

INDIANAPOLIS LAW CLUB

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Advocacy Tip of the Month: Graduality

Legal News: Havoc in the Criminal Courts.

On June 24, 2004, in *Blakely v. Washington*, the U.S. Supreme Court, in a 5-4 opinion, held that the Sixth Amendment requires a jury to determine all facts used to enhance a sentence and must do so pursuant to a “beyond a reasonable doubt standard.” Accordingly, the Court, in an opinion by Justice Scalia, held unconstitutional sentencing procedures in the State of Washington by which the judge determined such facts by a preponderance of the evidence. Dissenters observed that this decision “affects tens of thousands of criminal prosecutions, including federal prosecutions” and would “wreak havoc on trial courts across the country.”

The predicted havoc has ensued with courts across the country having to make sentencing decisions under statutes and sentencing guidelines that appear inconsistent with *Blakely*. In *U.S. v. Booker*, a case argued on July 6 and decided on July 9, the Seventh Circuit (per Judge Posner) reversed a sentence imposed pursuant to the Federal Sentencing Guidelines as a violation of the Sixth Amendment in light of *Blakely*. The Court expedited its consideration of this issue because of an “avalanche of motions for re-sentencing” that have been filed in the wake of the *Blakely* decision. In dissent, Judge Easterbrook observed that this “decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this. Soon.”

1. Knowing and Negligent Misrepresentation in Employment References: Passmore v. Multi-Management Services, Inc., 810 N.E.2d 1022 (Ind. 6/29/04)(Shepard)

A nursing home hired a new worker in part on the basis of a favorable recommendation from his former employer. The worker allegedly assaulted a patient. Suit was brought on behalf of the patient against the former employer, alleging that the favorable recommendation misrepresented material facts about the qualifications and character of the former employee. The employer had received reports and rumors of misconduct by the employee but had not been able to verify them. The trial court granted summary judgment to the former employer and the Court of Appeals affirmed.

On transfer, the Indiana Supreme Court adopts Section 310 of the Restatement (Second) of Torts, recognizing tort liability for a conscious or knowing misrepresentation that results in physical harm. Previously, this tort was limited to situations where there was a direct relationship between the plaintiff and the defendant. Making new law, the Court extends the tort to employment recommendations where no such direct relationship exists.

The Court, however, declined to adopt Section 311 of the Restatement, refusing to recognize tort liability for a *negligent* employment recommendation that results in physical harm. The Court observed that such a rule would “lead universally to employer reluctance to provide any information other than name, rank and serial number. Only those employers dull-witted enough to issue free-wheeling assessments without calling their lawyers would supply any but the most rudimentary of information.”

The Court found that the evidence indicated potential negligence by the employer “but was not the stuff of knowing misrepresentation” and affirmed summary judgment for the employer.

Lessons: What is an employer to do?

- a. If your reference is bad one, there's a risk of a defamation claim—however, there is a qualified privilege.
- b. If your reference is a good one, there's now a risk of a misrepresentation claim; however, the standard is high.
- c. Name, rank and serial number is the safest course to avoid any litigation.
- d. Litigation is not the only interest at stake; nondisclosure of favorable employment information could hurt former employees.

Prediction: Further chilling effect on exchange of employment information.

2. Misappropriation of Trade Secrets; Vicarious Liability: Infinity Products, Inc. v. Quandt, 810 N.E.2d 1028 (Ind. 6/29/04)(Shepard)

Four days after Herbert Quandt was fired, he went to work for Fabri-Tech doing the same sort of work. In his new job, he used trade secrets from his prior employer including customer lists, pricing, blueprints, and specific needs of customers. Suit was brought for misappropriation of the trade secrets against both Quandt and Fabri-Tech. The trial court found that Quandt was liable for misappropriation under Indiana's Trade Secrets Act but rejected vicarious liability of his employer, Fabri-Tech.

By a 3-2 vote on an issue of first impression, the Supreme Court refuses to apply the common law doctrine of respondeat superior to misappropriation of trade secrets under the Act. A party is liable under the Act only if "it knows or has reason to know that the trade secret was acquired by improper means." The evidence was inadequate to satisfy this scienter requirement as to the relevant corporate actors at Fabri-Tech. Judgment affirmed.

In dissent, Justice Dickson (joined by Rucker) contends that an employer should be liable for wrongful acts done within the scope of employment and that the majority's holding is contrary to decisions in other jurisdictions which like Indiana, have adopted the Uniform Trade Secrets Act.

Lessons:

1. Respondeat superior is inapplicable in trade secret litigation.
2. The Indiana Trade Secret Act supplanted common law remedies for theft of trade secrets.
3. Uniform Acts are not enforced uniformly.
4. Check out the resources of the individual defendant before deciding whether to pursue trade secret claim.
5. Note: Attorneys fees are recoverable.

3. Juror Removal: Riggs v. State, 809 N.E.2d 322 (Ind. 6/3/04)(Boehm)

The defendant, Sterling Riggs, was tried and convicted of murder and criminal deviate conduct of a 15-year-old girl. A controversy arose during jury deliberations. The foreman reported to the judge that one juror had "become belligerent." It had not gotten physical but the juror had reached an opinion and refused to budge. The foreman

reported that deliberations had stopped and he was fearful of violence although he didn't think the jurors were "physically fearing" the belligerent juror." After further deliberations and some screaming in the jury room, the judge interviewed the belligerent juror who commented: "The head juror accused me of trying to defend the defendant and I'm not going to take that." The judge, expressing fear about what would happen if he returned the juror to the juror room, dismissed the juror and replaced him with an alternate. The jury then reached a verdict.

The Court of Appeals affirmed but the Supreme Court granted transfer and reversed, finding that the record was not sufficient to support removal of the juror. The Court admonished that "once deliberations begin, discharge of a juror is warranted only in the most extreme situations where it is necessary for the integrity of the process, does not prejudice the deliberations of the rest of the panel, and does not impair the parties' right to a trial by jury." The juror was rude and intransigent but there was not proof of physical threats, intimidation or other conduct to justify removal.

Lessons:

1. If you have a juror who may be troublesome and you want a verdict, seek removal before deliberations.
2. The standard for removal after deliberations begins is very high.
3. Make a good record of bias or improper conduct if you seek removal.

4. Juror Phone Calls: Pagan v. State, 809 N.E.2d 915 (Ind. Ct. App. 6/11/04)(Barnes)

Pagan was convicted of robbery with a deadly weapon. One of the arguments made on appeal was that the requirement for jury separation was violated when two jurors used their cell phones to make outgoing calls while deliberations were taking place, apparently in order to inform family members that they would not be home for dinner. The Court of Appeals agreed that the making of a phone call by a jury amounts to "a jury separation." The court also noted by statute the bailiff may "not permit any person to speak or communicate" with jurors after deliberations have begun.

Notwithstanding this violation, the Court of Appeals found no evidence of prejudice to defendant and did not require reversal of his conviction.

The Court added that there is a potential for improper outside influence by the availability of cell phones. Some cell phones even have internet capability. Judges should emphasize to jurors that they are not to have contact with outside persons during deliberations and that this includes cell phone communications.

Lesson: Cell phones usage should be addressed with jurors before deliberations begin.

5. Peremptory challenges: Phillips v. State, 809 N.E.2d 335 (Ind. Ct. App. 5/24/04)(Sullivan)

The trial court entered an order on voir dire stating: "At the conclusion of inquiry by each side, prior to passing the jury to opposing counsel, peremptory challenges shall

be exercised. Jurors then seated are to be deemed accepted if not challenged. The reason for this rule is to prevent one side being placed in the situation where it is using voir dire time, which is limited by the court, on a prospective juror which the other side has already passed, but actually intends to strike.” Defense counsel (with 10 peremptory challenges in this criminal case), after using all of his allotted 20 minute voir dire time, exercised three challenges. As these potential jurors were replaced in the box, counsel “passed” the jury. The prosecutor then voir dired the newly seated potential jurors. Defense counsel sought to exercise peremptory challenges on these jurors but the challenges were denied by the trial judge based on his prior “passing” of the jury. The Court of Appeals held that the denial was error. A party has the right to consider the other party’s voir dire before exercising its peremptory challenges. Conviction reversed.

Lessons:

1. Don’t exercise your peremptory challenges until you’ve heard the voir dire of your opponent.
2. Don’t use your full voir dire time on the first jurors in the box.

6. Negligent Infliction of Emotional Distress: *Ritchhart v. Indianapolis Public Schools* (Ind. App. Ct. 7/23/04)(Kirsch)

The plaintiff Sheila Ritchhart sued IPS for negligent infliction of emotional distress. The conduct that gave rise to the complaint involved an IPS bus driver who delivered the plaintiff’s three-year-old son to the wrong address. The son, Joshua, is blind, autistic and vulnerable to a variety of connective tissue disorders and grand mal seizures. Joshua was located by police about three hours after he was supposed to be home and returned to the plaintiff unharmed. The plaintiff was in tears over the incident and received psychological counseling. She also sued IPS.

The trial court granted summary judgment for IPS and Ritchhart appealed. The principal issue on appeal concerns the standards that have evolved to limit claims for negligent infliction of emotional distress. In Indiana these limiting tests have included:

- (1) impact rule—plaintiff had to suffer a physical injury to sustain an action for negligent infliction of emotional distress
- (2) modified impact rule—direct physical impact is required but does not need to involve physical injury; can be satisfied by a touching in the sense of a physical sensation—held to be satisfied when plaintiff pounded on the side of a truck to get driver to stop running over a companion. *Conder v. Wood*, 716 N.E.2d 432 (Ind. 1999).
- (3) Relative bystander rule—allowing claim when (1) there is a fatal injury or one so serious as to cause severe distress to the bystander, (2) plaintiff is a close relative of the primary victim, and (3) plaintiff witnesses the incident or the gruesome aftermath minutes after it occurs. No touching of the plaintiff is required. *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000).

Ms. Ritchhart's claim failed to meet any of these tests. Although plaintiff was a close relative (mother), her claim did not satisfy the other requirements of the relative bystander rule: (1) a serious physical injury (Joshua was uninjured) and (3) no part of the incident was witnessed by plaintiff.

There is also authority in Indiana for:

- (4) Direct involvement rule—In *Blackwell v. Dykes Funeral Home*, 771 N.E.2d 692 (Ind. Ct. App. 2002), parents sued a funeral home that had lost their son's remains. The court overturned summary judgment for the defendant even though the claim does not satisfy the requirements of the bystander rule in *Groves*. The court concluded in *Blackwell* that the claim satisfied the underlying rationale of *Groves* in that the claim of emotional trauma was "of a kind that a reasonable person would experience" and "is not likely speculative, exaggerated, fictitious or unforeseeable."

Court of Appeals in *Ritchhart* felt that *Groves* criteria controlled the analysis. In *Blackwell*, did not feel so constrained. No principled reason given for the distinction.

7. Want of Prosecution and Arbitration: Sharif v. Wellness International Network, Ltd. (7th Cir. 7/21/04)(Evans)

Suit arising from distributorship contracts. District Court (N.D. Ill.) denied defendants' motion to compel arbitration and dismissed for want of prosecution by plaintiffs. Both parties appealed. Seventh Circuit reversed both decisions.

Plaintiffs' counsel failed to appear at a status hearing on December 4, 2003. Four days later the district court issued a minute order dismissing the case for want of prosecution for failure to appear and for failure to explain their absence. The court also noted that counsel had failed to appear at a prior status call on October 20. Plaintiffs moved to vacate the dismissal, presenting evidence that neither counsel who represented plaintiffs had received notice of the December 4 hearing. The district court was unmoved but the Seventh Circuit found the sanction unduly harsh, particularly since plaintiffs' counsel had actively participated in the case.

The Seventh Circuit suggested that the district court, as a matter of common courtesy, should have contacted plaintiffs' counsel at the time of the hearing. In addition, the district court should have ensured that it had counsel's proper address. Even the order of dismissal was not sent by the court to plaintiffs' counsel; addressed instead to the client who had initially filed the suit pro se.

On the motion for arbitration, the district court had refused to consider the motion because there was a pending motion to dismiss for lack of venue. The Seventh Circuit holds that under the Federal Arbitration Act, a motion for arbitration takes priority and should be resolved regardless of a prior venue motion.

The plaintiff argued that the right to arbitration had been waived, relying on precedent that held a party had waived the right to arbitration when it removed the case to federal court. The Seventh Circuit, however, found no waiver in the filing of a motion to dismiss for lack of venue or in defendants' delay in filing the arbitration motion where there had been no removal, no discovery and no trial date had been set.

Plaintiffs also argued that their claims, when aggregated, exceeded the \$100,000 ceiling for claims subject to the arbitration clause. The Court held that plaintiffs could not aggregate their claims to avoid arbitration. Claims can be aggregated to establish diversity jurisdiction when multiple plaintiffs join together in a suit but not to avoid arbitration. The case was remanded with instructions to order arbitration.

Lessons:

1. Watch out for status calls in Chicago. Failure to appear can lead to dismissal.
2. Judges are encouraged to show common courtesy by calling lawyers who fail to appear.
3. Removal of a case to federal court can be a basis for finding waiver of an arbitration clause.
4. A motion for arbitration takes precedence over most other pretrial motions; it should be decided first.

8. Disclaimer of Implied Warranty: Wilson v. Royal Motor Sales (Ind. Ct. App. 7/20/04)(May)

Plaintiff Sandra Wilson bought a used Daewoo from Royal. The car had numerous mechanical problems and Wilson sent written notice to Royal revoking her acceptance of the car. She then sued for breach of implied warranty of merchantability.

Royal argued that it had disclaimed the implied warranty by language on the back of the Buyer's Order. Wilson argued from other language on the Buyer's Order which incorporated information on the window sticker of the car. The window sticker for an "As Is" sale was not marked but instead, a provision indicating "Warranty" was marked. Royal had typed in "Balance of Factory Warranty" on the window sticker indicating that a factory warranty still covered the car. The Buyer's Order, however, also explained that whether or not there was a manufacturer's warranty, Royal disclaimed any implied warranty of merchantability. This disclaimer was sufficiently clear and conspicuous to be an effective disclaimer.

Lessons:

1. An implied warranty of merchantability is often subject to a disclaimer.
2. A disclaimer on the back of a form may be sufficiently conspicuous to be enforceable, particularly if the buyer is required to sign under language indicating that she has read the back of the form.
3. Just because the window sticker says that a used car is protected by a warranty does not mean that any implied warranty of merchantability will apply.

9. Sealing Public Records: Bobrow v. Bobrow, 810 N.E.2d 726 (Ind Ct. App. 6/16/04)(Vaidik)

This case involved dissolution proceedings brought by Janet Bobrow against her husband, Richard, the global chief executive officer of Ernst and Young, one of the four largest accounting firms in the world. During the proceedings, eighteen exhibits were introduced into evidence that contained confidential trade secrets of Ernst & Young and

Cap Gemini (a French company that purchased Ernst & Young's consulting business). Ernst & Young and Cap Gemini moved to seal the records. The New York Times opposed the motion. The trial court denied the motion to seal, finding that the documents had become part of the public record of the proceeding and could not retroactively be sealed.

The Court of Appeals reversed. The court finds that under the Public Records Act, trade secrets and confidential financial information are mandatory exceptions to the general rule that public records should be disclosed. Indeed, public agencies are prohibited from disclosing such information unless access is specifically required by statute or is ordered by a court. The court finds that such records may be sealed before or after they are admitted into evidence. Accordingly, the court orders the 18 exhibits and transcript testimony about those exhibits to be sealed.

Richard Bobrow also argued that certain information he regarded as confidential be sealed. Bobrow, unlike Ernst & Young and Cap Gemini, was present during the hearing and stipulated to admissibility of this evidence. The right to seal can be waived and Bobrow was held to have waived his right to keep confidential information from being disclosed to the public.

Lessons:

1. Evidence purportedly in the "public record" can still be sealed.
2. Confidential financial information and trade secrets are particularly subject to protection.
3. Be vigilant in protecting such information; failure to make a timely request may waive protection.

10. Punitive damages against Decedent's Estate: Kemp v. Estate of Crabtree, 809 N.E.2d 433 (Ind. Ct. App. 6/2/04)(Bailey)

This case presented the question of whether punitive damages may be awarded against a deceased tortfeasor's estate. Here the tortfeasor had been driving while intoxicated and punitive damages would have clearly been available if he had survived. The principal issue presented is whether the tortfeasor's death precludes the award of punitive damages. The issue was one of first impression in Indiana.

The majority rule holds that punitive damages may not be recovered against a deceased tortfeasor's estate. One rationale for this rule is that since a primary purpose of punitive damages is to punish the wrongdoer, it would not apply if the wrongdoer has died. The Indiana Court of Appeals decides to follow the minority rule on this issue. The court finds that allowing punitive damages to survive against deceased tortfeasors would serve as a deterrent to others, and that deterring reprehensible conduct like drunk driving will advance the state's public policy interests. The court also justified its holding on the belief that there should be no difference in the legal treatment of tortfeasors who are seriously injured in an accident and those who die.

Lessons:

1. New Law: Punitive damages are available as a matter of law against the estate of a deceased tortfeasor.

2. When relying on the majority rule in a case of first impression, emphasize the reasons behind the rule. Indiana courts appear increasingly willing to take the road less traveled.

11. Res ipsa loquitur: Rector v. Oliver, 809 N.E.2d 887 (Ind. Ct. App. 6/10/04)(Sullivan)

Plaintiff Kera Rector entered Joe's Video and was struck on the head and shoulders when a light fixture fell from the ceiling of the store. Rector sued the owners of the store who moved for summary judgment. The motion was supported by evidence indicating that the owners never installed the fixture, that they never replaced or altered the fixture, that the fixture never appeared loose and no one had ever indicated to them that there was a problem with the fixture. The trial court granted the owners' motion for summary judgment and the plaintiff appealed. The primary issue on appeal is whether the doctrine of res ipsa loquitur supports an inference of negligence by the owners in these circumstances.

Res ipsa loquitur applies when the plaintiff establishes (1) that the injuring instrumentality was within the exclusive management and control of the defendant and (2) that the accident is of the type that does not ordinarily happen if those who have the management and control exercise proper care. In determining if the doctrine is applicable, the question is whether the incident more probably resulted from defendant's negligence as opposed to another cause. The doctrine of res ipsa loquitur does not mean that the plaintiff wins by default—it simply allows an inference of negligence to be drawn when direct evidence is lacking—the trier of fact may or may not draw the inference.

After analyzing numerous cases, the Court of Appeals finds that the circumstances here do give rise to an inference of negligence—specifically negligence in failing to discover the problem by reasonable inspection and maintenance or in permitting the light to become defective.

Lessons:

1. Whether res ipsa loquitur applies is a fact sensitive inquiry.
2. Check examples in the Restatement—the Court relied on a Restatement example of a piece of plaster falling from the ceiling in a hotel room.

Note: Wrigley Field may be next.

12. Fraud by Underage Drinker with False ID: Millenium Club, Inc. v. Avila, 809 N.E.2d 906 (6/11/04)(Sharpnack)

In January 2003, numerous underage persons entered the Millenium Club in South Bend, Indiana, produced false ID's and signed affidavits falsely attesting to being 21 years of age or older. The Indiana Alcohol and Tobacco Commission brought charges against the club for allowing the underage drinkers to gain access to the club's tavern. The club then filed small claims against each of the underage drinkers for fraud, seeking damages for their costs and attorney fees arising from the charges. The trial court granted the minors' motion to dismiss for failure to state a claim and the club appealed.

Under Indiana law, the club can only be fined by the IATC if it finds that the club did not sell alcohol to the minors “in good faith based upon the reasonable belief that the purchaser was actually of legal age to make the purchase.” If the club is found guilty and fined by the IATC, the finding would be a basis for defensive collateral estoppel on the issue of the club’s reasonable reliance upon the minors’ misrepresentations, a necessary element of any fraud claim. However, no such finding had yet been made by the IATC. The minors argued that in the absence of an adverse finding by the IATC, the club would have no damages. The claim, however, included attorney fees and other potential losses that the club could incur even if it was found innocent by the IATC.

The minors also argued that, as a matter of public policy, the claims should not be allowed because it would discourage tavern owners from being careful when checking the age of patrons. Other state courts had rejected similar claims on this public policy ground but the Indiana Court of Appeals refused to follow these precedents, finding a competing public policy in holding the minors accountable for their actions. If the club did not violate the law, it should be allowed to proceed with its claim against the minors. Thus, the dismissal by the trial court was reversed.

Lessons:

1. Fraud can be a viable claim even when there are reasons to be concerned about improper reliance on the misrepresentation.
2. Bars and liquor stores have a new weapon in addressing the false ID problem.
3. Indiana courts are sometimes bold in making new law in the face of out-of-state precedents to the contrary.
4. The appellate courts will not rely on published state trial court decisions. By footnote, the court refused to consider such decisions that had been cited by the parties.

13. Nonparty Defense; Default Judgment: McDillon v. Northern Indiana Public Service Co. (Ind. Ct. App. 7/21/04)(Vaidik)

NIPSCO sued McDillon for damage to its utility pole after it was struck by McDillon’s car. When McDillon failed to respond to the summons, NIPSCO obtained a default judgment. McDillon filed a motion to set aside the default judgment which was granted by the court and the case proceeded to a jury trial. At the trial, McDillon testified that his car had been stolen from a gas station while he was inside getting a cup of coffee. This testimony was corroborated by a police officer who took a stolen vehicle report from McMillon prior to the accident. The car thief was never identified.

In its instructions to the jury, the trial court indicated that the McMillon had to prove the name and identity of the nonparty thief in order to rely on his defense based on theft of the car. The Court of Appeals concluded that the nonparty instruction should not have been given. The “thief” defense went to proximate cause and did not necessarily raise a nonparty affirmative defense. The trial court should not have suggested to the jury that McMillon had to identify the thief in order to rely on his defense. Verdict reversed.

NIPSCO cross-appealed on the setting aside of the original default judgment. However, a ruling denying or granting relief on a motion to set aside a default judgment

is “deemed a final judgment and must be appealed within 30 days of the ruling.” NIPSCO’s cross-appeal was too late.

Lessons:

1. Be careful in asserting a nonparty defense. If you can’t identify the nonparty, consider withdrawing that affirmative defense before jury instructions. Argue the issue as one of proximate cause.
2. If you want to challenge an adverse default judgment ruling, do so promptly.

14. ADR: Smith v. Archer (Ind. Ct. App. 7/27/04)(Barnes)

Julie and Scott Archer sued Amy Smith for personal injury and property damage after Smith drove her car into the front of the Archers’ home. The case went to mediation. Present at the mediation were Julie Archer and her counsel for plaintiff and a State Farm adjuster and counsel for defendant. Amy Smith was not present. The case did not settle and Archers sought sanctions against the defendant on two grounds: (1) because Smith failed to appear at the mediation and (2) because State Farm and Smith’s attorney failed to negotiate in good faith. The trial court granted the motion.

On appeal, the Archers dropped the second ground which apparently had been premised on the contention that State Farm’s offer was too low to have been made in good faith. Such a contention is inconsistent with prior case law in the absence of evidence of “dishonest purpose or moral obliquity” which was not present here.

As to the first ground, the Court of Appeals acknowledged that Amy Smith’s failure to appear at the mediation was a technical violation of ADR Rule 2.7(B)(2) but was not a basis for a sanction because her absence had no effect on the mediation process. The Archers’ settlement demand was within State Farm’s policy limits and the Archers failed to show how Amy Smith’s presence would have facilitated the mediation process. Case reversed.

Lessons:

1. Generally, when a defendant is fully insured, it will not be necessary for the defendant to appear at a mediation. The party representative should be a person who bears the financial risk.
2. If there is some reason to want the named defendant present at a mediation, make the basis clear.
3. Don’t expect to get sanctions just because you’re unhappy with the amount of money being offered by the opposing party at a mediation.
4. Don’t expect to get sanctions for a mere technical violation—look for real prejudice.
5. Also, it’s bad form to seek sanctions for a technical violation when you’re guilty of the same violation. (Plaintiff Scott Archer also failed to appear at the mediation.)

15. Medical Malpractice Statute of Limitations for Minors: Ledbetter v. Hunter, 810 N.E.2d 1095 (Ind. Ct. App. 6/29/04)(Riley)

Trenda Ledbetter was born on November 25, 1974. On April 22, 1994, almost twenty years later, Trenda brought suit for medical malpractice, alleging that the attending physicians negligence triggered birth complications resulting in permanent physical and mental injuries. The trial court granted defendants' motion to dismiss based on the statute of limitations applicable to medical malpractice claims of minors.

In this decision, the Court of Appeals holds that this statute of limitations, as applied to minors, violates the Privileges and Immunities Clause of the Indiana Constitution. The record in the case failed to provide a reasonable basis for treating minors injured by medical malpractice differently than minor victims of other torts. Minor victims of other torts have until two years after their 18th birthday (when their legal disability is removed) to bring suit. Under the Medical Malpractice Act, minors must bring suit within two years of the injury or by their eighth birthday if injured in the first six years of life.

Defendants sought to justify this disparate treatment by the public interest in controlling malpractice insurance costs. The evidence adduced, however, failed to demonstrate that malpractice insurance carriers considered the impact of claims filed by minors in the calculation of premiums. The Court further held that Ledbetter had negated this and every other alleged reasonable basis for the challenged disparate treatment. The Court also found that within the class of minors injured by medical malpractice, not all minors are treated equally, with minors whose parents are neglectful being unfairly disadvantaged. Case reversed and remanded.

Lessons:

1. Minor claims previously thought to be outside the statute, may now be brought.
2. The Indiana Constitution continues to be vital source of new law, with interpretations that differ from the same language in the federal constitution.
3. Consider whether medical records should be retained longer than the seven years now mandated for hospitals—since lawsuits may now be initiated up to 20 years after the malpractice when the patient is a minor.

Advocacy Tip of the Month: Graduality

The arrangement of facts and points can make a crucial difference. Consider the principle of graduality. Instead of starting with a conclusory point, think about taking the listener one small step at a time and leading the listener gradually to the conclusion you want. For example, you could immediately elicit an opinion from a witness that the driver appeared to be drunk. Alternatively, the point might be made more persuasively by starting with these kinds of details: Jones went to Sam's bar at 5:30 p.m. He ordered a beer, then another, and another. He continued drinking at the bar until 2:00 a.m. When he left the bar, his eyes were bloodshot. His speech was garbled. He smelled of booze. He stumbled as he opened the door to his car. He looked drunk to me. By taking small steps first, the listener will more readily accept the conclusion when it is offered.