

INDIANAPOLIS LAW CLUB
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Advocacy Tip of the Month: Master the Rules

IN THE NEWS: Judge John Tinder nominated to the Seventh Circuit.

“A federal judge in Indianapolis could be the first Hoosier jurist appointed to the 7th Circuit Court of Appeals in Chicago in 20 years.

“But U.S. District Judge John D. Tinder is poised to make an even more significant ripple in Indiana’s legal history, as he’d be the first ever jurist to go on the 7th Circuit from the Southern District of Indiana – or at least how it’s existed since the state was divided into two districts in 1928.”

Indiana Lawyer July 25-August 7, 2007, p. 1

1. Medical malpractice; contingency fees. In the Matter of Daniel Stephens, 867 N.E.2d 148 (Ind., 5/31/2007)(Per curiam)(Shepard)

Daniel Stephens received a public reprimand on August 11, 2006 for his fee arrangement with a client in a medical malpractice action. The Indiana Trial Lawyers Association moved to intervene and for rehearing. The principal issue presented was whether the Sliding Scale Fee Arrangement used by many medmal lawyers violates the Rules of Professional Conduct.

The Medical Malpractice Act limits a lawyer’s recovery to 15% of the amount the client recovers from the Fund but specifies no limit on fees from the amount a client receives from a Qualified Provider. Under the current statute, the Qualified Provider is responsible for the first \$250,000 and the Fund pays for recoveries above that, to a maximum of \$1 million (\$1.25 million total). Many Sliding Scale Fee Arrangements provide for a 35% overall fee, accomplished by a 15% fee from the Fund recovery plus an amount from the \$250,000 non-Fund recovery needed to make the total fee equal to 35% of the total settlement. By this means, up to 100% of the non-Fund recovery may be allocated to fees.

The Disciplinary Commission argued that the application of such a large percentage to the non-Fund recovery constitutes an improper attempt to circumvent the 15% statutory limit on the Fund portion and was an unreasonable fee arrangement in violation of the Rules of Professional Conduct. The Indiana Supreme Court agreed with that position in *Stephens I*, 851 N.E.2d 1256 (Ind. 2006), but in granting rehearing, the Court finds: “We cannot say that the employment of the Sliding Scale Fee Arrangement to yield a contingent fee in the 32-35% range is unreasonable in all medical malpractice cases. To the extent [prior cases including *Stephens I*] suggests otherwise, they are overruled.”

The Court declines to identify a “safe harbor” range of permissible fees, finding that “each case is unique and must be evaluated on its own terms.” Factors that will affect the permissible fee include: the complexity of the medical issues; the risk of a finding of no liability; the degree of dispute over damages; whether the case is fully tried and the anticipated litigation expenses. The Court indicates that the upper limit is probably 35% but sometimes that will be unreasonably high. It will help if there is evidence of “an arms-length, fully informed, and freely negotiated fee agreement.”

“An agreement containing a Sliding Scale Fee Arrangement must make clear that the client’s recovery, if any, may be paid in part from the Fund and in part from other sources, indicate that the MMA limits the lawyer’s fee attributable to that part of the recovery paid from the Fund to 15%, and clearly explain the operation of the Sliding Scale Fee Arrangement in relation to this statutory requirement.” (See footnote 4 for sample.)

Lessons:

1. Sliding Scale Fee Arrangements are ok but be careful.
2. The Supreme Court recommends adjusting the contingent fee percentage in accordance with the circumstances of the case—in all kinds of cases; not just medical.
3. “We agree with the Commission that 40% is ordinarily the maximum” percentage in any kind of case.

Notes:

- From 1975 to 2005, only 10.2% of proposed complaints resulted in a medical review panel finding of medical malpractice and only 13.8% received any payment from the Fund.
- The reprimand of Mr. Stephens, to which he had agreed, was affirmed, finding, *inter alia*, that a nonrefundable retainer provision was improper.
- Chief Justice Shepard concurred in the result, noting that the opinion “does not answer a good many questions important to the topic” and that while the ITLA submission was persuasive, “the defendants against whom they file claims (and their associations and related institutions with apparent stake in the outcome) have elected to stand silent.”

2. Lazy judge rule; mandamus. State ex rel Hoffman v. Allen Circuit Court, 868 N.E.2d 470 (Ind., 6/22/2007)(Dickson)

Following trial in a paternity case, the presiding magistrate set a deadline for proposed findings and conclusions and added: “The time within which the Court is to rule on the issues shall not begin to run until said Findings of Fact and Conclusions of Law are filed unless either party files an objection to this order within five (5) days.”

The parties filed a couple of agreed extensions to the submission of findings and conclusions and then on the 91st day after trial, counsel for the alleged father filed a praecipe under Trial Rule 53.2 seeking removal of the case from the judge and appointment of a special judge. Rule 53.2 requires a trial judge to rule within 90 days following a bench trial unless the parties agree that this time limit shall not apply or the Indiana Supreme Court extends the deadline.

Four days after the lazy judge motion was filed, the trial court ruled largely in favor of the mother and shortly thereafter, the Clerk refused to withdraw the case from the judge, finding that the father’s failure to object and multiple requests for extensions to file findings and conclusions “may be deemed to be an agreement as to the Court’s delay.”

The alleged father then petitioned the Indiana Supreme Court for a writ of mandamus. The Court agreed with the alleged father that the trial court's request for proposed findings and conclusions and the extensions of time for submission of these documents did not affect the trial court's obligation to rule within 90 days. The Court also agreed with the alleged father that an "order presuming agreement absent objection" will not satisfy the trial judge's obligation to make timely decisions. The Court, however, decided to give this ruling prospective application only and denied the writ of mandamus, noting: "The writ of mandamus is an extraordinary remedy, equitable in nature, and viewed with disfavor."

Lessons:

1. Pay attention to lazy judge deadlines if you want a new judge:
 - T.R. 53.1—30 days to set motion for hearing and 30 days after hearing to rule
 - T.R. 53.2—90 days to rule following bench trial
 - T.R. 53.3—45 days to set a motion to correct error for hearing and 30 days after hearing to rule
 - T.R. 53.4—5 days on motion to reconsider or deemed denied
2. Being right does not mean you will always win: mandamus is discretionary.

3. Unauthorized practice of law; real estate documents. Charter One Mortgage Corp. v. Condra, 865 N.E.2d 602 (Ind., 5/2/2007)(Boehm)

Kyle Condra borrowed \$89,000 from Charter One Mortgage Corp. to purchase real estate and was charged a fee of \$175 by Charter One for preparation of the deed and mortgage. The documents were prepared by Charter One's agents or employees who were not licensed to practice law. Condra filed a class action for money had and received and unjust enrichment on the theory that in preparing the documents and charging a fee, Charter One was engaging in the unauthorized practice of law. The trial court denied Charter One's motion to dismiss for failure to state a claim and the Court of Appeals affirmed.

The Indiana Supreme Court previously held in *Miller v. Vance*, 463 N.E.2d 250 (Ind. 1984), that filling out blanks by a bank employee on a routine mortgage instrument did not constitute the practice of law. The *Miller* Court added, however, that the "lay bank employee may not give advice or opinions as to the legal effects of the instruments he prepares or the legal rights of the parties" and added: "the bank may not make any separate charge for the preparation of the mortgage instrument."

Upon further consideration of the implications of charging a fee for the preparation of mortgage documents, the Supreme Court holds that there is no unauthorized practice of law when form mortgage documents are prepared by non-attorneys and the mere charging of a fee does not transform permissible conduct into the unauthorized practice of law.

The purpose of restricting the practice of law to licensed and trained attorneys is to protect the public from serious harm from unknowledgeable legal advice. Requiring an attorney for such a routine task would produce only inconvenience and added cost to the public.

Lessons:

1. The completion of legal documents incident to a lender's financing activities is generally not the practice of law.
2. It makes no difference if a fee is charged.
3. The things that distinguish the practice of law from other conduct include:
 - a. Giving legal advice to a client;
 - b. Placing oneself in a fiduciary relationship;
 - c. Involving the confidence of the client and the management of his affairs.

4. Bifurcation. State Farm Mutual Automobile Ins. Co. v. Gutierrez, 866 N.E.2d 747 (Ind., 2007)(Sullivan)

Francisco Gutierrez was injured when he was struck in the back by the door of a truck in which he had been a passenger. He sued the driver of the truck for negligence and State Farm Insurance for bad faith (due to denial of medical payments). The driver and State Farm both filed motions to bifurcate the trial but both motions were filed after the deadline set by the court in a case management order. The trial court denied the motions as untimely. The Court of Appeals reversed, suggesting that a bad faith claim should never be tried with a liability claim against an insured.

The Supreme Court holds that although as a policy matter it will often be appropriate for bad faith claims to be tried separately from liability claims, the movant should make its motion timely and if it does not, it is within the trial court's power to deny bifurcation. "Keeping the trains running on time is not an insignificant task. If getting the motion on file by the deadline ... proved problematic, Cancel could have asked for an extension of time.... As to the fact that trial was still two years away, we do not see why a party should not comply with a deadline set by the trial court simply because the trial date is far in the future."

The Supreme Court also finds little evidence of prejudice from joinder of the claims in this case. As to the potential prejudice arising from the reference to insurance when deciding compensatory damages for negligence, the Court agreed with the following analysis in Judge Bailey's dissenting opinion in the Court of Appeals:

In Indiana, a person may not operate a vehicle on a public road, street, or highway unless he or she continuously maintains proof of financial responsibility. ... The jurors were specifically instructed that, in deciding what or whom to believe, they should use their knowledge, experience, and common sense gained from day-to-day living. Insurance is known by the responsible citizen to be required to operate lawfully upon our roadways. This knowledge and experience is not lost on those responsible citizens who are called upon to serve as jurors. Thus, the existence of insurance coverage, while potentially prejudicial in some cases, does not appear to have an impact on the determination of compensatory damages in this case.

Lessons:

1. Even when trial is two years away, get an extension when you can't meet a case management deadline.
2. Referring to insurance will not always be prejudicial in a jury trial on liability of the insured.

5. *Batson* challenge; infractions. Schumm v. State, 866 N.E.2d 781(Ind. App., 5/21/2007)(Robb)

Attorney Joel Schumm was cited with a Class C infraction for operating a vehicle with improper taillights. Following a jury trial, he was convicted and fined \$100. Schumm appealed and the Court of Appeals writes a 27-page opinion, reversing the verdict based on error in the handling of Schumm's *Batson* challenge.

Although Schumm is not an African-American, he asserted a *Batson* challenge when the prosecutor struck the only African-American on the jury panel. Believing that only an African-American could assert the challenge, the trial judge denied the motion. The Court of Appeal reverses, finding: "Clear precedent and compelling rationale dictate that **a party may not remove a potential juror based on his or her race, regardless of the race of the opposing party**, and the trial court was incorrect to state otherwise."

The Court of Appeals also finds that the trial court improperly instructed the jury that this trial on a class C infraction was a criminal case. **A trial for a traffic infraction is a civil proceeding.** As such, the jury also determines the fine to be awarded. The trial judge incorrectly failed to present this issue to the jury.

At trial, Schumm attempted to bring in another lawyer as co-counsel. The trial judge denied the request and the Court of Appeals agreed with this ruling. Under Indiana law, **a party to an action may represent himself or by an attorney, but he cannot do both.**

6. Piercing the corporate veil. Four Seasons Manufacturing, Inc. v. 1001 Coliseum, LLC, 2007 WL 2068647 (Ind. App., 7/20/2007)(Baker)

This case arises out of a five-year lease for commercial property. The tenant (FiSHFO) abandoned the property with several years remaining on the lease after a dispute arose concerning who was responsible for roof repairs. The landlord sued for damages and the trial court pierced the corporate veil to hold FSM liable for the debt of FiSHFO, which was a related corporate entity. FSM was the owner and sole member of FiSHFO, an LLC.

In affirming this result, the Court of Appeals stated that the factors to be considered when a party seeks to pierce a corporate veil include eight factors identified in *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994): (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporate shareholders or directors; (4) use of the corporation to promote fraud, injustice, or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; and (8) other shareholder acts or conduct ignoring, controlling or manipulating the corporate form.

When a plaintiff seeks to pierce the corporate veil in order to hold one corporation liable for another closely related corporation's debt, additional factors may be considered, including (1) whether similar corporate names were used; (2) the corporations share common principal corporate officers, directors, and employees; (3) the business purposes of the corporations were similar; and (4) the corporations were located in the same offices and used the same telephone numbers and business cards. *Oliver v. Pinnacle Homes Inc.*, 769 N.E.2d 1188, 1191 (Ind. Ct. App. 2002).

These factors are not exhaustive and not every factor needs to be present to support piercing the corporate veil. Here the trial court and appellate court found there was sufficient evidence to warrant finding FSM liable for the debt of FiSHFO. The court found particularly persuasive the fact that on the day that FiSHFO abandoned the property, FSM orchestrated a transfer of FiSHFO assets to a newly formed corporate entity and while FiSHFO ceased operations and became insolvent, the newly formed entity (also owned by FSM) began operating in the same line of business, selling manufactured homes.

Lessons:

1. Although courts are generally reluctant to disregard corporate identity, they will do so to protect third parties from fraud or injustice when transacting business with a corporate entity.
2. This is a "highly fact-sensitive inquiry" with many factors to consider.
3. The trial court's decision on piercing will be "accorded great deference."

7. Res judicata; motion to amend complaint. Pinnacle Media, LLC v. Metropolitan Development Commission of Marion County, 868 N.E.2d 894 (Ind. App., 6/28/2007)(Najam)

After two prior trips to the Indiana Supreme Court, Pinnacle moved to amend its complaint to assert six new claims for equitable and declaratory relief in its effort to erect 15 billboards on interstate highway rights-of-way in Indianapolis. At the time Pinnacle started this process, it needed a permit from the State but not the City. It received a permit from the State for 10 billboards but as it started erecting the billboards, the City amended its zoning ordinance to require a City permit. After the City issued a stop work order for lack of the newly required City permit, Pinnacle filed suit against the City seeking a declaration that the amendment to the zoning ordinance was inapplicable to the 10 permits.

Pinnacle's initial complaint was based on the vested rights rule set out in *Knutson v. State ex rel. Seberger*, 239 Ind. 656, 160 N.E.2d 200 (1959), which had suggested that having a building permit on file creates a vested right that cannot be overcome by a change in zoning law. In *Pinnacle I*, the Supreme Court found in favor of the City, finding that it was entitled to summary judgment in light of *Lutz v. New Albany City Plan Commission*, 230 Ind. 74, 101 N.E.2d 198 (1958), which had held that there are no vested rights "where no work has been commenced, or where only preliminary work has been done."

On a motion for rehearing, the Supreme Court in *Pinnacle II* upheld the fundamental principle that changes in zoning ordinances are subject to vested rights in property but rejected the notion that having a building permit would automatically create a vested right and ordered the trial court to enter summary judgment for the City. Upon remand, Pinnacle's motion to amend to add additional counts was denied and pursuant to the Supreme Court's direction, granted summary judgment to the City.

Pinnacle again appealed, arguing that it should have been allowed to amend its complaint. The City contended that the new claims were barred by res judicata. In considering this argument, the Court of Appeals noted that there are four requirements for claim preclusion: "(1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between parties to the present suit or their privies."

Pinnacle argued that the third requirement was not met here because it seeks to assert exceptions to the "new rule" of *Pinnacle I* that "an applicant for a building permit does not obtain a vested right unless and until construction is commenced." The Court of Appeals, however, rejected the notion that *Pinnacle I* established a new bright-line rule that construction must be commenced in order to show a vested right. Rather, the existence of a vested right is fact-dependent and may accrue prior to filing for a permit.

Pinnacle could have presented evidence and made arguments based on *Lutz* to show a vested right at the time of the initial summary judgment motion. It could have, but apparently, did not present evidence of costs for leases, options, land purchases, surveying, engineering, site planning, or rezoning. Apparently, it chose instead to rely solely on *Knutson* and issuance of the State permit. Since it could have litigated a claim based on *Lutz* the first time round, res judicata was held to bar the amended complaint.

Lesson: Argue in the alternative; don't put all your eggs in one basket—even when the basket is supported by good language in a Supreme Court opinion.

8. Promissory estoppel. Kacak v. Bank Calumet, N.A., 2007 WL 2034431 (Ind. App., 7/17/2007)(Sullivan)

Gerald Kacak went to a drive-through window at a branch bank in Highland, Indiana to deposit a cashier's check in the amount of \$89,300 drawn on another bank. He asked the teller if the check was good and after the teller spoke to someone (presumably her supervisor), she told Kacak "the check was good." He subsequently withdrew most of the funds but the check proved to be counterfeit. When Kacak refused to reimburse the money, the bank sued.

Kacak defended, asserting the defense of promissory estoppel based on the teller's statement. The trial court rejected the defense and entered summary judgment for the bank. Kacak appealed.

On appeal, the court states: “The doctrine of promissory estoppel is applicable where there is: (1) a promise by the promisor; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise.”

The court finds that the teller’s statement that “the check was good” does not constitute a promise. For a promise, there must be “a voluntary commitment or undertaking by the party making it (the promisor) addressed to another party (the promisee) that the promisor will perform some action or refrain from some action in the future.” The statement “the check is good” is a representation of present fact, not a promise as to the bank’s future actions with regard to the cashier’s check. Summary judgment affirmed.

Lesson: Promissory estoppel requires a promise relating to a future action.

9. Employment agreement; belated pretrial order; appellate procedure. Trinity Baptist Church v. Howard, 2007 WL 2034419 (Ind. App., 7/17/2007)(Hoffman)

Trinity Baptist Church recruited Rev. George Howard to be its pastor in 1994. A written agreement was later signed by the Trinity Board that purported to contain the “full and complete terms and agreement for [Howard’s] employment compensation.” The agreement provided that “employment shall be in accordance with the by-laws of the church.” One of the by-laws of the church states: “The pastor is called for life and removable only by death.” Howard was fired in 2001 and sued for breach of the agreement.

Trinity argued that Howard was an at will employee who could be fired at any time and relied upon prior case law that had held that expressions such as “permanent employment” and “life employment” indicate an at will contract. Indiana law had also established that if there is no definite or ascertainable term of employment, then the employment is at will. Notwithstanding this prior case law, the Court of Appeals finds the language in the by-laws that a pastor is “removable only by death,” is unequivocal and precludes the termination.

Howard won a jury verdict in the amount of \$205,000 for breach of the agreement. He did not, however, file his proposed pre-trial order, including his witness and exhibits list, until the day of trial which was not timely. Trinity objected and asked for a continuance. The trial court denied the motion, saying that “they’re just a list” and if a witness or exhibit has not been disclosed in discovery, then “that’s subject to an objection when the witness or exhibit is called or offered.” Trinity made no such objections during trial. Under these circumstances, the trial did not abuse his discretion in denying the motion.

In its original notice of appeal, Trinity did not indicate that it intended to appeal the denial of the summary judgment motion and did not request a transcript of the summary judgment hearing. Howard argued that this waived the issue for appeal but the Court of Appeals, concluded otherwise, finding the notice of appeal was timely as to the issues relating to trial and summary judgment and the later request for a transcript of the summary judgment hearing is specifically sanctioned by Appellate Rule 9(G).

Lessons:

1. An employment agreement for life will be enforceable if the contract language is clear.
2. The late filing of a witness and exhibit list need not be fatal, although the effect will be left to the discretion of the trial judge.
3. The request for transcript in the original notice for appeal will not foreclose other appellate issues.

Note: Judge Friedlander dissented, finding that an employment contract requires a more definite statement as to time than “employment for life.”

10. Discovery Sanctions; privilege log. *Brown v. Katz*, 868 N.E.2d 1159 (Ind. App., 7/2/2007)(Baker)

Attorney Gregory Brown sued a number of parties for malicious prosecution after he himself had been sued for malicious prosecution based on a prior action. The case involved “an action, within an action, within an action”—like a Russian Matryoshka doll.

The defendants sought discovery from Brown but he objected to most of the requests on grounds that the documents were “protected by the insured-insurer privilege, attorney-client privilege, and work product.” Initially, Brown provided no privilege log. The trial court ordered Brown to file a privilege log by March 25, 2005. On April 1 (7 days late), Brown filed a privilege log that generically identified documents by date and category but did not identify the author of the document, the recipient, or the privilege asserted. The trial court found the log to be inadequate and ordered Brown to produce a properly prepared log within 30 days, adding: “Should he should fail to do so, the Court will dismiss this case with prejudice.”

Brown produced an amended log which he argued, complied fully with the standard set forth in *Hartford Financial Services v. Lake County Park and Recreation Board*, 717 N.E.2d 1232 (Ind. Ct. App. 1999). The trial court, however, was not satisfied and dismissed the case. The Court of Appeals was also not satisfied, not because the privilege log lacked sufficient detail but because Brown, while using the sword of a lawsuit to pursue his claims against defendants, was asserting in essence a blanket privilege to shield discovery about the case—so hampering the defendants’ case preparation as to make it inequitable to proceed.

Thus, while Brown used the same “structure and layout” for a privilege log that was found sufficient in *Hartford*, it was not found to be sufficient here. The Court was particularly troubled by the fact that, although Brown was asserting attorney-client privilege with respect to many of these documents, he never asked his client whether she would waive the privilege.

Lessons:

1. Even a privilege log can spell doom to a case.
2. Provide the required details.
3. Exercise discretion in asserting privilege; avoid blanket assertions as a shield when you’re wielding a sword as to the issue in question.

4. Before asserting the attorney-client privilege, check with the client. It's her privilege to assert or waive.

11. Worker's Compensation. Doerr v. Lancer Transport Services, 868 N.E.2d 890 (Ind. App., 6/28/2007)(May)

Jeff Doerr was employed as an over-the-road truck driver for Lancer and was injured in a work-related accident. At the time, Lancer's worker's comp carrier, Legion Insurance Company, was in liquidation proceedings in Pennsylvania and subject to a stay. Consequently, Doerr received no worker's comp benefits. About a year after the accident, Doerr settled claims he had asserted against the motorist and his uninsured motorist coverage, without the knowledge of Lancer or Legion. Not long thereafter, the stay was lifted and Legion began processing Doerr's claim.

Upon learning of the settlements, Lancer moved to dismiss Doerr's worker's comp claim based on Ind. Code 22-3-2-13. This statute provides that if an employee has *not* received any worker's comp benefits and settles with a third party responsible for accident, then the employer or its carrier "shall have no liability" for payment of worker's comp benefits. Finding the statute clear, the Court of Appeals dismissed Doerr's application for worker's comp benefits, reversing a prior ruling by the Full Worker's Compensation Board to the contrary.

Lessons:

1. When pursuing a work-related accident claim, be sure to protect your client's rights to worker's comp benefits.
2. Do not settle your personal injury claim prior to receipt of at least some worker's comp benefits unless you've got an agreement with the employer and its carrier.

12. Default judgment; excusable neglect; meritorious defense. Shane v. Home Depot, 2007 WL 2034425 (Ind. App., 7/17/2007)(Crone)

William Shane was injured in a "trip and fall" accident on the parking lot of a Home Depot store in Evansville. Suit was brought against three defendants, one of whom, Gershman-Brown & Associates, Inc., failed to timely respond to the complaint after receiving proper service. Upon plaintiffs' request, a default judgment was entered. Pursuant to Trial Rule 60(B), Gershman-Brown moved to set aside the default judgment on the ground of excusable neglect. The trial court granted the motion and plaintiff appealed.

The failure to respond occurred because Fireman's Fund mistakenly assigned the claim to an adjuster who had recently resigned from the company. Because the failure was due to a "breakdown in communication *within the insurance company*," the Court of Appeals upheld the trial court's finding of "excusable neglect." The defendant Gershman-Brown had not dragged its feet but had promptly forwarded the complaint to Fireman's Fund.

In addition to showing "excusable neglect," a party moving to set aside a default judgment must "allege a meritorious claim or defense." T.R. 60(B). Gershman-Brown

attempted to satisfy this requirement by presenting an affidavit from its counsel with several attachments. The Shanes argued that the attorney had no personal knowledge of the facts and could not authenticate the photographs and other documents that were attached to the affidavit. The trial court struck the affidavit but nonetheless found that Gershman-Brown had sufficiently alleged a meritorious defense.

The Court of Appeals agreed, saying it is largely within the discretion of the trial court as to whether there has been a prima facie showing of a meritorious defense. The defense was primarily one of comparative fault based on allegations that Mr. Shane (94 years-old) was not using a cane though he needed one and should have been able to see the large utility cover on which he tripped. The Court observed that “trip and fall” cases “generally lend themselves to defenses such as comparative fault.”

Lessons:

1. Just because “an act is not purposeful” does not make it per se excusable.
2. A meritorious defense need not be proven by admissible evidence.

Advocacy Tip of the Month: Master the Rules

To become skilled in litigation, you should first have mastery of the pertinent law, including especially the rules of evidence, the rules of civil procedure, and your local rules of court. These rules provide much of the legal framework in which litigation is practiced. Just as you have to know the rules of the game to play football, you have to know the rules of procedure and evidence to litigate.

How do you master the rules? Reading them is always a good place to start. Though obvious, it is overlooked by a surprising number of lawyers. To develop real proficiency in the rules of evidence, interactive videos and computer programs about making objections are now commercially available and are well suited to the task. It is also important to read advance sheets or other publications to stay current with changes in the law. In my opinion, though, the single best thing you can do to master the rules of evidence and procedure is to keep a copy of the rules conveniently located in your office and consult them often.

- From: *The Litigation Manual: First Supplement* (ABA 2007), Chapter 2, Learning the Craft by Ronald J. Waicukauski