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IN THE NEWS: Legal advertising blows past $1 billion and goes viral

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By Victor Li
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Whether it inspires envy, parody, anger, litigation or teeth-clenched admiration, legal advertising is here to stay.

According to Oct. 31, 2016, figures from Kantar Media's Campaign Media Analysis Group, lawyers, law firms and legal–service providers spent $770,598,900 on television ads in 2016. The CMAG also predicted that $924 million would be spent by the end of the year based on the current monthly average.

For paid Google keyword search terms-which advertisers buy to have ads appear after the terms are plugged into a Google search ad-a 2015 study by the GMAC and the U.S. Chamber of Commerce Institute for Legal Reform found nine out of the top 10 and 23 of the top 25 were legal terms. The most expensive terms were "San Antonio car wreck attorney" at $670, "accident attorney Riverside CA" at $626, and "personal injury attorney Colorado" at $553.

Although the ad-buy rush is being fueled by personal injury and mass tort lawyers, Kantar Media found that other lawyers and legal-service providers have contributed to the boom, ranking Avvo and LegalZoom among the top 10 biggest spenders on TV advertising in 2015.

Historically, the idea that a lawyer would market his or her practice to the general public was seen as unseemly and unprofessional. It was also unethical. Everything changed in 1977 when the Supreme Court handed down its decision in *Bates*. The court found that prohibitions on lawyer advertising violated the First Amendment. Moreover, the court simply saw such bans as anachronistic and unnecessary to maintain the integrity of the bar.

The Fieger Law Firm, a personal injury practice based in Southfield, Michigan, made waves last February when it released an ad that distinguished the firm's lead attorney, Geoffrey Fieger, from his competitors in Detroit, mentioning some by name. To Group Matrix CEO Sackett, these types of ads soon will become more commonplace. "At some point, within the next three to five years, we'll see substantially negative advertising about one competitor over another," Sackett says. "One law firm will do an ad like this, and then there will be retaliation because lawyers are trained to fight back."

1. The Governor and Public Records; *Groth v. Pence*, 67 N.E.3d 1104 (Ind. Ct. App. 1/9/17) (Najam)

This is one of the cases which make the news because it involves a highly political issue. But it makes it to this discussion because of its interesting legal issues.

In December of 2014, then-Governor Mike Pence made the decision that Indiana would join a Texas lawsuit against the President of the United States to contest certain presidential executive orders on immigration. Groth submitted a request for public records related to this decision under the Access to Public Records Act. The Governor provided a number of documents, but redacted some, and withheld a legal memorandum.

Groth complained about this response to the Public Access Counselor, who found that the Governor's response was proper. Groth then filed a complaint with the Marion Superior Court, who also found the Governor's response was proper after conducting an *in camera* review. Groth then appealed.

On appeal, the first dispute dealt with the standard of review. As the trial court conducted a *de novo* review on a paper record, the Court found that it could also conduct a *de novo* review. The Governor disagreed, arguing that appellate courts must defer to the trial court's assessment of the meaning of the paper records after an *in camera* review, and that the Court could not conduct its own *in camera* review. The Court disagreed.

> Among other reasons, Article 7, Section 6 of the Indiana Constitution guarantees the right to one appeal. The Governor's argument would render that right illusory where, as here, the merits of an appeal turn wholly on documents reviewed in camera by a trial court. On appeal, we review the entire trial court record. Groth has requested in camera review on appeal of the documents at issue, and to give effect to his right to an appeal, we have, by separate order, granted his request.

The Court began its substantive discussion by addressing a case we spoke about last April, *Citizens Action Coalition of Indiana v. Koch*, 51 N.E.3d 236 (Ind. 2016), which declined to define legislative work product on the basis of a lack of justiciability. The Governor argued that the same principles were at work here, and made "a categorical claim of executive privilege from disclosure of his public records under APRA." The Court did not agree, noting that "there is no APRA exception on which the Governor could rely that might plausibly be captured by the holding in *Citizens Action Coalition*." The exceptions to public access which did apply (privileged attorney-client communications, attorney-client work product, and deliberative material), were all well-established, and applying these standards would not impinge on the Governor's core executive functions. Therefore, the Court found that the dispute was justiciable.

Groth next argued that the trial court denied him due process when conducting its *in camera* review of the documents, because the trial court did not "provide a summary of the undisclosed information" after its *in camera* review. Groth argued that he could not effectively challenge the trial court's decision without such a summary. The Court was not persuaded because Groth did not preserve the argument in the trial court.

> Groth could have requested the trial court to permit him to view the sealed records under a confidential protective order, which the trial court in its discretion may or may not have allowed, but he did not make such a request. He cannot avoid his forfeiture of that opportunity by claiming a due process violation. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Groth has not shown that he did not have an opportunity to be heard at a meaningful time and in a meaningful manner.

As for the documents which were withheld, the Court first addresses the legal memorandum, or white paper, and found it was privileged. It noted that the memo was drafted by a Texas deputy attorney general in an effort to recruit states to jointly challenge recent executive orders on immigration. This implicated the common-interest privilege, which the Court had previously applied to attorney communications to prospective co-plaintiffs. In doing so, the Court rejected a narrower construction of the privilege, which would find that it would not apply if a public agency was merely considering whether to become involved in litigation.

Chief Judge Vaidik dissented on this last issue. She would hold that the common interest privilege would only apply if "the parties must first come to an agreement, and documents exchanged before an agreement is reached are not protected from disclosure." As there was no evidence of an agreement before the memo was sent, it should not be covered by that privilege. Rather, it was lobbying and soliciting, which are not activities protected by the common interest privilege.

This dispute over when the common interest doctrine applies may be of greatest interest to the bar, as it may affect our communications with prospective clients. Therefore, attorneys should be mindful of these issues—and watch out for transfer.

Lessons:

1. If a trial court conducts an *in camera* review of documents, then the appellate courts also need to review those documents to provide effective appellate review.
2. Litigants do not have a due process right to a summary of any documents reviewed *in camera*.
3. Disputes regarding whether the Governor complied with the APRA are justiciable.

4. The common interest doctrine may extend greater protection to attorney-client communications in Indiana than it does in other jurisdictions.

2. Personal Jurisdiction of BMV Depends on Service on Attorney General; *Indiana Bureau of Motor Vehicles v. Watson*, 70 N.E.3d 380 (Ind. Ct. App. 1/23/17) (Robb)

The Indiana Bureau of Motor Vehicles ("BMV") denied the renewal of Craig Watson's chauffeur's license. Following an unsuccessful administrative appeal, Watson petitioned for and the trial court granted him special driving privileges. BMV, however, refused to issue Watson's special driving privileges, and Watson filed a motion to compel which the trial court granted.

The Attorney General of Indiana then intervened on behalf of BMV and filed a motion to correct error alleging the trial court lacked personal jurisdiction to consider Watson's motion to compel. The trial court denied BMV's motion to correct error and BMV appealed.

The Court of Appeals concluded that, in granting Watson's petition for special driving privileges, the trial court engaged in judicial review of an agency decision and was required to comply with the Indiana Orders and Procedures Act ("AOPA"). See Ind. Code. §4-21.5-5-1 (establishing AOPA as the exclusive means for judicial review of an agency action).

> Indiana Code section 4-21.5-5-8 describes whom a petitioner seeking judicial review must serve: …
>
> (1) the ultimate authority issuing order;
>
> (2) the ultimate authority for each other agency exercising administrative review of the order;
>
> (3) the attorney general; and
>
> (4) each party to the proceeding before an agency….

Watson did not serve the Attorney General at the time he petitioned the trial court for special driving privileges.

> Generally speaking, ineffective service of process prohibits a trial court from having personal jurisdiction over a defendant. BMV argues because AOPA applies, Watson was required to serve the Attorney General; because he did not, the trial court lacked personal jurisdiction to order BMV to issue a chauffeur's license. [However] where there is not a complete lack of service, the general rule is not always applicable.

There was not a complete lack of service here. Watson served both BMV and the Lake County Prosecutor's Office. Indeed, a deputy prosecutor appeared on behalf of BMV. The Court of Appeals was not satisfied:

> Watson's original action was a petition for special driving privileges. As such, a prosecuting attorney was statutorily required to appear on behalf of BMV with regard to the issuance of special driving privileges. The prosecuting attorney is not charged with defending judicial review of agency action, and once Watson decided to petition the trial court for judicial review, the Attorney General was required to be served. Because Watson did not serve the Attorney General, his service of process was ineffective and the trial court lacked jurisdiction to order BMV to issue a chauffeur's license.

Lesson: When challenging an agency decision, serve the AG.

P.S.

1. Effective May 2015, the Indiana General Assembly created a separate statutory provision for administrative review of certain actions taken by BMV. *See* Ind. Code §9-33 *et seq*. If a party desires to contest a BMV action enumerated in Indiana Code § 9-33-1-1, it must now follow the procedures outlined in Indiana Code § 9-33-2-3, rather than AOPA. This was not applied retroactively to Watson.
2. Watson contended BMV waived the personal jurisdiction argument because a "party may not raise an issue for the first time in a motion to correct error or on appeal." The Court gave the issue short shrift in a footnote, stating: "Given our longstanding preference for deciding cases on the merits and our conclusion Watson omitted to serve the Attorney General as required by law, we decline to find BMV waived this issue."
3. Indiana Trial Rule 4.15(F) provides: "No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and time within which he is required to respond."

3. 180-Day Extension for Med Mal Claims Strictly Applied; *Dermatology Associates, P.C. v. White*, 67 N.E.3d 1173 (Ind. Ct. App. 1/19/17) (Robb)

The statute of limitations can be a briar patch, and it can really hurt if you get on the wrong side of it. While it may be cold comfort for the plaintiffs' attorney in this case that the appellate decision was divided, it sheds new light in how the statute of limitations in medical malpractice actions are applied.

White visited Dermatology Associates for laser hair removal on her face in September 2012. The procedure reacted with White's makeup, causing burning and permanent discoloration of White's face. In November 2013, White filed a medical malpractice complaint in the Marion Superior Court, and moved to amend the complaint less than a month later to add a declaration that she was seeking damages in an amount not greater than $15,000.

In November 2014, White moved to dismiss her complaint without prejudice because she believed her damages were now more than $15,000. The trial court granted that motion, and White filed a proposed medical malpractice complaint with the Indiana Department of Insurance. The Providers moved for summary judgment, arguing that White's new complaint was untimely under the statute of limitations. The trial court denied that motion, and the Providers appealed.

The Court noted that White originally followed an exception to the general procedure for filing medical malpractice cases—claims do not need to be presented to a medical review panel if the amount at issue is less than $15,000. If a plaintiff does so, and later dismisses the case because they find that the damages are greater than this amount, then the regular statute of limitations applies to the newly filed action "plus one hundred eighty (180) days."

At issue in this case is what the "plus one hundred eighty (180) days" means, for if it is counted after the dismissal, then White's proposed complaint was timely. But if runs from the date the statute ran, then her proposed complaint was too late. When resolving this issue, the Court rejected a bright-line rule. Rather, it held that the inquiry turns on when the plaintiff "later learns" that her injury "is more serious than previously believed."

> Use of the phrase "later learns" implies something additional has to have occurred since the original lawsuit was filed in court: that is, the patient has subsequently acquired knowledge of or received information about something she did not previously know with regard to her injury and $15,000 is insufficient to compensate her for that more serious injury. Subsection (b) does not say simply that the plaintiff may dismiss her original complaint and have an extended statute of limitations for refiling with the Department of Insurance in order to seek additional damages. The statute imposes requirements upon such a course of action—that the patient learns her bodily injury is more serious than previously believed. The inclusion of these requirements implies there is some burden on the patient to show she has dismissed and refiled for a reason other than seeking more damages for the same injury.

In this case, White's original complaint spoke of the burning and discoloration to her skin. When moving to dismiss the original case, she filed an affidavit which said that she originally thought the discoloring would disappear, but that it remained

and that $15,000 would not be sufficient to compensate her. The Court found this was insufficient to trigger the 180-day extension.

> She has not alleged she learned anything new or different about her injury after filing her original complaint. Moreover, her pleadings and affidavit fail to demonstrate her bodily injury is more serious than she originally believed; in fact, they demonstrate her injury is exactly the same now as it was when she commenced her original action in court seeking $15,000 or less. For instance, White does not allege the discoloration worsened between November 2013 and November 2014 or that she learned of additional current or future side effects from the burning other than the remaining discoloration. The only thing that appears to have changed is that she now wants the possibility of recovering a greater amount of damages for the same injury.

Judge Mathias dissented. While he agreed with the test the majority described for applying the 18-day extension, he disagreed with its conclusion that White did not meet that test.

> I also believe that, in the present case, White adequately established that she later learned that her injury was more serious than she originally believed. White originally pleaded that: her face immediately began to experience discoloration after the treatment; Dr. Johnson told her, incorrectly, that the discoloration would go away by the end of the day; that the burned area of her face turned dark and peeled, revealing the flesh underneath the skin; and that although her scarring had improved, it still remained after several months.
>
> …
>
> The majority concludes that White failed to allege that she learned anything new or different about her injury after filing her original complaint. However, she averred that the discoloration still remained. … In terms of the statute, White "learned" that her claim, based upon her permanent facial disfiguration, was worth more than $15,000. Under the facts and circumstances before us, I think a woman's ultimate decision that a lifetime of facial disfiguration was worth more than $15,000 is something she could, and here did, "learn" from looking into the mirror every day, trying without success to use make-up to make the scarring less noticeable.

Medical malpractice practitioners should take lessons from this case when deciding whether or when to dismiss a case because the plaintiff now wants more than $15,000 in damages.

Lessons:

1. A medical malpractice plaintiff may skip the medical review panel process if the amount of damages is less than $15,000.
2. If a medical malpractice plaintiff later learns that the amount of damages is greater than $15,000 and seeks to dismiss her complaint, then she must file an affidavit which sets forth the information learned when dismissing the original case.

4. No Constructive Fraud Without Concealment; *Central Indiana Podiatry, P.C. v. Barnes & Thornburg, LLP*, 2017 WL 819741 (Ind. Ct. App. 11/16/16) (May)

This case involves the client-attorney relationship and the release of claims at the end of that relationship. And, as an added bonus, this opinion was issued after the Court granted a petition for rehearing, which is always an unusual occurrence.

Vogel filed an action against a group of defendants called the Miller Parties. The Miller Parties hired Barnes & Thornburg to defend them. The case eventually settled.

During those settlement discussions, The Miller Parties spoke with B&T regarding outstanding fees they owed B&T. An oral agreement was reached, and when B&T included a release for past and future malpractice when reducing it to writing. B&T advised the Miller Parties to consult independent counsel before signing this agreement, and the Miller Parties did so. They eventually signed the release in order to settle the fee dispute.

Later, the Miller Parties sued B&T for legal malpractice. B&T argued that the claims were barred by the release, and moved for summary judgment. The trial court granted that motion, and the Miller Parties appealed.

The Miller Parties argued that the release was obtained by fraud. In its initial opinion, the Court dealt with this by holding sua sponte that the Miller Parties were precluded from advancing fraud-related arguments because they did not do so as part of a pleading. On rehearing, the Court acknowledged that this was a mistake, because a plaintiff is not required to anticipate and plead around an affirmative defense in the complaint. The Court then turned to whether there was a genuine issue of fact with regard to whether the release was procured by fraud. It found that they were not.

While the Miller Parties argued that the release was procured in the wake of B&T's fraudulent inducement, fraudulent concealment, and constructive fraud, the Court found that these claims were inconsistent with the evidence.

> While one B&T attorney testified during a deposition he worked to change the terms of the Vogel Agreement, specifically the change in corporation type, these changes were not concealed from Miller. In fact, B&T documented and testified they communicated at length with Miller regarding the change of FASC from an S-Corp to an LLC and what that would mean. B&T testified the change in corporation type was necessary to protect Miller's tax interests.
>
> Miller claims if he had known about the deficiencies with the Settlement Agreement, he would have not signed the Fee Release. B&T required Miller to retain outside counsel to review the Fee Release prior to Miller signing it. B&T had a conversation with Jim Knauer, who was Miller's attorney at the time and is Miller's attorney on appeal. As Miller's attorney, it was Knauer's responsibility to inquire regarding the status of the settlement of Federal claims filed by Vogel against the Miller Parties, as that was the litigation that spawned the fees to be released by the Fee Release Agreement. The Miller Parties have not demonstrated Knauer raised any questions about the status of the settlement or B&T responded deceptively to any questions Knauer or Miller may have asked. Knauer advised Miller to sign the Fee Release. The designated evidence does reveal Miller was in frequent contact with his entire litigation team at B&T and was permitted to review documents as they were prepared; none of the evidence Miller cites suggests B&T engaged in the web of concealment that Miller weaves in his argument.

Without evidence of concealment, there was no fraud, and B&T was entitled to summary judgment.

Judge Crone wrote separately both in the original opinion and in this one to lament lawyers' ability to prospectively limit liability to clients for future acts of malpractice. He feels that this practice "subverts the very nature of the attorney-client relationship," and discourages its use.

Lessons:

1. A prospective release of malpractice liability for future acts may be enforceable.
2. A fully-informed client who seeks the advice of independent counsel cannot claim constructive fraud without some evidence of concealment.

5. A Voidable Error Will Not Satisfy Tr. R. 60(B)(6) Requirements for Relief from Judgment; *Koonce v. Finney,* 68 N.E.3d 1086 (Ind. Ct. App. 1/13/17 (May)

Wife and military husband divorced in 1998 after 13 years of marriage. The dissolution decree required husband to pay wife 50% of his military retirement pay. He retired from the military in 2005 and starting paying wife $325 per month. In 2014, wife learns that he should have been paying a lot more and brings a civil action alleging fraud "over the course of nearly a decade, during which [Husband] deprived her of tens-of-thousands of dollars in military retired pay for which she was entitled."

Husband files motions to clarify the original dissolution order regarding the military pension and for relief from judgment under Tr. R. 60(B)(6) alleging the portion of the dissolution decree dividing his military pension was void. The trial court denied the motion and husband appealed.

> To prevail under Rule 60(B)(6), the party must demonstrate the prior judgment was void, and not merely voidable. A decision that is void "has no legal effect at any time and cannot be confirmed or ratified by subsequent action or inaction" and "is subject to a collateral attack." A decision which is voidable "has legal effect until such time as challenged in the appropriate manner and can be ratified or confirmed by subsequent action or inaction" and "may only be attacked through a direct appeal."

In *R.L. Turner Corp. v. Town of Brownsburg*, the Court provided a tutorial in jurisdiction:

> To act in a given case, a trial court must possess both subject matter jurisdiction and personal jurisdiction. Subject matter jurisdiction exists when the Indiana Constitution or a statute grants the court the power to hear and decide cases of the general class to which any particular proceeding belongs. Personal jurisdiction exists when a defendant both has sufficient minimum contacts within the state to justify a court subjecting the defendant to its control, and has received proper notice of a suit against him in that court. [963 N.E.2d 453, 457 (Ind. 2012)].

The court noted the well-established rule that "[r]elief from a 'void judgment' is available when the trial court lacked either personal or subject matter jurisdiction." Husband argued that a judgment may be void in additional circumstances as well, citing cases where the trial court had authority at one point, but that authority expired after a certain time limit. The Court of Appeals analyzed these cases, finding:

> The authority vested or rescinded in each of these cases was apparent on the face of the complaint, without the court needing to address the merits of any underlying factual issue or legal argument in the case. The trial court simply did not have statutory authority to act under the circumstances that existed. In contrast, it is undisputed the Dissolution Court here had authority to adjudicate the property division requested by the parties as part of its Dissolution Order.
>
> Whether Husband's military pay is "property" under Indiana Code §31-9-2-98(3) is subject to interpretation…. However, none of the parties' current arguments regarding Husband's military pay could deny the Dissolution Court of its authority to adjudicate the property division under Indiana Code Section 31-15-7-4 at the time the decree was entered.
>
> We decline Husband's invitation to examine the merits of his underlying legal argument in order to determine whether the Dissolution Court had authority to render any judgment at all. …That's because we would have to consider an appeal's merits in every case. Husband's opportunity to contest the terms of the Dissolution Decree involving his military pension passed almost twenty years ago. He cannot now attempt to revive this waiver by filing a Rule 60(B)(6) motion.

Regarding the motion for clarification, the Court stated:

> The Indiana Trial Rules do not provide for a motion for clarification; however, we have held, "it would elevate form over substance to treat a 'motion to clarify' as anything other than a motion to correct error." Although the Civil Court denied Husband's motion to clarify, it examined the process DFAS used to determine Wife's share of Husband's pension, and in doing so, the Civil Court explained why Wife was receiving the legally appropriate amount of Husband's pension. Because the Dissolution Court's Divorce Decree was not void, Husband is not entitled to relief from the judgment under Rule 60(B)(6). The Civil Court did not abuse its discretion when it denied Husband's motion to clarify.

Lessons:

1. If an argument is addressed to the merits of a claim as opposed to the authority of a court to decide the issue, it will be voidable, not void, and may not be attacked by a Rule 60(B)(6) motion.
2. A motion to clarify may be treated as a motion to correct error. In light of that risk, pay attention to the timeliness of your notice of appeal.

6. Failing To Follow Proper Rule 60(B) Procedure Results In Dismissal Of Motion; *Falatovics v. Falatovics*, 2017 WL 943970 (Ind. Ct. App. 3/10/17) (Crone)

When an appeal has been filed, Indiana's appellate courts have defined the procedure a party must file if they wish to file a Rule 60(B) motion. As the appellant in this case learned, if you don't follow this procedure, then your 60(B) motion will be denied.

Husband and Wife were divorced in December 2013, and Wife appealed that judgment. While the appeal was pending, Husband filed a Rule 60(B) motion, seeking to set aside the decree. Wife asked to have the matter stayed, pending the appeal, as the trial court did not have jurisdiction. The trial court granted her motion.

The Court of Appeals issued its opinion in August 2014, reversed the trial court's decision, and remanded for further proceedings. On remand, the parties addressed the issues raised by the appellate opinion, but did not address Husband's motion. The trial court issued an amended dissolution decree in November 25, 2014, and set a hearing on all remaining issues to take place in March 2015. Husband appealed.

In February 2015, Wife asked for the hearing on Husband's Rule 60(B) motion to be continued, as the second appeal prevented the trial court from exercising jurisdiction. Husband argued that the appellate briefing had been stayed, so his motion should be heard before the appellate issues were briefed. Wife pointed out that the CCS did not show that the appellate briefing schedule had been stayed, and the trial court granted Wife's motion on February 23, 2015.

On March 12, 2015, Husband moved for a stay of the appeal and a remand for the trial court to consider the Rule 60(B) motion. The Court of Appeals denied Husband's motion, and affirmed the amended dissolution decree.

The matter was certified back to the trial court in February 2016, and Wife moved to dismiss Husband's 60(B) motion a month later. The trial court granted Wife's motion, and Husband appealed again.

On appeal, the first issue the Court addressed was the standard of review. Wife argued that the Court should review for an abuse of discretion, as the trial court's decision was effectively a denial of a 60(B) motion. Husband argued that the issue should be reviewed under a *de novo* standard, as if it were a Rule 12(B) dismissal. The Court held that the dismissal "is effectively a denial," and applied an abuse of discretion standard.

The meat of the appeal dealt with whether Husband had followed proper procedures when filing his Rule 60(B) motion. And the Court found that Husband did not follow the procedure set forth in *Logal v. Cruse*, 267 Ind. 83, 368 N.E.2d 235 (1977), *cert. denied* (1978).

> Our supreme court consolidated Logal's appeals and adopted the following procedure for bringing a motion to set aside while a judgment is on appeal ("the *Logal* Procedure"):
>
> (1) The moving party files with the appellate court an application for leave to file his 60(B) motion. This application should be verified and should set forth the grounds relied upon in a specific and non-conclusory manner.
>
> (2) The appellate court will make a preliminary determination of the merits of the movant's 60(B) grounds. In so doing the appellate court will determine whether, accepting appellant's specific, non-conclusory factual allegations as true there is a substantial likelihood that the trial court would grant the relief sought. Inasmuch as an appellate court is not an appropriate tribunal for the resolution of factual issues, the opposing party will not be allowed to dispute the movant's factual allegations in the appellate court.
>
> (3) If the appellate court determines that the motion has sufficient merit, as described in the preceding paragraph, it will remand the entire case to the trial court for plenary consideration of the 60(B) grounds. Such remand order will terminate the appeal and the costs in the appellate court will be ordered taxed against the party procuring the remand. The decision to remand does not require the trial court to grant the motion. If the trial court denies the motion, the movant should file a motion to correct errors addressed to this denial, and appeal the denial. In this new appeal any of the issues raised in the original appeal may be incorporated, without being included in the second motion to correct errors.
>
> (4) If the trial court grants the motion, the opposing party may appeal that ruling under the same terms as described in paragraph (3). The original appeal shall be deemed moot.

Subsequently, the Court of Appeals had held that the failure to follow this procedure deprived the trial court of jurisdiction to rule on a Rule 60(B) motion filed while an appeal was pending.

Husband tried arguing that the *Logal* Procedure did not apply to him, but the Court disagreed. It held that it did not matter whether the appellant or appellee filed the Rule 60(B) motion—the *Logal* Procedure should be followed regardless. It also held that it did not matter whether the issues in the motions were the same as those on appeal— the *Logal* Procedure should be followed regardless. And it held requiring litigants to follow the *Logal* Procedure did not violate due process, because "parties are not entitled to evidentiary hearings when procedural requirements have not been satisfied." The trial court's decision was affirmed.

Lessons:

1. A dismissal of a Rule 60(B) motion is effectively a denial of that motion and should be reviewed for abuse of discretion.
2. All litigants must follow the *Logal* Procedure for filing a Rule 60(B) motion while an appeal is pending, and failure to do so will result in a dismissal of the motion.

7. Law Firms Must Comply With Credit Services Organizations Act; *Consumer Attorney Services, P.A. v. State of Indiana*, 2017 WL 1057413 (Ind. 3/21/17) (Massa)

Indiana has a number of laws which are designed to protect Hoosiers from exploitative tactics regarding debt or credit management. Individual attorneys licensed to practice law in Indiana are generally exempt from those requirements. But in this case, the Court held that these exemptions do not extend to the firms for which these lawyers are working.

Consumer Attorney Services ("CAS") is a Florida corporation in the business of providing foreclosure - and mortgage-related legal defense work. It charged clients non-refundable retainers and monthly fees to be automatically deducted from their bank accounts. CAS entered into relationships with several Indiana attorneys, making them either CAS "Partners," Associates," or "Of Counsel." These lawyers would do very little on behalf of the clients.

After CAS began doing business in Indiana, the Indiana Attorney General began receiving many complaints. After an investigation, the State brought suit against CAS and the Florida law firm and attorney who ran CAS (who has been "effectively disbarred in Florida"), claiming violations of the Credit Services Organizations Act (CSOA), the Mortgage Rescue Protection Fraud Act (MRPFA), the Home Loan Practices Act (HLPA), and the Deceptive Consumer Sales Act (DCSA). Defendants moved for summary judgment, arguing that these statutes exempted them from liability. The trial court denied the motion, but the Court of Appeals reversed on everything but a portion of the DCSA claim. The Indiana Supreme Court then granted transfer.

The central issue on transfer was whether the CSOA applies to law firms. The Act specifically excludes liability for any "person admitted to the practice of law in Indiana if the person is acting within the course and scope of the person's practice as an attorney." And it defines "person" to include "an individual, a corporation, a partnership, a joint venture, or any other entity." But this means that the law "is facially ambiguous" with regard to whether it applies to law firms, as law firms are not admitted to practice law.

Given the purpose of the CSOA—to protect vulnerable Hoosiers from predatory financial depletion—the Court held that any exemption to the Act should be read

narrowly. Moreover, the Court found that it would be inappropriate to use the statutory definition of "person" every time the statute uses the word "person."

> Moreover, the term "person" is used throughout the CSOA, and "we read the statute as a whole, avoiding excessive reliance on a strict, literal meaning or the selective reading of individual words." For instance, "person" is part of the definition of a "credit services organization," applies to those who violate the CSOA and also applies to those damaged by a credit services organization. Each of these usages is in a general manner, and would permit application to every definition of "person" contained in Indiana Code section 24-5-15-4. The exemption contained in Indiana Code section 24-5-15-2(b)(5) is similar to (b)(6), however, in that the "person" must be "licensed as a real estate broker under IC 25-34.1 if the person is acting within the course and scope of the person's license" in order to claim it, which similarly would exclude organizations of real estate brokers such as agencies. Indiana Code section 24-5-15-2(b)(1), on the other hand, exempts a "person" who is "authorized to make loans or extensions of credit under state or federal laws that is subject to regulation and supervision under state or federal laws," which as a practical matter is far more likely to be a corporate entity than an individual. Thus in reading the statute as a whole, it seems clear that the General Assembly's expansive definition of "person" in Indiana Code section 24-5-15-4 was not intended to apply to every usage of that word in the CSOA, but rather each usage should be read in context, and only the practicable definitions should apply. This supports that only individuals were intended to be exempted under Indiana Code section 24-5-15-2(b)(6).

Moreover, the Court found that there was good reason to exempt lawyers, but not law firms, as the Court holds exclusive jurisdiction over cases involving attorney misconduct, while the Rules have "no provisions for the discipline of an entire firm as a whole."

The analysis under the remaining statutes was substantially the same—the statute either referred to an "attorney," rather than a person, or incorporated violations of these other statutes.

The Court acknowledged that excluding attorneys from liability under these statutes as individuals may cause "peculiar" problems for their firms. But the Court ultimately found that this did not matter, as the ultimate purposes of these statutes was to protect the public from exploitative credit services, not to protect law firms.

Lesson:

Law firms may be liable for violations of consumer protection statutes, even if individual lawyers are exempt from liability.

8. Person Who May Have Exerted Undue Influence Always Has The Burden Of Proof; *Garrison v. Garrison*, 2017 WL 931285 (Ind. Ct. App. 3/9/17) (Shepard)

The burden of proof matters, and cases can hinge on which party bears the burden of proof. It was not clear who bore that burden when someone on his deathbed transfers his property under circumstances where competence may be in question. This case answered that question, at least if the transferee was a family member.

On his deathbed, Thomas Garrison transferred title on two cars to one of his sons, Jay Garrison. After Thomas' death, his widow Pamela Garrison filed a petition to recover these assets. She argued that they were *inter vivos* gifts, and that Thomas was not competent to give them. After a hearing, trial court found that the evidence of Thomas' competency to make a gift *causa mortis* was evenly split, and that the vehicles must therefore be returned to the estate.

On appeal, the Court distinguished between an *inter vivos* gift and a gift *causa mortis*.

> An *inter vivos* gift is one where the donee becomes the absolute owner of a thing given in the lifetime of the donor. An *inter vivos* gift is made when: (1) the donor is competent to contract; (2) the donor has freedom of will; (3) the donor intends to make a gift; (4) the gift is completed with nothing left undone; (5) the property is delivered by the donor and accepted by the donee; and (6) the gift is immediate and absolute.
>
> A gift *causa mortis*, on the other hand, is accomplished when: (1) the gift was the donor's property; (2) the gift was given when the donor was in peril of death or while under the apprehension of impending death from an existing malady; (3) the donor dies as a result of the disorder without intervening recovery; and, (4) there was actual or constructive delivery of the thing given to the donee with the intention that the title vest conditionally upon the death of the donor.

And the Court noted a 1904 Indiana Supreme Court decision, *Branstrator v. Crow*, which found that when the evidence of competency was in equipoise, then the plaintiffs' claim would be defeated.

But the Court nevertheless affirmed the trial court's decision because of the familial relationship between Thomas and Jay.

> We acknowledged that establishment of the existence of certain relationships, such as parent and child, lead to a presumption that the

> questioned transaction was the result of undue influence exerted by the dominant party, constructively fraudulent, and, therefore, void.

In this situation, the fact that the evidence of Thomas's competence was evenly split led to the opposite result—Jay did not rebut the presumption and the vehicles went back to the estate.

Lessons:

1. If there is equal evidence regarding a person's competence, the person challenging the competence generally loses.
2. If a relationship exists which could give rise to a presumption of undue influence, then equal evidence regarding a person's competence means that the gift is revoked.

9. Bail Bonds Are Subject To Garnishment; *Garner v. Kempf*, 70 N.E.3d 408 (Ind. Ct. App. 1/30/17) (Altice)

It is one thing to get a judgment. It is another to collect. This case introduces a new way to collect against people who may otherwise be judgment-proof: by garnishing their bail.

Garner obtained a judgment against Kempf in 2013 for $20,600, but has been unable to collect. In July 2015, Kempf was arrested and a $5,000 bond was posted on his behalf. The next day, Garner filed a motion for proceedings supplemental in the civil case seeking to garnish the bond proceeds and naming the Vanderburgh County Clerk (the Clerk) as a garnishee defendant. Garner served a copy of the motion on the Clerk, and notified Kempf and the Clerk of the lien. The Clerk did not make a note of the lien on the CCS in the criminal case, and there is no indication that the criminal court had any knowledge of its existence.

In August 2015, Kempf asked the criminal court to release the bond proceeds to his criminal defense attorney, and the criminal court granted that motion. At a September 2015 hearing on the motion for proceedings supplemental, the Clerk explained these facts, and the civil court declined to enter a judgment against the Clerk, finding that his failure to place an entry on the CCS in the criminal case notifying the criminal court of the lien was dispositive. Garner appealed.

On appeal, the Clerk argued that the civil court's decision was correct, because a local rule required that the lienholder place an entry on the criminal court's CCS. This argument did not impress the Court, as the "rule" was not a rule—it was an internal memo from the local courts to the Clerk which was not apparently publicized. But although the trial court erred when relying on this "rule" when declining to enter judgment against the Clerk, "trial court's ruling on a motion for proceedings supplemental as a general judgment and affirm on any legal theory supported by the evidence."

The Court went on to address whether a bail bond could be garnished, and found that it could. It noted that a judgment creditor acquires an equitable lien on funds owed by a third party to the judgment debtor from the time the third party receives service of process in proceedings supplemental, and that no statute limits the rights of creditors when those funds are a bail bond.

> Specifically, where a criminal court has notice of an unsatisfied civil judgment or a pending civil action "arising out of the same transaction or occurrence forming the basis of the criminal case," the criminal court may not declare bond proceeds forfeited. Instead, the criminal court must order the clerk to continue to hold the bond proceeds, and payment of the civil judgment must be made from those funds before any remainder may be forfeited. Essentially, by protecting the bond proceeds from forfeiture where the criminal court has notice of a pending civil action or unsatisfied civil judgment arising out of the same circumstances giving rise to the criminal case, I.C. § 35-33-8-7(b) provides an additional safeguard for the victims of the crime for which the defendant is being prosecuted. The statute does nothing, however, to undermine the general law applicable to other types of creditors seeking to garnish bond proceeds posted in unrelated criminal cases.

Garner took the step required of him by the garnishment statutes to preserve his claim to the bond proceeds. After this, it was the Clerk's responsibility, not Garner's, to ensure that the criminal court was notified of the lien. Therefore, the case was remanded with instructions for the trial court to enter judgment against the Clerk.

Judge Pyle dissented. He interpreted the statutes governing bonds to require that the bond be returned to the criminal defendant, and that it allowed the deduction of only certain fees (such as attorney's fees). And he interpreted these statutes to say that the only circumstance in which a bond could be used to satisfy a civil judgment is if that judgment arose out of the same transaction or occurrence as the criminal charges. "Because bail statutes are criminal statutes which must be strictly construed, I would conclude that the absence of legislative authorization allowing unrelated third parties to bring civil judgments into criminal courts to attach bond money means that there is no error in this case."

Lesson:

> Judgment creditors can garnish bail bonds that judgment debtors pay in criminal cases.

10. The Best Evidence Rule May Not Require the Actual Tape Recording; *Morris v. Crain,* 2017 WL 899957, ____ N.E.3d _____ (Ind. Ct. App. 3/7/17) (Crone)

When Waste Recovery became insolvent, Morris, Crain and others discussed taking over its business. Morris expected to have the biggest ownership interest in the new company but Crain and Redpath ended up owning the business 50/50. Morris sued and asserted several causes of action. The trial court granted Crain's motion for summary judgment and Morris appealed.

The first issue addressed on this appeal was the trial court's decision to strike a portion of Morris's affidavit submitted in opposition to the summary judgment motion. This affidavit contained the transcript of a tape-recorded conversation between Morris and Crain in which they discussed the parties' agreement to form the new business and in which they debated the current and prospective value of the business. Crain moved to strike on hearsay, relevancy, and best evidence grounds, and the trial court granted the motion.

> [W]e are concerned primarily with the following statement made by Crain: "Right now, the company is worth about 6 million. That's the way I look at it." …Crain argues that this statement is inadmissible hearsay because it is an out-of-court statement made by Crain. However, a statement is not hearsay if it is a statement made by an opposing party that is offered into evidence against him. Ind. Evidence Rule 801(d)(2)(A).
>
> Crain maintains that the statement violates the best evidence rule. The best evidence rule requires that the original writing, recording, or photograph be produced to prove the content of such unless otherwise provided by the rules or by statute. Ind. Evidence Rule 1002. Crain argues that the actual tape recording of the conversation should have been produced rather than Morris's affidavit which includes a transcription of the conversation.
>
> Crain makes no specific challenge regarding the accuracy of the transcription, nor does he claim that he did not make the relevant statement. An effective best evidence objection "must identify an actual dispute over the accuracy of the secondary evidence." Under the circumstances, we decline Crain's invitation to strike the statement on best evidence grounds.

The second issue concerned whether Crain was entitled to summary judgment based on his "no damages" argument.

> Essentially, Crain's "no damages" argument is this: BioSafe has been an unsuccessful business financially, so Plaintiffs cannot prove that they were harmed by being deprived of their ownership interests.

> Specifically, Crain designated financial statements and evidence indicating that BioSafe has realized net losses rather than profits since its formation and therefore, Plaintiffs cannot prove that they suffered damages as a result of Crain's breach of any contract or duty….
>
> [I]t is Crain's burden on summary judgment to establish that BioSafe was without value, not Plaintiffs' burden to prove that BioSafe had value. Moreover, BioSafe's profitability or lack thereof since its formation is not the same as value. While BioSafe's lack of profitability would be relevant to the amount of damages suffered by Plaintiffs, the business's lack of profitability does not per se preclude damages. We conclude that Crain has not established a prima facie case negating an element of Plaintiffs' claims and thus, the burden never shifted to Plaintiffs to present evidence establishing the existence of a genuine issue of material fact.
>
> [E]ven assuming that Crain met his burden of negating the damages element of Plaintiffs' claims, Plaintiffs' designated evidence in opposition to summary judgment is sufficient to create a genuine issue of material fact on the damages issue. As an owner of BioSafe, Crain presumably possessed sufficient acquaintance with the business to estimate its value. His statement that the value of the business in October 2007 was around six million dollars is "sufficient, though minimally so, to raise a factual issue to be resolved at trial…."

Lessons:

1. The best evidence rule does not require the tape recording of oral statements by a party opponent in the absence of an actual dispute over the accuracy of the secondary evidence.
2. A business owner can testify about the value of his business.
3. Persistent net losses of a business do not satisfy a summary judgment movant's initial burden of proving no value of a business.

P.S. Amazon showed no profit for many years and in 2015 surpassed Wal-Mart in market capitalization.

11. The Interplay Between Trial Rules 12(B) and 12(C); *Mourning v. Allison Transmission, Inc.*, 2017 WL 999453 (Ind. Ct. App. 3/15/17) (Vaidik)

Mourning worked for Ternes, a company which provided supply-chain-management services to Allison. While she was on FMLA, a group of employees she supervised filed a complaint against her, with the assistance of Mourning's manager and Allison employees. Mourning was terminated as a result of these complaints, and

filed suit against Allison for tortious interference with an employment contract and defamation. Allison filed a "12(C) Motion to Dismiss" Mourning's complaint in which it alleged that Mourning "failed to state a claim upon which relief may be granted" and that her claims failed "as a matter of law." The trial court granted Allison's motion, and Mourning appealed.

On appeal, the Court addressed the interplay between Indiana Trial Rules 12(C) and 12(B).

> A motion for judgment on the pleadings is typically directed toward a determination of the substantive merits of the controversy. … "[A] judgment on the pleadings is, in reality, a summary judgment minus affidavits and other supporting documents."
>
> Trial Rule 12(B), on the other hand, provides for certain defenses to be raised by motion before an answer is filed. In contrast to a typical Trial Rule 12(C) motion for judgment on the pleadings, a Trial Rule 12(B) motion is directed solely toward procedural defects or the statement of the plaintiff's claim for relief and does not seek to determine the substantive merits of the controversy. … Importantly, when a motion to dismiss is sustained for failure to state a claim under 12(B)(6), "the pleading may be amended once as of right pursuant to Rule 15(A) within ten [10] days after service of notice of the court's order … ."

A litigant can raise a defense of failure to state claim in either a 12(B) or (C) motion. And when brought in a 12(C) motion, "that defense should be treated in the same manner as a Trial Rule 12(B)(6) motion to dismiss for failure to state a claim." This includes allowing the non-movant an opportunity to amend the pleading.

As for the merits of the argument, Allison argued that it was entitled to judgment under 12(C) because "[a] customer complaint does not constitute tortious interference or defamation as a matter of law." The Court found no authority supporting this argument, and rejected it.

Allison next argued that Mourning failed to plead her tortious interference claim, because she failed to plead an absence of justification. In her complaint, Mourning alleged the following facts on this element:

> Defendant Allison had no justification for inducing the breach of the employment contract between Ternes and Plaintiff, as Defendant willfully failed to abide by established procedure regarding staffing requests or complaints/discipline directed to Ternes Packaging, and as Defendant leveraged its continued business relationship with Ternes (which was at that time in rebid negotiations) to demand the termination of Plaintiff's employment.

The Court found that while these facts addressed **how** Allison got Mourning fired, they did not address **why** it did so. Therefore, Mourning failed to state a claim for tortious interference.

The same did not hold true for Mourning's defamation claim, as she sufficiently pleaded all of the elements of that claim. Notably, the Court distinguished the actual malice element of a defamation claim (which deals with the defendant's knowledge of a statement's falsity) from the type of malice relevant to a tortious interference claim.

Lessons:

1. A T.R. 12(B) motion to dismiss is essentially procedural, while a T.R. 12(C) motion for judgment on the pleadings is substantive unless it is brought on T.R. 12(B) grounds.
2. To state a claim for tortious interference with an employment contract, set forth operative facts that support the absence of justification element.

12. Attorney Fee Award Cannot Be Based On Ex Parte Submission; *Riley v. AAA Automotive, LLC*, 67 N.E.3d 1131 (Ind. Ct. App. 1/12/17) (Bailey)

3A Automotive is a car dealership, and agreed to sell a vehicle to the Rileys. Financing fell through, and 3A Automotive asked the Rileys to provide either a larger down payment or an additional trade-in. The Rileys did neither, but kept the car.

3A Automotive filed a complaint for breach of contract and conversion. The Rileys claimed that 3A Automotive engaged in wrongdoing, and the dispute was eventually arbitrated. The arbitrator entered an award for 3A Automotive, which consisted largely of attorney's fees.

The Rileys challenged this award, arguing that the award of attorney's fees was improper, as the only "proof" of the amount of those fees was a statement in 3A Automotive's arbitration brief. 3A Automotive argued that it actually submitted its legal invoices to the arbitrator, but that it was not required to provide them to the Rileys as the invoices were "work product." The trial court found for 3A Automotive, and the Rileys appealed.

Despite some confusion as to why the matter was arbitrated, the Court found that the arbitrator's acceptance of an ex parte document on which he based the attorney fee award was wrong.

> [T]he lack of impartial and fair proceedings is evident. … The Rileys' lack of notice and opportunity to respond is readily apparent from the

> argument and admissions made by the attorney for 3A Automotive at the motion to correct error hearing.

As "evident partiality by the arbitrator" is a sufficient basis to vacate an arbitration award, this may have been a sufficient basis for a reversal.

But the Court did not reverse on that basis. Rather, the Court reversed because the record contained no evidence of an arbitration agreement. In doing so, the Court included a cautionary footnote:

> As a cautionary note, alternative dispute resolution has reached full bloom since it was first recognized by our Indiana Supreme Court. Nevertheless, absent a contract, our courts are to remain open—pursuant to Article 1, Section 12 of the Indiana Constitution—and participation in alternative dispute resolution is still voluntary. While we encourage voluntary settlement and resolution, we do so only after full disclosure of the nature of the alternative dispute method selected and its consequences to the litigants. It is incumbent upon the mediator or arbitrator to document the agreement to mediate or arbitrate in the Chronological Case Summary. And, moreover, where an individual has been selected first as a mediator, we question the propriety of that individual continuing to participate as an arbitrator, when he or she has first participated with the same litigants in a failed mediation.

"Thus, the arbitration proceedings were for naught," and the case was remanded for further proceedings.

Lessons:

1. An arbitration award must be vacated if the record contains no evidence of the arbitration agreement.
2. An arbitration award may be vacated if the arbitrator relies on *ex parte* evidence when reaching the arbitration award.

13. Jury Verdict Reinstated Because Findings Of Fact Did Not Support A New Trial; *Estate of Pfafman v. Lancaster*, 67 N.E.3d 1150 (Ind. Ct. App. 1/18/17) (Najam)

We frequently advise lawyers to submit detailed proposed orders when the law requires that the order be detailed. But if that proposed order does not follow the law, then it will be reversed.

This case arises from the electrocution of a young man. Diehm owned a farm, and he had a pole barn built on that farm in 2004. Diehm's brother-in-law, Pfafman, was an electrician, and agreed to help Diehm with the electrical work in the barn. At the

time, Diehm did not need electricity to run to two water troughs in the barn, but had them installed anyway, in case he wanted to install de-icers in the future. Pfafman installed some wire for that purpose, but warned Diehm that it wasn't properly protected, and that it should be protected before any electrical equipment was installed.

In 2007, Diehm installed de-icers in the water troughs, but didn't consult with Pfafman and didn't install proper protection. He also did not properly maintain the de-icers, pursuant to the instruction manual.

In 2010, a 16-year-old boy was visiting the farm when a thunderstorm passed through. Lightning hit a tree on the farm, and one of the heifers died. The kids went out to check it out, and the boy grabbed a gate between the kids and the heifer. The gate was electrified as a result of the storm and the improper electrical installation in the barn, and the boy was severely injured.

A lawsuit ensued, and all but Pfafman's estate settled. At trial, Pfafman argued that he had not been negligent, and attributed fault to Diehm and the de-icer's manufacturer as non-parties. The jury entered a defense verdict The plaintiff moved for a new trial, alleging that the verdict was against the weight of the evidence. Following a hearing, the trial court adopted the plaintiffs' proposed findings of fact and conclusions of law verbatim and ordered a new trial. When doing so, it found that the plaintiff was hurt "only because" Pfafman failed to install the proper electrical protections in 2004, and that if he had done so, any negligence by the non-parties would not have caused the boy's injuries.

This decision was reversed on appeal for two reasons. First, the trial court concluded that Pfafman's conduct was the sole cause of the injuries, and but recognized that some fault could be allocated to non-parties. This inconsistency meant that it "did not sufficiently relate the evidence of the nonparties' negligent conduct to the issue of comparative fault under the Act."

Second, the trial court did not consider the possibility that the jury allocated 100% fault to one or both of the nonparties despite the lack of an intervening cause. Put simply, the fact that Pfafman was a "but-for" cause of the boy's injuries does not mean that he was liable for those injuries.

> Indiana Code Section 34-51-2-7(b)(1) provides in relevant part that, in assessing the percentage of fault, the jury "shall consider the fault of all persons who caused or contributed to cause the alleged injury[.]" … The statute does not say that the jury shall allocate fault to all persons who caused or contributed to cause the alleged injury. Rather, the jury shall merely consider a person's fault in making that determination. Moreover, and significantly, the statute expressly permits a jury to allocate less than 100% fault to a party. … The legislature could have required that a minimum percentage of fault be allocated to a party under the statute, but it did not.

In this case, the jury could have allocated all of the fault to Diehm or the manufacturer of the de-icers. As the trial court's findings of fact and conclusions of law did not consider this possibility, its findings were insufficient to support a new trial. Thus, the jury's verdict was reinstated.

Chief Judge Vaidik disagreed with this last point. She would hold that a jury must allocate some fault to an actor who has proximately caused an injury. "[T]he fact that a jury can allocate less than 100% of the fault to an at-fault party in no way leads to the conclusion that the jury can simply choose to allocate 0% of the fault to that party." But she felt that a jury could have found that the actions of the non-parties were superseding causes, which cut off Pfafman's liability.

Lesson:

A person could proximately cause an injury, but be allocated 0% fault at trial.

14. Supreme Court Limits Laches as a Defense to Patent Infringement; *SCA Hygiene Products Aktiebolag et al. v. First Quality Baby Products, LLC*, 580 U.S. _____ (2017) (J. Alito)

In *Petrella v. Metro-Goldwyn-Mayer, Inc.,* 572 U.S. ____ (2014), the Supreme Court addressed the relationship between the equitable defense of laches and claims for damages that are brought within the time allowed by a statute of limitations, holding that laches cannot preclude a claim for damages incurred within the Copyright Act's 3-year limitations period. "[L]aches," the Court explained, "cannot be invoked to bar legal relief" "[i]n the face of a statute of limitations enacted by Congress." The question in this case was whether *Petrella*'s reasoning applied to a similar provision in the Patent Act, 35 U.S.C. §286.

The Court explained that laches is "a defense developed by courts of equity" to protect defendants against "unreasonable, prejudicial delay in commencing suit."

Before the separate systems of law and equity were merged in 1938, the ordinary rule was that laches was available only in equity courts. In this case, the Court addressed the application of the defense to a claim for damages, "a quintessential legal remedy."

> *Petrella*'s holding rested on both separation-of-powers principles and the traditional role of laches in equity. Laches provides a shield against untimely claims, and statutes of limitations serve a similar function. The enactment of a statute of limitations necessary reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted. Therefore, applying laches within a limitations period specified by Congress would give judges a "legislation-

> overriding" role that is beyond the Judiciary's power. As we stressed in *Petrella*, "courts are not at liberty to jettison Congress' judgment on the timeliness of suit."
>
> As *Petrella* recounted, the "principal application" of laches "was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation." Laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill.
>
> In holding that Congress codified a damages-limiting laches defense, the Federal Circuit relied on patent cases decided by the lower courts prior to the enactment of the Patent Act. After surveying these cases, the Federal Circuit concluded that by 1952 there was a well-established practice of applying laches to such damages claims that Congress, in adopting §282, must have chosen to codify such a defense in §282(b)(1). We have closely examined the cases on which the Federal Circuit and First Quality rely, and we find that they are insufficient to support the suggested interpretation of the Patent Act.

Accordingly, the Court concluded: "Laches cannot be interposed as a defense against damages where the infringement occurred within the period prescribed by §286."

Justice Breyer, dissented, making this point:

> The majority tries to minimize the overall thrust of this case law by dividing the cases into subgroups and then concluding that the number of undistinguishable precedents in each subgroup is "too few to establish a settled, national consensus." The majority's insistence on subdivision makes it sound a little like a Phillies fan who announces that a 9-0 loss to the Red Sox was a "close one." Why close? Because, says the fan, the Phillies lost each inning by only one run.

(In case you were wondering, as Wikipedia points out, Alito is an avid Phillies fan while Breyer spent most of his adult life in Boston.)

Lessons:

1. Laches will be no defense to a patent infringement claim if there is compliance with the statute of limitations, notwithstanding substantial prior case law to the contrary.
2. The Supreme Court's reasoning arguably applies to any claim for which Congress has set a limitations period.
3. The Court's separation of powers discussion may also apply to state law claims where a state legislature has adopted a statute of limitations.

ADVOCACY TIP OF THE MONTH: **Discipline Yourself in Writing: No Adverbs in Persuasive Writing**

From abovethelaw.com
By John G. Balestriere
February 17, 2017

You're not writing a novel or a short story. You're writing a legal paper. Make it focused.

Legal writing in litigation has a purpose: to win. In some fashion that is your goal in everything you file in court or submit to your adversary. One simple rule my colleagues and I at our firm try to follow is this: No adverbs in persuasive writing.

No adverbs means exactly that. They add nothing, they waste time, and excising them often helps your writing become more focused overall.

Thus, don't write: "Plaintiff incredibly asserts that this email exchange somehow created an enforceable agreement. This simply is wrong. Defendant obviously never paid consideration."

Instead: "Plaintiff asserts this email exchange created an enforceable agreement. This is wrong. Defendant never paid any consideration."

Or best: "This email exchange did not create an enforceable agreement because David never paid consideration."

The second is tighter because of the lack of adverbs, and the reader doesn't feel as lectured to. And cutting out the adverbs in the move from the first to the second makes it easier to move to the third, which is the tightest, most to the point assertion (and which has only 14 words contrasted with the 21 in the first example).

Winning in writing means being focused.

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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).

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Brad is frequently asked to speak to lawyers on a variety of subjects, including the use of technology in a legal practice and recent developments in Indiana law. Brad authors Technolawgical, a column on the use of technology in a legal practice, in the *Verdict*, the quarterly publication of the Indiana Trial Lawyers Association.