

**INDIANA LAW UPDATE**  
(November 2007 to February 2008)  
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Tip of the Month: Provide active oversight of the search of client files for documents requested in discovery.

HOW TO ACCESS THE INDIANA LAW UPDATE HANDOUT AND PODCAST

## **IN THE NEWS: The real West Virginia mirrors Grisham's fictional Mississippi**

John Grisham's newest legal thriller, *The Appeal*, is about a billionaire who loses a huge verdict in Mississippi and then spends millions to elect a sympathetic Mississippi Supreme Court Justice to influence the outcome on appeal. Last November, the West Virginia Supreme Court of Appeals, on a 3-2 vote, reversed a \$76.3 million judgment against A.T. Massey Coal Co. ("Massey"). *Caperton v. A.T. Massey Coal Company, Inc.*, 2007 WL 4150960 (W.Va.).

After this verdict, photographs emerged showing one of the West Virginia justices (Elliott Maynard) in Monte Carlo "gallivanting" with Massey's CEO, Don Blankenship, while the appeal was pending. It was also revealed that Blankenship spent \$3.5 million of his own money in 2004 to elect another one of the three justices who voted in his favor (Brent Benjamin). This is reportedly the most money ever spent by an individual "to affect a state court judicial election in the history of the United States."

There was a stinging dissent by Justice Larry Starcher, including these comments:

"The majority's opinion is morally and legally wrong. The majority opinion is morally wrong because it steals more than \$60 million dollars from a man who was the victim of a deliberate, illegal scheme to destroy his business. The majority opinion is legally wrong because it uses erroneous legal reasoning to justify an immoral result.... Let's not forget why the jury's verdict was justified: the jurors looked Blankenship in the eye and concluded that he was lying, and that [the plaintiff] was telling the truth. The majority opinion says: "That doesn't matter" — it all should have been handled in Virginia. To which argument, one must respond: "Horse pockey!"

Now three members of this Court have ruled that even though it is a fact that Don Blankenship illegally took over \$60 million dollars from [the plaintiff] — he can get away with it scot-free. Talk about crime in the suites!

I am one judge voting on this case who can say that I owe nothing to Mr. Blankenship one way or another—he did nothing to hurt or hinder my election. He did not fund my campaign nor am I a social friend of his. ...[H]e has said he will be "targeting" me in the next election if I run."

The other dissenting justice, Albright, was similarly harsh:

"The majority opinion in this case . . . is a result-driven effort to excuse without penalty an egregious exercise of raw economic power. . . . [T]he majority is just flat-out wrong. . . . It has decided this case for the sake of Massey . . . by twisting logic, misapplying the law and introducing sweeping 'new law' into our jurisprudence that may well come back to haunt us . . ."

The West Virginia Supreme Court recently voted to reconsider the November 3-2 ruling. Maynard has recused himself for the reconsideration but Benjamin has not. Starcher also

recused himself. He noted in his dissent that the Massey parties had claimed that he should remove himself “from the consideration of the instant case because [he] had publicly decried the one-man smear tactics that Mr. Blankenship brought to our most recent Supreme Court election.” He added: “It has been amusing for me to see Mr. Blankenship trying with all his might to create the circumstances where I would be forced to step aside and let him have *in toto* the kind of court he wants . . .”

The reconfigured West Virginia Supreme Court is scheduled to rehear the case on March 12. Stay tuned.

From the [blog.wsj.com/law](http://blog.wsj.com/law), Feb. 22, 2008.

**1. Summary judgment procedure; statute of limitations; duty of insurance agent--  
*Filip v. Block*, 879 N.E.2d 1076 (Ind. January 29, 2008)(Boehm)**

John and Valaria Filip obtained insurance from Carrie Block, an insurance agent with the First Choice Insurance Agency, to cover an apartment building. After a fire substantially destroyed the building, the Filips incurred losses that were not covered by their insurance policy and they sued Block and First Choice for negligence in the selection of insurance. Block and First Choice moved for summary judgment on the claim and the Filips filed their response late. After the late response was stricken, the Filips opposed the motion by relying on evidence filed by defendants. The trial court granted the summary judgment motion but the Court of Appeals reversed.

On transfer, the Supreme Court addressed three issues: First, it clarified the designation requirements for summary judgment, stating:

“Trial Rule 56(c) does not mandate either the form of designation, i.e., the degree of specificity required, or its placement, i.e., the filing in which the designation is to be made. Trial Rule 56(C) does compel parties to identify the “parts” of any document upon which they rely. The Rule thus requires sufficient specificity to identify the relevant portions of a document, and so, for example, the designation of an entire deposition is inadequate. . . . Although page numbers are usually sufficient, a more detailed specification, such as supplying line numbers, is preferred. Adding verbatim quotations of the selected items gives the trial court a more convenient reference, but is not required and may be excessive if large quantities of text are designated.

*Parties may choose the placement of evidence designation. .... Designation may be placed in a motion for summary judgment, a memorandum supporting or opposing the motion, a separate filing identifying itself as the designation of evidence, or an appendix to the motion or memorandum. The only requirement as to placement is that the designation clearly identify listed materials as designated evidence in support of or opposition to the motion for summary judgment. If the designation is not in the motion itself, it must be in a paper filed with the motion, and the motion should recite where the designation of evidence is to be found in the accompanying papers.*

*[T]he entire designation must be in a single place*, whether as a separate document or appendix or as a part of a motion or other filing. If a party designates both specific lines or text and also more general identification of the document containing the specified lines, the court may limit that party to the more specific designation.

On the other hand, a party may rely on designations by an opposing party, even if inconsistently designated in different places. Any confusion as to what comprised the formal designation in this case was created by the defendants. Having stated in their motion that they designated, for example, pages 18-25 of a deposition, the defendants may not later provide an alternative designation of specific lines and paragraphs and prevent the Filips from relying on the remainder of the designated pages. The Filips may therefore rely on the entire designated pages identified in the defendants' motion in opposing summary judgment. [Emphasis added].

The second issue addressed by the Supreme Court concerns the trigger date of the two-year statute of limitations for claims for obtaining inadequate insurance. The Filips argued that the claim accrued when the fire occurred, noting that “a cause of action prior to a loss is not ripe.” The Supreme Court, however, adopted an expansive view of “loss,” finding that “[t]he Filips bore the risk of loss from the date the policy was issued, so their injury from the alleged negligence occurred at this point.” The Court holds that the statute begins to run from the date the insureds, “in the exercise of ordinary diligence, could have discovered that they were underinsured.”

Since the deficiencies in the Filips' coverage “were ascertainable simply by reading the policy,” the limitations period began to run on or shortly after the activation of the policy. In so holding, the Court quoted language from earlier opinions holding that insurance applicants are not “relieved from the duty of exercising the same ordinary care and prudence that is required in every other business transaction. It is the duty of every man to read what he signs.”

The Court recognized that an insurance agent may be estopped from relying on the written policy if the agent has specifically and erroneously stated to the insured that the policy provides for certain coverage. There was evidence of record that the insurance agent told the Filips that their nonbusiness personal property was covered by the commercial policy when in fact, no such coverage was provided. As to this claim, the Supreme Court held that the statute of limitations had not run. The Court, however, further held that there were no damages from this breach because the personal property policy limits of \$17,000 had been exhausted by losses of business personal property and the \$17,000 limit was known to the Filips.

The third issue addressed by the Court concerns the duty owed by an insurance agent to the insured. An insurance agent who undertakes to procure insurance for another is an agent of the insured and owes the insured a general duty to exercise reasonable care, skill and good faith diligence in obtaining insurance. Included in this general duty is a duty of care to procure the insurance asked for by the potential insured. The agent does not have a duty, however, to advise the potential insured about the adequacy of coverage or any alternative coverage that is available unless a “special relationship” has been established.

The Court held that there was no “special relationship” between Block and the Filips that would give rise to a “duty to advise” except as to coverage of nonbusiness personal property. There may have been such a duty arising from Block’s statement that such property was covered by the commercial policy and a promise by Block to visit the building. The Court, however, found that this special relationship existed only in 1999 and the statute had run on any such claim.

Lessons:

1. When moving for summary judgment, designate the supporting materials in the motion itself or in a separate paper filed with the motion, but state in the motion where the designation can be found.
2. Designate in one place; don’t intersperse designations throughout a summary judgment brief.
3. A claim against an insurance agent may start to run before you’ve incurred a real loss.
4. An insurance agent has no duty to advise unless there is a special relationship.

## **2. Preferred venue—*Randolph County v. Chamness* (Ind. Jan. 22, 2008)(Shepard)**

A question of preferred venue arose in this auto accident case after a car left a county roadway in Randolph county, overturned, rolled and ejected a passenger in Delaware County. Suit was filed in Delaware County against defendant Randolph County for failing to properly construct, maintain and supervise the Randolph County roadway. Randolph County moved for change of venue, claiming that preferred venue did not lie in Delaware County. The trial court denied the motion but the Court of Appeals reversed, finding that preferred venue lies in the county in which the tortious conduct took place—in this case, Randolph County.

On transfer, the Supreme Court interpreted the language of Trial Rule 75 to allow that “the county where the accident occurred” may actually be two counties. The Court concluded that: “If a car runs off the road in one county, and lands in another, an injured plaintiff may file suit in either county.” In reaching this result, the Court noted that the venue rule is intended for the convenience of all those involved in the litigation. Here, both counties were convenient for the witnesses, the litigants and a jury viewing. “Most people would say that this accident occurred in both counties, and if we were to hold that an ‘accident or collision’ must occur only in one county, we would not add any level of convenience, only a level of disputatiousness.” The Court observed: “This extraordinary situation, evocative of a law professor’s hypothetical, merely calls for adherence to the spirit of convenience underlying the venue rules, rather than an examination of the technical language.”

Lessons:

1. Sometimes the “spirit” of a rule will prevail over the specific language.
2. An accident may occur in more than one county for venue purposes.

Note: If the plaintiff had sued in Randolph County, the parties would have been entitled to change of venue based on Trial Rule 76. This is the rule that allows a change of venue if the home county is a party.

**3. Preferred venue—*Surfware, Inc. v. Allied Specialty Precision*, 876 N.E.2d 1156 (Ind. Ct. App. Nov. 30, 2007)(Riley)**

Plaintiff Allied (located in St. Joseph County) purchased software licenses, software drivers, maintenance plans and training sessions from defendant Online Resources (located in Boone County). Online Resources' President, Jay Schaumberg, went to St. Joseph County to install the software and train Allied's employees but was unsuccessful in properly installing the software and never returned. Allied sued Online Resources and other defendants in St. Joseph County for breach of contract and related claims. Defendants moved to dismiss or transfer to Boone County, contending that it was the only county of preferred venue. The trial court denied the motion and defendants filed an interlocutory appeal.

Allied argued that preferred venue lies in St. Joseph County pursuant to Trial Rule 75(a)(2) which authorizes preferred venue in the county where: "the chattels or some part thereof are regularly located or kept, if the complaint includes a claim for injuries thereto or relating to such ... chattels, including without limitation claims for recovery of possession or for injuries, to establish use or control, to quiet title or determine any interest, to avoid or set aside conveyances, to foreclose liens, to partition and to assert any matters for which in rem relief is or would be proper..." The specific issue before the court was whether Allied's complaint included a claim for injuries to chattel or relating to chattel.

The trial court found that "the product (CD ROMS containing the software licensed to [Allied], USB keys necessary to operate the software and the post-processor) are chattels." That these items were chattels was not challenged on appeal, chattels being defined as "movable or transferable property; personal property; esp[ecially], a physical object capable of manual delivery and not the subject matter of real property." There was also no dispute that these chattels were located in St. Joseph County. The issue was whether the claims qualified as "relating to chattel" in light of limitations established by prior case law.

In *R&D Transport, Inc. v. A.H.*, 859 N.E.2d 332 (Ind. 2006), the Supreme Court had refused to find in an auto accident case that preferred venue would lie in the county where damaged items inside a vehicle (orthotic devices, clothing, etc.) were regularly kept, since this location played no role in the accident. Here, the Court found that St. Joseph County is where the "accident" occurred due to the chattel being located there.

In *Burris v. Porter*, 477 N.E.2d 879 (Ind. Ct. App. 1985), the Court interpreted T.R. 75(A)(2) to require more than that the claim "relate to the chattel" but must include a claim for injuries thereto or relating to such chattels. In *Surfware*, the Court expressly rejected the *Burris* holding, saying it had been previously overruled and requires a more onerous burden to establish venue that the rule mandates.

**Lessons:**

1. If chattel is involved in your case, the county in which it is regularly located may provide preferred venue pursuant to T.R. 75(A)(2); the provision is not just when you've got an in rem claim.
2. Software is "chattel," at least when sold in a physical form such as a CD ROM.

**4. Refreshed recollection; adverse party—*Gault v. State* (Ind. Jan. 15, 2008)(Sullivan)**

During cross examination by defense counsel in a drug case, police officer Shawn McGuire indicated that his police report would refresh his memory. The prosecutor handed the report to the defense counsel who handed it to McGuire and after reviewing the report, McGuire provided some additional information. Defense counsel asked to examine the report and the prosecutor objected that it was work product. The trial court refused to allow defense counsel to examine the document and the Court of Appeals agreed.

The issue before the Supreme Court on transfer was whether pursuant to Rule 612(a) of the Indiana Rules of Evidence, the defense counsel should have been allowed to review the report. This rule provides: “If, while testifying, a witness uses a writing or object to refresh the witness’s memory, an *adverse* party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.” The State argued that since the refreshing of recollection occurred during cross examination by defense counsel, the defendant should not be regarded as the adverse party.

In considering the issue, the Court noted that there can be much confusion in identifying who is an adverse party for purposes of Rule 612(a). It cannot always be determined by reference to which party called the witness, which party asked for refreshing the recollection, or by the parties’ relative position in the case. The Court noted that in civil cases, there may be parties, such as intervenors and joint defendants, whose interests may be adverse on certain issues and converge on other issues.

To resolve this problem, the Court cited with approval the following analysis set forth by Charles Alan Wright & Victor James Gold, in Federal Practice and Procedure § 6183, at 451 (1993):

The policy underlying Rule 612 of exposing the danger of suggestion again indicates the appropriate interpretation of that provision. An “adverse party” should be considered one whose interests could be harmed by the testimony that was based on the refreshed memory. Thus, regardless of whether the parties are generally aligned or opposed, standing to invoke rights under Rule 612 should depend upon whether a party has a motive to expose the influence of suggestions contained in the writing.

Accordingly, the Court held: “If a witness uses a document to refresh his or her recollection on the stand, the spirit and text of Evid. R. 612 require that . . . the parties ‘whose interests could be harmed by the testimony that was based on the refreshed memory’ must have access to the document.’ In this case, Gault was the party whose interests could have been harmed by McGuire’s testimony based on his refreshed memory. Gault’s counsel should have had access to the police report.”

This ruling, however, proved to be a hollow victory for Gault because, upon further analysis, the Court found the error to be harmless.

Lessons:

1. For purposes of Evid. R. 612, an adverse party is one whose interest could be harmed by the refreshed testimony.
2. Providing a privileged document to refresh recollection will usually waive the privilege.
3. Wright & Miller (Gold) on Federal Practice is a good source to cite to the Indiana Supreme Court.

**5. Dead Man's Statute; waiver; habit evidence—*Carlson v. Warren* (Ind. Ct. App. Dec. 27, 2007)(Vaidik)**

In August 2003, Noel Mangus executed a warranty deed on 117 acres of farmland in Montgomery County, retaining a life interest and granting a remainder interest to his nephew, Ernest Warren and Ernest's wife, Anita. Mangus died intestate in 2004. The sole beneficiaries of his estate were Ernest, his niece (Joyce Carlson who was named personal representative of the estate) and his sister (Elizabeth Alderson). Carlson and Alderson sued the Warrens to set aside the August 2003 conveyance of land on the grounds, inter alia, of undue influence and fraud. The Warrens denied any wrongdoing and moved for summary judgment. In support of the motion, the Warrens designated deposition testimony of Ernest. Carlson and Alderson filed a cross motion for summary judgment and moved to strike Ernest's designated testimony, arguing that it was barred by the Dead Man's Statute.

The Dead Man's Statute provides that in certain suits in which an administrator of an estate is a party, a person who is a necessary party and whose interest is adverse to the estate, is not a competent witness as to matters against the estate. The purpose of the rule is to "ensure that when one party to a transaction has had her lips sealed by death the other party's lips are sealed by law." The statute is limited to circumstances in which the decedent, if alive, could have refuted the testimony of the surviving party.

The Warrens did not challenge the fact that the Dead Man's Statute was generally applicable to Ernest's testimony but they argued that Carlson and Alderson had waived the statute by designating 14 excerpts from Ernest's testimony in support of their cross-motions for summary judgment. Carlson and Alderson argued that these excerpts were outside the Dead Man's Statute and therefore did not waive anything. The Court of Appeals agreed that it is only testimony "as to matters or transactions concerning the decedent" that are subject to the statute but concluded that the excerpts in question were of this type and therefore, the statute was waived.

Carlson and Alderson also challenged habit evidence from the attorney, Richard McGaughey, who prepared the August 2003 deed. McGaughey prepared 500 to 700 deeds per year and could not remember his meeting with Mangus and the Warrens. McGaughey testified that it was his normal practice to talk with the individual preparing to execute a deed and observe certain interactions in order to evaluate the person's competency and the voluntariness of the transaction. It was further his practice to refuse to execute a deed where an individual appears to be incompetent or an involuntary participant to the transaction. The Court of Appeals concluded that this evidence of habit was admissible under Evidence Rule 406 and highly relevant.

Lessons:

1. If you want to rely on the Dead Man's Statute, don't offer testimony from the witness you are saying is "incompetent" unless you're certain it falls outside the scope of the statute.
2. Habit evidence can help fill a gap when memory loss prevents direct testimony about repetitive events.

Note: The opinion also includes a good discussion of the law on undue influence, constructive fraud and tortious interference with an inheritance.

**6. Oath requirement; statutory construction—*Oddi-Smith v. State* (Ind. Jan. 9, 2008)(Shepard)**

Ms. Oddi-Smith was charged with OWI. She moved to suppress the evidence from her traffic stop and arrest on the grounds that the arresting officer lacked authority to perform her arrest because he had not re-taken the oath to enforce the Constitution etc. after the merger of IPD and the Marion County Sheriff's Department. Judge Reuben Hill granted the motion and dismissed the charges against her. The State appealed and the Supreme Court granted immediate review, bypassing the Court of Appeals. The Court finds that all sworn officers of the IPD or MCSO at the time of the consolidation satisfied the oath requirement for officers in the Indianapolis Metropolitan Police Department (IMPD).

In so holding, the Court provides a succinct summary of the law of statutory interpretation:

The primary purpose in statutory interpretation is to ascertain and give effect to the legislature's intent. The best evidence of that intent is the language of the statute itself, and we strive to give the words in a statute their plain and ordinary meaning. A statute should be examined as a whole, avoiding excessive reliance upon a strict literal meaning or the selective reading of individual words. The Court presumes that the legislature intended for the statutory language to be applied in a logical manner consistent with the statute's underlying policy and goals.

Note: The time from arrest (on January 15, 2007) to Supreme Court decision (January 9, 2008) was less than one year.

**7. Waiver of treble damages; Crime Victims Statute—*State Group Indus. (USA) Ltd. v. Murphy & Assocs. Indus. Servs., Inc.* (Ind. Ct. App. Dec. 28, 2007)(Robb)**

State Group was the prime contractor on a project with the Army Corps of Engineers. M&A entered into a contract with State Group to provide materials for the project. State Group asserted claims against M&A for breach of contract and fraud based on failing to deliver promised materials and making false representations to induce payment before delivery. State Group also sought treble damages and attorney's fees under the Crime Victims Statute (Ind. Code § 34-24-3-1). Following a bench trial, the trial court found in favor of State Group on both

its breach of contract and fraud claims and further, concluded that M&A had committed the crime of deception by knowingly and intentionally making false or misleading statements with the intent to obtain payment from State Group. The trial court awarded actual damages of \$141,943 but declined to award damages under the Crime Victims Statute.

The issue on appeal concerned whether recovery under the Crime Victims Statute was barred by a contract provision that purported to limit State Group's remedies for any legal claims against M&A, stating that "under no circumstances shall [M&A] be liable for . . . exemplary damages." The Court of Appeals refused to enforce this provision, noting first: "Although we have found no Indiana decision indicating that a party may not contract against liability for intentional *tortious* (sp?) acts, this rule has a general consensus among our sister states. . . . Research has disclosed no state allowing parties to contract out of liability for future intentional torts." (Emphasis added).

Notwithstanding this research, the Court decided to rest its decision on other grounds, specifically the principle that exculpatory provisions phrased in general terms will not be enforced. Such provisions must specifically and explicitly refer to the conduct that is being released. Here the Court found that the contract language was not sufficiently specific in its preclusion of claims for criminal or fraudulent conduct. The case was remanded to the trial court for consideration of treble damages and attorney's fees under the Crime Victims Statute.

Lessons:

1. The Court is likely to find unenforceable any contractual provision that purports to waive intentional torts.
2. Any waiver provision needs to specifically refer to the claims being waived; general language will not suffice.
3. The word is "tortious"; not "tortuous."

**8. Meaning of "Shall"; statutory deadline and continuances—*Parmeter v. Cass County Dep't of Child Services* (Ind. Ct. App. Dec. 28, 2007) (Najam)**

Indiana Code Section 31-34-11-1 states: "[T]he juvenile court *shall* complete a fact-finding hearing not more than sixty (60) days after a petition alleging that child is a child in need of services is filed . . . ." Indiana Code Section 31-34-19-1 states: "The juvenile court *shall* complete a dispositional hearing not more than 30 days after the date the court finds that a child is a child in need of services . . . ."

In this CHINS case, the trial court did not meet either deadline and the Mother argued on appeal that, having failed to meet the deadlines, the juvenile court lacked jurisdiction. In resolving this issue, the Court of Appeals observed: "A statute containing the term "shall" generally connotes a mandatory as opposed to a discretionary import. However, "shall" may be construed as directory instead of mandatory "to prevent the defeat of the legislative intent. Thus, the term "shall" is directory when the statute fails to specify adverse consequences, the provision does not go to the essence of the statutory purpose, and a mandatory construction would thwart the legislative purpose."

Applying these principles the court finds that “shall” as used in these statutes is directory and not mandatory and that the juvenile court did not lose jurisdiction when it failed to meet the statutory deadlines. [Black’s Law Dictionary defines “directory” as: “A provision in a statute, rule of procedure or the like, which is a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed.”]

The trial court continued the factfinding hearing at the request of DCS because of the alleged unavailability of witnesses. The appellant Mother argued that granting this motion was an abuse of discretion, noting the statute that required completion of the factfinding hearing within 60 days after the CHINS petition is filed. The Court of Appeals found that Trial Rule 53.5 that governs continuances and allows the court discretion to continue a trial upon a showing of good cause, takes precedence over any conflicting statute.

Note: The Federal Rules of Civil Procedure were amended, effective December 1, 2007, to remove the term “shall” and replace it, when a mandate is clear, by the term “must.” When something is not mandated but is encouraged, the term “should” is used. When the act is permissive, the term “may” is used. The verbiage “may, in its discretion” has been changed to delete “in its discretion” as redundant because “may” already invokes discretion. These were all stylistic changes that were not intended to make any substantive changes.

Lessons:

1. “Shall” is not always mandatory; sometimes it is a mere direction of no obligatory force.
2. Trial Rule 53.5 on continuances controls over statutes that impose time limits.

**9. Motion for new trial; Thirteenth Juror—*Leroy v. Kucharski* (Ind. Ct. App. Dec. 13, 2007)(Sharpnack)**

Michelle Kucharski sued Shon Leroy for injuries in an auto accident. The jury found Kucharski 60% at fault and Leroy 40% at fault. The trial court granted Kucharski’s motion for a new trial on the grounds that the verdict was against the weight of the evidence. Leroy had pulled out at an intersection in response to a gesture by another driver encouraging him to turn. Kucharski had the right of way and although Leroy argued that she should have slowed down, there was no evidence that she had been speeding. Leroy appealed, arguing that the trial court had abused its discretion in setting aside the jury verdict and had failed to comply with the requirement in Trial Rule 59(J) that it “shall make special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted.”

The Court of Appeals recognized that the “trial judge sits as a thirteenth juror and must determine whether in the minds of reasonable men a contrary verdict should have been reached.” It was noted that if the trial judge orders a new trial because the verdict is against the weight of the evidence but fails to make the required special findings, the proper remedy is reinstatement of the jury verdict. In reviewing the findings by the trial court here, the Court of Appeals concluded that while there were some minor deficiencies in the trial court’s findings, they were

not material and the trial court was within its discretion in finding the verdict to be “against the weight of the evidence.”

Lessons:

1. When trying a jury case, don’t forget about persuading the “thirteenth juror.”
2. When moving to correct error on the ground that the verdict is against the weight of the evidence, make sure that you provide the requisite special findings on each material issue.

**10. Discovery of trade secrets—*Bridgestone Americas Holding, Inc. v. Mayberry* (Ind. Dec. 18, 2007)(Shepard)**

This case arose from a fatal car accident that plaintiffs blamed on a defective Bridgestone/Firestone tire. During pretrial discovery, plaintiff sought the formula used for the rubber compound used in the tire. Bridgestone moved for a protective order which the trial court denied, ordering Bridgestone to produce the formula. Bridgestone appealed. The Court of Appeals affirmed and the Supreme granted transfer to resolve as an issue of first impression: how should an Indiana court analyze a request to protect a trade secret from pre-trial discovery?

The Court adopts a three-part balancing test that has been used in federal courts and other state courts for many years:

First, the party opposing discovery must show that the information sought is a “trade secret or confidential research, development, or commercial information” and that disclosure would be harmful.

Second, if the first burden is met, then the burden shifts to the party seeking discovery to show that the information is relevant and necessary to bring the matter to trial. “Necessity” means that without discovery of the trade secret, the discovering party would be unable to present its case “to the point that an unjust result is a real, rather than a merely possible threat.”

Third, if both parties satisfy their burden, the court must weigh the potential harm of disclosure against the need for the information in reaching a decision.

Here the Court found that Bridgestone had met its burden of establishing that the rubber formula was a trade secret by presenting the affidavit of a Bridgestone engineer indicating that this formula was one of Bridgestone’s most valuable assets and closely guarded secrets. The Court, however, found that the plaintiffs failed to show that discovery of the formula was necessary to their case. They could inspect and test the tire to determine whether it was defective without knowing the formula. Accordingly, the trial court’s order was reversed.

Lesson: The test for discovery of a trade secret requires consideration of three questions:

1. Is the information a trade secret?
2. Is the information relevant and necessary to the discovering party’s case?
3. Does the harm of disclosure outweigh the need?

**11. Discovery of personal financial information—*Estate of Raymond Lee v. Lee & Urbahns Co.* (Ind. Ct. App. Nov. 14, 2007)(Bradford)**

The plaintiff Estate sought discovery of the personal financial information of the defendant, John Urbahns, who was a former partner of Raymond Lee (deceased) in several real estate developments. Lee’s Estate contended that Urbahns had breached common law and statutory duties to the Estate, had committed conversion of the Estate’s asset, and had committed fraud, constructive fraud, and ultra vires acts by concealing information. The trial court declined to order production of Urbahns tax returns, bank statements and other personal financial records unless and until the Estate showed at trial that it was entitled to punitive damages.

The Court of Appeals noted that under Trial Rule 26(C), a party seeking a protective order must show “good cause” why such an order is required to protect it from “annoyance, embarrassment, oppression, or undue burden or expense.” The Court finds that although Trial Rule 26(C) contains no specific reference to privacy interests, such matters are implicit in the broad purpose and language of the rule. The Court further finds that it “seems self-evident” that a person’s financial records dating back five years, including tax returns, bank statements, etc., are “something almost all persons would prefer to keep private.... [A] request for such records would be, for most, annoying and quite likely embarrassing, unduly burdensome, and expensive as well.... We believe that, in almost all cases, such a request confers good cause on the opposing party if it wishes to oppose it. We see nothing in the record here to suggest this case should be an exception to that general rule....”

In light of this “good cause” for a protective order, the Court held that the Estate was required to make some showing that discovery of Urbahn’s personal financial information was warranted, beyond mere assertions. This the Estate failed to do.

Lessons:

1. Protective orders can be obtained to protect privacy interests from discovery.
2. To obtain personal financial information in discovery, a party must provide a substantial justification that is based on more than bare assertions.

**12. Consolidation of preliminary injunction hearing and trial—*Roberts v. Community Hospitals of Indiana, Inc.* (Ind. Ct. App. Dec. 12, 2007)(Riley)**

Dr. John Roberts was terminated from his employment as a resident in Community Hospital’s Family Medicine Residency Program for myriad instances of allegedly unprofessional conduct. Roberts sued and sought a preliminary injunction to restore his position. The trial court conducted a hearing on the motion for preliminary injunction and then issued an order, after the hearing, denying the motion for preliminary injunction, consolidating the hearing with the trial on the merits, and entering final judgment against Roberts.

On appeal, Roberts argued that the trial court had erred when it consolidated the preliminary injunction hearing with trial on the merits without notice. The Court of Appeals agreed that notice of consolidation should be provided prior to the hearing but failure to give

notice is not reversible error unless the party claiming error demonstrates that it was prejudiced by the consolidation. Roberts filed an affidavit explaining some of the things he would have done if had been given notice such as conducting additional discovery, calling additional witnesses, and retaining an expert witness. The Court of Appeals found that this affidavit was sufficient to demonstrate prejudice and accordingly, reversed the trial court for failure to give notice of the consolidation.

Lessons:

1. If you want to consolidate a preliminary injunction hearing with the trial on the merits, ask for it early and alert the court of the need to give advance notice of consolidation.
2. If the trial court consolidates without notice to your client's prejudice, provide an affidavit with details as to how this was prejudicial.

**13. Incurred Risk in medical malpractice—*Spar v. Jin S. Cha, M.D.* (Ind. Ct. App. Feb. 20, 2008)(May)**

Brenda Spar sued Dr. Jin Cha for medical malpractice after he perforated her bowel during a surgical procedure which resulted in a serious infection. The medical review panel unanimously found that Dr. Cha had committed malpractice but the jury returned a verdict in his favor. On appeal, Spar argued that the trial court had erred by permitting Dr. Cha to argue the defense of incurred risk based on Spar's knowledge that the risks of this surgery included injury to the bowel and infection.

The Court of Appeals held that the defense of incurred risk may not generally be used to avoid negligent performance of a medical procedure. The Court recognized that the defense would apply if a patient fails to follow a physician's instructions and as a result of that failure, suffers consequences. But the general rule is that a patient does not assume the risk of a negligently performed surgical procedure regardless of what the patient was told and regardless of a signed consent form to the procedure.

Lesson: Incurred risk will not generally be a defense to medical malpractice.

(Note: This was a 2-1 decision with Judge Darden dissenting. The majority opinion by Judge May relied heavily on a prior concurring opinion by Judge Sullivan).

**14. Court Costs; attorney misconduct—*Custer v. Schumacher Racing Corp.* (S.D. Ind. 2/8/07 )(Lawrence)**

Defendant Schumacher Racing won a jury verdict in federal court and then filed a bill of costs in the amount of \$4,593. This request launched what Judge Lawrence called "an unfortunate, surprising and disappointing battle" between counsel in the case. Less than 4 ½ hours after the motion for costs was filed, plaintiff's counsel filed a response brief which the Court noted: "Without question [counsel] would have been well served to take some time for circumspection before filing his brief; not only might he have realized his errors in legal reasoning, but perhaps he also would have toned down his rhetoric to a more appropriate level."

In his response, plaintiff's counsel moved for sanctions which the court concluded was "unfounded and imprudent." Defendant's counsel "further cluttered the Court's docket by filing a motion to strike the request for sanctions on the sole ground" that it violated Local Rule 7.1 by not filing the request for sanctions as a separate motion. The defendant's motion was denied as frivolous. Judge Lawrence ended his entry with this comment: "It is the Court's sincere hope that both attorneys now realize the impropriety of their behavior and regret using the Court's docket as a forum for airing their apparent animosity toward one another."

Lessons:

1. Don't file something until after you've had time to cool off.
2. Be cautious before filing motions for sanctions and motions to strike.

**Tip of the Month: Provide active oversight of the search of client files for documents requested in discovery.**

A cautionary tale: On January 9, 2008, a U.S. Magistrate Judge in the Southern District of California awarded sanctions of more than \$8 million against Qualcomm, Inc. and its lawyers for failure to produce emails that were requested in discovery. She also referred six of the lawyers to the State Bar of California for an investigation of possible ethical violations. *Qualcomm Inc. v. Broadcom Corp.* (S.D. Calif., January 8, 2008).

Qualcomm failed to produce 46,000 responsive documents (300,000 pages) that were directly relevant to the most important issue in the case. The Judge held that these six attorneys "assisted Qualcomm in committing this incredible discovery violation by intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that Qualcomm's document search was inadequate, and blindly accepting Qualcomm's unsupported assurances that its document search was adequate."

The Judge relied upon Rule 26(g)(2) of the Federal Rules of Civil Procedure:

Every discovery request, response or objection made by a party . . . shall be signed by at least one attorney [and] [t]he signature of the attorney . . . constitutes a certification that to the best of the signer's knowledge, information, and belief, *formed after a reasonable inquiry*, the request, response, or objection is: consistent with the rules and law, not interposed for an improper purpose, and not unreasonable or unduly burdensome or expensive. [Emphasis in original]

"Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search."

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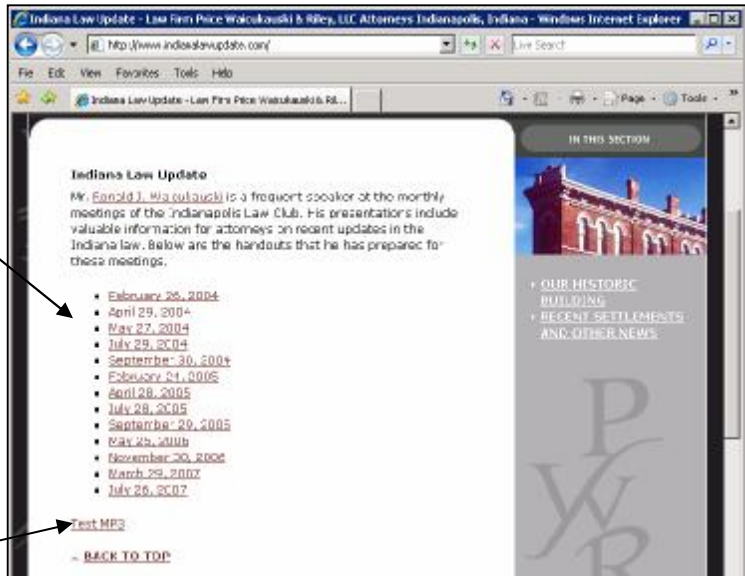
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