

# INDIANAPOLIS LAW CLUB

JULY 28, 2005

By Ronald J. Waicukauski

Price Waicukauski Riley & DeBrotta, LLC  
301 Massachusetts Ave., Indianapolis, IN 46204

[rwaicukauski@price-law.com](mailto:rwaicukauski@price-law.com)

317-633-8787

## INDEX

Legal News: New Supreme Court Nomination

1. Adverse Possession: Fraley v. Minger (Ind. 6/20/05)(Dickson)
2. Voir Dire: Black v. State (Ind.Ct.App. 6/21/05)(Crone)
3. Statutory Construction/License Plate Location: Merritt v. State (Ind. 6/17/05)(Dickson)
4. Malicious Prosecution: Crosson v. Berry (Ind.Ct.App. 6/15/05)(Sharpnack)
5. Bad Faith/Punitive Damages: Monroe Guaranty Ins. Co. v. Magwerks Corp. (Ind.6/29/05)(Rucker)
6. Extensions of Time: Ramos v. Ashcroft (7<sup>th</sup> Cir. 6/15/05)(Easterbrook)
7. Res Ipsa Loquitur/Exclusive Control Doctrine: Balfour v. Kimberly Home Health Care, Inc. (Ind.Ct.App. 7/12/05)(Najam)
8. Paternity: In the matter of the Paternity of H.J.B. (Ind.Ct.App. 6/14/05)(Vaidik)
9. Breach of Warranty/Contractual Time Limits: New Welton Homes v. Eckman (Ind. 6/28/05)(Shepard)
10. Preferred Venue: Monroe Guaranty Ins. v. Berrier (Ind.Ct.App. 5/13/05)(Bailey)
11. Preferred Venue: Swift v. Pirnat (Ind. Ct. App. 6/3/05)(Riley)
12. Freedom of Speech: In the matter of U.M. v. State (Ind.Ct.App. 5/26/05)(Hoffman)
13. Excited Utterance/Testimonial Statement: Hammon v. State (Ind. 6/16/05)(Boehm)
14. Excited Utterance/Right of Confrontation: Fowler v. State (Ind. 6/16/05)(Boehm)

15. Breach of Contract to Sell Goodwill/Tortious Interference with Business Relationship: Rice v. Hulsey (Ind.Ct.App. 06/09/05)(Sharpnack)
16. Intentional Interference with Contract/Fraud: Bilimoria Computer Systems v. America Online (Ind.Ct.App. 6/14/05)(Bailey)
17. Liability for Recording of Phone Calls: Dommer v. Dommer (Ind.Ct.App. 6/10/05) (May)
18. Scientific evidence: faked left syndrome: Smith v. Yang (Ind.Ct.App. 6/23/05)(Najam)
19. Motion to Correct Error/Motion for New Trial: Garrison v. Metcalf (Ind.Ct.App. 6/9/05)

Litigation Tip of the Month: Federal Pattern Instructions

## IN THE NEWS

### John Roberts, from Indiana, nominated for Supreme Court.

- "If you ask John where he's from, he says Indiana." *Indianapolis Star*. July 20, 2005.
- If confirmed, he will be the sixth sitting judge to attend Harvard Law School (Souter, Stephen Breyer, Antonin Scalia, and Anthony Kennedy all graduated from Harvard Law School, while Ruth Bader Ginsburg attended there for two years).
- A veteran appellate attorney, Roberts has argued 39 cases before the Supreme Court, both in private practice and as deputy solicitor general during the elder Bush's administration.
- "The New York Times profile poured across the front page to two more full pages inside without uncovering one single person who knew Roberts and had a harsh word to say."
- Jeffrey Toobin: "He is an intellectual heavyweight. There's no doubt about it. He is one of the most accomplished Supreme Court advocates of his generation."
- But Roberts has not been invincible. Once, when the Supreme Court shut Roberts out 9 to 0 in a commercial case, the clients were ranting about the result. "How could we lose 9-0?" they kept demanding. Roberts responded: "Because there were only nine Justices."

#### 1. Adverse Possession—*Fraley v. Minger*, 829 N.E.2d 476 (Ind. 6/20/05)(Dickson)

Clarence Fraley owned the title to a 2.5 acre parcel of undeveloped rural land in Ripley County that lies adjacent to a 24 acre farm owned by Clarence and Eva Minger. For several decades, the Mingers used the 2.5 acre parcel to pasture cattle, camp, hunt, and ride dirt bikes. They installed a culvert in a ditch on the parcel and sold timber from the parcel. Then, they brought suit to quiet title based on adverse possession. The trial court ruled in favor of the Mingers.

After granting transfer, the Indiana Supreme Court issued a lengthy decision that clarifies adverse possession law in several respects:

- (1) Holds that to establish adverse possession, the applicable standard of proof is "clear and convincing." Prior opinions had phrased the heightened standard in many different ways.
- (2) Synthesizes and rephrases the elements required to prove common law adverse possession as follows:
  - a. Control—The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land.
  - b. Intent—The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner.
  - c. Notice—The claimant's actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant's intent and exclusive control.
  - d. Duration—The claimant must satisfy each of these elements continuously for the required period of time (ten years).
- (3) Enforces the adverse possession tax statute to the extent of requiring "substantial compliance." This 1927 law requires that the claimant "shall have paid and discharged all taxes and special assessments of every nature falling due on such land or real estate during the period he claims to have possessed the same adversely."

Recent Court of Appeals decisions had disregarded this requirement. Justice Dickson states that “Such disregard of clear statutory language should be avoided” and cautions that the judiciary must exercise restraint since it is the legislative branch that is empowered by the Constitution to make law.

Applying the clarified law to the *Fraley* case, the Court held that the four elements of common law adverse possession had been proven in accordance with the clear and convincing standard but the adverse claimants had not substantially complied with the requirement that they pay all taxes on the parcel. Reversed. Title stays with Fraley.

Justice Sullivan wrote a concurring opinion (joined by Rucker), opining that substantial compliance with the tax statute is not enough; there needs to be full compliance with the statute as written. Sullivan disagreed with Dickson’s position that the legislative acquiescence doctrine should be applied in support of the Court’s prior decision to require only substantial compliance.

Lessons:

1. The principle of acquiring property by adverse possession has a long lineage dating back to the Code of Hammurabi in 2250 B.C., to the Norman Conquest in 1066 and to the resolution of squatters rights in Virginia in 1646.
2. Justice Dickson has made “a major contribution to Indiana property law.”
3. All future adverse possession analysis in Indiana should start with the *Fraley* case.

## 2. **Voir dire—Black v. State, 829 N.E.2d 607 (Ind. Ct. App. 6/21/05)(Crone)**

Cecil Black was convicted of murder. He admitted at trial to shooting the victim but claimed it was self-defense. Prior to trial, the State obtained an order in limine prohibiting defense counsel from questioning prospective jurors regarding self-defense. Black argued on appeal that this ruling was in error.

The Court of Appeals agreed: “We conclude that the ability to question prospective jurors regarding their beliefs and feelings concerning the doctrine of self-defense, so as to determine whether they have firmly-held beliefs which would prevent them from applying the law of self-defense to the facts of the case, is essential to a fair and impartial jury. Accordingly, prohibiting Black from questioning prospective jurors regarding self-defense during voir dire so prejudiced his rights as to make a fair trial impossible.”

Lessons:

1. There is a right to voir dire on material issues in a case. You are entitled to ask whether a prospective juror has conscientious scruples or other mental obstacles likely to interfere with a proper application of the law on an issue in the case.
2. There is not “unbridled leave to brainwash prospective jurors.”
3. A voir dire issue is not preserved for appeal by resisting an order in limine; you must request relief during voir dire.
4. Even if not preserved, you can still win on appeal if you can establish fundamental error—error so prejudicial as to make a fair trial impossible.

Tip: Keep this case in your trial notebook for citing when opposing counsel or the judge objects to trying your case in voir dire.

**3. Statutory construction; license plate location—Merritt v. State (Ind. 6/17/05)(Dickson)**

Merritt was convicted of possession of marijuana based on evidence found following a traffic stop for improper display of his license plate. The plate was in the rear window, not in the brackets at the rear of the vehicle. State statute requires that plates be displayed “upon the rear of the vehicle.” The Supreme Court holds that placement “*inside* the back window” does not qualify as “*upon* the rear of the vehicle.”

Lessons:

1. “We assume that the language in a statute was used intentionally and that every word should be given effect and meaning.”
2. There’s hope for transfer to the Supreme Court even in cases that don’t seem to be especially consequential.
3. Just because a lot of people have their license plate in the back window, doesn’t make it legal.

**4. Malicious Prosecution—Crosson v. Berry (Ind. Ct. App. 6/15/05)(Sharpnack)**

Tom Berry, an attorney in Bloomington, represented Cathy Crosson, a member of the IU Law School faculty, in a settlement conference in federal court. She didn’t pay his bill so Berry sued. Crosson counterclaimed for legal malpractice. Berry won his claim for fees and obtained summary judgment on the counterclaim for legal malpractice. Berry then brought a separate suit for malicious prosecution against Crosson and her attorney, Michael Ausbrook. The jury found that there had been malicious prosecution but awarded zero damages to Berry.

On appeal by Crosson, the Court held that, as a matter of law, a claim for malicious prosecution can be based on a counterclaim. Also held that a malicious prosecution claim is not collaterally estopped by the denial of a motion for sanctions under Rule 11 or I.C. 34-52-1-1.

Lessons:

1. When you sue to collect a bill, you can expect a retaliatory counterclaim for legal malpractice.
2. You can respond to such a counterclaim by seeking sanctions or suing for malicious prosecution (but don’t expect to win damages).
3. I.C. 34-52-1-1 allows for recovery of attorneys fees by a prevailing party if (1) a claim or defense is frivolous, unreasonable or groundless; (2) if a party continued to litigate an action or defense after it clearly became frivolous, unreasonable or groundless; or (3) litigated the action in bad faith.

P.S. In a concurring opinion, Judge Baker viewed Crosson’s appeal as groundless and warranted sanctions against Crosson for pursuing the appeal. Note that she was appealing as a defendant in a case where the jury awarded zero damages.

**5. Bad faith; punitive damages. Monroe Guaranty Insurance Co. v. Magwerks Corp. (Ind. 6/29/05)(Rucker)**

Magwerks suffered a loss due to damage to its building that Magwerks claimed was covered by a Monroe Guaranty insurance policy providing for protection in the event of the “collapse” of a part of the building due to rain. Judge Zore granted summary judgment in favor of Magwerks on the issue of whether there had been a “collapse” under the policy.

The case proceeded to trial by jury on the amount of damages and on Magwerks’ bad faith claim. The jury awarded compensatory damages of \$1.1 million and after finding that Monroe Guaranty violated its duty of good faith, awarded punitive damages of \$4 million.

The Court of Appeals reversed, finding that summary judgment should have been denied because there was a genuine issue as to whether there had been a “collapse.” The Court of Appeals rejected the narrow and traditional definition of collapse advocated by Monroe Guaranty (requiring sudden and complete disintegration, reducing the building to rubble), adopting instead the “modern definition” of the term (requiring only substantial impairment of the structural integrity of any part of the building). The Court of Appeals further held that on remand, punitive damages could not be awarded because there was a good faith dispute about coverage.

The Supreme Court granted transfer and agreed that the motion for summary judgment should have been denied because there were genuine issues of fact as to whether there had been a collapse. The Court, however, disagreed with the Court of Appeals on the bad faith issue, holding that a good faith dispute concerning insurance coverage does not automatically preclude punitive damages for bad faith.

An insurer’s duty to deal in good faith includes, as established in *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993), the obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim.

Here, there was an issue as to whether Monroe Guaranty’s conduct leading up to and including the issuance of the denial letter rose to the level of bad faith. Monroe Guaranty’s adjuster and independent engineering firm had both used the term “collapse” in describing the damage and in its letter denying coverage. Monroe Guaranty made no reference to the collapse provision of the policy, basing the denial on several other exclusions and limitations of the policy. Under these circumstances, the denial letter may have amounted to “an unfounded refusal to pay policy proceeds” sufficient to support a bad faith finding. “In the end this is the jury’s call. And the jury has already decided this issue in Magwerks’ favor. We find no error.”

The Court of Appeals opinion is affirmed in all other respects. The case is returned to the trial court for trial on whether there was coverage under the policy in light of the “collapse” issue but the \$4 million punitive damages for bad faith appears to be sustained.

Lessons:

1. A good faith dispute regarding insurance coverage does not preclude a finding of bad faith if the insurer engages in other improper conduct in connection with a claim.
2. To insurers: make sure your denial letter covers all available defenses. Omitting the collapse issue here appears to have been a \$4 million mistake.

**6. Extensions of time—Ramos v. Ashcroft (7<sup>th</sup> Cir. 6/15/05) (Easterbrook)**

On the day that the government’s brief was due in the Seventh Circuit, counsel filed a motion to transfer and asked for more time to file its brief in the event the motion to transfer was denied. Judge Easterbrook characterized the filing of the motion as a kind of self-help extension and was harshly critical of the practice of filing motions as a way to extend the date of filing an appellate brief. “All too many motions have the subtext. ‘Oops, my brief is due today but is not ready. . . So, I’ll whip up a short motion. Whew!’ No go... A motion is not a substitute for a brief.”

Lesson: Don’t count on anything other than a proper motion for extension to get more time in the Seventh Circuit.

**7. Res ipsa loquitur; exclusive control doctrine—Balfour v. Kimberly Home Health Care, Inc. (Ind. Ct. App. 7/12/05)(Najam)**

After liposuction surgery on plaintiff’s abdomen, a 4x4 gauze pad was left in the abdomen during follow-up care. Olsten Certified Health Care provided follow-up care including changing the dressing. The trial court granted summary judgment in favor of Olsten, finding that it did not have exclusive control over the injuring instrumentality. The Court of Appeals reversed, applying a broader view of exclusive control. Although Olsten did not have exclusive control from the date of the surgery to the date that the 4x4 was discovered (over four months), Olsten did have exclusive control during the four-day period when it appears likely that the 4x4 was left behind. This is sufficient to satisfy the exclusive control doctrine so that res loquitur applies to create an inference of negligence.

Lessons:

1. Res ipsa loquitur requires that the injuring instrumentality be within the exclusive control of the defendant.
2. The notion of “exclusive control” is more flexible than it might first appear.
  - a. Can be limited in time to the period when the problem appears to have arisen.
  - b. Exclusive control may be shared control if multiple defendants each have a nondelegable duty to use due care.
  - c. Plaintiff is not required to eliminate with certainty all other possible causes—all reasonably probable causes will do.

**8. Paternity—In the matter of the Paternity of H.J.B. (Ind. Ct. App. 6/14/05) (Vaidik)**

Following the death of his parents when H.J.P. was 10 months-old, a petition was filed by the maternal grandmother to disestablish paternity of the deceased father. It is not stated in the opinion but it appears likely that the maternal grandmother may have had a dispute with the paternal relatives and used this petition as a way of terminating any rights they might have to visitation or possibly custody of the child. The father was married to his mother at the time of the boy’s birth but not at the time of conception and allegedly was not the natural father. The trial court dismissed the petition and the issue was appealed.

The Court of Appeals affirmed, holding that there is no cause of action to disestablish paternity. A petition for paternity may be unsuccessful or may result in paternity being found in one person to the exclusion of another but there is no cause of action to disestablish paternity.

Lessons

1. There are limits to the availability of a judicial remedy for perceived claims.
2. There is a public policy against declaring a child a “filius nullius”—that’s Latin for “son of nobody.” You don’t deprive a child of paternal relatives unless you’ve got a new father or paternal relative to replace them.
3. Latin may not be so dead after all.

P.S. John Roberts had six years of Latin.

**9. Breach of warranty; contractual time limits—New Welton Homes v. Eckman (Ind. 6/28/05)(Shepard)**

The Eckman family bought a manufactured home with a warranty requiring any claims for breach to be brought within one year. Two and a half years after construction was completed, there were heavy rains and the Eckmans discovered that the perimeter drainage system was defective with resulting damage to the foundation. The Eckmans sued for breach of warranty. The builder moved for summary judgment citing the one-year limitation in the contract.

The Eckmans argued that the discovery rule should be applied to the contractual limitations period because they were not able to discover the defect until after the damage surfaced following the heavy rains. The trial court denied the motion for summary judgment and the Court of Appeals affirmed. The Supreme Court reversed, finding that the discovery rule arises from tort principles and does not apply to a contract where the parties have agreed on the applicable terms. The one-year contractual limit was enforced in accordance with its terms.

Lessons:

1. “The basic theory underlying the distinction between contract and tort is that tort liability is imposed by law and that contract liability is the product of an agreement of the parties.”
2. On a contract claim, the parties will be held to the terms of their agreement unless the terms are unlawful.
3. The discovery rule will not apply to a contractual limitation period unless the language of the contract allows it.

**10. Preferred venue—Monroe Guaranty Insurance v. Berrier, 827 N.E.2d 158 (Ind. Ct. App. 5/13/05)(Bailey)**

Berrier sued Monroe Guaranty in Porter County for bad faith in failing to settle a prior case. The prior case was tried in Porter County, resulting in a \$8.1 million judgment, well in excess of Monroe Guaranty’s \$1 million policy. Monroe Guaranty moved to transfer, claiming that Porter County was not a county of preferred venue. The trial court denied the motion.

On interlocutory appeal, the Court of Appeals affirmed, finding that preferred venue lies in Porter County. Trial Rule 75(A)(2) provides for preferred venue in the county where a chattel is located and where the lawsuit relates to such chattel. The prior judgment was held to be “chattel” located in Porter County. The Court found that the “relating to” language of the rule should be broadly interpreted. The Court found a sufficient nexus between the “chattel” and the lawsuit since the underlying judgment was essential to proving damages.

Monroe Guaranty also argued that priority should be given to preferred venue in its home county. The Court of Appeals rejected the argument, finding that preferred venue may lie in multiple counties and among those counties, no priority is to be given to one over another by the court.

Lessons:

1. A lawsuit is a chattel. (“Chattel” is a species of property other than a freehold or fee interest in land.)
2. “Relating to” requires a minimal nexus under Tr. R. 75.
3. Plaintiff can choose among counties with preferred venue and defendant will be stuck there.

#### **11. Preferred Venue—Swift v. Pirnat, 828 N.E.2d 444 (Ind. Ct. App. 6/3/05)(Riley)**

Donna Swift, a resident of Vigo County, was injured in an auto accident in Vanderburgh County. She sued in Vigo County and upon motion by defendant, the case was transferred to Vanderburgh County. Swift appealed.

Swift argued that preferred venue lies in Vigo County because her complaint seeks damages for a chattel which was regularly kept in Vigo County, to wit: a tape recorder that she had in her car and which was damaged in the accident. Over vigorous objection by defendant about the spirit and purpose of the venue rule, the Court of Appeals applied the letter of the rule and reversed.

Lessons:

1. Adding a small property damage claim to a routine PI case can get you venue in your home county when you otherwise could not.
2. Tis better to have the language of the law on your side. When you must argue spirit or purpose of the law, you’re probably in trouble.

#### **12. Freedom of Speech—In the matter of U.M. v. State, 827 N.E.2d 1190 (Ind. Ct. App. 5/26/05)(Hoffman)**

Officer Laton responded to a report that juveniles were spray painting graffiti on a garage. When he arrived, U.M., a juvenile, was in the back of a car with a companion. Officer Laton instructed the people in the car to hold up their hands. The companion did not keep his hands up. U.M. yelled at Officer Laton, ““F--- you, he can’t keep his arms up, his arms hurt.” He added: “You guys are all racists; f-- the police.” Officer Laton told U.M. to stop yelling two or three times but it took U.M. two or three minutes to heed the order. Based upon this conduct, U.M. was adjudicated a delinquent child for committing the offense of disorderly conduct.

On appeal, U.M. argued that his speech was protected by Article 1, Section 9 of the Indiana Constitution which provides: “No law shall be passed, restraining the free interchange

of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible.”

This provision has been construed to protect political speech unless there is evidence that the communication inflicted particularized harm analogous to tortious injury on readily identifiable private interests. Since U.M. was expressing himself regarding the appropriateness of police conduct, the Court deemed the communication to be protected as political speech and found that there was insufficient evidence to meet the State’s burden of proving particularized harm. The adjudication of disorderly conduct was “reluctantly” reversed for violating Article 1, Section 9 of the Indiana Constitution.

Lessons:

1. The Indiana Constitution provides very broad protection of “political” speech.
2. If you want to cuss out a police officer with immunity, be sure to comment on the appropriateness of his conduct.

**13. Excited utterance; testimonial statement—Hammon v. State, 829 N.E.2d 444 (Ind. 6/16/05)(Boehm)**

Amy Hammon was beaten by her husband Herschel. The police were called. Amy told a police officer what happened and signed an affidavit. Herschel was charged with Domestic Battery. Amy didn’t show up at trial. Herschel was convicted based on the testimony of the police officer as to what Amy told him orally and the written affidavit. On appeal, Herschel challenged the admissibility of Amy’s out-of-court statements.

In a well-reasoned opinion by Justice Boehm, the Court holds that Amy’s out-of-court statements were admissible hearsay under the “excited utterance” exception. Ind. Evid. R. 803(2). Most jurisdictions have a residual hearsay exception like Fed.R.Evid. 807, that allows evidence if there are “circumstantial guarantees of trustworthiness” even when the hearsay does not fit within a traditional exception. Although the Indiana rules contain no residual exception, the courts have interpreted the “excited utterance” exception broadly to permit admission of statements deemed trustworthy. Under the circumstances here, Amy’s reports to the officer occurred while she was still under the stress of the alleged domestic violence and were admissible under state law.

The Court further considered whether these statements were precluded by the Sixth Amendment which was interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004) to require exclusion of “testimonial statements” in criminal cases where the defendant had no opportunity to cross examine the person who made the statement. After canvassing the developing case law on this issue, Justice Boehm finds that a “testimonial” statement is one given or taken in significant part for purposes of preserving it for future “use in legal proceedings.” The affidavit of Amy Hammon was deemed inadmissible under this standard but her oral statements to the police officer were permitted.

Although admitting the affidavit violated Herschel’s Sixth Amendment rights, the Court determined that the error was harmless beyond a reasonable doubt because of the other admissible evidence. The Court suggested that if the case had been tried to a jury, rather than to the bench, the result might have been different—there’s a greater likelihood that the jury would have given more weight to the affidavit with its attendant formality than would a judge.

Lessons:

1. The excited utterance exception is wide enough to drive a truck through.
2. Indiana follows the “use in legal proceedings” test to identify testimonial statements that are inadmissible in criminal cases under *Crawford*.
3. Whether an evidentiary error will be deemed harmless may depend on if the trial is to the court or jury.

**14. Excited utterance; right of confrontation—Fowler v. State, 829 N.E.2d 459 (Ind. 6/16/05) (Boehm)**

In this companion domestic battery case to *Hammon*, Justice Boehm again addressed the scope of the excited utterance exception—finding again that statements made by the victim to police shortly after the incident were admissible. The bigger issue in the case, however, concerned whether the defendant forfeited his right to confront the witness when, after the witness refused to answer questions on cross examination, no request was made to the court to compel the witness to answer. The Court ruled, yes, it is forfeited.

Lesson: To preserve the right of confrontation issue, you must ask the court to compel answers to cross examination if the witness appears in court but refuses to testify.

*See also, Purvis v. State* (Ind.Ct.App. 7/7/05)(Vaidik)(also finding that out-of-court statements qualify as excited utterances and addressing testimonial statements and the right of confrontation).

**15. Breach of contract to sell goodwill; tortious interference with business relationship—Rice v. Hulsey, 829 N.E.2d 87 (Ind. Ct. App. 6/9/05)(Sharpnack)**

Hulsey sold Just Drains, a business providing drain cleaning and plumbing services, to Rice. The contract of sale specifically included “all of the goodwill of the business.” After the sale, Hulsey started another drain business and solicited his former customers. Rice sued Hulsey, claiming that Hulsey’s solicitation of Just Drains’ customers violated the provision on sale of goodwill.

Rice relied upon prior case law that recognized goodwill to be an intangible asset which may be transferred from seller to purchaser and when sold, becomes the buyer’s right to expect the firm’s established customers will continue to patronize the purchased business. “The seller reentering the market and competing with buyer for customers precludes buyer from receiving all that has been sold to him.” Notwithstanding this authority, the Court holds that the sale of goodwill does not, by itself, limit the seller from soliciting prior customers. Such a limitation must be imposed through a covenant not to compete.

Rice also argued that by soliciting his customers, Hulsey committed tortious interference with a business relationship. A necessary element of this tort is proof of independent illegal action. Here there was no such illegality. Hulsey has the right to engage in competition with Rice by soliciting customers of Just Drains. This conclusion was also supported by analysis of a related element of a tortious interference claim: “absence of justification.” In light of the right to compete, there was no genuine issue on the issue of “absence of justification.”

Lesson: When buying a business where goodwill is of value, be sure to get a covenant not to compete.

**16. Intentional interference with contract; fraud—Bilimoria Computer Systems v. America Online, 829 N.E.2d 150 (Ind. Ct. App. 6/14/05)(Bailey)**

Bilimoria, a seller of computer components, was the victim of a Nigerian-based counterfeit check scheme. A Nigerian entity, identifying itself as America Online (West Africa) Ltd., ordered printer cartridges and sent 9 checks drawn on AOL's checking account with Chase Manhattan Bank. Prior to shipping the cartridges, Bilimoria was assured that there were funds to back up the checks after a series of communications among Bilimoria's bank (Sand Ridge), AOL's bank (Chase Manhattan), and AOL.

On this appeal, Bilimoria argued that AOL intentionally interfered with its contractual relationship with its bank (Sand Ridge) when Chase, allegedly as AOL's agent, induced Sand Ridge to freeze Bilimoria's bank account. In rejecting the argument, the Court of Appeals focused on the "absence of justification" element of intentional interference. This element is established "only if the interferer acted intentionally, without a legitimate business purpose, and the breach is malicious and exclusively directed to the injury and damage of another." The existence of a legitimate reason for the defendant's actions provides the necessary justification to avoid liability. The communication by Chase to induce freezing of the account was in the midst of an active investigation into a counterfeiting scheme. Thus, there existed a legitimate business purpose for the communication and it was not exclusively directed to the injury and damage of Bilimoria.

Bilimoria also contended that AOL was liable for fraud. However, AOL had no direct contact with AOL and "as such, AOL did not make a representation to Bilimoria upon which Bilimoria was entitled to rely." AOL did direct Chase to honor the checks but this "does not amount to a reckless or knowingly false representation of fact made with intent to deceive." Fraud requires "a material representation of past or existing fact" made "with intent to deceive." Neither element could be proved on these facts.

Lessons:

1. Intentional interference claims will often turn on whether the defendant can identify a legitimate reason for the conduct.
2. When alleging fraud, be careful to allege a statement about "past or existing fact." Other statements that make representations about future conduct, that make promises, or that refer to existing intent will not generally be actionable.

**17. Liability for recording of phone calls—Dommer v. Dommer, 829 N.E.2d 125 (Ind. Ct. App. 6/10/05) (May)**

Steven Dommer tape recorded phone conversations between his wife and several of her friends without their knowledge. Wife sued for divorce and then with her friends sued husband for illegally tape recording their conversations in violation of federal and state law. The trial court denied summary judgment to wife and friends and sua sponte granted summary judgment to husband. Wife and friends appealed.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 protects against the interception of phone calls and provides a civil remedy. Husband argued for an exception for interspousal immunity. The Court of Appeals, after a detailed review of statutory history and case law on the issue, finds no such exception in the act and refuses to “carve such an exception when it appears Congress did not want one.”

The Indiana Wiretap Act also protects against the interception of phone calls and provides a civil remedy. Again, husband argued for a marital exception. Finding none in the statute, the Court of Appeals ruled otherwise.

Lesson: Don’t record any phone calls in Indiana without at least one parties’ consent.

**18. Scientific evidence: faked left syndrome—Smith v. Yang, 829 N.E.2d 624 (Ind. Ct. App. 6/23/05)(Najam)**

Ruby Lee Smith was injured in an auto accident when she crossed the double yellow center line while driving around a curve and collided with Jack Yang’s car. Yang’s car was within his lane but had drifted between the center line and white line. Due to her injuries, Smith could recall nothing about the accident.

In opposition to Yang’s motion for summary judgment, Smith submitted an affidavit from Stephan Neese, an accident reconstructionist. Neese explained the accident as being a result of the “faked left syndrome”: “This syndrome is seen near curves and/or hill crests where an initial vehicle enters the area left of center and the other driver steers to the left, now being left of center in avoidance, when the initial vehicle steers back to the right and a head-on collision occurs in the initial vehicle’s traveling lane.”

The trial court disregarded the affidavit and granted summary judgment to Yang. On appeal, the court considered whether the affidavit satisfied Rule 702 standards for the admissibility of expert scientific testimony. In determining whether the affidavit was reliable, the court considered the five Daubert factors and found the scientific basis for the fake left syndrome theory lacking because: there was no evidence that the theory can or has been tested, no evidence that it had been subjected to substantial peer review; no evidence regarding the rate of error or the standards controlling the application of the theory; and no objective evidence of the theory’s general acceptance in the field. Neese’s opinion that it was “accepted as a reliable authority in the accident reconstruction arena” was insufficient. The Court of Appeals concluded that the Smiths had not designated sufficient evidence to show that the faked left syndrome is a reliable theory. Summary judgment affirmed.

Lessons:

1. It is not necessary to file a motion to strike an expert affidavit in order to have the opinion excluded from consideration on summary judgment. (Yang had not done so. The safer practice is to do so anyway.)
2. If you proffer scientific opinion testimony on a motion for summary judgment and anticipate a Rule 702 objection, be sure to include as much information as you can to satisfy the Daubert tests.

**19. Motion to Correct Error; motion for new trial—Garrison v. Metcalf, 828 N.E.2d 930 (Ind. Ct. App. 6/9/05)**

While riding a bicycle, Travis Garrison was seriously injured in a collision with a Grand Cherokee driven by Charles Metcalf. Garrison was riding the bike at night, on the wrong side of the road, without lamps, and while wearing dark clothing. He tested positive for marijuana and had a BAC of .19%. The jury found that Metcalf and Garrison were both 50% at fault.

Metcalf filed a motion to correct error. It was not acted on within 30 days and was deemed denied pursuant to Trial Rule 53.3. Six days later, the trial court purported to grant the motion. The court found that the verdict was against the weight of the evidence and ordered a new trial.

On appeal, Garrison argued that the order of a new trial came too late and was null and void. The Court of Appeals holds that a belated ruling on a motion to correct error is not per se invalid and in light of the circumstances, allowed the new trial order to stand. Note: This overturns prior precedent to the contrary.

Lessons:

1. A motion to correct error that has been deemed denied may, at least in some circumstances, still be ruled upon by the trial court.
2. The trial judge sits as “thirteenth juror” and must determine whether in the minds of reasonable persons a contrary verdict should have been reached.

*See also, Simon Property Group v. Acton Enterprises*, 827 N.E.2d 1235 (Ind. Ct. App. 5/31/05)(Bailey)(allowing consideration of materials designated on a prior motion where defendant failed to respond to motion for summary judgment within 30 days notwithstanding language in Trial Rule 56 to the contrary).

### **Litigation Tip of the Month: Seventh Circuit publishes pattern civil jury instructions.**

- A committee appointed by Seventh Circuit Chief Judge Joel Flaum and headed up by Judge Robert Miller of the Northern District of Indiana has drafted pattern civil jury instructions.
- They are available on line at the Seventh Circuit web site.
- The Seventh Circuit has authorized their publication without specifically approving their content. No further approval is expected.
- They cover general procedural and evidentiary issues for trial and certain substantive areas that are frequently tried in federal court, like employment discrimination.
- They do not cover state court substantive law. That remains the province of state pattern instructions.
- Looks like a good and useful work product.

Suggestions:

1. If you need to prepare instructions for a jury trial in federal court in the Seventh Circuit, look first to these pattern instructions.
2. Consider drafting jury instructions early in the preparation of any case. It will help clarify exactly what you will need to prove and help guide discovery and other trial preparation.