

INDIANAPOLIS LAW CLUB

FEBRUARY 24, 2005

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INDEX

1. Class Action Fairness Act (2/18/05)
2. Class Actions: Indiana Business College v. Hollowell, 818 N.E.2d 943 (Ind. Ct. App. 11/24/04)(Darden)
3. Class Actions—Carnegie v. Household International, Inc., 376 F.3d 656 (7th Cir. 7/16/04)(Posner)
4. Class Actions--Smith v. Sprint Communications Co., L.P., 387 F.3d 612 (7th Cir. 2004) (Evans)
5. Medical malpractice—statute of limitations--Levy v. Newell (Ind. Ct. App. 2/10-05)(Hoffman)
6. Contempt and Damages--City of Gary v. Major (Ind. S. Ct. 2/10/05) (Rucker)
7. Law Enforcement Immunity--Patrick v. Miresso (Ind. Ct. App., Jan. 31, 2005)(Crone)
8. Economic Loss Doctrine—Gunkel v. Renovations, Inc. (Ind., Feb. 1, 2005)(Boehm)
9. Privity and Implied Warranty of Merchantability—Hyundai Motor America, Inc. v. Goodin (Ind., Feb. 22, 2005) (Boehm)
10. Product Liability; Presumption Arising from Compliance with Government Standard—Schultz v. Ford Motor Co. (Ind. Ct. App. Feb. 21, 2005)(Kirsch)
11. Modified Impact Rule; Bystander Rule—Delta Airlines v. Cook (Ind. Ct. App., Oct. 19, 2004 and Jan. 20, 2005) (Najam)
12. Nonparty Negligence of a Mother—Witte v. Mundy (Ind., Jan. 6, 2005) (Boehm)

13. Mitigation; Expert Witness—Willis v. Westerfield (Ind. Ct. App., Nov. 17, 2004)(Vaidik)

14. Spousal Privilege—Glover v. State (Ind. Ct. App., Nov. 5, 2004)(Barnes)

Advocacy Tips of the Month: Comments from Judge Richard Posner

1. Class Action Fairness Act: Signed into law by President Bush on February 18, 2005.

- **Expands Federal Court Jurisdiction.**

Class actions. The bill expands diversity jurisdiction to include class actions in which the matter in controversy exceeds \$5 million (aggregated class claims) and any class member is a citizen of a state different from any defendant; or any class member is a citizen of a foreign state and any defendant is a citizen of a state; or vice versa.

Mass actions--The bill also treats mass actions as class actions where there are more than 100 plaintiffs and each plaintiff seeks more than \$75,000 in relief. This is intended to plug the loophole of mass actions being filed to avoid class action rule.

Home State Exception--The court shall decline jurisdiction if more than 2/3 of the class members are citizens of the state in which the action was originally filed and the primary defendants are citizens of that state.

Local Controversy Exception--The court shall decline jurisdiction if more than 2/3 of the class members are citizens of the state in which the action was originally filed, at least one significant defendant is a citizen of that state, and the principal injuries were incurred in that state, and no other class action based on the same allegations has been filed during the previous 3 years.

Discretionary Federal Jurisdiction--The federal court has discretion to decline jurisdiction if between 1/3 and 2/3 of class members are citizens of the state in which the action was originally filed.

Removal--An exception to the one-year limitation on removal is made for class actions. The Act allows defendants who are residents of the state to remove. It also allows removal by one defendant without the consent of all defendants.

Appeal of Removal--Unlike the usual rule, the bill also allows appeal of a district court's decision to remand a class action suit to state court. The bill provides for a very expedited appeal. The Court of Appeals must rule within 60 days. The court is allowed one 10-day extension. If no ruling within the time limit, the appeal is deemed denied.

- **Additional Scrutiny of Settlements**

Net Loss Recovery Settlements—May be approved only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

Coupon Settlements--The bill requires that in all coupon settlements the court determine that the settlement is fair, reasonable, and adequate. The bill reforms attorney's fees by providing that contingent fees in coupon settlement cases will be based on the

value of coupons actually redeemed, not the coupons distributed. In a coupon settlement if the value of coupons is not used to determine attorney's fees, the fee shall be based on the amount of time expended. The court may use a lodestar with a multiplier method to determine fees and may award a fee for obtaining equitable relief, including an injunction.

- **Protection against discrimination based on geography**--The bill prohibits a larger recovery to class members because they live closer to the court.
- **Notification to State and Federal Government Officials**--The bill also requires class action defendants to notify appropriate state and federal officials (the attorney general or relevant regulatory agency) of any proposed class action settlement. A court may not give final approval of any settlement until 90 days after this notification.
- **Effective Date**—Act shall apply to civil actions commenced on or after the date of enactment (Feb. 18, 2005). Will not apply to previously pending cases.
- **Report on Best Practices.** The Act requires the Judicial Conference of the United States to prepare a report within twelve months recommending best practices to ensure that settlements are fair and best practices on awarding attorney's fees.

Comments: The Act is a major victory for the opponents of nationwide class actions. It will keep many cases out of state court venues like Madison County, Illinois. In most federal courts, judges set a higher bar for certification of a nationwide class. This may not be the death knell for nationwide class actions, but they will be diminished. Note: No federal appellate court has approved a nationwide class action based on state law claims. Expect more statewide class actions and more MDL activity coordinating cases in many jurisdictions.

2. Class Actions: Indiana Business College v. Hollowell, 818 N.E.2d 943 (Ind. Ct. App. 11/24/04)(Darden)

Plaintiffs, graduates of the Medical Coding program of Indiana Business College, brought a class action for common law fraud against the college based on misrepresentations about accreditation of the program and that it would qualify graduates for employment. The trial court certified a class consisting of at least 840 persons and IBC appealed.

IBC requested special findings of fact and conclusions of law on the certification motion. There was, however, no evidence presented at the certification hearing. Plaintiffs relied on the factual allegations of the complaint and a deposition of a witness that was attached to the motion for certification. Defendants proffered no evidence of its own. Trial Rule 52(a) requires a motion for findings and conclusions to be made prior to the admission of evidence. Since no party offered any evidence after the motion, the Court of Appeals found IBC's argument based upon the absence of evidence to support the findings to be "disingenuous and, therefore, unpersuasive."

The court proceeded to analyze each of the criteria for class certification under Trial Rule 23(A), finding:

- (1) Numerosity was satisfied by evidence indicating that more than one hundred plaintiffs were involved.
- (2) Commonality was established based on a common nucleus of operative fact and a common course of conduct.
- (3) Typicality was satisfied since the plaintiffs were graduates of the Medical Coding program at IBC and had claims typical of the class.
- (4) Adequacy was established by the fact that the named representatives had a sufficient interest to ensure vigorous advocacy and their counsel were experienced trial attorneys with some experience in class action matters.

The Court also found that the action satisfied the predominance requirement of Trial Rule 23(B)(3) (i.e., common questions of law and fact predominate over individual questions) and that a class action was superior to other methods for the fair and efficient adjudication of the controversy.

IBC argued that it had not been given proper notice that certification was being sought under Trial Rule 23(B)(3) since the motion for certification had referred to 23(B)(2). The Court found this to be “an inadvertent scrivener’s error” and of no consequence.

Lessons:

- To get findings and conclusions, you need to offer evidence.
- Scrivener’s errors will be overlooked (at least sometimes).

3. Class Actions—Carnegie v. Household International, Inc., 376 F.3d 656 (7th Cir. 7/16/04)(Posner)

The District Court certified a plaintiff class of 17 million borrowers of refund anticipation loans, with interest rates exceeding 100%, arranged by their tax preparers. The tax preparers allegedly violated federal mail and wire fraud statutes by leading their customers to think they were fiduciaries like lawyers and accountants when they were engaged in self-dealing. Defendants took a 23(f) appeal of the class certification.

On the issue of manageability of this huge class, Judge Posner states: “The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.”

The case had been to the Seventh Circuit once before and the Court had reversed the approval of a proposed class action settlement. Defendants previously argued in favor of certification of a settlement class but now were arguing against certification of a litigation class. The prior argument came back to haunt defendants. In *Buford v. H&R Block*, 168 F.R.D. 340 (S.D. Ga. 1996), the court concluded that a RICO claim was not appropriate for class treatment. On the first appeal, defendants had argued that *Buford* was wrongly decided. Because of that prior argument, defendants were held estopped to

argue that *Buford* was right on this appeal. The Seventh Circuit finds that the RICO claim is appropriate for class certification and affirms.

Lessons:

- Seventh Circuit is not always hostile class actions.
- Defendants must be careful what they argue in support of a settlement class; if the settlement is disapproved, defendants' position may be weakened.

4. Class Actions--Smith v. Sprint Communications Co., L.P., 387 F.3d 612 (7th Cir. 2004) (Evans)

This case concerned Sprint's laying of fiber optic cable in railroad easements without getting permission from adjacent landowners. The Seventh Circuit reversed the district court's approval of a settlement class on the ground that the class representative's representation was inadequate. The same court had previously reversed certification of a nationwide litigation class on the ground that numerous property deeds at issue and state laws regarding railroad easements would lead to "a nightmare of a class action."

Isaacs v. Sprint Corp., 261 F.3d 679 (7th Cir. 2001).

The court now accepted that settlement removed the management problems it identified in *Isaacs*, but noted that classes had been certified for trial in Kansas and Tennessee. In Tennessee, landowners had already established liability and demonstrated that trespass may justify punitive damages, and the upper limit on the nationwide settlement would result in recovery about 1/10 of that estimated in the Tennessee case. The court determined that the national class was "disarmed" by not being able to threaten a trial, and that class members would be better off in state classes.

The court rejected the class representative's argument that members would be protected by the settlement plan to adjust recovery based on property law in each state, as determined by a panel of law professors. It stated: "Law professors are no substitute for proper class representatives."

In dissent, Judge Cudahy suggested that if the majority's approach "had been applied to the construction of the first transcontinental railroad, the Pony Express might still be galloping along." Judge Evans retorted that "the Pony Express might well be still galloping along if class-action lawyers were on the prowl in the 1830's."

Lessons:

- A disarmed class representative is not an adequate representative for a well-armed subclass.
- Nationwide classes are subject to landmines of many kinds; statewide classes have fewer risks.

5. Medical malpractice—statute of limitations--Levy v. Newell (Ind. Ct. App. 2/10-05)(Hoffman)

Dr. Levy performed gall bladder surgery on Tracey Newell on April 5, 2001. Newell had sufficient information by October 2001 to know that the surgery was

negligently done but did not bring suit until May 13, 2003, 2 years and a month after the surgery and 14 months after discovery of the malpractice. Levy argued that the case was brought too late, in violation of the two-year statute of limitations.

In deciding the issue, the court applied the three-step analysis established in *Jacobs v. Manhart*, 770 N.E.2d 344, 352 (Ind. Ct. App. 2002). Step one requires determining when the alleged malpractice occurred and thus, when the occurrence-based two-year statutory period expired. Second, the court must determine when the “discovery date” occurred, that is, when the plaintiff actually discovered the alleged malpractice or possessed sufficient information to make such a discovery. And third, if the discovery date falls within the two-year limitation period, then a third stage of analysis must be applied to determine “whether the time which remains of the limitation period is reasonable rendering the occurrence based statute of limitation constitutional as applied.”

Applying the third stage of analysis here, the court determined that 14 months from the discovery date to the end of the statutory period did not deny Newell a meaningful opportunity to pursue the malpractice claims. The motion for summary judgment was granted.

Lesson: Do not rely on the “discovery rule” when the “statutory period” has not run.

6. Contempt and Damages--City of Gary v. Major (Ind. S. Ct. 2/10/05) (Rucker)

The Mayor and the City Council in Gary had a long-time dispute over who could control the awarding of towing contracts (for towing illegally parked cars). The City Council passed an ordinance requiring its authorization but the Mayor wanted to enter into contracts on his own. The towing companies not favored by the City Council sued, claiming that the decision to enter into towing contracts was an executive function for the Mayor and that the ordinance violated the statutory separation of powers. The trial court agreed with the towing companies and declared null and void all towing contracts entered by the City Council. The court also ordered the Mayor to establish a fair procedure for awarding towing contracts. There was no appeal of this order.

Several months later the towing companies moved to hold the City in contempt for failure to comply with the court’s order. The court granted the motion, found the City in contempt and ordered the City to pay the Towing Companies \$150,000 in damages. On appeal, the City did not challenge the jurisdiction of the trial court, which is one potential basis for challenging a contempt finding. The City was legally precluded from arguing that the underlying order was erroneous on the merits—that is not a basis for challenging a finding of contempt. The City argued that there was insufficient evidence to show that it had willfully violated the prior order but the Supreme Court disagreed—finding that the City had not established the required fair procedure for awarding of towing contracts. Accordingly, the Court upheld the contempt finding.

The Supreme Court, however, set aside the finding of \$150,000 in damages. It found no basis in the record to support damages in this amount and in the absence of such evidence found this award of damages to be an abuse of discretion.

Lessons:

- You must obey even an erroneous ruling of a court or risk being held in contempt.
- Damages awarded to a plaintiff for contempt of court must be supported by evidence just like other damages.

7. Law Enforcement Immunity--Patrick v. Miresso (Ind. Ct. App., Jan. 31, 2005)(Crone)

Patrick, a Gary police officer, was pursuing a suspected burglar in his marked police car. Witnesses said he did not have his siren or flashing lights on and was running a red light when he collided with Miresso's vehicle. Miresso sued, relying on a state statute that requires the driver of an emergency vehicle to slow down as necessary when running a red light. Patrick and the City of Gary sought refuge under the Tort Claims Act immunity for enforcement of a law.

The Court of Appeals concluded "that the legislature did not intend to 'sanction negligent and reckless conduct, and [cause] hardship to the individual injured by the enforcement. To the extent that Indiana Code Section 34-13-3-3(8) [the law enforcement immunity provision] conflicts with Indiana Code Section 9-21-1-8 [the duties of a driver of an emergency vehicle], we hold that Indiana Code Section 9-21-1-8 prevails. Consequently, Appellants are not entitled to law enforcement immunity under the ITCA under these circumstances. The trial court did not err in denying Appellants' motion for summary judgment."

Note: The opinion provides a detailed analysis of the law on governmental immunity. Judge Crone suggests that the traditional public/private duty analysis for determining the scope of governmental immunity has been implicitly overruled by the Indiana Supreme Court.

8. Economic Loss Doctrine—Gunkel v. Renovations, Inc. (Ind., Feb. 1, 2005)(Boehm).

The Gunkels contracted with Renovations, Inc. for the construction of a \$435,000 three-story residence in Fremont, Indiana. Six months later, J & N Stone, Inc. was hired to install a stone and masonry exterior on the home. Shortly after the stone façade was installed, water began to enter through gaps in the façade and substantial moisture problems arose. The Gunkels claim that walls, ceilings, floors, drywall, carpet, and carpet padding were damaged due to defects in the stone façade installed by J&N. The Gunkels sued both Renovations and J&N. J&N denied that it had a contract with the Gunkels. The central question presented in the trial court and on appeal was whether the damages to the residence were recoverable by the Gunkels against J & N on a negligence theory or were precluded by the economic loss doctrine.

In a carefully written opinion, Justice Boehm concluded: "We hold that damages recoverable in tort for a defective product or service are governed by the "economic loss" doctrine whether or not the product or service is supplied in a transaction subject to either the Products Liability Act or the Uniform Commercial Code, or both. Under the doctrine, physical injuries and damages to other property are recoverable in tort, but

damages to the defective product itself are not. Whether damaged property is “other property” turns on whether it was acquired by the plaintiff as a component of the defective product or was acquired separately.”

The Court of Appeals held that here the “product” is the entire house on which the stone façade was installed. Under this view, the damage caused to other parts of the house by the alleged defect in the façade is damage to the product itself and is barred by the economic loss rule. The Supreme Court disagreed. “The economic loss rule does not bar recovery in tort for damage that a separately acquired defective product or service causes to other portions of a larger product into which the former has been incorporated. The product or service purchased from J & N was the façade added to the exterior of the Gunkels’ home by J & N. Therefore, the economic loss rule precludes tort recovery for damage to the façade itself, but tort recovery for damage to the home, and its parts, caused by the allegedly negligent installation of the façade is not limited by the economic loss rule.”

Lesson:

- If your sole cause of action is a tort, you cannot sue a defendant for damage to its own product. Your remedy for that loss is contract only.
- But Note: The Supreme Court took a narrow view of what the product was, allowing a greater recovery than the Court of Appeals had sustained.

9. Privity and Implied Warranty of Merchantability—Hyundai Motor America, Inc. v. Goodin (Ind., Feb. 22, 2005) (Boehm)

Goodin bought a Hyundai Sonata from AutoChoice, an Evansville dealer. The car had mechanical problems and Goodin sued Hyundai. The jury found in favor of Goodin on her claim of breach of implied warranty of merchantability and awarded damages of \$3,000 and \$19,237.50 for attorney’s fees pursuant to the fee-shifting provisions of the Magnuson-Moss Warranty Act. The Court of Appeals reversed the verdict relying on a footnote in a prior case that stated “privity between the seller and buyer is required to maintain a cause of action for implied warranties of merchantability.”

After another thorough analysis by Justice Boehm, the Supreme Court concludes that Indiana law does not require privity between a consumer and a manufacturer for breach of the manufacturers’s implied warranty of merchantability.

Lesson:

- Even though you don’t have a contract with defendant (or privity), a consumer can sue on contract-type theory of implied warranty of merchantability for contract-type damages (economic loss—the difference between the value of the good accepted and the value it would have had if it had been as warranted).

10. Product Liability; Presumption Arising from Compliance with Government Standard—Schultz v. Ford Motor Co. (Ind. Ct. App. Feb. 21, 2005)(Kirsch)

Schultz was rendered a quadriplegic in a Ford Explorer rollover accident. Schultz sued Ford, alleging the design of the vehicle's roof was defective. Ford defended by claiming that the roof design complied with Federal Motor Vehicle Safety Standard 216. Ford requested and received an instruction that follows Indiana Pattern Jury Instruction 7.05(D) to the effect that "if you find that the product complied with applicable standards approved by an agency of the United States, then you *may presume* that Ford Motor Company was not negligent in its design of the 1995 Ford Explorer and that the Ford Explorer was not defective. However, the Plaintiffs may rebut this presumption if they introduced evidence tending to show that the 1995 Ford Explorer was defective."

Ford won a defense verdict at trial and Schultz appealed. The Court of Appeals determined that this instruction was given in error and required reversal. Specifically, the Court was persuaded that the instruction improperly addressed the notion of presumption. I.C. 34-20-5-1 creates a rebuttable presumption that a product is not defective and the manufacturer is not negligent if the product complies with a government safety standard. This presumption, however, serves only to relieve the defendant of having to prove absence of defect and absence of negligence—issues on which the defendant never had a burden of proof to begin with. It is the plaintiff who has the burden and if the plaintiff comes forward with evidence of defectiveness and negligence, the presumption is rebutted and goes away. As a matter of law, the presumption has no practical effect. It may be important for summary judgment but not for trial.

The jury could have been instructed that evidence of compliance with a governmental standard creates a *permissive inference* that a product is not defective. But the Court of Appeals concludes that it was improper to instruct as to a *presumption*.

Lessons:

- Pattern instructions are not always safe.
- Presumptions fall away if rebutted and have no effect thereafter.

Note: This appears to be a case likely to get the attention of the Indiana Supreme Court since it disapproves of language in a pattern instruction. Also, the Court of Appeals does not provide specific alternative instruction language that would be acceptable.

11. Modified Impact Rule; Bystander Rule—Delta Airlines v. Cook (Ind. Ct. App., Oct. 19, 2004 and Jan. 20, 2005) (Najam)

The Cooks were passengers on a Delta flight from Indianapolis to New York City, on Feb. 8, 2002, about four months after 9/11. Girard, another passenger on the flight, engaged in erratic behavior and when confronted by a flight attendant and other passengers, said: "Get Back! World Trade Center! Americans! New York City!" and began muttering in French. The Cooks who were among the passengers that confronted Girard, asserted a claim for negligent infliction of emotional distress against the airline

and others. The airline argued that the course of conduct did not satisfy the Impact Rule, since the Cooks were never physically touched by Girard; and did not satisfy the Bystander Rule since they did not witness the death or severe injury to a loved one.

In its initial decision in this case, the Court of Appeals rejected the airline's argument that the Impact Rule required dismissal of the claim. Upon rehearing, the Court affirmed, finding:

(1) The Impact Rule as modified allows a claim absent a physical impact as long as an alleged traumatic incident would reasonably be expected to result in emotional injury to someone directly involved in that incident.

(2) To the extent that a degree of physical impact is required, the Cooks have satisfied the modified impact rule by alleging "physical changes" as a result of the defendants' alleged negligence. Cook described the following physical changes he experienced during his confrontation with Girard: his "pulse increased, heart rate increased, adrenaline rushed, palms became sweaty, his breathing increased, and his senses became very acute." Physical change is "good enough" to satisfy the modified impact rule.

Lesson: The Impact Rule has now been so modified that it can be satisfied in virtually any traumatic circumstance.

12. Nonparty Negligence of a Mother—Witte v. Mundy (Ind., Jan. 6, 2005) (Boehm)

A child and her mother sued when the child was struck by the defendants' car. On the eve of trial the mother moved to dismiss her claim. The trial court granted the motion to dismiss but denied the defendants' motion to add the mother as a nonparty for purposes of comparative fault. The Court of Appeals held that she was a non-party and the Supreme Court agreed.

Here, the trial court instructed that: "Children . . . less than the age of seven may not be assessed any fault for their action[s], even if those actions proximately caused their injury or damages. Should you find that Kristin Mundy was negligent, you cannot hold Mikayla Mundy responsible for the negligence of her mother."

It is one thing to say a child under age seven is "incapable of judgment or discretion" and therefore, as a matter of law, cannot be negligent. It is another thing to conclude that an adult's negligent supervision cannot be a contributing cause to the child's injury relieving a third party of some or all liability.

The definition of nonparty was amended in 1995 to define a "nonparty" as "a person who caused or contributed to cause the alleged injury, death, or damage to property but who has not been joined in the action as a defendant." I.C. § 34-6-2-88 (2004). This provision was presumably chiefly designed to permit employers of injured workers to be named as nonparties even though under workers' compensation law they have no tort liability to a worker injured by accident on the job. . . . As the Court of Appeals has held, the comparative fault statute "no longer requires that the nonparty be liable to the plaintiff, but only that he or she have caused or contributed to the cause of the plaintiff's injury. . . . This reasoning applies to parent-child immunity just as it does to workers' compensation. The basic point of the statute is that a defendant should be

required to compensate an injured party only in proportion to the defendant's fault. . . . Despite her immunity from suit by her child, the defense should have been permitted to name Kristin as a nonparty to permit the jury to determine whether her negligence contributed to the accident.

Lesson: Immunity from liability will not preclude a person being named as a non-party, regardless of the basis of the immunity.

13. Mitigation; Expert Witness—Willis v. Westerfield (Ind. Ct. App., Nov. 17, 2004)(Vaidik)

At trial, Westerfield did not present his own medical expert to establish that Ann Willis failed to mitigate her damages. Nor did he elicit any testimony from the Willises' medical expert that Ann aggravated or increased her injuries by failing to follow the course of treatment he prescribed. Recent cases have established the requirement that there be expert testimony that the plaintiff's injuries have been aggravated or increased before a jury may be instructed on the affirmative defense of failure to mitigate damages. *See Wilkinson v. Swafford*, 811 N.E.2d 374, 384 (Ind. Ct. App. 2004) (holding that the trial court abused its discretion by instructing the jury on mitigation of damages where there was no expert medical testimony that the plaintiff's failure to follow up in a timely manner, her decision not to have surgery, her decision not to have a nerve root block, and her lack of cooperation during a diagnostic exam aggravated or increased her injuries).

In light of the case law and the dearth of expert medical testimony that Ann's sporadic course of treatment aggravated or increased her injuries, the Court of Appeals found that the trial court erred in instructing the jury on the affirmative defense of failure to mitigate damages and remanded for a new trial as to damages only.

14. Spousal Privilege—Glover v. State (Ind. Ct. App., Nov. 5, 2004)(Barnes)

The State charged Glover with Gibbs' murder in October 2002 and listed his wife as a State's witness on the charging information. In June 2003, Glover filed a motion to suppress Bobbie's testimony pursuant to the spousal privilege codified at Indiana Code Section 34-46-3-1. The trial court denied the motion after a hearing. Specifically, the court found that the only purpose of the Glovers' marriage was to assist Bobbie, who immigrated to the United States from India in 1999, to remain in this country legally. . . . In light of the nature of the more than one-hundred-year-old statutory privilege and its well-established exceptions, we decline the State's request to follow federal law and create a "fraudulent" marriage exception to the spousal privilege. Such a creation is best left to the legislature.

Advocacy Tips of the Month:

From Judge Richard Posner:

“My advice for lawyers practicing before me and my colleagues is threefold: always explain the purpose of a rule that you want us to apply in your favor, because the purpose of a rule delimits its scope and guides its application; always give us practical reasons for the result you are seeking; and don't overestimate the knowledge that an appellate judge brings to your case, because we have very little time to prepare for argument in depth, and the breadth of jurisdiction of the federal courts is such that we cannot possibly be experts in all or most of the fields out of which appeals arise.”

“Amicus curiae briefs are for the most part a complete waste of time and a complete waste of the amici's money. If an amicus curiae has some distinctive information or perspective to contribute to the consideration of the appeal, fine, but 99 out of 100 times the amicus curiae briefs filed with our court rehash the arguments in the brief of the party whom the amicus is supporting.”