutual Automobile Insurance Company. Plaintiff appeals as of right. The trial court did not err in granting summary judgment in favor of defendants Lowe and Moffet. Defendants were immune from tort liability for damage to the tree pursuant to § 3135 of the no-fault insurance act. The trial court did not err in refusing to enter a default judgment against State Farm. Since it is undisputed that plaintiff did not serve process upon State Farm in accordance with the court rules, the court did not obtain personal jurisdiction over the insurer.

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Ron Waicukauski is a trial lawyer whose practice focuses on plaintiffs' complex litigation including matters involving business disputes, property rights, professional malpractice, and class actions. He has tried more than sixty jury cases to verdict as lead counsel in both state and federal courts. Ron has been recognized in Best Lawyers in America (2006-2010) and Indiana Super Lawyers (2004-2010) and with an AV Rating from Martindale-Hubbell.

Ron received his bachelor degree with Distinction from Northwestern University, his J.D. degree from Harvard University where he was named Best Oralist in the Ames Moot Court Competition, and an LL.M. degree, with Highest Honors, from George Washington University. Ron has taught trial and appellate advocacy at the Indiana University Schools of Law in Bloomington and Indianapolis, and has served on the faculties of the National Institute of Trial Advocacy and the Defense Counsel Trial Academy.

Ron has also served as President of the Indianapolis American Inn of Court, as Chair of the Continuing Legal Education Board of the International Association of Defense Counsel, and as Co-chair of the Training the Advocate Committee, Litigation Section, American Bar Association. He formerly was a JAG and Captain in the U.S. Marine Corps and served as the elected Prosecuting Attorney in Monroe County, Indiana.

Ron co-authored *The Twelve Secrets of Persuasive Argument* (2009 ABA), *The Winning Argument* (2001 ABA), *Classical Rhetoric and the Modern Trial Lawyer*, Litigation (Winter 2010); and *Ethos and the Art of Argument*, Litigation (Fall 1999). Ron also wrote *Learning the Craft*, Litigation (Spring 1998) and was the editor and a contributing author of *Law and Amateur Sports* (Ind. Univ. Press 1982).