

INDIANAPOLIS LAW CLUB

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IN THE NEWS: A JUDICIAL PAY RAISE--FINALLY

“After eight years without a pay raise, Indiana's judges and prosecutors are a signature away from getting hefty salary increases courtesy of criminals and others who use the state's court system.

Legislation on its way to Gov. Mitch Daniels would create a new court fee to pay the \$14 million cost of the raises, which are deemed critical to keeping good lawyers working in the public sector. Daniels plans to sign it, a spokeswoman said.

The raises range from 16 percent for Supreme Court justices to 23 percent for trial court judges, prosecutors and deputy prosecutors. That equates to pay raises up to \$20,500.

Members of the state's high court will see their salaries increase July 1 to \$133,600 from \$115,000; appeals court judges will go to \$129,800 from \$110,000; and trial judges and prosecutors will go to \$110,500 from \$90,000. * * *

The legislation also protects judges and prosecutors from another lull in pay raises by tying future increases to those granted to state employees in similar salary brackets. The cost of the raises would be born by users of the court system. A new \$15 fee would be imposed on most people convicted of crimes and on any filing in civil or probate court under House Bill 1113, which already has advanced to the governor's office.”

-- Indianapolis Star 04/26/05

1. Spoliation--Gribben v. Wal-Mart Stores, Inc. (Ind. 3/22/05)(Dickson)

Magistrate Judge V. Sue Shields certified to the Indiana Supreme Court the following question: “Does Indiana law recognize a claim for ‘first-party’ spoliation of evidence; that is, if an alleged tortfeasor negligently or intentionally destroys or discards evidence that is relevant to a tort action, does the plaintiff in the tort action have an additional cognizable claim against the tortfeasor for spoliation of evidence?”

First-party spoliation refers to spoliation by a party to the principal litigation and third-party spoliation refers to spoliation by a non-party.

After a careful review of cases and considerations pro and con, the Supreme Court holds: No, there is no independent cause of action for first party spoliation of evidence.

The Court finds that although there are important considerations favoring an independent tort for spoliation, these are outweighed by the disadvantages. The Court seemed particularly persuaded by decisions in California where the tort was initially recognized and then overturned based on experience indicating that the burdens exceeded the benefits.

The Court condemns intentional spoliation but concludes that sanctions for first-party spoliation will be limited in Indiana to: (1) permitting an inference that the spoliated evidence was unfavorable to the party responsible; and (2) sanctions under Trial Rule 37(B) including, (a) ordering that designated facts be taken as established (b) prohibiting the introduction of evidence; (c) dismissal of all or any part of an action; (d) rendering a judgment by default against a disobedient party, and (e) payment of reasonable expenses including attorney fees. The destruction of evidence may be

prosecuted criminally as a Class D felony for obstruction of justice. If done by an attorney, it also may be the subject of a disciplinary action and subject to sanctions up to and including disbarment.

Lessons:

1. There is no independent tort for first-party spoliation of evidence in Indiana.
2. There are many other sanctions for first-party spoliation.
3. Indiana may still recognize a tort for third-party spoliation of evidence. The Court did not reach this question. Alternative remedies are more limited in the third-party context.

2. Mitigation of Damages/ Footnote Style--Kocher v. Getz (Ind. 3/30/05)(Dickson)

In this vehicle accident case, the defendant admitted that he failed to yield the right-of-way but contended that the plaintiff had failed to mitigate damages by seeking replacement part-time employment. Defendant asked the trial court to give an instruction that would have permitted the jury to consider mitigation of damages for purposes of fault allocation. Fault is defined in the Comparative Fault Act to include “unreasonable failure to mitigate damages.” The trial court refused the proposed instruction but the Court of Appeals found the refusal was error.

On transfer, the Supreme Court vacated the Court of Appeals opinion, finding that mitigation is not to be considered in making the allocation of fault. Mitigation is properly considered only as to the amount of recoverable damages. Its only effect is to prevent the recovery of those damages which reasonable care would have prevented.

The language about mitigation in the Comparative Fault Act was construed to refer only to conduct *before* an accident or initial injury, such as the failure to slow down to avert an accident after observing a defendant run a stop sign.

In this opinion, Justice Dickson adopts a new style of citation and footnote use which he explains as follows: “All citations unessential to the text are placed in footnotes and substantive matter that otherwise might appear in footnotes is included in the text.” This style follows the footnote recommendations of Bryan Garner in *The Winning Brief*, 139-47 (2d ed. 2004). It is not supported by Judge Posner. Richard A. Posner, *Against Footnotes*, 38 Court Rev. 24 (Summer 2001).

The Supreme Court invites comment on the new style to be sent to the Supreme Court Administrator.

Lessons:

1. A plaintiff’s failure to mitigate (after initial injury) cannot be used to increase the plaintiff’s percentage of fault—language in the Comparative Fault Act to the contrary notwithstanding.
2. Consider moving cites from the text and putting them into footnotes.

Postscript: *Sherry Wall v. City of Brookfield* (7th Cir. 4/27/05) (Judge Posner)(loss of animal companionship for 60 days)

3. Medical Malpractice/ Wrongful Death--Chamberlain v. Walpole (Ind. 2/24/05)(Boehm)

Walpole's father died following surgery for a hernia repair. Walpole alleged that the doctors involved had committed malpractice and sought damages for loss of the love, care, affection and services of his father. The Wrongful Death Act does not authorize recovery of such non-pecuniary damages when, as here, the decedent had no spouse or dependent children. Walpole argues that notwithstanding lack of authority in the Wrongful Death Act, the Medical Malpractice Act should be interpreted to create such a remedy.

Although there is language in the act that could arguably be interpreted in this fashion, the Supreme Court refuses to so hold, finding that the Medical Malpractice Act does not create new substantive rights or create new causes of action. Rather, the Act merely creates new procedures that must be followed when pursuing claims for medical malpractice that are otherwise recognized under tort law or applicable statutes.

Lesson: The Medical Malpractice Act does not expand the types of damages a non-dependent child may recover when a parent dies of medical malpractice.

4. Unfair Competition—Keaton and Keaton, P.C. v. Keaton & Keaton (Ind. Ct. App. 4/7/05) (Felts)

Keaton and Keaton has been a law firm in Rushville since 1971. In 2002 brothers Mark and Paul Keaton formed the firm of Keaton & Keaton in Fort Wayne. After a couple of incidents where the two firms had been confused, the Rushville Keaton firm sued the Fort Wayne Keatons for unfair competition—arguing that the use of an essentially identical name by the Fort Wayne Keatons has a natural and probable tendency to deceive the public. The trial court granted the Fort Wayne Keatons' motion for summary judgment based on the absence of evidence of any intent to deceive.

On appeal, the Rushville Keaton firm contended that it need not prove intent to deceive. Prior case law had established that in order to obtain damages, proof of intent to deceive was required. The Rushville Keaton firm had withdrawn its request for damages and sought only equitable relief. The Court of Appeals held that in order to maintain a cause of action for unfair competition, some level of intent to deceive must be present even when damages are not being sought. Here there was no evidence that the Fort Wayne Keatons had passed off their services as being the work of or related to the Rushville Keaton firm and summary judgment was affirmed.

Lesson: Intent to deceive is required to maintain an unfair competition claim.

Note: I.C. 23-1-23-1(b)(1) would preclude the Fort Wayne Keatons from establishing a P.C. in the name of Keaton & Keaton since corporate names must be distinguishable from the corporate name of a corporation or other business entity authorized to transact business in Indiana.

Rule 7.2 of the Rules of Professional Conduct might provide a remedy if the Disciplinary Commission were to conclude that the use of the same name is inherently misleading or deceptive.

5. Wrongful Death--Horn v. Henderson (Ind. Ct. App. 3/29/05)(Najam)

Brittany Horn was six-months pregnant and involved in a car accident. Her unborn fetus died in the accident and Horn sued for her own injuries and for the wrongful death of the unborn fetus. The trial court dismissed the child wrongful death claim and Horn appealed.

In *Bolin v. Wingert*, 764 N.E.2d 201 (Ind. 2002), the Supreme Court held that only children born alive fall under Indiana's Child Wrongful Death Statute. In *Bolin*, what was at issue was an eight-to-ten-week-old fetus. Horn argued that a different result should follow if the fetus is viable, as was alleged here. The Court of Appeals agreed that a different result should follow but constrained by the ruling in *Bolin*, affirmed the dismissal. Judge Najam, however, wrote a lengthy opinion urging the Supreme Court to reconsider and limit *Bolin*.

Judge Najam opined that statutory history indicates that the legislature intended to permit recovery for the death of viable unborn children. This conclusion was based on application of the rule of statutory construction that in construing a particular statute, related statutes are *in pari materia* and should also be considered to effectuate legislative intent. He regarded as an anomaly that, by Indiana statute, it is an act of murder to intentionally kill a fetus that has attained viability but that *Bolin* says a viable fetus is not an "individual" to which the wrongful death statute applies.

Judge Najam further concluded that the *Bolin* ruling, when applied to a viable fetus, violates Article I, Section 23 of the Indiana Constitution, the Equal Privileges and Immunities Clause. He found no inherent distinction between parents of a child born alive and parents of a viable unborn fetus to justify giving the first parents a cause of action in the event of tortious death while denying a cause of the action to the second.

Judge Mathias dissented, noting that this is a case for application of the doctrine of legislative acquiescence. The General Assembly has failed to act to modify *Bolin* during four legislative sessions since the ruling. Judge Mathias believes that this kind of policy decision is up to the legislature, not the courts.

Lessons:

1. There may yet be a cause of action recognized for wrongful death of an unborn but viable fetus. The Arkansas Supreme Court changed its mind in a nearly identical context.
2. The *in pari materia* rule of statutory construction applies to require consideration of statutes that address the same subject and to try to harmonize them if possible.
3. The doctrine of legislative acquiescence, arising from the separation of powers, suggests that once the court has interpreted a statute and the legislature has chosen not to overrule this interpretation, that ruling should stand.

6. Successor liability; nonprofit board immunity--Rodriguez v. Tech Credit Union Corp. (Ind. Ct. App. 3/29/05) (Baker)

Catalina Rodriguez was terminated from her job as General Manager of the LTV Steel Employees Credit Union (“LTV”). Tech Credit Union (“Tech”) then merged with LTV and the surviving credit union did business as Tech. Rodriguez sued Tech and the LTV board members for breach of and tortious interference with contract. The trial court granted summary judgment in favor of both defendants and Rodriguez appealed.

The Court of Appeals first held that, as result of the merger, Tech, as the surviving corporation, succeeded to LTV’s liabilities and obligations. Tech attempted to argue that it was just an assets sale but the transaction document repeatedly referred to the deal as a merger.

The Court held secondly that the directors were not liable based on the immunity given to volunteer directors under the Nonprofit Corporations Act when exercising business judgment in good faith. The court cited considerable evidence in the record indicating that Rodriguez had performed poorly in her job and that the board members had exercised their business judgment in good faith when they terminated her.

The Court then summarily found that since the Board Members committed no wrongdoing, LTV had also committed no wrongdoing and accordingly affirmed the judgment below.

Lessons

1. If you don’t want to assume the liabilities of an acquired business, don’t call the transaction a merger. Structure the deal as a sale of assets.
2. Board members of a nonprofit corporation have statutory immunity unless “they have not exercised their business judgment in good faith, with the care of an ordinarily prudent person, in a manner reasonably believed to be in the best interests of the corporation, and the breach or failure to perform constitutes willful misconduct or recklessness. Ind. Code § 23-17-13-1.”

7. Res Ipsa Loquitur—Ross v. Olson (Ind. Ct. App. 4/20/05)(Bailey)

During knee replacement surgery, James Ross’s popliteal artery was severed. In a subsequent medical malpractice trial against the doctor who severed the artery, Ross requested an instruction on the doctrine of *res ipsa loquitur*, to the effect that “the act speaks for itself” creating an evidentiary presumption of negligence. The court denied the request and on appeal, the Court of Appeals reconsidered the question of whether this conduct was sufficient to invoke the *res ipsa* doctrine.

The court reviewed prior decisions where *res ipsa* was found to be appropriate in a medical malpractice context: *e.g.*, where the physician operated on the wrong limb; where surgical padding was left in the intestinal tract; and where the patient’s oxygen mask caught fire. This case, however, was deemed to be different. This was not a case where the physician’s conduct was so substandard that expert testimony was unnecessary to recognize the breach of the applicable standard of care.

Lessons:

1. The unintentional severing of an artery during surgery is a known complication of some surgeries which may result even when a surgeon exercises due care.
2. Some acts that seem to speak clearly for themselves to a layman are not so clear to an expert.
3. If a qualified medical expert has opined to the contrary, you're probably not going to get a *res ipsa* instruction. (Here, the medical review panel unanimously concluded that there was no violation of the standard of care.)

8. Judicial Estoppel--Skinner & Broadbent Construction Co. v. Old Fort, LLC (Ind. Ct. App. 4/25/05)(Kirsch)

In a prior bankruptcy proceeding, Old Fort, LLC made representations about setoffs that were relied upon by the court. The members of the LLC in this state court proceeding took an allegedly different and inconsistent position as to the setoffs. (Note: The owners of an LLC are called "members.") The Court of Appeals held that, pursuant to the doctrine of judicial estoppel, Old Fort's members would be bound by the representations of the LLC, precluding these individuals from taking a different position in the subsequent case. "Because the bankruptcy court relied upon Old Fort's allegations in making its decision to sell the assets, Old Fort's members cannot now deny those allegations or claim otherwise in this proceeding."

Judge Baker dissented, finding that judicial estoppel applies only to the party who makes an assertion and does not extend to different parties. In particular, since members of an LLC are not personally liable for the debts of the LLC, he does not believe that they should be judicially estopped from asserting a position contrary to that taken by the LLC.

The majority found that under the circumstances here, the LLC and its members should not be regarded as different parties, but as one and the same. In support of this position, the majority relied upon a comment in the Restatement (Second) of Judgments, §59(3), "For the purpose of affording opportunity for a day in court on issues contested in litigation, however, there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct. On the contrary, it may be presumed that their interests coincide and that one opportunity to litigate issues that concern them in common should sufficiently protect both."

Lessons:

1. For purposes of judicial estoppel, individuals who own or control a closely held business entity may find themselves personally bound by representations made by the entity.
2. When taking a judicial position for an entity, consider potential implications that might affect the interests of individual owners.
3. The corporate veil provides less protection than you might have thought.

9. Bad Faith--Cain v. Griffin (Ind. Ct. App. 4/26/05)(Baker)

Cain was injured in a slip and fall accident at the Griffins' restaurant. Cain sued the Griffins and then amended her complaint to sue the Griffins' insurer, Auto-Owners, for breach of its alleged duty to act in good faith and deal fairly with her. Summary judgment was granted to Auto-Owners and Cain appealed.

The Court of Appeals held that under Indiana law, Auto-Owners has no duty to deal in good faith with an injured third-party like Cain. The duty of good faith extends only to the insured.

Judge Sharpnack dissented, opining that Cain qualifies as a third-party beneficiary under the medical payments provision of Auto-Owners's policy. This provision required Auto-Owners to pay medical expenses of third-parties "regardless of fault." In support of his dissent, Judge Sharpnack cited to *Donald v. Liberty Mutual Ins. Co.*, 18 F.3d 474 (7th Cir. 1994), in which the Seventh Circuit, applying Indiana law, held that an injured plaintiff was a third-party beneficiary under a similar medical benefit provision of a Liberty Mutual policy.

In Indiana, the general rule is that an injured person cannot sue the tortfeasor's insurance company directly. Indiana is not a "direct action" state. The Seventh Circuit indicated in the *Donald* case that "the concept of direct action applies when an injured party seeks to sue the insurer directly to recover sums for which the insured would otherwise be liable in tort." The Seventh Circuit found that this concept does not apply when a third party beneficiary sues under an insurance policy that provides for medical payments to an injured third-party "regardless of fault," since the claim does not depend on whether the insured would be liable in tort. Judge Sharpnack, in dissent, finds that analysis persuasive and believes that Cain had the right to sue Auto-Owners directly for breach of contract and for breach of the duty of good faith.

Lessons:

1. Generally, an insurer has no duty to deal in good faith with an injured party who has a claim against its insured.
2. For now, this rule applies to third-party medical payment claims for which the insured may be liable "regardless of fault" by its insured.
3. In light of the contrary view of Judge Sharpnack and the Seventh Circuit, this issue may not be finally resolved.

10. Oral contract--Zimmerman v. McColley (Ind. Ct. App. 4/26/05)(Najam)

Ed and Opal McColley were injured in a car accident. They asked their granddaughter (not a lawyer) to deal with Auto-Owners Insurance Company regarding settlement. After settlement offers for \$65,000 and \$75,000 had been rejected by the McColleys, a claim representative for Auto-Owners Insurance asked the McColleys granddaughter, if they would settle for \$115,000. The granddaughter, after checking with the McColleys, said, "Yes, we'll take it" and asked for details about handling of the settlement check and releases. The claim rep then indicated that the \$115,000 would be paid as a structured settlement, which the McColleys rejected. The McColleys petitioned to enforce the settlement, which the trial court did.

The principal issue on appeal was whether an enforceable contract had been created by the oral exchange between the granddaughter and the claim rep. The claim rep testified that her question was not an offer, but part of negotiations preliminary to making an offer. She said she never intended to make a lump-sum \$115,000 offer (she only had authority to \$75,000), so there could have been no meeting of the minds. The Court of Appeals held that the claim rep's subjective intent makes no difference. A contract was created by the words that were used, indicating a known intent. When the granddaughter said, "Yes, we'll take it", there was an enforceable oral contract.

The court also held that it made no difference that the claim rep did not have actual authority to make the \$115,000 offer. Auto-Owners made the claim rep their sole negotiator, giving her apparent authority sufficient to bind the company.

If it had been an attorney who had made the offer without authority, the result would likely have been different. The rule as to attorneys is that a client will not be bound to a settlement agreement negotiated by the attorney unless the client has first consented to the terms. *Gravens v. Auto-Owners Ins. Co.*, 666 N.E.2d 964 (Ind. Ct. App. 1996).

Lesson:

1. Strive to be clear when discussing settlement. Avoid statements that can be construed as an offer, if that is not your intent.
2. If there are conditions that you want on your offer (like a structured payment schedule or confidentiality), express them as a part of the offer. You probably won't be able to add them later.

11. Class Actions --Associated Medical Networks, Ltd. v. Lewis, (Ind. 3/31/05) (Dickson)

Plaintiffs were non-network medical care providers who sued Anthem and affiliated companies for payment of medical bills pursuant to assignments executed by patients. Anthem refused to recognize the assignments and instead paid the bills by making direct payments to patients. The trial court granted class certification and the Court of Appeals agreed, finding that questions common to the class predominate over individual issues because the case involved a common nucleus of operative facts. For certification under Trial Rule 23(B)(3), the court must find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

The Supreme Court reversed, rejecting a line of cases that had found predominance to be established if there was a common nucleus of operative facts. Instead, the Supreme Court held that predominance requires a pragmatic assessment of the entire action and all the legal and factual issues involved. Factors to be considered include: whether the substantive elements of class members' claims require the same proof for each class member; whether the resolution of an issue common to the class would significantly advance the litigation; and whether the common questions are central to all members' claims.

The common course of conduct asserted here—Anthem's practice of paying patients, rather than non-network providers—was found to be irrelevant to the issues of

proof in the causes of action asserted and establishing this common question, the Court concluded, would not advance this litigation in any respect. The Court perceived that no economy of time, effort or expense would be achieved by pursuing the claim as a class action.

Lessons:

1. The predominance requirement is no longer satisfied by a common nucleus of operative facts.
2. In lieu of the prior bright-line test, there are now a variety of factors to be considered which look to whether class treatment would achieve economy of time, effort or expense.
3. Some class actions will be harder to get certified.

12. Negligent Entrustment—Davidson v. Bailey (Ind. Ct. App. 4/26/05)(Friedlander)

Bailey was injured in a motor vehicle accident caused when Davidson drove Thornberry's car into the rear of a truck. Davidson was intoxicated; his BAC was .248%. Bailey sued Davidson and also sued Thornberry on a negligent entrustment theory. The jury found Davidson 80% at fault, Thornberry 10% at fault, and awarded punitive damages against both.

An element of a claim for negligent entrustment is that the defendant must have "actual and specific knowledge" that the person to whom the car is being entrusted "is incapacitated or incapable of using due care at the time of the entrustment."

Thornberry claimed that she had no knowledge of Davidson's intoxication. There was, however, evidence that she was with him for over three hours immediately prior to the accident during which they had been at a bar and Davidson had done some drinking. (Thornberry said it was very little). Given the extent of intoxication, the court held this evidence to be sufficient to support the required knowledge for negligent entrustment.

It was also sufficient for the jury to conclude that giving Davidson the keys to her car was "an intentional act done with reckless disregard of the natural and probable consequences of injury" and would support punitive damages.

Lesson: Consider a negligent entrustment claim when the driver at fault is not the owner.

13. Trade Secrets/Preliminary Injunction—U.S. Land Services, Inc. v. U.S. Surveyor, Inc. (Ind. Ct. App. 4/26/05)(Sharpnack)

Surveyor sued Land Services and two former employees for violating the Indiana Uniform Trade Secrets Act and for breach of noncompete agreements. The trial court granted a preliminary injunction in favor of Surveyor and defendants appealed. The trial court based its ruling on the trade secret claim while finding that the noncompete agreements were probably not enforceable.

Defendants argued that the customer, prospect and surveyor lists at issue were not trade secrets because they were readily ascertainable by proper means through trade publications, the yellow pages and the internet. The Court of Appeals disagreed, finding evidence that some of the information was not available at all in the public domain.

The Court further observed, based on prior case law, that the phrase “not being readily available” is ambiguous and “where the duplication or acquisition of alleged trade secret information requires a substantial investment of time, expense, or effort, such information may be found ‘not readily ascertainable.’” On this point, Judge Baker dissented, finding that the customer information was readily ascertainable from public sources.

The Court of Appeals affirmed the injunction to the extent it prohibited defendants from contacting surveyors or customers identified on Surveyor’s secret lists. The injunction, however, went too far in prohibiting defendants from operating a survey management and coordination business, and to that extent, the injunction was reversed.

Lessons:

1. In the absence of an enforceable noncompete agreement, consider a trade secret claim to obtain the desired injunctive relief.
2. Trade secrets may include information in the public domain if it takes some effort to compile it.
3. You might be able to enjoin a business from operating at all (a “production injunction”) to protect trade secrets but only if there is an “inextricable connection” between the business and the protected information. Usually, you will only be entitled to a “use injunction”—protecting against use of the trade secrets.

NOTE: *See also, Coleman v. Vukovich* (Ind. Ct. App. 4/12/05)(Vaidik)(holding that customer information was not a trade secret where business took insufficient steps to keep the information confidential).

14. Juror Misconduct--*Rector v. State of Indiana* (Ind. Ct. App. 4/20/05)(Sullivan)

In this criminal case, a juror brought a booklet into the jury room during deliberations and showed it to other jurors. The booklet, entitled “Citizen’s Rule Book,” could be “mildly described” as libertarian in tone with anti-communist and religious references. It included the Declaration of Independence, the Constitution of the United States and other text which described the historic right of the jury to determine the facts and the law and encouraged jury nullification. Upon learning of this, the judge excused the juror and replaced him with an alternate over the objection of the defendant.

The trial in this case occurred prior to the decision by the Indiana Supreme Court in *Riggs v. State*, 809 N.E.2d 322 (Ind. 2004), where the Court held that removal of a juror during deliberations “should be accompanied by an instruction that removal in no way reflected approval or disapproval of the views expressed by the juror.” Here, although no such instruction was given, the Court declined to apply *Riggs* retroactively since it was not a constitutional rule.

Lessons:

1. Watch out for the “Citizen’s Rule Book.”
2. When considering removal of a juror during deliberations, recognize as *Riggs* requires:
 - removal should only be done in the “most extreme” situations to protect the integrity of the process;
 - a complete record of the basis for removal must be made; and
 - the jury should be instructed that removal indicates no approval or disapproval of the views of the juror.

15. Oral Contract/ Attorney Liability for Litigation Expenses—Kelly v. Levandoski (Ind. Ct. App. 4/18/05)(May)

Stanley Levandoski, a towing service operator, towed a van from an accident scene. Tim Kelly was hired as counsel by the van owners. Kelly told Levandoski to “hold onto” the van because Kelly needed it for legal purposes and asked him to send Kelly a copy of the bill. Kelly told Levandoski he would be paid when the case was over. The van was stored for four years and the final bill was \$18,827.00. When Kelly refused to pay the bill, Levandoski sued Kelly and won a jury verdict in the amount of his bill. Kelly appealed.

Kelly argued that no contract was formed by his exchange with Levandoski. The court disagreed, finding that an offer can reasonably be inferred from the request to hold the van, to send a copy of the bill to Kelly, and promising payment at the end of the case. Levandoski’s act of sending the bill to Kelly was sufficient to establish acceptance of the offer.

Kelly argued further that if there was an obligation to pay, it was his clients’ obligation, not his as the attorney. The court found guidance in prior case law holding an attorney personally responsible to pay expenses incurred in litigation that were requested by the attorney, such as court reporter’s charges, in the absence of an express disclaimer of personal liability by the attorney.

Judgment affirmed.

Lessons:

1. In representing a client, a conversation to preserve evidence may become an oral contract for storage.
2. If you’re requesting services for a client, be prepared to pay for it out of your pocket unless you expressly disclaim personal liability.

16. Consolidation/Joinder—Bodem v. Bancroft (Ind. Ct. App. 2/28/05) (Sullivan)

Rebecca Bancroft was involved in two auto accidents about four months apart. Both were rear-end collisions and both resulted in shoulder and back injuries. Bancroft filed separate lawsuits and then moved to consolidate the cases for trial. The trial court granted the motion to consolidate and defendants brought an interlocutory appeal.

Consolidation under Trial Rule 42 is allowed when there is a common question of law or fact. Although the cases involved accidents on different days at different places with different defendants, there was a common question of fact as to the injuries sustained by Bancroft. Accordingly, it was within the trial court's discretion to consolidate the cases for trial.

But Note: It would not have been possible to obtain joinder of these defendants in a single case under Trial Rule 20 (governing permissive joinder). Rule 20 has the additional requirement that the claim arise out of the same transaction or occurrence or series of transactions. *Grove v. Thomas*, 446 N.E.2d 641 (Ind. Ct. App. 1983) (rejecting joinder of two defendants who were involved with the same plaintiff in accidents on the same day).

Lesson: Even when you can't join defendants in a single action under Trial Rule 20, consolidation pursuant to Trial Rule 42 provides another means to the same end.

17. Civil contempt/court costs/ attorney fees—Nance v. Miami Sand & Gravel, LLC (Ind. Ct. App. 4/14/05)(Barnes)

Miami Sand & Gravel obtained a judgment against John and Georgia Nance and other defendants for trespass, conversion, contempt of court, costs, attorney's fees and a permanent injunction. The Court of Appeals found numerous errors by the trial court, reversing virtually every finding against the Nances. As to many of these errors, Miami failed to even present a cogent argument in defense of the trial court's ruling.

The trial court awarded Miami \$20,000 for civil contempt. Damages awarded to a party for civil contempt must be based on evidence of actual damages incurred by the party due to the offending party's contemptuousness. There was no such evidence of record, requiring reversal of this ruling.

The trial court awarded Miami "costs" under the conversion statute, including costs of \$17,754 for installing scales at a gravel pit, \$3352 for deposition expenses and \$564 for mediation expenses. Under the law, however, the only recoverable "costs" are costs of the action, meaning only filing fees and statutory witness fees, and reasonable costs of collection. The award of costs was reversed except for \$104 in court costs.

The trial court also awarded attorney's fees of \$77,388, purportedly pursuant to the conversion statute, but these fees were incurred on the entire litigation and the conversion claim represented but a small fraction of the matter. There was no evidence of record allocating or separating the fees incurred on the conversion claim. In the absence of such evidence, the Court of Appeals reversed.

Lessons:

1. When asking for an award for civil contempt, present evidence of actual damage to support it.
2. When suing for conversion along with other theories, be detailed in recording your time to facilitate proof of what portion to allocate to the conversion count.
3. Thank God for appellate courts.

Advocacy Tips of the Month:

Clarence Darrow: “The main work of a trial attorney is to make a jury like his client.”

Daniel Webster: “The power of clear statement is the great power of the bar.”