INDIANAPOLIS LAW CLUB
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Advocacy Tip of the Month

1. PSI Energy, Inc. v. Roberts, 49A02-0210-CV-883 (Ind. Ct. Appeals 01/28/04) (Sharpnack)
- Premises Liability/Electronic Submission

Roberts developed mesothelioma after years of employment working with asbestos insulation, much of it while employed with an insulation contractor doing work at PSI generating facilities. He sued PSI on a premises liability theory and won a judgment for $494,000. PSI appealed.

The Court looked to Restatement (Second) of Torts § 343 (1965): A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and *should expect that they will not discover or realize the danger, or will fail to protect themselves against it*, and fails to exercise reasonable care to protect them against the danger.

PSI contended that it had the right to expect that Roberts, as a professional asbestos worker, would realize the danger of PSI's asbestos work. Although the asbestos was easily observable, the danger was not so obvious. The jury was presented with conflicting evidence as to whether Roberts, although an experienced insulator, would have been aware of the dangers. PSI had actual notice and knowledge that the asbestos workers were not taking precautions to protect themselves. PSI cannot continue to rely on what might have been a reasonable expectation at the outset where activities inconsistent with that expectation continued for a number of years. Judgment affirmed.

Fn: We thank the parties and amici curiae for their extra effort in preparing their electronic submissions. The electronic submissions, especially the linked source citations, greatly assisted in our review of this matter. We encourage other parties with voluminous records and complex cases to consider such electronic submissions with linked source citations in addition to the regular hardcopy submissions.

2. Rawls v. Marsh Supermarket, Inc., 34A05-0306-CV-274 (Ind.Ct.App 01/28/04) (Friedlander)
- Premises Liability

Rawls withdrew cash from a First National ATM on the exterior wall of a Marsh Supermarket. She turned, stepped on a curb and fell. She sued First National and Marsh, claiming the sidewalk in front of the ATM was not wide enough for her to safely turn and leave the area. First National leased a small area inside the Marsh behind the ATM but not the sidewalk area outside the

store where the accident occurred. The trial court granted summary judgment to First National and Rawls appealed.

In considering whether First National owed a common law duty to Rawls, the Court of Appeals considered three factors: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns. First National contended that these factors weigh in favor of finding no duty since the lease agreement did not place it in the position of possessor or occupier of the premises where Rawls fell. First National argued that it should have no duty to keep Marsh's property in a reasonably safe condition. The Court of Appeals disagreed.

It indicated that First National retained an easement over the sidewalk area so that its customers (i.e., invitees) could stand there while conducting transactions at the ATM. It relied upon a prior case which found that a duty of reasonable care may be extended beyond the business premises when it is reasonable for invitees to believe that the invitor controls premises adjacent to his own or where the invitor knows his invitees customarily use such adjacent premises in connection with the invitation. The Court concluded that First National owed Rawls a duty of reasonable care in selecting the location of its ATM. It specifically noted that the unsafe condition at issue was not the result of recent or temporary conditions, but something of which First National should have been aware when it chose this location for its ATM. Summary judgment reversed.

3. Glass v. Trump Indiana Inc., 45A03-0305-CV-70 (Ind. Ct. App. 01/28/04)(Friedlander)

- **Intervening Cause/Malicious Prosecution**

Glass worked as a dealer on a gambling boat owned by Trump in Lake County. Trump's on-site manager suspected Glass of cheating, allowing a friend to win while Glass was dealing. Criminal charges were brought against Glass and later dismissed. Glass sued for malicious prosecution and lost. Glass appealed, challenging the trial court's instruction on intervening cause.

The Court of Appeals expressed skepticism as to the correctness of the intervening cause instruction, suggesting that the doctrine may be inapplicable to all intentional torts; the only issue being whether there is a cause-in-fact relationship between the tort and the alleged injury. The court, however, chose not to decide the issue, concluding that even if it was error, it was harmless.

One of the elements of malicious prosecution is that the defendant had no probable cause to institute the action. A judicial finding of probable cause in a criminal case constitutes prima facie evidence of the required probable cause and must be rebutted by the plaintiff with evidence that the finding of probable cause was induced by false testimony, fraud or other improper means. Glass failed to provide such evidence. Judgment affirmed.

4. Krieg v. Hieber, 17A05-0306-CV-311, (Ind. Ct. App. 02/03/04) (Bailey)
- **Parol Evidence/ Insurance**

The case involves a buyer and seller who got into a dispute over a contract for the sale of a dairy farm in St. Joe, Indiana. After the purchase, the seller retained a right of residency in the house. There was a fire, the house was partially burned, the buyer received insurance proceeds for the loss and declined to re-build the house. The seller sued for the value of his life estate in the house. Following a bench trial, the trial court found in favor of the seller and the buyer appealed.

The buyer argued first that the court should have excluded parol evidence at trial. In rejecting that argument, the court noted, in general, where the parties to an agreement have reduced the agreement to a written document and have included an integration clause that the written document embodies the complete agreement between the parties, the parol evidence rule prohibits courts from considering parol evidence for the purpose of varying or adding to the terms of the written contract. The prohibition against the use of parol evidence is by no means complete. Indeed, parol evidence may be considered if it is not being offered to vary the terms of the written contract, and to show that fraud, intentional misrepresentation, or mistake entered into the formation of a contract. Moreover, parol evidence may be considered to show the nature of the consideration supporting a contract. In this instance, it was proper to prove consideration.

The buyer argued secondly that as a holder of the life estate, it was entitled to fire insurance proceeds at least to the extent of the value of the life estate. On this issue the buyer prevailed. Judgment reversed.

5. American Family Insurance v. Ginther, 71A05-9906-CP-770 (Ind. Ct. App. 02/09/04) (Riley)
- **Collateral Estoppel/Judicial Estoppel/Insurance**

Plaintiffs were injured in an accident involving a 1963 Ford pickup, on the day that it was purchased by a driver (Beckner) who had a policy with American Family Insurance. American Family denied coverage on the grounds that the pickup was a commercial vehicle excluded by the policy. Beckner brought a declaratory judgment action against American Family to establish coverage. This action was dismissed with prejudice when Beckner's attorney withdrew from the case.

The plaintiffs asserted an uninsured motorist claim against their own insurer, Safeco. Safeco settled the claim for $63,000. Then the plaintiffs, as subrogors for Safeco, sued Beckner and obtained a default judgment for $100,000. In a proceeding supplemental, plaintiffs brought in American Family as a garnishee-defendant and obtained a summary judgment against American Family.

On appeal, American Family first sought refuge in the doctrine of **collateral estoppel** based on the declaratory judgment action that had been

dismissed with prejudice. The primary consideration in the use of collateral estoppel is whether the party against whom the former adjudication is asserted had "a full and fair opportunity to litigate the issue and whether it would be otherwise unfair under the circumstances" to permit the use of issue preclusion in the subsequent action.

American Family argued that the injured motorists and their subrogee, Safeco, had a full and fair opportunity to litigate the coverage issue in the declaratory judgment action. The court disagreed, finding that the injured motorists were not parties in the declaratory action.

Although American Family contended that the injured motorists should have intervened in the declaratory judgment action, Indiana Code section 34-14-1-11, provides otherwise: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest that would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." Thus, it was the person seeking declaratory relief that should have joined the injured motorists.

American Family also relied on the doctrine of **judicial estoppel** which prevents a party from asserting a position in a legal proceeding inconsistent with one previously asserted. Unlike equitable estoppel, which focuses on the relationship between the parties, judicial estoppel focuses on the relationship between a litigant and the judicial system.

In this case, American Family attempted to preclude the injured motorists from asserting that they were covered under a policy of insurance issued by American Family, due to their previous position in their claim against Safeco that Beckner was uninsured. The court found that, notwithstanding the claim for uninsured coverage, the injured motorists at all times had taken the position that American Family had or may have an obligation owing to them.

Sullivan, concurring: The doctrine of judicial estoppel is not applicable because the assertion by the injured motorists that Beckner was uninsured in their claim upon the policy with Safeco was not made pursuant to a lawsuit. The recovery from Safeco was obtained without judicial action. There was no complaint filed in a judicial forum giving rise to judicial estoppel.

6. Strack and Van Til, Inc. v. Carter, 45A03-0209-CV-311 (Ind. Ct. App. 02/17/04) (Ratliff)

- **Subsequent Remedial Measures/Admonishment to Jury**
- **Insurer-Insured Privilege/Poverty Evidence**

Carter was injured when she slipped and fell while reaching for a box of cereal at the Strack grocery store. Carter won a verdict of $504,000 at trial and Strack appealed. On appeal, Strack argued first that the trial court should have excluded an exhibit that had been prepared by a Strack manager after the incident. This exhibit, an "Employee Corrective Action Notice," indicated that, prior to the accident, a Strack employee named Brooks "was called to get a clean up. When he went to get a mop and bucket, [Brooks] left the mess

unguarded. When he got back to the spill a customer had already fallen and injured themselves. Whenever there is a wet spill, we must use wet floor signs."

The court found that as an initial stage in the disciplinary process, this corrective form was a subsequent remedial measure that may not be used to prove Strack's negligence or culpability in connection with Carter's injury. This does not end the analysis, however, because subsequent remedial measures may be admitted into evidence "when offered for another purpose such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." In this context, the court held that the trial court could have concluded that the corrective notice was admissible for impeachment purposes.

Strack also challenged on appeal the admission of a photograph that showed a sign, installed after the accident, warning that the floor was wet. The court noted that, as a depiction of the accident scene and the stain on the floor, the photograph was relevant and admissible. However, as a depiction of a subsequent remedial measure, the photograph was inadmissible. When evidence admissible for one purpose but not admissible for another purpose is admitted, "the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly." Ind. Rule of Evidence 105.

The trial court *sua sponte* admonished the jury not to consider the depiction of the subsequent remedial measure. Even though requested to do so, Strack did not assist the trial court in drafting the wording of the admonishment. Strack cannot now challenge the content of the admonishment. Such admonitions are presumed to be effective, and Strack has not presented anything to lead us to the conclusion that the presumption has been rebutted.

Strack also challenged the admission into evidence of an accident report that it had prepared and submitted to its insurance company, Safeco. The report contained a recitation of the facts surrounding Brooks' discovery of the spill, his failure to cordon off the spill while he went to the back of the store to obtain a mop, and the slip and fall by the customer. Although clearly a privileged communication under *Richey*, the court found that the report was cumulative of evidence already admitted through the corrective action notice and therefore would not constitute reversible error.

During Carter's case in chief, her counsel elicited testimony from her concerning her financial hardship. Over objection, the trial court admitted testimony that Carter was unable to pay utility bills, that she had to go begging for money, and that she was destitute. Generally, evidence is not admissible to show directly or indirectly the wealth or financial standing of the plaintiff. The injunction against the use of evidence of the "worldly condition of parties" is longstanding. The Court held that while the admission of this evidence was clearly improper, Strack did not establish sufficient prejudice from the error and it was held harmless.

7. Van Etten v. Fegaras, 46A04-0309-CV-440 (Ind. Ct. App. 02/18/04) (Baker)

- **Summary Judgment Standard**

Van Etten injured his leg in a commotion at a steakhouse where Fegaras was the manager. Van Etten claimed that Fegaras struck him with a large statue of a native American in full headdress and a rawhide fringe outfit. Fegaras denied the allegation, and contended that Van Etten had slipped and fell on ice.

The record indicated that there were many reasons to doubt Van Etten's claim, including: blood tests showed that he had a blood alcohol level of .21 at the time; he told ambulance personnel that his leg was injured when someone sat on it in a fight; and he told the police that he had been jumped from behind by someone in a cook's uniform.

Fegaras moved for summary judgment, relying in part on statements made by Van Etten at his deposition. Van Etten submitted an affidavit in opposition to the motion. Based on a federal decision from the Southern District of Indiana, Fegaras argued that Van Etten's evidence was merely colorable; it was not significantly probative. The trial court agreed and granted the motion. Van Etten appealed.

The Court of Appeals concluded that under the federal summary judgment standard, the case was probably appropriate for summary judgment, but not under state law. It is entirely the burden of the movant to demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence. There is no requirement that the non-movant produce sufficient contrary evidence to allow the possibility that he will win his case. He merely must show that there is some admissible evidence that creates a genuine issue of material fact to prevent the trial judge from granting summary judgment in an Indiana court. The Indiana standard sets a higher bar in order to win summary judgment. In light of the evidence from Van Etten, Fegaras failed to surmount this higher bar. Judgment reversed.

While so holding, the court reaffirmed the principle that a party who has been examined at deposition cannot raise an issue of fact simply by submitting an affidavit contrary to his own prior testimony.

8. Polinsky v. Violi, 09A05-0310-CV538 (Ind. Ct. App. 02/18/04) (Baker)

- **Privity/Arbitration**

Violi entered into a three-year employment agreement with TotalEMS to be its president and CEO. A year into the agreement, Violi was terminated and he sued TotalEMS. In his capacity as a minority shareholder, he also sued the controlling shareholders of TotalEMS, Polinsky and Sutker, for breach of fiduciary duty. The employment agreement provided for arbitration of disputes arising under the agreement and Polinsky and Sutker moved to

compel arbitration. The trial court denied the motion, stating that they were nonparties to the arbitration provision. Polinsky and Sutker appealed.

The Court of Appeals noted that when construing arbitration agreements, every doubt is to be resolved in favor of arbitration, and the parties are bound to arbitrate all matters, not explicitly excluded, that reasonably fit within the language used.

With respect to who has rights under the employment agreement, it includes the parties and those in privity with the parties. Privity has been described as a "mutual or successive relationship as to the same right of property, or an identification of interest of one person with another as to represent the same legal right." Violi had alleged TotalEMS was "merely the alter ego or instrumentality of Polinsky and Sutker" and that they "control the operations of TotalEMS." In light of these allegations, Violi could not deny that Polinsky and Sutker stand in privity with TotalEMS and therefore, the arbitration agreement applied. Reversed with instructions to order arbitration.

9. MPACT Construction Group v. Superior Concrete Constructors, No. 26S01-0307-CV-349 (Ind. S. Ct. 2/2/04) (Sullivan; 3-2 vote with Boehm and Shepard dissenting)

- **Arbitration**

Subcontractor sued to foreclose on its mechanic's lien for work done on the construction of a Flying J travel plaza in Gibson County. Several counterclaims and cross-claims followed involving the owner, the general contractor and other subcontractors. After six months of litigation, the general contractor moved to compel arbitration based on a provision in the contract between the owner and general contractor. The trial court denied the motion. The general contractor appealed.

The Supreme Court held that the arbitration provision had not been agreed to by the subcontractors and refused to order them to arbitration. The majority refused to interpret provisions in the subcontracts that made reference to the General Contract as accepting the arbitration provision.

The dissent believes that, given the context in an industry where arbitration is widely used, the subcontractors should have understood that arbitration was intended even if it was not spelled out in the subcontracts. The arbitration clause was enforced as to the disputes between the owner and the general contractor.

10. Time Warner Entertainment Co. v. Whiteman, 49SO2-0402-CV-47 (Ind. S. Ct. 2/3/04)(Sullivan)

- **Voluntary Payment Doctrine/Liquidated Damages**

Customers sued Time Warner, a cable television company, for charging excessive late fees, seeking to recover the late fees paid and declaratory and injunctive relief. The trial court overruled Time Warner's motion for summary judgment and Time Warner appealed.

Time Warner argued that the voluntary payment doctrine precluded the customers from getting their late fees back. This doctrine provides:

- As a general rule, money voluntarily paid with a full knowledge of all the facts, and without any fraud or imposition on the payor, cannot be recovered back, although it was not legally due.
- Generally a voluntary payment made under a mistake or in ignorance of law, but with a full knowledge of all the facts, and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered back.
- In general money paid under a mistake of fact, and which the payor was under no legal obligation to make, may be recovered back, notwithstanding a failure to employ the means of knowledge which would disclose a mistake.

Although the voluntary payment doctrine would appear to apply, the Supreme Court refused to find it applicable, contrary to the weight of authority on this issue: First, because customers were put in the position by Time Warner of having to pay the late fees in order to continue to receive cable service, making their situation different from most cases applying the voluntary payment doctrine. Second, because "we are sympathetic to contemporary scholarly opinion that suggests the distinction between a mistake of law and a mistake of fact is artificial. While the American Law Institute's 1937 Restatement of Restitution is frequently cited for the distinction, the current tentative draft of a new Restatement of Restitution & Unjust Enrichment (Third) eliminates it. The tentative draft – correctly, we think, limits application of the voluntary payment doctrine to situations where a party has voluntarily paid a disputed amount.... We think there is a genuine issue of material fact as to whether customers voluntarily paid the late fees in the face of recognized uncertainty as to the existing or extent of an obligation to Time Warner."

Time Warner also defended the late fees as enforceable liquidated damages. Whether a liquidated damages provision is enforceable depends on whether the amount is grossly disproportionate to the actual loss. The customers presented affidavits from two expert witnesses indicating that the late fees exceeded by more than ten times Time Warner's actual costs. Based on this evidence, the Court found there was a genuine issue for trial as to whether the late fees were valid and enforceable as a liquidated damages clause. Judgment of the trial court was affirmed.

11. Conklin v. Fisher, No. 91A02-0310-CV-835 (Ind. Ct. App. 2/19/04)(May)
- **Court Costs**

The trial court ordered Conklin to pay $1,033.58 to White County for jury per diem/mileage costs, jury lunch and dinner costs, and bailiff

reimbursement for jury expenses. In *VanWinkle v. Nash*, 761 N.E.2d 856 (Ind. Ct. App. 2002), the court addressed what items are included as "costs" that can be recovered. In *VanWinkle*, the prevailing party sought to recover costs of deposition transcription, medical records acquisition, photograph and diagram exhibits, and photocopying. The court held that absent "manifest contrary legislative intent, the term 'costs' must be given its accepted meaning which does not include litigation expenses." The court found the term "costs" to be "an accepted legal term of art that has been strictly interpreted to include only filing fees and statutory witness fees." "Costs are not a penalty imposed on the losing party for his misconduct. They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court." *Harmon v. Pacific Tel. & Tel. Co.*, 20 Cal. Rptr. 118, 121 (Cal. Ct. App. 1962).

The record did not reflect that Fisher paid the jury's per diem or mileage costs, the jury's lunch and dinner costs, or the bailiff reimbursement for jury expenses, and Conklin was therefore not obliged to "indemnify" her for such. Rather, the costs imposed on Conklin appear to be in the nature of a penalty imposed on him as the losing party and they were therefore improper. The jury costs the trial court assessed were not filing fees nor were they statutory witness fees. As a result, the trial court erred in assessing jury costs and expenses against Conklin in the absence of authorization by statute or court rule. Reversed.

12. *D&M Healthcare, Inc. v. Kernan*, 49S05-0310-CV-437 (Ind.S.Ct 12/17/03)(Boehm)

- **Rule of Necessity/Veto/De Minimis Doctrine/Judicial Salaries**

Governor vetoed nursing home reimbursement act. Issue: Was Governor's veto valid? Article V, Sec. 14 of Indiana Constitution says that in the event of a veto after final adjournment of a session of the General Assembly, such bill shall be returned by the Governor to the House in which it originated on the first day that the General Assembly is in session after such adjournment. If such bill is not so returned, it shall be a law notwithstanding such veto. The bill was returned to the House six months before its first day of session after adjournment. Judicial pay raise bill was similarly vetoed and returned.

Our personal financial interests and expressed views would normally preclude participation in this case. Yet we must address this claim because there is no one else to do it. When every judge has an interest in the outcome of a case, the "Rule of Necessity" requires that they not recuse themselves.

At some point in the prehistory of the common law, the court formulated the eminently practical doctrine now sometimes colloquially referred to as "*de minimis*" but formally stated as "*de minimis non curat lex.*" Freely translated from the Latin, it proclaims that the law does not redress trifles. In contemporary American vernacular, it is the courts' way of saying "So what?"

If there is no "what," the courts do not provide relief to ordinary litigants and certainly do not interfere with the operations of the other branches of government.

The *de minimis* doctrine is closely related to the idea of substantial performance, which teaches that minor irregularities that do not affect the finished product do not provide the basis for a lawsuit. One may view these doctrines as denying legal intervention where no significant injury is inflicted, at least for unintentional wrongs, or as denying legal intervention where the process complained of is out of specification but in the end produces the same result that would have emerged from strict conformance. Plaintiffs' complaint about the Governor's veto in this case suffers from both defects. No harm whatsoever was inflicted on the legislative process. And delivery before rather than "on" the first day achieved everything necessary for the process to work.

Shepard, C.J., concurring: Judges and prosecutors and their families have now gone seven years without so much as a cost-of-living adjustment, even as social workers, teachers, university professors, prison guards, and state employees generally have received several such adjustments. This differential treatment has been ruinous to the state's judiciary. Passing through the cloud of this calamity to decide this appeal on the basis of our best judgment about the law, however, is the job we have chosen and been chosen to do.

ADVOCACY TIP OF THE MONTH

Ask questions to get the listener actively thinking your way.

Zig Zigler, a prominent sales trainer, preaches: "You don't persuade by telling, you persuade by asking." Neil Rackham, an international consultant on the psychology of negotiating, has observed: "Any good negotiator asks an awful lot of questions. They don't tell, they ask and that's their way of persuading. It is much better to ask two or three questions that make you think about an area and say yes, than to try ramming it down your throat by telling you."

Instead of expressing your argument solely in terms of assertions, consider including a few well-chosen questions. A question expressly invites the listener to think about an issue and in a way, compels more involvement from the listener.

For example, instead of an assertion, you might ask: What should a reasonable driver do when she comes to an intersection with a malfunctioning stoplight? Should she just drive through as if the light were green or should she exercise more caution? Such questioning allows the listener to form her own opinion and is often a more persuasive way of gaining acceptance of an idea.