

INDIANAPOLIS LAW CLUB

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1. News Item

Usually, changes in society start in California and make their way sometime later to Indiana. The situation was reversed this month when Governor Arnold Schwarzenegger proposed to the California legislature that it adopt a statute that presently exists only in Indiana. Specifically, what Governor Schwarzenegger suggested was that California collect 75% of all punitive damages awarded in civil lawsuits filed in California, with no compensation for lawyers out of that 25%. Several states now take a slice of punitive damages awards but only Indiana does so without compensating lawyers, and that's the precedent Schwarzenegger wants California to emulate.

2. Evidence Derived from Mediation: Bridges v. Metromedia Steakhouse Co. (Ind. Ct. App. 4/30/04)(Najam)

Betty Bridges sued the operator of a Ponderosa steakhouse for a burn injury to her hand caused by a steam table. Bridges claimed that the burn resulted in scars that persisted for 4 ½ years until she had laser surgery to eliminate the scars shortly before trial. In response, defendant called a claims adjuster as a rebuttal witness who testified, over objection, that she observed the hand during a mediation prior to the laser surgery and she saw no scars.

Bridges argued that because the observation was made during a mediation it was inadmissible. Rule 408 of the Ind. Rules of Evidence provides that evidence of "conduct or statements" made in compromise negotiations is not admissible. ADR Rule 2.11 provides that mediation is to be regarded as a settlement negotiation and is governed by Ind. Evid. R. 408. The Court of Appeals concluded that the testimony of the claims adjuster as to her observations of the hand did not involve "either conduct or a statement made in the course of mediation." Although Bridges argued that she had displayed her hand to the claims adjuster and had pointed to the scars, there was nothing in the record to reflect any such nonverbal conduct intended as an assertion.

The Court of Appeals admonished "that our holding does not establish a new exception to the general rule that matters discussed in mediation are confidential and privileged."

Bridges also objected to the testimony of the claims adjuster on the grounds that her name had not been included on any witness list. The testimony was presented largely as rebuttal to surprise evidence of the laser treatments that had occurred shortly before trial. The trial court decided that, in fairness to the defendant, the witness would be allowed to testify. The Court of Appeals found that this was not an abuse of discretion, noting in a footnote that the pretrial order included a reservation of the right to call "rebuttal or impeachment witnesses, the necessity of whose testimony can not reasonably be anticipated before trial."

Lessons:

1. Do not assume that what happens at mediation can never be used as evidence.
2. Observations made during mediation may be admissible at trial.
3. To oppose admissibility when an observation at a mediation is offered, show that it was the result of non-verbal conduct intended as an assertion--that there was an intentional display including a pointing out.
4. Alternatively, before displaying any physical condition at a mediation, obtain a stipulation of inadmissibility.
5. Note: There is precedent for the use of mediation evidence for impeachment.

3. Juror Questions: Ashba v. State (Ind. Ct. App. 5/18/04)(Baker)

In an OWI trial, the judge gave a preliminary instruction stating: "When counsel have finished questioning the witnesses, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so prior to that witness being excused." The trial occurred on January 7, 2003, just after the Indiana Jury Rules went into effect on January 1, 2003, including Rule 20 that requires a preliminary instruction stating "that jurors may seek to ask questions of the witnesses by submission of questions in writing."

The trial proceeded without juror questions and after both sides rested, jurors asked the bailiff when were going to have an opportunity to ask questions. Three jurors had collected questions they wanted asked and were upset that they had not been given the opportunity. The judge and counsel for both sides agreed that it was too late and overruled the jurors' questions. The jury returned a guilty verdict and the defendant appealed.

The Court of Appeals held: "[A] trial court should explain to jurors what the questioning procedure will entail. A trial court can inform the jurors that it will be glancing at the jury to see if any questions exist after a witness's testimony. Another mode of inquiry could be for the trial court to instruct jurors to verbally or physically indicate if they have any questions. The trial court may also choose to tell jurors that it will specifically ask for questions after each witness. In sum, the trial court may use a variety of methods to obtain jury questions but must ensure that jurors know when they will be given an opportunity to ask such questions."

The Court of Appeals held further that the procedure for handling questions should be as set forth in Rule 614(d) of the Indiana Rules of Evidence: "A juror may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties, which may be made at the time or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness."

Ashba was held to have waived any issue about juror questions because he expressly joined in the State's objections to the juror questions and agreed that they should not be given. Conviction affirmed.

Lessons:

1. Judge should advise jurors regarding how to alert the judge when they have questions.
2. Questions should be in writing.
3. Counsel should be given an opportunity to object outside the hearing of the jurors.
4. If you don't think the judge has adequately explained the process for jury questions, make an objection promptly to preserve the issue for appeal.

4. Business Records: In re Termination of E.T. and B.T. (Ind. S.Ct. 5/20/04) (Rucker)

In support of a petition for involuntary termination of parental rights, the Allen County Office of Family and Children offered into evidence reports prepared and maintained by a non-profit corporation documenting home visits and supervised visitation. The trial court allowed the reports into evidence and the Court of Appeals affirmed. The Supreme Court held that these reports were not admissible under the business records exception to the hearsay rule.

In reaching this decision, the Court looked to the history of the business records exception. The Court noted that it was an outgrowth of the English common law "shop book" rule and was "based on the fact that the circumstances of preparation assure the accuracy and reliability of the entries." This reliability "stems in part from the fact that the organization depends on these business records to operate, from the sense that they are subject to review, audit or internal checks, and from the precision engendered by the repetition." In essence, the basis for the business records exception is that reliability is assured because the maker of the record relies on the record in the ordinary course of business activities.

It is not enough to show that the records are made regularly. Where a company does not rely upon certain records for the performance of its functions, those records are not business records within the meaning of the exception of the hearsay rule

In finding that these reports of a social service agency were not business records, the Court observed that the reports appeared to have been compiled not for the benefit of the non-profit contractor, but for the benefit of the Allen County Office of Family and Children. The Court also noted that the reports included information that was not the result of firsthand observations and contained conclusory lay opinions.

The Court found that "unlike financial statements, inventory records, or other administrative or operational documents traditionally allowed under the business records exception," the reports in question appear to be substantive end products of a service offered by the contractor solely for an external government agency.

Lessons:

1. The Court has adopted a restrictive view of the business records exception.
2. Specifically, it now appears that to qualify as a business record, the document must be one that the business depends upon for the systematic conduct of its operations.
3. Don't overlook historical arguments. By relying on history, the Court confirmed its willingness in appropriate cases to go beyond the language of a rule of evidence in determining its scope.

5. Civility: IP Innovation LLC v. Thomason Inc. (S.D. Ind. 4/08/04)(Magistrate Baker)

In an unpublished entry to resolve several pretrial motions, Magistrate Judge Tim Baker took exception to what he called “a tone of incivility in plaintiff’s submissions.” Judge Baker criticized plaintiff’s counsel for comments like the following: accusing the defendant of making intentional misrepresentations in its filings, of ignoring and overlooking facts, and of engaging in “subterfuge”; asserting that defendant’s response “ignores key facts and distorts many others in an effort to dissemble and confuse the actual record”; contending that defendant makes “unsupported” “unfounded,” and “manufactured” claims; asserting that defense counsel “knows for a fact, that the claims he makes in defendant’s responding papers are incorrect”; accusing the defendant in making a “two-faced approach” to an issue; of advocating a position that is “especially duplicitous”; and of asserting a claim that is “nothing but a smoke screen”.

Judge Baker commented, “Accusations such as these are no trifling matter,” and indicated that, if true, opposing counsel could violate a number of rules of professional conduct. Judge Baker, however, viewed plaintiff’s attacks as not only improper, but wholly unfounded. “While the Court encourages attorneys’ strong advocacy for their clients, plaintiff’s accusatory and combative approach does not further this objective.... The undersigned expects civility and professionalism from the attorneys litigating cases before this Court. As a reminder to all attorneys of their duties in this regard, the Court will publish this opinion on its website with the expectation that it will be adhered to by members of the bar in the future.”

Lessons:

1. Ad hominem attacks are clearly out of order.
2. But what about asserting that an opposing argument is “unsupported” or “unfounded”? The chosen examples cover a wide swath.
3. If you choose to attack, make sure you have the goods.

6. Judicial Civility: Guchshenkov v. Ashcroft (7th Cir. 4/29/04)(Posner)

In this decision, the Seventh Circuit reversed decisions by the Board of Immigration Appeals denying asylum to a Russian from Kazakhstan and a Macedonian from Bulgaria. In reversing these decisions, Judge Posner had harsh words for the immigration judges, commenting as to one, “Her analysis fell far below the minimum required to support an administrative decision. It is one more indication of systemic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum.”

In a concurring opinion, Judge Evans offered a perspective not often heard in the Seventh Circuit: “I write separately to express my concern, and my growing unease, with what I see as a recent trend by this court to be unnecessarily critical of the work product produced by immigration judges.” Judge Evans noted that in other decisions, Seventh Circuit judges had written that the immigration judge displayed an “astounding lapse of logic,”: “the immigration judge’s opinion is riven with errors,”; the immigration judge’s analysis “was woefully inadequate.” Judge Evans expressed sympathy with the plight of the immigration judges and concluded: “This court should not be so quick to criticize their efforts.”

Lessons:

1. Lawyers are not the only recipients of disparaging words by some Seventh Circuit judges.
2. Judge Evans’ expression of concern and unease may be a sign of more temperance in judicial criticism in the future.

Query: Do the Seventh Circuit’s comments on the writing of immigration judges satisfy Magistrate Baker’s standard of civility?

7. Summary Judgment, Duty, Fraud, Economic Loss Rule: AUL Ins. Co. v. Douglas (Ind. Ct. App. (5/12/04)(Robb)

Employees of Computer Business Services, Inc. sued AUL for losses arising in the company’s 401(k) plan based on the purchase of an AUL group annuity contract. Plaintiffs asserted several causes of action, including fraud for failure to disclose all material facts by one on whom the law imposes a duty to disclose. AUL did not have a fiduciary relationship to plaintiffs but claimed to have special knowledge as to matters of tax planning. The court held that AUL has the kind of superior knowledge of a subject which invokes a duty of good faith and fair dealing with the purchaser of its products, including the duty to disclose the nature of the investment especially when it knew it was selling the product for placement in a 401(k) plan. Accordingly, the Court of Appeals upheld the trial court’s denial of a motion for summary judgment on the fraud claim for alleged lack of duty.

AUL also argued on appeal that the alleged misrepresentations or omissions were matters of opinion, not fact, and thus not actionable in fraud. Fraud requires a misrepresentation of a material fact; expressions of opinion cannot be the basis for

actual fraud. The Court of Appeals perceived, however, that the omission in question was not a matter of opinion but a statement regarding the tax deferral properties of the annuity. These properties are a matter of law, not a matter of opinion.

Ordinarily, a misstatement of law cannot form the basis of fraud because everyone is presumed to know the law. There is an exception to that general rule for misstatements of law made by someone professing knowledge in legal matters. This exception would extend to someone claiming an expertise in tax planning which was the case here. Thus, AUL could be held liable with respect to the alleged misrepresentations.

AUL also argued that it was entitled to summary judgment on the plaintiff's claim of negligence per se based on the economic loss rule. The economic loss rule applies to bar recovery where a negligence claim is premised on a product's failure to perform as expected and the plaintiff suffers only economic damages. If no physical harm occurs, courts deny recovery under a negligence theory. The economic loss doctrine, however, applies only to a claim of negligence when seeking recovery for economic loss to a product caused by a defect in the product. The appellate courts in Indiana have refused to extend the rule to preclude the recovery of economic loss in other actions for negligence. The rule was held to be inapplicable to claims made for negligence based upon AUL's violation of state statutory and federal regulatory law in selling its annuity product.

Lessons:

1. When alleging fraud, focus on **facts** that are omitted or misrepresented, rather than opinions.
2. A duty to disclose may arise not only in relationships involving a fiduciary but also in relationships where a party claims special expertise.
3. Although ordinarily a misstatement of law cannot be fraud, it may be if the misstatement is made by someone professing expertise on the law.
4. The economic loss rule will be limited to product liability cases.

8. Punitive Damages: Juarez v. Menard (7th Cir. 4/26/04)(Rovner)

While shopping at a Menards store, Juarez was struck by a falling steel door caused by Menard's employees who were stocking a high shelf. Juarez suffered severe permanent back and neck injuries, including four broken vertebrae in her back. Menards admitted negligence and Juarez won an award of \$385,000 in compensatory damages. The district court, however, granted summary judgment on her punitive damages claim and Juarez appealed.

In support of her claim for punitive damages, Juarez presented evidence of sixteen prior accidents that had occurred in the prior five years involving falling merchandise. Juarez also submitted an affidavit from one of the Menard's employees to the effect that employees had warned Menard's managers of the dangers of falling merchandise and had been prohibited from using employee-devised safety measures to reduce the risk.

Notwithstanding these circumstances, the Seventh Circuit finds that the evidence does not rise to a level sufficient for the award of punitive damages in Indiana. In reaching this decision, the Court observed: “The Indiana general assembly has demonstrated a disinclination toward allowing unchecked punitive damages awards by enacting legislation that limits the amount of money a plaintiff may receive from a punitive damages award and by requiring that the plaintiff establish the facts warranting an award of punitive damages by clear and convincing evidence rather than the usual preponderance of the evidence standard. Thus in Indiana, before a court may award punitive damages a plaintiff must demonstrate by clear and convincing evidence that the defendant acted with malice, fraud, gross negligence or oppressiveness that was not the result of mistaken fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing.”

A plaintiff may recover punitive damages in Indiana “only if he can show by clear and convincing evidence that the defendant engaged in conscious and intentional misconduct that he knew would probably result in injury.” What is required is “willful and wanton conduct or a quasi-criminal state of mind.” The Seventh Circuit concluded, as did the trial court, that the evidence here fell short of establishing the requisite “consciousness and intent--or quasi-criminal state of mind.”

Lessons:

1. If you are on the plaintiff side, come prepared with very strong evidence if you hope to survive a summary judgment motion on a punitive damages claim.
2. If you are on the defense side, a motion for summary judgment on punitive damages is probably worth filing in all but the most egregious cases.

9. Rule of Completeness: Walker v. Cuppett (Ind.Ct.App. 5/5/04)(Barnes)

In this auto accident case, the plaintiff offered into evidence certain medical records that were substantially redacted to delete references to a pre-existing history of neck pain. The defendant argued that the medical records should have been admitted without the redactions and the Court of Appeals agreed, concluding that the defendant should have been able to present the full unredacted medical records. Ind. Evid. R. 106.

The defendant argued that some of the redactions reflected opinions without proof of expert qualifications. As to this argument, the Court of Appeals found that the plaintiff had “opened the door” by submitting other opinions in the same medical records without proof of expert qualifications.

Lessons:

1. What’s good for the goose.
2. When you see a redaction of favorable stuff, immediately consider Rule 106.
3. Note: This rule authorizes admission of not only the rest of the document that has been proffered by the adverse party but “any other

writing or recorded statement which in fairness ought to be considered contemporaneously with it.”

10. Default Judgment: State Farm Mutual Automobile Ins. Co. v. Hughes (Ind. Ct. App. 5/7/04)(Darden)

A month after bringing a lawsuit, Hughes filed a motion for default judgment against an uninsured defendant. Three months later, Hughes’ attorney sent a copy of the complaint to State Farm and advised that Hughes was making an uninsured motorist claim. State Farm then filed a motion to intervene in the lawsuit. While the motion to intervene was pending, the court granted a default judgment on the issue of liability against Thomas. State Farm subsequently moved to set aside the default judgment. The motion was denied by the trial court but reversed by the Court of Appeals.

The Court of Appeals held, pursuant to Rule 60(b)(3), that the default judgment should be set aside based on “fraud, misrepresentation, or other misconduct of an adverse party.” The misconduct, on which the Court of Appeals relied, consisted primarily of the plaintiff lawyer’s failure to advise State Farm that he had filed the motion for default judgment against Thomas and failed to give notice to State Farm of the status hearing at which the default judgment was granted.

Lessons:

1. On the plaintiff’s side, if you wish to rely on a default judgment, be sure to give notice to persons that you know will be affected.
2. On the defense side, recognize that the notion of misconduct of an adverse party may include failure to give notice under circumstances where there may be no legal obligation to give such notice—the notion of “misconduct” in this context is a broad one.
3. A default judgment is not a “trap to be set by counsel to catch unsuspecting litigants.”

11. Appellate Procedure: Hughes v. King (Ind.Ct.App. 5/13/04) (Najam)

The Court of Appeals dismissed this appeal of a summary judgment ruling based on non-compliance with Ind. App. Rule 50. This rule sets forth the required contents of the appellant’s appendix, including “the chronological case summary for the trial court” and other documents “that are necessary for resolution of the issues raised on appeal.” Here the appellant failed to provide, among other things, a copy of the designated evidence the trial court considered in ruling on the summary judgment motion. Although appellees had filed at least some of this evidence, the Court of Appeals found the appendix to be inadequate so that dismissal of the appeal was warranted. The court also noted in a footnote that “without a copy of the chronological case summary from the trial court, we have no way of determining whether the parties statement of the case are accurate.”

Lessons:

1. When handling an appeal, pay close attention to the appellate rules.
2. When appealing a summary judgment motion, be sure to include the designated materials in the appendix.

12. Venue: Lake Holiday Conservancy v. Nicole Davidson (Ind.Ct.App. 5/10/04)(Barnes)

Pursuant to Indiana Trial Rule 75(a)(5), whenever a governmental organization is a defendant, there will be preferred venue in any county where one or more individual plaintiffs reside. Ordinarily, the plaintiff's county of residence will not establish preferred venue but it will when one of the defendants is a governmental organization.

Judge Crone writes in a concurring opinion that the result "creates a highly inconvenient and illogical result, one which is susceptible to abuse and an unnecessary increase in litigation costs. There is, however, no logical reasoning that would permit any other result." Note: This meant that a case arising in Montgomery County was held to be properly venued in Marion County.

Lessons:

1. The opportunities to get preferred venue in the plaintiff's county of residence may be broader than you think.
2. Any complaint about the equity of this situation should, as the Court of Appeals indicated, "be directed to the Supreme Court Committee on Rules of Practice and Procedure pursuant to Indiana Trial Rule 80."

13. Note: No Posting of Unpublished Decisions.

All Supreme Court opinions are published and available electronically. Many decisions of the Indiana Court of Appeals are not published and when not published, shall not be cited to any court and shall not be regarded as precedent. Indiana Appellate Rule 65(D). Unlike unpublished decisions in some other courts, these decisions are not posted electronically.

Advocacy Tip of the Month: Controlling a witness on cross-examination

In cross-examination, control of the witness should always be a primary concern. Control can be maximized by doing the following:

- Focus on facts (rather than opinions).
- Limit the question to a single fact.
- Select a fact that the witness has confirmed in prior statements.
- Use exactly the same words as in the prior statement.
- Record the precise location of the prior statement by page number in your notes.

- Ensure that the statement is accessible during the cross-examination.
- Impeach immediately when the witness changes his statement.