

INDIANAPOLIS LAW CLUB

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Litigation Tips of the Month:

Streamline summary judgment submissions.

On appeal, focus on a few key issues.

IN THE NEWS: Milberg Weiss indicted.

From the New York Times and other sources, May 18, 2006:

The securities class-action law firm of Milberg Weiss Bershad & Schulman was charged today with several criminal counts, including obstructing justice, perjury, bribery and fraud. The 20-count indictment, handed up by a federal grand jury in Los Angeles, represents the most prominent confrontation between the government and a law firm in years. ...[N]o major law firm has faced a criminal indictment in recent memory.

Milberg Weiss has been the dominant law firm in winning multimillion-dollar lawsuits against huge corporations on behalf of shareholders who claimed they were wronged. Today, the firm was accused of secretly paying kickbacks, beginning in 1981 and continuing through 2005, to plaintiffs in class-action lawsuits. Two of the firm's prominent partners are named in the indictment: David J. Bershad and Steven G. Schulman.

Mr. Bershad earned some \$161 million as his share of the firm's profits between 1983 and 2005; Mr. Schulman made \$67.1 million between 1991 and 2005.

The indictment accuses the New York-based firm and the two partners of securing the lucrative lead counsel position in more than 150 class actions and shareholder derivative actions by paying at least \$11.3 million in illegal kickbacks to a stable of named plaintiffs. The government seeks to recover at least \$216 million in "tainted attorney fees."

Under New York law, it is illegal for a lawyer to promise or give anything of value to induce a person to bring a lawsuit or to reward a person for having done so, according to the indictment. Furthermore, the kickbacks created a conflict because the paid plaintiffs had a "greater interest in maximizing the amount of attorneys' fees awarded to Milberg Weiss than in maximizing the net recovery" to others in the class, the indictment said.

1. Indiana Financial Responsibility Act; Antisubrogation Rule; Duty of Disclosure. *Northern Indiana Public Service Co. v. Bloom*, 2006 WL 1350306 (Ind. 5/18/06)(Boehm)

NIPSCO employed Fred Zurbrick and allowed him to drive a NIPSCO truck to and from work. Zurbrick was driving the truck when it collided with another vehicle driven by Charmaine Minniefield. Zurbrick was killed. Minniefield was injured and brought suit against Zurbrick's estate and NIPSCO. NIPSCO asserted that Zurbrick was not acting within the scope of his employment at the time of the accident. NIPSCO, however, self-insured the truck pursuant to the Indiana Financial Responsibility Act.

The Court first holds, under the Act, NIPSCO's liability to Minniefield is limited to \$60,000 (\$50,000 for personal injuries and \$10,000 for property damage). Even though NIPSCO had \$1 million on deposit with BMV, its liability for a single incident is limited to the minimum amounts of financial liability under the Act.

The Court holds secondly that as a self-insurer, NIPSCO may seek indemnity from a permissive user like Zurbrick for any payments it makes to third parties due to the permissive user's negligence. The "antisubrogation rule" operates to preclude an insurer from recovering back from its own insured the very same risk that the insured transferred to the insurer. The Court holds that the Indiana Financial Responsibility Act does not make a "self-insurer" an insurer of a permissive user and accordingly, the antisubrogation rule does not apply. So, it appears that NIPSCO has a right of indemnity from Zurbrick's estate for the \$60,000 that it would pay to Minniefield and others. But hold on, that does not end the analysis.

The Court holds thirdly that as Zurbrick's employer, NIPSCO owed special duties to him including a duty of disclosure. This duty includes a duty to disclose facts which, if unknown, would be likely to subject the agent or employee to pecuniary loss. Accordingly, NIPSCO had a duty to disclose these liability risks to Zurbrick and if it didn't, the Court finds that NIPSCO has a duty to indemnify its employee for any loss attributable to the breach. Thus, if NIPSCO cannot prove that it made this disclosure, NIPSCO would be required to indemnify the Zurbrick estate for any amount the estate is required to pay Minniefield. The Court further holds that this duty to indemnify also includes a duty to defend the Estate.

Lessons:

1. What looks like a deep pocket may not be if a company self-insures and the driver is not acting within the scope of his employment.
2. A company that wants to escape liability should document full disclosure.
3. An employee driving a company vehicle that is self-insured should get his own insurance.
4. What a tangled web we weave when we "self-insure."

2. The Constitutional Right to Tuition-Free Common Schools. *Nagy v. Evansville-Vanderburgh School Corp.*, 844 N.E.2d 481 (Ind. 3/30/06)(Rucker)

The Evansville-Vanderburgh School Corp. imposed a \$20 student services fee on all students. Frank Nagy brought a class action complaint alleging that the fee violated Article 8, Section 1 of the Indiana Constitution, which states: "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, **wherein tuition shall be without charge**, and equally open to all."

The Indiana Supreme Court finds the \$20 student services fee is a mandatory charge for attending a public school and contravenes the mandate for Common Schools "wherein tuition shall be without charge." In reaching this result, the Court noted that the fee was to be used for the very programs, services, and activities that are already a part of a publicly-funded education in Indiana. The Court further observed that the fee was imposed on *all* students. The Court indicated that the Constitution would not preclude imposing a fee on individual students who avail themselves of specific "extracurricular" activities offered by the school.

Lessons:

1. Look to Justice Rucker's opinion for a good discussion of how the Supreme Court seeks to resolve constitutional questions in general: "by examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our Constitution, and case law interpreting the specific provisions."
2. Look also to the opinion for a detailed account of the history of Article 8, Section 1, of the Indiana Constitution.

Note: In 1848, there was a statewide referendum on this question: "Are you in favor of free schools?" Over vigorous opposition, the referendum passed with 56% of the vote.

Further Note: The Indiana State Teachers Association recently filed a class action seeking a determination that the education being provided to underprivileged children in many Indiana

schools is inadequate and fails to comply with the requirements of Article 8, Section 1, of the Indiana Constitution.

3. Medical Malpractice; Statute of Limitations. *Booth v. Wiley*, 839 N.E.2d 1168 (Ind. 12/30/05)(Dickson) (3-2 decision)

Defendant Dr. Robert Wiley performed eye surgeries on plaintiff Thomas Booth in November 1998 and February and May 1999. Booth alleges the surgeries were negligently performed. Booth did not bring suit until July 2001, more than two years after the last of these surgeries. Wiley moved for summary judgment on statute of limitations grounds. The trial court granted the motion and the Court of Appeals reversed. The Supreme Court granted transfer.

The Indiana malpractice statute purports to require filing of all medical cases within two years of the negligent act. In *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999), the Court said the statute was unconstitutional when applied to persons who had not discovered the malpractice within the two-year statutory period. Subsequent cases have established the following methodology to guide the application of the medical statute of limitation:

- Initially, a court must determine the date the alleged malpractice occurred and determine the discovery date—the date when the claimant discovered the alleged malpractice and resulting injury, or possessed enough information that would have led a reasonably diligent person to make such discovery.
- If the discovery date is more than two years beyond the date the malpractice occurred, the claimant has two years after discovery within which to initiate a malpractice action.
- But if the discovery date is within two years following the occurrence of the alleged malpractice, the statutory limitation period applies and the action must be initiated before the period expires, *unless* it is not reasonably possible for the claimant to present the claim in the time remaining after discovery and before the end of the statutory period.
- “In such cases where discovery occurs before the statutory deadline but there is insufficient time to file”, the court holds “that such claimants must thereafter initiate their actions within a reasonable time.”

Defendants argued that Booth should have been on notice of the malpractice because of problems that were identified in the eye following the surgeries. The Court majority finds: “The evidence does not indisputably establish that Mr. Booth discovered the malpractice and resulting injury, or acquired sufficient knowledge to lead a reasonably diligent person to discover the malpractice and resulting injury until December 2000, when another doctor said the initial surgery (LASIK) by Dr. Wiley should not have been performed because of pre-existing eye conditions.”

Summary judgment for defendants reversed. In dissent, Chief Justice Shepard finds that “the majority puts us on a path that the statute of limitation cannot run unless a medical expert informs the patient that the ‘pain or debilitating symptoms’ . . . are the product of negligence by a particular actor. . . . [This] turns the medical malpractice statute of limitation into a very liberal rule without so much as a word about why the Indiana Constitution requires the result.”

Also, in dissent, Justice Sullivan writes: “The result of the Court’s opinion today seems to me to be that the medical malpractice statute of limitations is tolled whenever the alleged malpractice is associated with a pre-existing condition until the patient receives an expert opinion that the pain or symptoms are the product of a particular provider’s medical negligence.”

The majority (per Justice Dickson) resists this interpretation: “[W]e are not holding that an expert’s advice is always required to put a patient on notice that problems may be due to malpractice. In fact, in most cases, such advice is not required. It is true in this case because the symptoms were reasonably attributable to Mr. Booth’s pre-treatment condition. But in many cases, the malpractice produces conditions that reasonably suggest the possibility of malpractice without any expert advice.”

Lessons:

1. The statute of limitations for medical malpractice has been further liberalized by case law.
2. The result suggests a similar liberalization in other contexts where the discovery rule applies.
3. Don’t count on summary judgment based on the statute of limitations when the plaintiff may reasonably attribute his symptoms to a cause other than malpractice.

4. Medical Malpractice; Statute of Limitations. *Ledbetter v. Hunter*, 842 N.E.2d 810 (Ind. 2/22/06)(Dickson)

Trenda Ledbetter was born on Nov. 25, 1974. Suit was brought in 1994 for alleged medical malpractice that occurred at the time of her birth. The statute of limitation for medical malpractice provides that a claim must be filed within two years after the incident “except that a minor less than six (6) years of age has until the minor’s eighth birthday to file.”

Plaintiff argues that the statute violates the Privileges and Immunities Clause of the Indiana Constitution. The clause provides: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”

Plaintiff contends that the Medical Malpractice Act, without a legitimate basis, creates two unequally treated classes: 1) those children injured by medical malpractice who must file suit by age eight; and 2) those children injured by negligence other than medical malpractice who have until two years after the age of majority to file suit. Plaintiffs further contended that there is no evidence to support the alleged rationale for the Act—that it protects the health of citizens by preventing a reduction of health care services.

The Supreme Court was not persuaded, finding that a lack of evidence supporting a legislative rationale does not affirmatively establish that the rationale is unreasonable. Thus, plaintiff had not met her burden of negating “every reasonable basis for the classification” as required by prior case law. Accordingly, the statute of limitations for minors was held to be constitutional.

Lesson: There are limits as to how far the Supreme Court will go in liberalizing the medical statute of limitations.

5. Sudden Emergency Doctrine; Mitigation of Damages. *Willis v. Westerfield*, 839 N.E.2d 1179 (Ind. 1/5/06)(Boehm)

Christopher Westerfield rear-ended Ann Willis’ van as it was stopped at a red light. Westerfield testified that this happened because Willis suddenly and without warning changed lanes and applied her brakes and he was unable to stop due to wet pavement and Willis’ quick lane change. The jury found for Willis but after reduction for comparative fault, awarded only \$2,500. Willis appealed.

On appeal, Willis argued first that the trial court should not have given an instruction on the sudden emergency doctrine because defendant had failed to assert it as an affirmative defense in his answer. The Court of Appeals agreed, finding that the defense should have been asserted in the answer. The Supreme Court rules otherwise, finding that notwithstanding a number of prior cases that refer to the doctrine as an affirmative defense, it is not.

Whether a defense is affirmative depends upon whether it controverts an element of a plaintiff's prima facie case or raises matters outside the scope of the prima facie case. Sudden emergency does not assert a matter outside the allegations of the plaintiff's complaint. It defines the conduct to be expected of a prudent person in an emergency situation.

Although not an affirmative defense, the burden of proof under the doctrine is on the defendant. The defendant must show: 1) the defendant must not have created or brought about the emergency through his own negligence; 2) the danger or peril confronting the defendant must appear to be so imminent as to leave no time for deliberation; and 3) the defendant's apprehension of the peril must itself be reasonable.

Willis argued secondly, that the trial court had erred by instructing the jury on the affirmative defense of mitigation of damages. Willis's doctor had recommended physical therapy but Willis hadn't pursued it. The doctor testified that in failing to do this physical therapy, Willis "didn't help herself" but also said she had done "nothing after the collision to aggravate or worsen her injuries." Defendant produced no expert testimony regarding the aggravation of harm caused by her failure to do physical therapy.

The Court of Appeals adopted a bright line test, requiring expert testimony on the issue. The Supreme Court rejects the bright-line test in favor of case-by-case analysis. The Court rules: "When, as here, a defendant claims that after an accident a plaintiff unreasonably failed to follow medical advice, in order to establish a failure to mitigate, the defendant must also prove that the plaintiff's actions cause the plaintiff to suffer a discrete, identifiable harm arising from that failure, and not arising from the defendant's acts alone." Expert testimony will often be required to meet this burden but not always. Here defendant failed to meet the burden and it was therefore, improper for the trial court to instruct on mitigation of damages. Case remanded for a new trial on damages.

Lessons:

1. Defendant may have the burden of proof on issues other than affirmative defenses.
2. Sudden emergency is not an affirmative defense and need not be pleaded in an answer.
3. Expert testimony is not always required to prove mitigation of damages by failure to treat but the prudent defendant will present such evidence.

6. Invited Error Doctrine; Frivolous Appeals. *Potter v. Houston*, 2006 WL 1320132 (Ind. Ct. App. 5/16/06)(Friedlander)

Gary Potter owns property as to which Richard Houston asserted an implied right of way easement to provide access to his adjacent property. The trial court ruled in favor of Houston finding an implied easement based on evidence of an agreement to retain "an access point from which hay and timber could be extracted from [Houston's] property once harvested" upon vacation of the end portion of a public roadway in 1986.

Potter subsequently sought clarification regarding the scope of the easement. In a subsequent order, drafted by Potter and entered at Potter's request, the court stated: "This court intends the easement's use to be limited to travel on foot or horseback, and to occasional use of

trucks, hay machines and other agricultural equipment reasonably necessary to serving the *agricultural needs* of the valley portion of Houston’s real estate, such as cutting hay.”

In subsequent proceedings, Potter sought an injunction against Houston’s use of the easement for “timbering.” The trial court ruled that “timbering is a valid agricultural use of the property contemplated under the terms of the easement.” On appeal, Potter argued that timbering is not an “agricultural” use of land.

The Court of Appeals rejected the argument, finding Potter’s position to be subject to the invited error doctrine. “A party may not take advantage of an error that he commits, invites or which is the natural consequence of his own neglect or misconduct.” The Court of Appeals observed that the lower court’s original order specifically found that the implied easement had been used for the extraction of timber. If there is ambiguity or error in the order of clarification as to “agricultural needs,” it is invited error as the definition of terms Potter asked the court to adopt and is not subject to appeal by Potter.

The court also finds that “timbering” was a valid “agricultural” use as the term was used in the trial court’s order. Thus, Potter’s appeal fails both procedurally and on the merits.

The court finds further that Potter “has committed both procedural and substantive bad faith” in pursuing this appeal and orders that Potter pay Houston’s appellate attorney’s fees.

The procedural deficiencies included: a Statement of the Case that excluded most dates, rulings, and other pertinent information regarding the course of the proceedings; a Statement of Facts that the court deemed “woefully lacking”; and an Appendix that lacked the key rulings of the trial court as required by Appellate Rule 50.

As for substance, the court found Potter’s appellate arguments to be “illogical and puerile.” It noted that “Potter has steadfastly ignored unfavorable factual determinations and rulings” and that Potter’s efforts “are calculated to cause great expenditure of time and money by Houston in attempting to enjoy the use of his easement....Enough is enough.”

Lessons:

1. Consider the invited error doctrine if the opposing party contributed to the alleged error.
2. Be careful about assuming the role of draftsman of court orders; you may not thereafter be able to complain about the content.
3. Don’t pursue an appeal unless you’re prepared to do it right.

But see, Gabriel v. Windsor, Inc., 843 N.E.2d 29 (Ind. Ct. App. 2/28/05)(although appellant failed to present a proper statement of facts and some arguments improperly asked the appellate court to reweigh the evidence, the appellant’s brief does not “appear to be written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court,” thus appellate attorney’s fees are denied).

7. Filing Documents under Seal; Citizenship of LLC. *Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346 (7th Cir. 2/22/06)(Easterbrook).

In this appeal of a trade secret case, Judge Easterbrook addressed two procedural issues. First, the court noted: “The citizenship of a limited liability company is that of its members, and its member may include partnerships, corporations, and other entities who have multiple citizenships. A federal court thus needs to know each member’s citizenship, and if necessary each member’s members’ citizenships.” Hicklin has 65 members, some with multiple citizenships; all must be disclosed in the corporate disclosure statement. The citizenship of a

trust is that of its trustee. National Banks are citizens of the states in which their main offices are located.

Second, the court observed that the district court had kept both of her substantive opinions under seal—not just the portion that revealed trade secrets but the whole opinions. “We have insisted that litigation be conducted in public to the maximum extent consistent with respecting trade secrets, the identities of undercover agents, and other facts that should be kept in confidence. This means that both judicial opinions and litigants’ briefs must be in the public record, if necessary in parallel versions—one full version containing all details and another redacted version with confidential information omitted.”

“What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification. . . . We hope never to encounter another sealed opinion.”

Lessons:

1. For an LLC, report the citizenship of all members in the corporate disclosure statement.
2. For documents filed in federal court that contain confidential information, redact and make parallel filings.

8. Pro Hac Registration. *In the matter of Anonymous*, 845 N.E.2d 145 (Ind. 4/13/06)(per curiam)

Rule 3(b) of the Disciplinary Rules for lawyers requires that “All attorneys admitted pro hac vice . . . shall file a Notice with the clerk of the Supreme Court within 30 days after a court grants permission to appear in the proceeding. A separate Notice must be filed for each proceeding in which a court grants permission to appear.”

Rule 3(c) requires that the pro hac vice attorney shall with the notice “pay to the clerk of the Supreme Court the annual registration fee required of members of the bar of this state” (\$90 per year) and if the attorney continues to appear in any case pending as of the first day of a new calendar year, “the attorney will continue to pay the required registration fee, which shall be due within 30 days of the start of that calendar year.”

In this case, the Indiana Supreme Court imposed a private reprimand on a pro hac lawyer for failure to follow this rule. The rule provides for other possible sanctions including “revocation of the opportunity to appear in Indiana courts.”

Lesson: If you are serving as local counsel in any case, make sure that the out-of-state lawyer is alerted to and complies with this rule.

9. Duty to advise client of settlement offer. *In the matter of Corizzi*, 2006 WL 1379615 (Ind. 5/17/06)(Shepard)

Corizzi was disbarred in Virginia and D.C. for suborning perjury, making false statements to a court and to Bar Counsel, and “for failing to advise a client of a settlement offer.” The Indiana Supreme Court imposed reciprocal discipline, disbaring him from Indiana as well.

The Comment to Rule 1.4 of the Rules of Professional Conduct states: “[A] lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea

bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the offer will be acceptable or unacceptable or has authorized the lawyers to accept or reject the offer.”

Lesson: Do not fail to communicate a settlement offer to your client.

10. Qualified Settlement Offer. *Vasquez v. Phillips*, 843 N.E.2d 61 (Ind. Ct. App. 2/28/06)(Bailey).

Suit was brought by Roshawn Phillips and her five children against Danielle Vasquez for injuries incurred in a minor vehicle collision. Plaintiffs made six qualified settlement offers; three children for \$200 each, two children for \$300 each and Roshawn for \$950. The offers were not accepted. The case went to trial and each of the plaintiffs was awarded more than the amount set forth in the offer. Collectively, the verdict was for \$4,300.

Plaintiffs moved to enforce the Qualified Settlement Offer and requested \$1,000 in attorney’s fees for each plaintiff or \$6,000 total. On appeal, Vasquez argued that the statutory cap of \$1,000 applies to the whole case, not a separate cap for each plaintiff. The Court of Appeals disagreed, finding that each plaintiff could collect up to \$1,000.

The Court, however, was not satisfied with the record made on the fees. Plaintiffs’ counsel had failed to identify the time incurred in litigating the case after the date of the Qualified Offer and failed to apportion the fees among plaintiffs. The matter was remanded for further evidence on these issues.

Lessons:

1. Don’t forget to make a Qualified Offer.
2. If you represent a lot of parties, making a Qualified Offer can result in a significant recovery of fees.

Note: Qualified offers are currently the only way to get prejudgment interest in tort cases.

11. Fiduciary duty to LLC; derivative and direct actions. *Purcell v. Southern Hills Investments, LLC*, 2006 WL 1379599 (Ind. Ct. App. 5/22/06) (Riley)

Southern Hills owned a 50% interest in VillageNet Services, LLC. VillageNet was in the business of marketing fibers in a fiber optic network known as the Southern Loop, connecting Bloomington, Columbus, Shelbyville and Indianapolis. Purcell was the co-manager of VillageNet and was responsible for its day-to-day operations. Southern Hills sued Purcell for breach of his fiduciary duty to VillageNet. Following a bench trial, the trial court found in favor of Southern Hills and awarded damages in the amount of \$375,000 and another \$120,000 in prejudgment interest. Purcell appealed.

The Court of Appeals holds that “common law fiduciary duties, similar to the ones imposed on partnerships and closely-held corporations, are applicable to Indiana LLCs” and finds that the evidence is sufficient to establish that Purcell violated these duties by keeping money that should have been forwarded to VillageNet and by failing to inform VillageNet and its member, Southern Hills, of the money that was owed to them.

Purcell challenged Southern Hills’ standing to assert its claim, suggesting that a derivative action was required. The Court of Appeals holds that Southern Hills may bring a direct claim against Purcell for breach of common law fiduciary duties owed to Southern Hills as a member, not to VillageNet.

The Court also holds that Southern Hills may bring a direct statutory claim against Purcell pursuant to I.C. § 23-18-4-2. This statute provides that a member or manager of an LLC is not liable for damages to the LLC or to the members of the LLC “for any action taken or failure to act on behalf of the limited liability company, unless the act or omission constitutes willful misconduct or recklessness.” Here the trial court found and the Court of Appeals agreed that Purcell’s conduct satisfied the “willful misconduct or recklessness” standard.

In *Barth v. Barth*, 659 N.E.2d 559 (Ind. 1995), the Court held that in a closely-held corporation, shareholders may sometimes be viewed as partners and the formalities of corporate derivative litigation may be bypassed when a shareholder seeks to redress injury sustained by the corporation. In the instant case, the Court of Appeals concluded that it did not need to reach the *Barth* issue but stated, nonetheless, that in the future, it would “apply the case law with respect to derivative and direct claims in a closely-held corporation to LLCs.”

Lessons:

1. Managers and members of LLCs have fiduciary duties to members akin to the duties imposed in partnerships and closely-held corporations.
2. The appellate courts will be guided by case law on closely held corporations in determining claims arising in LLCs.

12. Admissibility of Lost Profits of S Corp. *Bova v. Gary*, 843 N.E.2d 952 (Ind. Ct. App. 3/16/06)(Baker)

Bova sued Gary for injuries in an auto accident. In support of his claim, Bova introduced evidence of the lost profits of his sub S corporation. Bova is president, sole shareholder and primary decision maker of the company. On appeal, Gary argues that the court erred by admitting evidence of lost profits of the corporation since Bova was pursuing his personal injury claim as an individual and the corporation had no standing to assert a claim.

The Court of Appeals finds that where, as here, the S corporation at issue is essentially a sole proprietorship and Bova is the alter ego of the corporation, it was proper for the trial court to consider the S corporation’s lost profits as evidence of the personal losses of its sole shareholder.

Lesson: The S corporation form will be disregarded in assessing the admissibility of evidence of lost profits for a party who is the alter ego of the corporation.

13. Premises Liability. *Rhoades v. Heritage Investments, LLC*, 839 N.E.2d 788 (Ind. Ct. App. 3/9/06)(Kirsch)

Edward Rhoades accompanied a friend to a building that was being renovated. As he descended stairs with poor lighting and no guardrails or handrails, he fell and broke his arm and glasses. He sued for negligence. The trial court granted summary judgment in favor of defendant and Rhoades appealed.

“The first step in resolving a premises liability case is to determine the plaintiff’s visitor status. The visitor status then defines the duty owed from the landowner to the visitor. A person’s status on the land, along with the duty owed, is a matter left for determination by the trial court, not the jury.”

The status options are:

- (1) an invitee (to which the highest duty of care is owed *i.e.*, the duty to exercise reasonable care for the invitee’s protection);

- (2) a licensee (to which a landowner owes a duty to refrain from willfully or wantonly injuring him or acting in a manner to increase his peril; this includes the duty to warn of any latent danger of which the landowner has knowledge); and
- (3) a trespasser (to which the duty is merely to refrain from wantonly or willfully injuring him after discovering his presence).

In deciding who is an invitee, the court uses the “invitation test.” There are three kinds of invitees: the public invitee, the business visitor, and the social guest. Licensees are on the premises with permission of the owner but have not been invited by the owner. “An invitation is conduct which justifies others in believing that the possessor desires them to enter the land.”

The court finds that Rhoades was a licensee; he was there with permission of the owner but had not been invited, unlike the friend who he was with. As a licensee, plaintiff needed evidence that the owner renovated the building and rebuilt the stairway with the wanton and willful intent to injure Rhoades or someone else. There was no such evidence. Alternatively, plaintiff needed evidence that the stairway was a latent danger due to the absence of guardrails and handrails and the dim lighting but Rhoades admitted that he knew these facts before he ascended it. Summary judgment affirmed.

Lesson: Whether you’re an invitee or a licensee basically depends on whether the owner desires that you be there.

Litigation Tips of the Month:

Streamline summary judgment submissions.

Based on Entry on Pending Motions, 1/19/06, by Magistrate Judge Tim Baker in *Carter v. Citizens Gas & Coke Utility*, Cause No. 1:04-cv-0854-JDT-TAB:

In *Volovsek v. Wisconsin Department of Agriculture*, 344 F.3d 680, 686 (7th Cir. 2003), the court lamented that “the parties appear to have simply collected the sum total of all the unpleasant events in Volovsek’s work history, dumped them into a legal mixing bowl of this lawsuit, set the Title VII-blender on puree and poured the resulting blob on the court.”

In the *Carter* case, Magistrate Baker was confronted with summary judgment submissions that he felt were reminiscent of the *Volovsek* “blob.” They each far exceeded the specified page limitation. Plaintiff’s response brief was actually only 23 pages but his statement of disputed facts was submitted separately and was 41 pages. Judge Baker observed that “the sheer volume of briefs and exhibits” in the case suggests that counsel made insufficient efforts to “discipline their presentation” as contemplated by the 2002 amendments to the local rule.

These amendments were intended to streamline what had become a cumbersome and unwieldy summary judgment process. One of the specific changes made was to require that the statement of disputed facts be included in a section of the brief itself, subject to the page limitation. Apparently, there are some counsel who have been slow to catch on.

In the *Carter* case, both sides had also filed motions to strike portions of the opposing submission. Magistrate Baker noted that, in filing these motions, counsel “fell short of the admonition of Local Rule 56.1(f) which provides in relevant part that collateral motions in the summary judgment process, such as motions to strike, are ‘disfavored.’”

Lesson: On summary judgment, don’t pour out a blob to the court; discipline your presentation.

On appeal, focus on a few key issues.

In *United States v. Boscarino*, 437 F.3d 634 (7th Cir. 2/8/06), Judge Easterbrook writes: “Boscarino’s appellate lawyer has pursued almost every contention that trial counsel raised and lost. The result is that none of the issues has been developed in depth, and strong contentions (if any) have been buried under anemic ones. ‘Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.’ *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). We discuss only three of the contentions; the rest have been considered but are too feeble to call for exposition.”