

# INDIANAPOLIS LAW CLUB

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### Advocacy Tip of the Month

**News Item: From the New York Times, April 18, 2004**

Suppose you took a case to the Indiana Supreme Court and lost. Suppose then you appealed to the U.S. Supreme Court and lost. Have you now exhausted your appeals or is there a higher court to which you might go to seek relief?

If you're a Canadian or Mexican business and you think that you've been treated unjustly by the American courts, you can seek a further review by asking for a NAFTA tribunal. One such tribunal reviewed a decision by the Massachusetts Supreme Judicial Court after cert had been denied by the U.S. Supreme Court. Another such tribunal is currently reviewing a case involving the largest jury verdict in Mississippi history, a \$500 million award against a Canadian company for breach of contract and fraud. In such cases, the Fat Lady doesn't sing until the NAFTA tribunal has ruled.

**1. Peters v. Forster, No. 42S01-0301-CV-24 (Ind. 3/11/04)(Rucker)  
- Acceptance Doctrine**

Wayne Peters was injured when he slipped and fell on a ramp at a house as he was delivering food. He sued Donald Forster, a contractor who installed the ramp, for negligence. The trial court granted summary judgment to Forster based on the acceptance doctrine. This is a doctrine of long-standing that provides that an architect, engineer or building contractor is generally not liable to a third party for injury after the structure is completed and accepted by the owner. This rule was based historically on privity concerns and on the fact that after acceptance, the owner, not the contractor, has control of the premises.

The Indiana Supreme Court, in a unanimous opinion, overturned 100 years of precedent and abandoned the acceptance rule. In the future, an architect, engineer or building contractor is to be held responsible if he or she was negligent regardless of whether the owner has accepted the work.

**Lessons:**

- Architects, engineers and building contractors now have significantly more liability exposure for personal injuries.
- The Indiana Supreme Court appears more receptive to arguments based on developments in the law in other states—noted that the acceptance doctrine has been abandoned in a number of jurisdictions.
- Court continuing to demonstrate tendency to be plaintiff-friendly.

**2. Trustees of Indiana University v. University Development Group 1, LLC, No. 49A04-0301-CV-35 (Ind. Ct. App. 12/18/03)(Darden)**  
- **Injunction; Covenants Not to Compete**

The plaintiff, UDG, sued the IU Trustees to enforce exclusive rights to provide food services on the IUPUI campus that were granted to UDG in a lease agreement. The trial court found that the IU Trustees violated the lease and issued a permanent injunction preventing IUPUI from opening new food services at University College and Cavanaugh Hall. The Court of Appeals agreed that the IU Trustees had violated the lease but ordered that the injunction be vacated, finding that UDG had an adequate remedy at law.

In refusing to uphold the injunction, the Court of Appeals relied upon language in *Indiana FSSA v. Walgreen*, 769 N.E.2d 158 (Ind. 2002), where the Supreme Court suggested that if an injury is purely economic, injunctive relief should be denied. The Court gave no weight to authorization of injunctive relief in the Lease Agreement.

This decision appears inconsistent with cases that in the past have regularly allowed injunctive relief to enforce covenants not to compete based on: (1) concern with avoiding repetitive action for damages; (2) the uncertainty of calculating damages for loss of goodwill arising from competition, and (3) history of allowing injunctions to enforce negative covenants.

Petitions for transfer to the Supreme Court have been filed by both parties and are set for oral argument on May 6, 2004.

**3. Dicen v. New Sesco, Inc., 55A01-0305-CV-173 (Ind. Ct. Appeals 04/22/04) (Sullivan)**  
- **Injunction; Covenant not to compete; trade secrets**

In 1996 Michael Dicen left his job at IDEM and started an environmental consulting company with two other former IDEM employees. Three years later they sold the assets of the company to New Sesco, Inc. and Dicen signed non-competition covenants in the Asset Purchase Agreement and in a related employment agreement. After a year, Dicen resigned his position and started a new company providing similar services. New Sesco sued. Trial court granted a preliminary injunction against Dicen and he appealed.

Court of Appeals upheld trial court's finding that there was no adequate remedy at law. The Court recognized that when a covenant not to compete is breached, it would be pure speculation to place a dollar amount on the damages and an injunction "is the most efficient way to lift the burden of that harm from the shoulders of the employer who contracted so as not to suffer such harm." [Note: Not consistent with ruling in *IU Trustees v. UDG*]

As to the non-competition covenant in the employment agreement, the Court found the geographic scope to be overbroad. It covered the entire United States but Dicen had only provided services to customers in Indiana and some surrounding states.

This overbreadth could not be corrected by blue pencil of the offending provision since to do so would leave the employment agreement without any geographic limitation, so the non-competition provision of the employment agreement was held to be unenforceable.

The non-competition covenant in the Purchase Agreement was also unreasonably broad but included a term giving the court power to limit or modify the provision. The court used this power to make the covenant less restrictive as to the scope of customers who could be solicited by Dicen, as to the areas of business covered, and as to the geographic scope. With these modifications, the covenant was enforceable by injunction.

The preliminary injunction also protected as trade secrets New Sesco's customer's names, addresses and other customer information. The Court of Appeals disagreed, finding that much of this customer information was available on IDEM's website and therefore was not a trade secret. In addition, New Sesco's efforts to protect these purported trade secrets were judged to be inadequate

Lessons:

- The Court of Appeals will uphold injunctive relief to enforce a covenant not to compete in at least some cases.
- Non-competition covenants ancillary to the sale of a business are not as disfavored as when ancillary to employment.
- Include a clause allowing the court to limit and modify the non-competition clause if needed to make it "reasonable."
- Don't claim a trade secret for information that is available on line.
- Take steps to protect trade secrets, e.g., if on computer, provide for password protection, limit access to hard copies, impose confidentiality requirements

**4. Jaehnen v. Booker, 58A01-0307-CV-269 (Ind. App. 4/7/04)(Ratliff)**  
- **Cognovit Note**

In 1997, Jaehnen borrowed \$20,000 from Booker, signed a note for the amount and agreed to pay 8% interest. Five years later Jaehnen paid off the principal of the loan but failed to pay the 8% interest, by then about \$10,000. Booker sued. Jaehnen argued that the note was void because it contained a cognovit provision.

A cognovit note is a promissory note in which a debtor purports to give advance consent to a holder to obtain a judgment without notice or hearing. It amounts to a confession of judgment. Cognovit notes are prohibited by statute in Indiana. Generally, a contract made in contravention of a statute is void but this is not automatic. Here Booker did not rely on the cognovit provision. Even though the cognovit provision of the note was invalid, the obligation to pay interest was held to be enforceable.

Lesson: Not all contracts in violation of a statute are void Depending on the circumstances, a court may enforce the remainder of a contract that is invalid in part.

**5. City of Carmel v. Leeper Electric Services, Inc., No. 30A01-0304-CV-158 (Ind. Ct. App. 3/18/04)(Kirsch)**

- **Eminent domain; inverse condemnation**

Leeper Electric Services sued the City of Carmel for the taking of four acres of property at the corner of 131<sup>st</sup> and U.S. 31. Evidence from four appraisers indicated that the value of the property taken was between \$1.12 and \$1.4 million based on comparative transactions. One of the appraisers had been hired by the City of Carmel. The jury found the value to be \$675,000. On a motion to correct error, the trial judge ruled that this amount was outside the bounds of the evidence and increased the award to \$1.12 million.

The City of Carmel appealed, arguing that jury could reach its own valuation of the property. The Court of Appeals affirmed the trial court, finding that the market data approach was the proper method to determine value and the lowest sustainable value based on the evidence was \$1.12 million.

Lessons:

- The only proper method to determine the value of unimproved property is the market data approach (the value indicated by recent sales of comparable properties in the market).
- Judges will in the right circumstances increase the amount of a jury's verdict.
- Not all experts are pure hired guns (range here is small: cited prior case where appraisal range was \$130,000 to \$6.3 million and jury verdict for \$130,500 was sustained as being within the bounds of the evidence)
- Not all motions to correct error are fruitless.
- Appraised values will generally set the upper and lower bounds for condemnation damages.

**6. Construction Co., Inc. v. D.T. Carpentry, No. 45A03-0309-CV-344 (Ind. Ct. App. 3/25/04)(Baker)**

- **Waiver of evidence objection on motion to dismiss; borrowed employee doctrine**

This case arose from a construction site accident that occurred in connection with the operation of a crane. Gatwood Crane Company moved to dismiss, claiming that its crane operator was acting under the direction and control of D.T., the same company that employed the injured plaintiff and consequently, it should be protected from suit

by application of worker's comp immunity and the borrowed employee doctrine. In support of this motion, Gatwood designated as support the Crane Rental Agreement.

On appeal, D.T. argued that the Agreement should not have been considered by the trial court because the Agreement had not been authenticated. The Court of Appeals refused to consider the argument because D.T. had never objected to the evidence on this ground in the trial court. The issue was waived.

On the borrowed employee issue, the court engaged in a detailed discussion of the seven Hale factors, giving greatest weight to the factor of control and found the evidence sufficient to support the trial court's finding that Paddock was a borrowed employee.

#### Lessons

- To preserve evidentiary issues on motions to dismiss, make sure you object in the trial court on the specified ground. Procedurally, that probably means filing a motion to strike the designated evidence.
- The borrowed employee doctrine is still alive and well in Indiana. Consider it carefully in any construction accident case. *See also Argabright v. R.H. Marlin, Inc.*, No. 49A05-0305-CV-220 (Ind. Ct. App. 3/16/04)(affirming dismissal of claim based on worker's comp immunity by applying Hale factors to crane-related accident).

#### **7. Brown v. Jones, No. 18A02-0306-CV-469 (Ind. Ct. App. 3/18/04)(Bailey)** - **Judicial notice; res judicata**

Jones sued Brown seeking dissolution of a closely held corporation and appointment of a receiver and damages for conversion. The case was bifurcated and in the first phase, tried to the bench, the trial court found for the plaintiff Jones, ordered the corporation dissolved and appointed a receiver. In so holding, the trial judge made a number of findings of fact to the effect that Brown's conduct was wrongful and Brown's testimony lacked credibility.

In the second phase of the bifurcated case, the jury considered whether Brown was liable to Jones for conversion. At Jones request, the trial court took judicial notice of the prior findings of fact and instructed the jury that these findings were conclusive. The jury found in favor of Jones on his conversion claim and returned a verdict of \$132,000.

The Court of Appeals held that it was improper to take judicial notice of the trial court's prior findings of fact. These facts were not "generally known" and were subject to reasonable dispute, and therefore, are not the kind of facts that may be judicially noticed pursuant to Indiana Rule of Evidence 201. The rule allowing a court to take judicial notice of its own records does not mean that all facts recited in such records are suitable for judicial notice. Judicial notice is limited to the record's existence and does not extend to the facts found or alleged within the record.

The Court of Appeals held further that the trial court's findings of fact were not subject to the doctrine of res judicata. This doctrine applies only when there has been a final judgment on the issue. The order in phase I on the dissolution and receivership was not a final judgment. It might have been if there had been "an express determination that there is no just reason for delay" and the trial court had directed entry of a final judgment on the claims resolved in Phase I.

The law-of-the-case doctrine also was inapplicable. This doctrine requires that the facts be part of a proceeding in which judgment has been entered and an appeal taken.

Lessons:

- Don't get confused over judicial notice of the existence of records and of the facts set forth in those records.
- In a bifurcated case, consider making a request for a Rule 54(b) final judgment.

**8. A.M. v. Jerry Butler, No. 02-2882 (7<sup>th</sup> Cir. 3/16/04)(Evans)  
- Attorney Discipline**

Seventh Circuit Rule 30 requires that the appellant include in its main brief a copy of the opinion or decision from which the appeal is taken. Lisa Hoffman, an attorney in the Illinois AG's office, failed to comply with this rule when she filed her brief for the appellant. The Seventh Circuit reprimanded Ms. Hoffman for this omission and ordered her to show cause "why she should not be fined \$1,000." After receiving evidence that the failure was not willful and that Ms. Hoffman was otherwise a capable lawyer, the Seventh Circuit found that the fine was not necessary. "We chalk up the violation of Rule 30 in this case to a simple mistake." Of course, "our original opinion still stands as public censure."

Lesson: Read and follow the court's rules, especially in the Seventh Circuit.

**9. Kennedy v. Guess, Inc., No. 29S02-02111-CV-594 (Ind. 4/21/04)(Shepard)  
- Product liability; trademark liability**

A customer received a free umbrella with the Guess logo when she bought a Guess watch at Lazarus. Her husband was injured by the umbrella when a co-worker swung it and the shaft separated from the handle. The husband sued Guess, Inc., Callanen International (the distributor) and others for the injury. The trial court granted summary judgment to Guess and Callanen and the plaintiff appealed.

The Indiana Supreme Court reversed the summary judgment as to Callanen, finding that Callanen could be sued on a strict liability theory although it was not the manufacturer. Generally, strict liability applies in Indiana only to manufacturers. There is, however, an exception that allows a principal distributor or seller of the

product to be strictly liable if the Indiana court is unable to hold jurisdiction over the manufacturer. Here, the manufacturer was based in Hong Kong and the plaintiff was unable to get service. To be more precise, Callanen failed to prove that jurisdiction over the manufacture could be held in Indiana and it was Callanen's burden.

Callanen presented an affidavit saying that it was not a "principal distributor or seller" of these umbrellas. The plaintiff presented evidence that Callanen purchased more than 93,000 umbrellas from the manufacturer. The latter evidence was held sufficient to raise an issue for trial as to whether Callanen was a "principal distributor."

Summary judgment was also reversed as to Guess, not on strict liability, but on negligence arising from the use of its trademark. The only name on the umbrella was "Guess." Section 400 of the Restatement Second of Torts provides that "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." The Court holds that Indiana law should treat trademark licensors as having responsibility for defective products placed in the stream of commerce bearing their marks, but only so much of the liability for those defects as their relative role in the larger scheme of design, advertising, manufacturing and distribution warrants. There should be some oversight by those who put their name on the product.

Lessons:

- To avoid strict liability, burden is on the distributor to establish that the manufacturer is subject to jurisdiction in Indiana.
- Conclusory statements in affidavits are of little value; provide specific facts.
- Licensing of trademarks raises risk of liability.
- Promotional items raise risk of liability.

**10. King v. Terry, No. 18A02-0307-CV-601 (Ind. Ct. App. 3/22/04)(Mathias)**  
- **Quantum meruit; unjust enrichment**

King bought a piece property in Muncie at "308" East 13<sup>th</sup> Street. He was billed and paid taxes for another piece of property at "608" East 13<sup>th</sup> Street. The "308" property was then sold at a tax sale to Terry. This tax sale was found invalid for inadequate notice and Terry's tax deed was vacated by a 1997 decision of the Court of Appeals. While Terry had the tax deed, he received rental income from the property.

In April 2001, King brought this action to recover the rental income that Terry had received. The trial court dismissed on statute of limitations grounds. King appealed.

The complaint was entitled "Petition for Recovery of Monies Due and Owing and for Breach of Contract." King contended that the complaint stated a cause of action for tortious interference with contract and was barred by a two-year statute of limitations. The Court of Appeals, looking to the nature or substance of the cause of action rather than the form, found that a claim for quantum meruit (also called unjust

enrichment) was being asserted. Quantum meruit is an equitable doctrine that applies when a measurable benefit has been conferred upon the defendant under such circumstances that the defendant's retention of the benefit would be unjust. It applies only when there is no contract that would otherwise provide a remedy at law.

When two statutes of limitations may apply, the doubt is resolved in favor of applying the longer statute. The six-year statute of limitations was held applicable.

For a quantum meruit claim, pursuant to Indiana's discovery rule, the statute of limitations begins to run when the plaintiff knew or would have discovered an injury. It did not begin to run, as Terry argued, when King stopped receiving rent on the property. It did not begin to run, as King argued, when the Court of Appeals voided Terry's tax deed. Rather, it began to run when King had reason to believe that Terry was collecting rent on the basis of an invalid deed and had a cause of action against Terry. This date was beyond the six-year statute of limitations and therefore the claim was barred.

Lessons:

- An incorrect caption for your cause of action will be of little consequence—it's the nature or substance that controls.
- Quantum meruit can be a viable cause of action when no valid contract is available.
- Under the discovery rule, the claim accrues not when you know for sure that you have a claim but when you have a reason to believe that a claim exists.
- The safer practice is to join together related claims and assert them as early as possible. (King should have joined his quantum meruit claim in his initial action challenging the tax deed.)

**11. Frazier v. Mellowitz, No. 49A02-0305-CV-385 (Ind. Ct. App. 3/10/04) (Najam)**  
- **Attorney referral fee/breach of contract**

Frasier referred clients to Mellowitz and in a letter, Mellowitz confirmed the terms of a litigation referral agreement, agreeing to pay Frasier 25% of the attorney fees that he recovered. The letter also confirmed Frasier's agreement "to pay 25% of all costs and expenses in this matter as they are incurred." In May 1997, Mellowitz sent a letter to Frasier, saying that he had incurred about \$4,400 in expenses and asking that Frasier send a check for \$1,000 for his share. Mellowitz sent three follow-up letters to Frasier in 1997, and left several voicemail messages requesting payment but Frasier never returned the calls and never paid his share of the expenses.

In one of the letters, Mellowitz wrote: "I would appreciate it if you would live up to your end of the bargain, so that we do not need to consider the referral agreement void. I am quite confident that the outcome of this matter is going to be rewarding."

The outcome of the matter was rewarding: The case was settled for \$600,000 and \$240,000 went to Mellowitz for attorney's fees. Mellowitz brought a declaratory

judgment action to establish that Frazier breached the agreement and was not entitled to any portion of the fee. The trial court granted summary judgment to Mellowitz and Frazier appealed.

The Court of Appeals reversed the grant of summary judgment, finding that there was an issue for trial as to whether the breach of the agreement to pay costs as they were incurred was material. There was also an issue as to whether Frazier attempt to cure, after the settlement, was timely. Although there was no dispute about the underlying facts, conflicting inferences could be drawn from those facts, so that summary judgment was inappropriate.

Lessons:

- Just because all the facts are undisputed doesn't mean that summary judgment is appropriate.
- If you want to share in the fee, be prepared to share in the costs.

### **ADVOCACY TIP OF THE MONTH**

#### **Seek identification with your listener.**

Kenneth Burke, considered by many to be the pre-eminent rhetorician of the 20<sup>th</sup> Century, emphasized the role that identification plays in persuasion. He wrote: "You persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, identifying your ways with his."

Psychologists teach that we trust and like people who we perceive to be like ourselves. Try to make connections with your listener to establish identification.

During voir dire in the Oklahoma City bombing trial of Terry Nichols, Mike Tigar spoke about French references with a French exchange student, he talked about farming with farmers and about poetry with a poet. According to one observer, he made connections that lasted throughout the trial.

Another way of establishing identification is by starting with points of agreement. The listener will begin to perceive you as someone who thinks like him or her. It will make it easier to bridge to areas where agreement will be harder.