

INDIANA LAW UPDATE
November 20, 2008
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NOTE: The contents of this handout consist primarily, but not completely, of words taken directly from the appellate court opinion with citations generally omitted. Anyone intending to rely upon the opinion should consult the published decision.

HOW TO ACCESS THE INDIANA LAW UPDATE HANDOUT AND PODCAST

IN THE NEWS:

Law Firm Layoffs--From the Wall Street Journal online, Nov. 12, 2008:

- White & Case, an international law firm, said Tuesday it would lay off 70 lawyers, plus an additional 100 staff members, due to a decline in legal activity caused by the global financial crisis. Cadwalader, Wickersham & Taft laid off more than 130 attorneys in two rounds of cuts earlier this year.
- The cuts come amid a string of law-firm layoffs that began last fall and have accelerated recently. Moreover, in the past two months alone, the partnerships of two major firms -- Heller Ehrman LLP and Thelen LLP -- voted to dissolve, leaving hundreds of lawyers looking for work.
- The stream of lawyer layoffs not only underscores the depth of the financial crisis but upends the widely held assumption in the legal industry that a law-firm career comes with a measure of job security.

New Federal Rules on Expert Discovery under Consideration:

- The Advisory Committee on the Federal Rules of Civil Procedure has issued proposed amendments to Rules 26(a)(2) and (b)(4) governing disclosure of expert opinions. The proposed changes include: 1. Communications between counsel and retained experts would be generally protected from disclosure or discovery. 2. Draft expert reports would no longer be discoverable. If adopted, these amendments would be effective December 1, 2010.

1. Evidence: Prior Consistent Statement. Bassett v. State, No. 15S00-0611-CR-474 (Ind., Oct. 28, 2008). (Sullivan)

Robert Bassett, Jr., appeals his four convictions for murder and sentences of life imprisonment without the possibility of parole. [The State's theory of motive was that Bassett had murdered Jamie Engleking and three children in order to conceal the fact that he had violated parole by having an intimate relationship with Engleking. One of the conditions of his parole was that Bassett could not have an intimate relationship with another person without permission from his parole officer.]

One of the State's witnesses who testified at trial that she believed Bassett and Engleking were engaged in an intimate relationship was a woman named Karen Carroll, a friend of Engleking. Following vigorous cross and re-cross-examination, the State was permitted to ask Carroll whether, in 2001, she had indicated under oath that she believed Engleking and Bassett "were having a relationship." . . . Carroll answered in the affirmative. Bassett contends that this evidence was inadmissible hearsay.

The State argues here that Carroll's statement at issue was not offered to prove the truth of the matter asserted or as substantive evidence but rather as non-substantive evidence to rehabilitate her after Bassett's cross and re-cross examination of her. "When

prior statements are used to impeach and rehabilitate a witness they are not hearsay because they are not used to prove the truth of the matter asserted.” *Birdsong v. State*, [685 N.E.2d 42, 46](#) (Ind. 1997). Does Evid. R. 801, which prohibits the use of hearsay as substantive evidence, foreclose the use of such statements for nonsubstantive, i.e., rehabilitative purposes?

This court has never addressed this precise issue but the Court of Appeals has. In language we find highly persuasive, Judge Kirsch began by observing that where the Indiana Rules of Evidence do not cover a specific issue, common or statutory law applies. Evid. R. 101(a). *Moreland v. State*, [701 N.E.2d 288, 292](#) (Ind. Ct. App. 1998). Looking to pre-rules cases, he cited this Court’s opinion in *Thompson v. State*, [223 Ind. 39](#), 58 N.E.2d 112, 112 (1944), which held that prior consistent statements were admissible on rebuttal where a witness’s statements had been impeached by prior contradictory ones. *Id.* He also cited a Federal Court of Appeals decision to the same effect. *Id.* (discussing *United States v. Ellis*, [121 F.3d 908](#) (4th Cir. 1997), cert. denied, [522 U.S. 1068](#) (1998)). And he quoted Judge Miller’s treatise:

If an adversary has made an express or implied charge against the witness of recent fabrication or improper influence or motive, and the prior consistent statement was made before the motive to fabricate arose, the prior consistent statement is admissible as substantive evidence; if the prior consistent statement was made after the motive to fabricate arose, however, it is only admissible to rehabilitate the witness. *Moreland*, [701 N.E.2d at 293](#) (quoting [13 Robert L. Miller, Jr., Indiana Evidence § 613.208](#) (1995)).

On the basis of this authority, Judge Kirsch concluded that “the adoption of Rule 801 did not replace the admissibility of prior consistent statements to rehabilitate a witness, but merely allowed a certain subset of these statements to be used as substantive evidence of the truth of the matter asserted.” *Moreland*, [701 N.E.2d at 293](#).

[Note: Rule 801(d)(1)(B) provides that a statement is not hearsay if it is “consistent with the declarant’s testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose”].

We adopt Judge Kirsch’s opinion in *Moreland* on this issue and hold that *Carroll*’s prior consistent statement was admissible following cross and re-cross-examination to rehabilitate her testimony.

Lessons:

1. Prior consistent statements will be admissible, over a hearsay objection, for the purpose of rehabilitation even if made after the motive to fabricate arose.
2. A prior consistent statement need not meet all the requirements of Rule 801(d) to be admissible but in such circumstances, the statement should not be considered for the truth of the matter asserted (although it probably would be).

2. Lab Test Results: Sponsoring Witness. *Jackson v. State*, 891 N.E.2d 657 (Ind. Ct. App., Aug. 12, 2008). (Najam)

The State charged Jackson with dealing in cocaine, as a Class A felony. At trial, Troy Ballard, a supervisor at the Indiana State Police Laboratory in Fort Wayne, testified regarding a Certificate of Analysis showing that the substance officers recovered from Jackson's vehicle was cocaine. Kristi Lang, the lab technician who had performed the testing, was on maternity leave and did not testify at trial. Alleging a violation of the Sixth Amendment right to confront witnesses, Jackson objected to the Certificate of Analysis admitted into evidence through Ballard's testimony, but the trial court overruled the objection and admitted that evidence.

Jackson maintains that the challenged evidence is testimonial in nature. And Jackson invokes the United States Supreme Court's opinion in *Crawford v. Washington*, [541 U.S. 36](#) (2004), where the Court held that "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation." *Id.* at 36. But the State contends that the evidence is non-testimonial and that the Certificate of Analysis was properly admitted through Ballard's testimony. The State also asserts that the Certificate of Analysis falls under the business records exception to the hearsay rule.

Whether a certificate of analysis, or laboratory report, used to prove an element of a charged crime constitutes a "testimonial statement" under *Crawford* is an issue of first impression for Indiana. "Federal courts of appeals and state courts of last resort are now [almost evenly] divided . . . over whether state forensic laboratory reports prepared for use in criminal prosecutions are testimonial." Petition for Writ of Certiorari, *Melendez-Diaz v. Massachusetts*, 2007 WL 3252033 at *9 (U.S. October 26, 2007) (No. 05-P-1213) (Petition granted, [128 S. Ct. 1647](#) (2008)). [Footnote 4: The issue presented in *Melendez-Diaz* is on all-fours with the issue presented in the instant case. We decide this case today mindful that the United States Supreme Court will have the last word.]

Here, . . . Lang, an Indiana State Police lab technician, performed the laboratory testing and prepared the Certificate of Analysis for the purpose of showing that the substance police found in Jackson's car was cocaine and to prove the weight of the cocaine. And Ballard's testimony was limited to his opinion that based on his review of Lang's work, it appeared that she had performed the testing properly. Ballard was merely a sponsoring witness of the exhibit and did not perform any tests himself.

We hold that Ballard's testimony was not enough to satisfy Jackson's right of confrontation. The nature of the testing at issue in this case is such that only Lang can testify whether she correctly followed each step in the testing process. Jackson is entitled to inquire about Lang's testing procedures, and Ballard's testimony from Lang's notes is insufficient. The cross-examination of Ballard is not equivalent to the cross-examination of Lang. Under the principles enunciated in *Crawford*, Jackson was entitled to confront Lang directly.

While Lang might have been unavailable to testify at trial, the Sixth Amendment requires that Jackson have been given an opportunity to cross-examine her prior to trial. See *Crawford*, [541 U.S. at 53-54](#).

Thus, we reject the State's contention that the Certificate of Analysis is admissible under the business record exception to the hearsay rule under Indiana

Evidence Rule 803. *Cf. Pendergrass v. State*, [889 N.E.2d 861](#) (Ind. Ct. App. 2008) (holding Confrontation Clause inapplicable to use of Certificate of Analysis pertaining to DNA test where Certificate used to provide context for expert’s testimony, not to prove element of charged crime), *trans. pending*. Neither is the Certificate admissible through Ballard’s expert testimony under Indiana Evidence Rule 703. Jackson’s Sixth Amendment right to confrontation is not subordinate to a rule of evidence under the circumstances of this case. As the Court stated in *Crawford*, “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence[.]” [541 U.S. at 61](#). In sum, the Court in *Crawford* rejected “reliable hearsay” as a substitute for the right of confrontation.

Lessons:

1. In criminal cases, you will need the actual lab technician to testify as to lab results for cocaine in a cocaine dealing case (but maybe not for DNA results).
2. The courts are divided on this issue which is likely to be settled by the U.S. Supreme Court in *Melendez-Diaz*.
- 3. Evidence: Prior Acts. *Gary Community School Corp. v. Boyd*, 890 N.E.2d 794 (Ind. Ct. App. July 29, 2008). (Kirsch)**

Gary Community School Corporation (“GCSC”) appeals a jury verdict in favor of Neal Boyd III and Theresa Stanback (collectively “Parents”), as parents of Neal Boyd IV (“Neal”) on Parents’ claim of negligence against GCSC for the death of Neal, which occurred at Lew Wallace High School (“Lew Wallace”), a part of GCSC. GCSC raises several issues, of which we find the following dispositive: whether the trial court abused its discretion in admitting evidence of prior acts of violence that had occurred at or around Lew Wallace.

“In cases involving the existence of an alleged dangerous condition evidence of the occurrence of prior accidents of a similar character under the same circumstances is admissible to show both the existence of the dangerous condition and notice thereof.” *State By and Through Ind. State Highway Comm’n v. Fair*, [423 N.E.2d 738, 740](#) (Ind. Ct. App. 1981). Such evidence is not admissible unless a similarity is shown between the essential conditions surrounding the prior accidents and the one at issue. *Id.* The key to admission is similarity, and the party seeking admission of the evidence must lay a proper foundation by demonstrating sufficient similarity of circumstances and conditions before such evidence may be admitted. *Id.* A proper foundation includes the general requirements of similarity of conditions, reasonable proximity in time, and avoidance of confusion of the issues. *Id. at* 741 (quoting 29 Am. Jur. 2d *Evidence* § 307, at 353 (1967)).

Here, Parents failed to lay a proper foundation for the evidence of prior acts of violence at or around Lew Wallace to be admitted at trial. First, several of the incidents of violence occurred remotely in time from the shooting of Neal. These occurrences happened eight years, five years, and four years before Neal was shot. Second, there was no similarity between such incidents and the tragic case before us. In one, a student was hit by a stray bullet at a football game, which was not during school hours. Two involved

students either being shot or struck by a stray bullet while walking home from school and not being on school property. The remaining incidents included a drive-by shooting where no one was shot, a student being arrested for carrying a weapon to school, and a man shooting a weapon into the air at a neighboring school. None of these occurrences involved similar circumstances to the present case where a former student shot another student on school grounds during the morning while students gathered outside before the bell rang. Under these circumstances, the foundational requirements for the admission of such evidence were not met.

. . . The admission of the evidence of prior incidents of violence at or around Lew Wallace was prejudicial to GCSC. The trial court therefore abused its discretion and the admission of the evidence of prior violence was reversible error.

Lessons:

1. To be admissible, prior acts must not be too remote in time; four years may be too remote.
2. Substantial similarity of circumstances will be required
3. Gun violence is a serious problem for students in Gary.

4. Jury re-deliberation. *Kempf Contracting and Design, Inc. v. Holland-Tucker*, 892 N.E.2d 672 (Ind. Ct. App. Aug. 27, 2008). (Kirsch)

Kempf Contracting and Design, Inc. (“Kempf”) appeals the judgment, after a jury trial, in favor of Cynthia Holland-Tucker (“Tucker”) in her action against Kempf for negligence. Kempf raises several issues, of which we find the following dispositive: whether the trial court erred when it entered judgment on a second verdict reached by the jury, where, after an initial verdict was reached, the trial court reconvened the jury, gave them new instructions and verdict forms, and allowed the jury to deliberate a second time.

In this case, after the jury’s verdict in favor of Tucker on July 20, 2007, the trial court discharged the jury. As was his normal practice, Judge Weikert then went back to the jury room to speak with the jury members and conduct an exit interview. After his discussion with the jury members, Judge Weikert determined that the original verdict had been based on a faulty jury instruction and verdict form, which directed the jurors to combine the percentages of fault attributed to both Kempf and Greer even if they had found that Greer was not acting within the scope of his employment at the time of the accident. After hearing arguments from both parties, the trial court determined that it would reconvene the jury, give them a newly drafted jury instruction and verdict form, which correctly stated the process for determining their verdict, and allow them to re-deliberate and reach a new verdict. Both parties objected to this. After the jurors were allowed to re-deliberate, they again returned a verdict in favor of Tucker.

“From the moment of its official discharge the jury is released from any further obligations or duties in the case” and “may not at any time thereafter be reassembled even on the orders of the judge for the purpose of correcting errors of substance in the verdict or for further deliberation of its verdict.” *West v. State*, [228 Ind. 431, 438](#), 92 N.E.2d 852, 855 (1950). When a jury is officially discharged, it becomes *functus officio* as a jury in that particular case, and anything it does thereafter, even by order of the trial

court, is null and void. *Id.* Based on this, the trial court incorrectly entered judgment after allowing the jury to re-deliberate when it had previously been discharged by the trial court.

Here, the trial court faced a situation where the jury instructions and verdict form were incorrect and improperly directed the jurors to combine the fault percentages of Kempf and Greer even if the jury had found that Greer was not acting within the scope of his employment when the accident occurred. When the trial court realized the problem, it attempted to correct the error by rewriting the instruction and verdict form and allowing the jury to deliberate a second time. This was not the proper procedure, as the jury was no longer able to deliberate having been previously discharged. Because the jury had ceased to exist as an entity to determine the case when it was discharged, it was not able to render a second verdict.

“Indiana courts have the inherent power to grant new trials *sua sponte* and are expressly authorized to do so by [Indiana] Trial Rule 59(B).” *Dughaish ex rel. Dughaish v. Cobb*, [729 N.E.2d 159, 169](#) (Ind. Ct. App. 2000), *trans. denied* (2001). When a trial court raises a motion to correct error *sua sponte*, a new trial may be granted if it is determined that prejudicial or harmful error has been committed. Ind. Trial Rule 59(J). While the trial court in the present case had the authority to *sua sponte* grant a new trial under T.R.59, it did not do so. Instead, it improperly reconvened the jury and allowed it to re-deliberate. Therefore, the trial court improperly entered judgment on the jury’s second verdict. We vacate the judgment and remand to the trial court with instructions to declare a mistrial and to order a new trial.

Lesson:

1. Once discharged, a jury cannot re-deliberate.
2. *Functus officio*: “A task performed. Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority.”

Note: This case also addresses the admissibility under Rule 702 of expert testimony of a vocational economics expert, finding that the reliability of the methodology used by the expert (John Tierney) had not been demonstrated and the trial court should have excluded his testimony on lost earnings.

5. Change of Judge: Deadline to File Motion. *McClure v. Cooper*, 893 N.E.2d 337 (Ind. Ct. App. Sept. 16, 2008). (Barnes)

Cooper hired McClure to perform certain legal services and paid him a retainer, including funds for a bankruptcy court filing fee. On August 30, 2007, Cooper filed a Small Claims Notice of Claim (“Claim”) in Warren County for a refund of the entire amount paid, alleging that McClure had failed to perform. The Claim contained a notice of hearing. On September 21, 2007, McClure filed a Motion for Change of Judge, which was denied as untimely.

The trial court conducted a hearing and entered a money judgment for Cooper. McClure now appeals. . . . McClure asserts that his Motion for Change of Judge was timely and that it should have been granted. Specifically, he argues that Indiana Trial

Rule 76(C)(1) allows a small claims litigant to file a Motion for Change of Judge no later than “thirty [30] days from the date the same is placed and entered on the chronological case summary.” Ind. Trial Rule 76(C)(1). Although McClure filed his motion within the thirty days, he did so just three days before the scheduled hearing as set forth in the clerk’s notice on Cooper’s Claim. This notice identified the Warren Circuit Court and the place, date and time for the hearing.

Under the Trial Rules, the general deadline for change of judge motions is ten days after the issues are closed on the merits. Ind. Trial Rule 76(C). There are six exceptions, any one of which may make a motion untimely. McClure’s argument is limited to one of them – Trial Rule 76(C)(1). It provides: in those cases where no pleading or answer may be required to be filed by the defending party to close issues . . . , each party shall have thirty [30] days from the date the same is placed and entered on the chronological case summary of the court. Ind. Trial Rule 76(C)(1). No responsive pleading is required in small claims proceedings. Ind. Small Claims Rule 4(A).

The Small Claims Rules make no provision for change of judge motions. Although McClure does not reference this provision, Trial Rule 76(C)(5) narrows the window of opportunity to seek a change of judge after a trial date has been set. Pursuant to Trial Rule 76(C)(5), a party has three days after receiving notice from the court that a trial date has been set to file a motion for change of judge.

Here, as in most small claims proceedings, the hearing and trial date are one in the same and are set forth in the notice which is a part of the small claims form. Thus, unlike most civil proceedings, a small claims litigant automatically has a hearing date upon the filing of a claim. Accordingly, we conclude that a timely motion for change of judge within the context of a small claims action would have required McClure to file his motion within three days of receiving the notice of claim. We therefore agree with the trial court that McClure’s Motion for Change of Judge was untimely.

KIRSCH, J., dissenting.

Indiana Trial Rule 76 (C)(5) addresses the situation where a court holds a hearing in a matter and *at that hearing* sets the matter for trial. That is not the situation here. Here, the court simply set the matter for trial.

Lessons:

1. Even when pleadings are not closed, you should file a motion for change of judge within 3 days after a case is set for trial.
2. Although Rule 76(C)(5) by its words appears to limit application of the three day rule only to an “oral setting” for trial, this decision applies the rule to a written setting for trial (at least for small claims proceedings).

6. Compensatory and Punitive Damages. *Clark v. Simbeck*, 895 N.E.2d 315 (Ind. Ct. App., Oct. 20, 2008). (Hoffman)

Victims of assault and battery brought action against their attackers. The St. Joseph Circuit Court issued an order awarding damages to victims, and attackers appealed. Defendants Clark and Biddle contend that the trial court's \$738,500.00 compensatory damage award to Donald is excessive. Donald presented evidence that he

had expended \$64,663.56 for medical expenses, and Clark and Biddle do not contradict this evidence. However, they contend that the remainder of the award is “not reasonable compared to the amount of damages actually proven during trial.”

Donald testified that he is in constant pain and has difficulty concentrating. Since the attack, Donald has been unable to do many day-to-day activities, which has greatly affected his relationship with his wife and family. His future includes repeated surgeries to make his life somewhat comfortable and to keep him from suffering from kidney failure, strokes, and other problems. The evidence supports the trial court's conclusions. Given the pain (physical, mental, and relational), scarring, disfigurement, and future problems and procedures caused by the attack, we cannot conclude that the trial court's award is improper.

Clark and Biddle contend that the trial court erred, as a matter of state law, in ordering them to pay punitive damages of \$60,000.00 to each of the victims. Our supreme court has held “as a matter of state law that review of the amount of a punitive damage award should be *de novo*.” *Stroud v. Lints*, 790 N.E.2d 440, 443 (Ind.2003). In *Stroud* the court reversed a \$500,000.00 punitive damage award imposed on a drunken teenage driver who ran a stop sign, severely injuring Lints and killing others. The court held that a defendant's financial condition and ability must be considered when such an award is made. *Id.* at 446-47. Indeed, the court characterized this factor as an important one. *Id.* at 447.

In the present case, the only evidence of financial condition indicates that neither Clark nor Biddle has significant assets. Clark made approximately \$13.00 dollars per hour on his job and there is no indication that Biddle has any income. Under these circumstances, we must conclude that the trial court's punitive damages award is excessive.

BAKER, Chief Judge, dissenting in part. I believe that the appellants' conduct on the night in question was so egregious, so malicious, and so brutal that the relatively nominal punitive damages award of \$60,000 is warranted.

Lessons:

1. Compensatory damages of ten times medical specials may not be excessive.
2. Punitive damages that are 1/10th of compensatory damages may be excessive.
3. Evidence of defendants' income and assets is necessary to support a punitive damages award.

7. Untimely Appeal. *Cooper v. State*, 894 N.E.2d 993 (Ind. Ct. App., Oct. 6, 2008). (May)

On April 24, 2007, the trial court received a notice of probation violation after Cooper was arrested for domestic violence. At a hearing on May 10, 2007, the trial court revoked Cooper's probation based on a probable cause affidavit. It did not receive evidence. Cooper was ordered to serve the remainder of his twelve year suspended sentence. Cooper did not appeal the probation revocation. The charges leading to the probation revocation were later dropped, and Cooper asked the court to reconsider the probation revocation. The court treated a subsequent hearing as one on a motion to reconsider and denied Cooper's motion.

The State argues Cooper is barred from challenging his probation revocation because he did not timely appeal that order. He did not bring a timely appeal, but we have inherent power to hear it. However an appeal under such conditions is not a matter of right and will not be permitted in every situation. This Court will exercise such discretion only in rare and exceptional cases, such as in matters of great public interest, or where extraordinary circumstances exist.

This case qualifies. This is a matter of great public interest, as a trial court may not revoke probation without a hearing that provides due process. The record does not reflect the court advised Cooper of his right to appeal. We accordingly choose to exercise our discretionary power to hear this late appeal. . . . The State may not revoke probation at its discretion, as it involves a person's liberty. *Parker v. State*, [676 N.E.2d 1083, 1085](#) (Ind. Ct. App. 1997). Because probation involves liberty interests, a person is entitled to "some procedural due process." *Id.* Even a probationer who admits a violation must be given an opportunity to offer mitigating evidence suggesting the violation does not warrant revocation.

Deprivation of due process is fundamental error. . . . Because Cooper maintained his innocence, the lack of a probation revocation hearing that provided due process falls under the fundamental error exception. . . . We find Cooper is entitled to a probation revocation hearing because the court deprived Cooper of his right to due process. We reverse the trial court's denial of the motion to reconsider and remand for a probation revocation hearing.

VAIDIK, J., concurs in result, with opinion:

Our inherent power to hear appeals that are barred should be exercised in the rarest of cases. My fear is that, by reviewing the merits of the appeal on grounds other than Indiana Post-Conviction Rule 2, we are sending the wrong message to practitioners.

Lesson: An untimely appeal may still be brought in an exceptional case.

8. Insurance: Coverage of Successor Company; Consent to Assignment.
Travelers Cas. & Sur. Co. v. United States Filter Corp., 2008 WL 4837453,
N.E.2d (Ind. Ct. App., Oct. 15, 2008). (Shepard)

Five corporations seek insurance coverage from insurers who issued liability policies for their predecessors. The underlying litigation involves bodily injury claims relating to the operation of an industrial blast machine. The corporations say that coverage rights passed to them through the same corporate transactions that brought them the blast machine assets. The trial court agreed and granted summary judgment to the current holder of the assets.

Each of the implicated insurance policies contains a provision that bars assignment of the policy without the consent of the insurer. We hold that consent is required for any assignment of policy rights, unless the assignment occurs after an identifiable loss, in which case the right to receive payment on that claim may be transferred without consent. Because the corporations neither obtained consent nor made a post-loss assignment, we direct judgment for the insurer.

Because the policies require insurer consent before a valid assignment can be made, and that consent was not given, we hold that the several insurance policies at issue

here were not transferred in any of the corporate transactions involving the Wheelabrator blast machine assets.

Even though the complete policies did not transfer, U.S. Filter and Waste Management argue that certain claims under the policies did transfer as choses in action, notwithstanding the consent-to-assignment provisions. The Insurers contend that the consent-to-assignment provisions apply to any assignment of rights under the policy and that no choses in action existed at the time of the corporate transactions.

. . . Unlike an instantly incurred loss, such as that resulting from windstorm or fire, the underlying third-party claims allege injuries that apparently occurred but went unreported, even unrealized, for years. None of the parties contend that anyone knew of the alleged injuries when the relevant transactions took place involving the Wheelabrator blast machine assets. The question then is whether such occurred but not yet reported losses can form the basis of choses in action that U.S. Filter and Waste Management say transferred to them through the Wheelabrator predecessors-in-interest.

At a minimum, for an insured loss to generate an assignable coverage benefit, the loss must be identifiable with some precision. It must be fixed, not speculative.

This rule draws as much from the law on choses in action as from the law on insurance policies. A right not currently held is not a chose in action assignable at law. It follows that a chose in action only transfers in these circumstances if it is assigned at a moment when the policyholder could have brought its own action against the insurer for coverage. Under the liability policies implicated here, that moment does not arrive until a claim is made against the insured. Put another way, at a minimum the losses must have been reported to give rise to a chose in action.

The potential for assignment to increase the risk to insurers is also a significant factor. The indemnity risk will remain largely the same regardless of who holds the policy rights – that is, the risk that a jury on some future date will assess damages for the bodily injuries caused by the Wheelabrator blast machine. On the other hand, the risk of being called to court to defend more than just the underlying claims seems substantial, as this dispute soundly demonstrates.

Notwithstanding the post-loss exception, we read the consent-to-assignment provisions to apply to coverage transfers of any scope because it is hard to see the practical difference between assignment of the entire policy and assignment of a single claim. If a claim was assigned in an asset sale, and the assignment encompassed indemnification and defense coverage, what does it not cover from the assignee's perspective? The assignee is receiving everything under the policy the assignee could possibly want, especially since any claim receives the benefit of the full policy limits. Moreover, the assignment of a pre-loss claim, or set of claims, can be just as risky for the insurer as assignment of an entire policy.

Corporate managers engaged in asset transactions that may involve occurred-but-not-yet-reported losses have other means available to insure against the losses. For example, the asset purchaser could negotiate for indemnification of losses that have occurred up to the moment of exchange. If that strategy were followed over time, a distant successor could still benefit from the original policyholder's liability insurance via indemnity claims made up the chain of corporate succession. Or, if the seller will not indemnify potential losses, the buyer can negotiate the price down to compensate for the increased risk of liability.

To the extent the alleged Wheelabrator blast machine injuries had occurred but had not yet been reported at the time of the relevant transactions, they did not constitute an assignable chose in action. Accordingly, U.S. Filter and Waste Management do not have a right to seek coverage under their predecessors' CGL policies for these claims.

We reverse the trial court's summary judgment determination and direct entry of judgment for the Insurers on the issues at contest in the present appeal.

Lessons:

1. Successor corporations will generally not inherit the insurance coverage of their predecessor corporations in the absence of a consent to assignment.
2. Coverage may transfer without consent as to choses of action that existed at the time of transfer.
3. A *chose in action* is "the right to receive or recover a debt, demand, or damages on a cause of action ex contractu or for a tort or omission of a duty." (*Black's Law Dictionary* (5th ed., 1979) at 219).

9. Instructions: Mitigation of Damages. *Simmons v. Erie Ins. Exchange*, No. 32A04-0710-CV-552, (Ind. Ct. App. Aug. 11, 2008). (Robb)

Elwood and Lila Simmons appeal following a judgment awarding them each \$10,000 following an automobile accident. The Simmonses raise two issues, but we find dispositive the issue of whether the trial court abused its discretion by instructing the jury on the affirmative defense of failure to mitigate damages. Concluding that insufficient evidence exists to support this instruction, we reverse and remand for a new trial.

Erie argues that Elwood failed to mitigate damages due to his failure to undergo surgery to treat his plantar fasciitis, his learned gait, and his alleged failure to regularly use his medications and orthotics.

Based on the small amount of Indiana caselaw regarding this issue, the rules generally accepted by our sister states, and Indiana caselaw on a plaintiff's duty to mitigate damages involving personal injury in general, we conclude that whether a plaintiff has a duty to submit to surgery requires a "reasonable person" analysis. Although the question of whether a reasonable person, under all the circumstances, would submit to surgery will normally be a question for the jury, under some circumstances, courts will be able to answer the question as a matter of law.

We also agree that the factors that should normally be considered when making a reasonable person inquiry are those identified by our sister states: 1) the likelihood that the surgery will correct or improve the condition; 2) the risk involved in the surgery; 3) the pain or inconvenience caused by the surgery; and 4) the ability of the plaintiff to bear the cost of the surgery. [A]lthough expert medical opinion will normally be necessary as to the first three factors, no bright-line rule exists on this point.

Based on the circumstances at bar – 1) no doctor recommended surgery to Elwood; 2) Elwood saw several doctors, who prescribed a variety of treatments other than surgery; and 3) Erie's failure to introduce evidence regarding the risks, benefits, costs, or inconveniences of the surgery – we conclude Elwood's failure to undergo surgery is insufficient to support an instruction on failure to mitigate damages.

Erie also argues that the instruction on failure to mitigate damages was supported by evidence relating to Elwood's "learned gait." Although Erie attempts to paint Elwood's gait as some sort of voluntary choice, it is clear that Elwood has developed this gait as a direct result of his plantar fasciitis. . . .

Erie also argues that the instruction was supported because: "Dr. Raynor testified that Elwood did well when using his medications and orthotics, yet Elwood did not do so regularly, as evidenced by his comments to both doctors Gurvis and Raynor." Appellee's Br. at 17. This statement is the sole reference Erie makes in its argument section to Elwood's alleged failure to use medications and orthotics. Erie does not cite to any legal authority indicating that Elwood's alleged failure to regularly use his medications and orthotics would support a jury instruction on failure to mitigate damages. Erie also fails to cite to evidence indicating that these alleged failures have aggravated or increased his injuries. Even if it could be inferred that these alleged failures somehow increased the harm, Erie has also failed to point to evidence establishing the extent of this increase. *See Willis*, 839 N.E.2d at 1189 ("[T]he trial court erred in giving a failure to mitigate instruction because [the defendant] failed to carry his burden to prove that [the plaintiff's] post-injury disregard of advice as to treatment increased [her] harm, and if so, by how much." (Emphasis added)).

. . . . Here, as the jury instruction did not indicate whether the jury reduced the award based on a theory of failure to mitigate damages, we have no way of knowing whether the jury was improperly influenced by the erroneous instruction. In closing argument, counsel for Erie discussed at length Elwood's alleged failure to mitigate damages. *See Tr.* at 429 (discussing the "ninety to ninety-five percent success rate" of the surgery identified by Dr. Gurvis). Therefore, the issue of mitigation of damages was emphasized for the jury, and the likelihood that the matter was discussed and impacted the jury's verdict is significant.

Under these conditions, we conclude that the trial court's erroneous instruction was not harmless error. Therefore we must remand for a new trial.

Lessons:

1. To get an instruction on failure to mitigate by not having surgery or for failing to take medication, be sure to present evidence of causation and the extent of harm caused by the failure to take those steps.
2. An instruction given without sufficient evidence may not be harmless error.

10. Workers Compensation Immunity: Defamation and Invasion of Privacy; Express Disclaimer. *Hart v. Webster*, No. 46A05-0802-CV-47 (Ind. Ct. App. Oct. 15, 2008). (Riley)

Former employee brought action against employer and employer's quality assurance director for defamation and invasion of privacy. The Marion Superior Court, S.K. Reid, J., dismissed employee's second amended complaint for lack of subject matter jurisdiction, and employee appealed.

Hart's original Complaint in this case alleged the following facts. Hart began working for SNS in 1979. In 1988, Hart became SNS's Vice President of Purchasing. In 2005, SNS instructed Webster, its Director of Quality Assurance, to investigate

allegations that Hart had violated SNS's gratuity policy and engaged in unethical relationships with SNS's vendors. Hart was initially suspended from his employment, but he was eventually cleared of all wrongdoing.

Nonetheless, Hart claims that Webster “maliciously communicated to persons employed by SNS, persons who had dealings with SNS, including but not limited to, vendors from which SNS purchased products and supplies, and others, that Hart had engaged in unethical conduct in the course of Hart's duties as Vice President of Purchasing.” According to Hart, “Such communications included allegations that Hart was ‘on the take’ and had accepted gratuities, ‘kick-backs’, and bribes from vendors, which had allegedly enriched Hart at the expense of higher costs, lower quality, or ‘shorted’ quantity of products and supplies ordered by Hart on behalf of SNS.”

Hart claimed that, because of the “embarrassment, humiliation, and severe emotional and physical distress” that he suffered as a result of the investigation, he became “fully disabled and unable to work.”

On July 9, 2007, the Defendants filed a joint motion to dismiss. The Defendants asked for dismissal “with prejudice” under Indiana Trial Rule 12(B)(1) for lack of subject matter jurisdiction because Hart's claims arose out of his employment and therefore lie within the exclusive jurisdiction of Indiana's Worker's Compensation Board. The Defendants also asked that Hart's defamation and invasion of privacy claims be dismissed under Indiana Trial Rule 12(B)(6) for failure to plead with sufficient specificity.

The trial court dismissed Hart's Amended Complaint “without prejudice” and ordered him to file another amended complaint within fifteen days. Hart filed his Second Amended Complaint, in accordance with the trial court's prior dismissal order. In his Second Amended Complaint, Hart omitted his prior references to “severe emotional and physical distress” and the claim that he was “fully disabled and unable to work.” Also, he again “expressly disclaim [ed] recovery” under the WCA.

On December 18, 2007, the trial court “ORDERED that [Hart's] Complaint is dismissed in its entirety, with prejudice, under Trial Rule 12(B)(1).”

Initially, we conclude that the trial court properly dismissed Hart's original Complaint and his Amended Complaint for lack of subject matter jurisdiction. Hart's original Complaint and his Amended Complaint each claimed that the “defamatory communications resulted in Hart suffering embarrassment, humiliation, and severe emotional and *physical distress to the point that Hart's doctor determined that Hart was fully disabled and unable to work.*” As such, even though Hart purported to disclaim any recovery under the WCA in his Amended Complaint, the trial court correctly concluded that the substance of Hart's claims fell under the WCA and properly dismissed those claims.

In his Second Amended Complaint, Hart made no mention of any physical injury or disability or impairment. Rather, Hart claimed damages to his personal and business reputation, humiliation, and emotional injuries. For all of these reasons, Hart's claims do not fall under the exclusive remedy clause of the WCA, and the trial court has subject matter jurisdiction over Hart's Second Amended Complaint.

Lessons:

1. An employee's civil action against his employer for defamation and invasion of privacy will not be subject to the Worker's Compensation Act unless the complaint asserts a claim for physical injury, disability or impairment.
2. An express disclaimer of any claim for recovery under the WCA will not change the result if the substance of the employee's claim is for physical injury, disability or impairment.

11. Evidence after Stipulation of Liability. *Haas v. Bush*, 894 N.E.2d 229 (Ind. Ct. App. Sept. 29, 2008) (Friedlander)

Personal representative of patient's estate brought wrongful death action against physician based on theory that physician's medical negligence increased risk of patient's death and loss of chance of survival. The Superior Court, Hancock County, Terry K. Snow, J., entered judgment in favor of patient's estate, and physician appealed.

Dr. Haas argues the trial court abused its discretion when it admitted the written opinion of the MRP into evidence at trial over his objection. He claims the portion of the MRP opinion regarding a breach of the standard of care was rendered irrelevant, misleading, cumulative, and more prejudicial than probative by the stipulation entered into by the parties acknowledging said breach.

In *Dickey v. Long*, 591 N.E.2d 1010 (Ind.1992)(*Dickey II*), the Court held that the provision for admissibility of the panel's opinion is "unambiguous and absolute." By statute, the panel's expert opinion "is not conclusive" and either party may examine a panelist as a witness and the panelists are required to appear and testify if called. Thus, any alleged frailties in the panel opinion could have been exposed at trial and judged by the trier of fact. We find no error in the admission of the panel's opinion at trial.

Lesson: A stipulation as to breach of the standard of care will not keep out of evidence a panel finding of such breach by the defendant health care provider.

12. Medical Malpractice: Failure to Supervise to Prevent Unwanted Sexual Advances. *Fairbanks Hospital v. Harrold*, 895 N.E.2d 732 (Ind. Ct. App. Nov. 6, 2008) (Friedlander)

Patient and her parents filed action against hospital alleging that it failed to supervise an employee sufficiently to prevent his unwanted sexual advances on patient. Hospital filed motion for preliminary determination that plaintiffs' claims fell within scope of the Medical Malpractice Act. The Superior Court, Marion County, David Dreyer, J., determined that claims did not fall within scope of Act, and, on hospital's petition, certified its order for interlocutory appeal.

In each of [several prior cases], the plaintiff/patient sought recovery under the Act based upon the allegation that the purported health care provider's offending conduct, i.e., the act of malpractice, was the sexual assault itself. For this reason, we agree with Fairbanks that those cases do not address the issue presented here, i.e., whether an allegation of failure to supervise an employee sufficiently to prevent a sexual assault upon a patient states a claim under the Act. The IDI, however, does cite one case that we

deem to be dispositive of the appeal: *Winona Mem'l Hosp., Ltd. P'ship v. Kuester*, 737 N.E.2d 824 (Ind.Ct.App.2000).

We learn from *Winona* that a medical malpractice action cannot become completely unmoored from the provision of what our case law has established is the very essence of health care, i.e., “conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity[.]”*Id.* This is especially true where, as here, the patient is required to prove more than one layer-or multiple acts-of tortious conduct in order to prevail. It is for this reason that the court held in *Winona* that it availed the patient nothing to prove that *Winona* was negligent in credentialing the physician in question if the patient did not also prove that said physician's negligence in rendering health care services was a proximate cause of the patient's harm. In other words, both allegedly tortious acts that comprised the patient's claim of malpractice must sound in medical malpractice and not merely ordinary negligence.

The Harrolds' claim against Fairbanks requires proof, at least so far as this appeal is concerned, both that Shears was guilty of sexual misconduct with Natalie, and that Shears was in a position to do this as a result of Fairbanks's negligent supervision. Pursuant to *Winona*, both allegations, i.e., Shears's sexual misconduct and Fairbanks's negligent supervision of Shears, must sound in medical malpractice in order for the action to come within the Act's purview. As set out above, this court has consistently held that an employee's sexual conduct with a patient cannot constitute a rendition of health care or professional services, and thus a claim based thereon does not fall under the Act. For these reasons, the trial court did not err in determining that the claim filed against Fairbanks by the Harrolds does not fall within the purview of the Act.

Lessons:

1. Claims of sexual misconduct by a health care provider are generally not subject to the Medical Malpractice Act.
2. Nor are claims for failing to supervise to prevent such misconduct.

13. Inter Vivos Gift. *Heaphy v. Ogle*, No. 46A03-0806-CV-276 (Ind. Ct. App. Nov. 14, 2008) (Darden)

Vicky Heaphy (daughter of Stuart Terry, the decedent) appeals the trial court's determination that a 1957 Chevrolet Corvette (the “Corvette”) was a gift to Randy Ogle, the nephew of the decedent and executor of the Estate.

On June 12, 2007, Terry executed a will, leaving all of his property to his daughters, Heaphy and Patty Terry. Terry died on August 8, 2007.

On December 5, 2007, Ogle, as the Personal Representative of the Estate, filed a petition to determine the ownership of the Corvette. He alleged that “[s]even to 10 days before his death,” Terry signed and delivered the Corvette's title to him, with the intent to gift the Corvette to him. As of the date of the hearing, however, he had not taken possession of the Corvette, which is “not drivable[.]”

Much testimony was presented that [Heaphy] held a valid Power of Attorney from [Terry] prior to his death. While this is acknowledged by the Court, the Court understands also that the existence of a Power of Attorney does not vitiate the ability of the grantor of a Power of Attorney to execute documents or perform actions and activities

on his own, absent a legal finding of incompetence.

Based on all the evidence presented at the hearing on March 4, 2008, the Court finds that the delivery of the title to the [Corvette] to [Ogle] constitutes a gift and that no more than delivery of the title was required to constitute a delivery. The vehicle is not an asset of the estate and is the personal property of [Ogle], individually.

“Delivery is an indispensable requirement without which a gift fails, regardless of the consequences.” *Hopping*, 526 N.E.2d at 1207. However, “it is not necessary that there should always be a manual transfer of the thing given.” Delivery may be actual, constructive or symbolic. In this case, Ogle testified that Terry signed and delivered the Corvette's title to him prior to Terry's death. Given the evidence, we cannot say the trial court's finding that Terry made an inter vivos gift to Ogle is clearly erroneous.

Lessons:

1. A person who gives a power of attorney to another may still perform binding actions on his own absent a legal finding of incompetence.
2. The gift of a car is complete upon signing and delivery of the title; delivery of the vehicle is not required.

14. Litigation Commentary for the Month

The following commentary was written by Gregory P. Joseph, New York attorney, National Law Journal columnist and former Chair of the Litigation Section of the ABA:

Federal Litigation – Where Did It Go Off Track?

“Twenty-five years ago, on January 1, 1983, it cost parties roughly the same to litigate in state and federal court. Plaintiffs chose federal court sometimes for expansive discovery or to get a good judge, even though state court was an available alternative and additur impermissible in federal court. Today, plaintiffs with non-federal causes of action flee federal court, and those with federal claims scour the books for state law analogues. What happened? (Note: What follows is only a partial list of the developments identified by Greg Joseph)

• **1983: Rule 11**--Federal Rule of Civil Procedure 11 has become a symbol of the disesteem into which contemporary litigation has fallen. Although the Rule was originally adopted in 1938, it had no real bite for 45 years. All that changed in August 1983, when it was amended to mandate compliance with objective standards and require judges to impose sanctions if those standards were not met. There were more than 7,000 Rule 11 decisions reported on LEXIS during the first ten years following the August 1983 amendment, and it is apparent from the Federal Judicial Center's empirical studies that the actual activity under the Rule dwarfed this number. Rule 11 created a momentum for parties to seek sanctions against one another (predominantly, defendants seeking sanctions against plaintiffs) that did not abate even after the mandatory features of the rule were excised in 1993.

• **1986: Summary Judgment Trilogy**--In 1986, the Supreme Court rendered three decisions intended to reinvigorate summary judgment practice in the federal court,

and summary judgment practice has certainly been reinvigorated since. Distinguished researchers at the Federal Judicial Center take the view that the increase in summary judgment is more attributable to the emphasis on managerial judging and changes in the civil rules that preceded the Summary Judgment Trilogy, rather than the trilogy itself. Whether the Summary Judgment Trilogy is the cause or was an effect, there is no doubt that summary judgment has become a centerpiece of federal litigation over the past 25 years. Coupled with subsequent developments (read: *Daubert*), summary judgment motions have become part of virtually all substantial federal civil litigation.

• **1993: *Daubert***--Initially, *Daubert* was perceived as liberalizing the admissibility of expert evidence — especially novel scientific evidence — because it rejected the strictures of the *Frye* test. What a misperception. In December 2000, when the Advisory Committee on the Federal Rules of Evidence codified *Daubert* in Rule 702, it stressed in the Committee Note that: “A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a ‘seachange over federal evidence law,’ and the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system” (citation omitted). Seven years later, compare the Third Circuit’s observation in *United States v. Ford*, 481 F.3d 215, 220 n.6 (3d Cir. 2007): “Although we do not adopt the apparent *presumption of exclusion* enunciated by the Ninth Circuit, we agree with the spirit of our sister court's exhortation. In particular, district courts should tread carefully when evaluating proffered expert testimony, paying special attention to the relevance prong of *Daubert*.” The seachange may have approached covertly, but it has overtaken us.

• **2006: Electronic Discovery Rules**--The electronic discovery amendments to the Federal Rules of Civil Procedure in 2006 build additional cost into every case not only by mandating that the parties focus on electronic discovery from the outset of the litigation but also by erecting a series of battlegrounds (format, accessibility, cost-shifting) over which the parties wage war, as they search incessantly for spoliation. The lasting legal legacy of the current era of electronic discovery likely will lie in the area of spoliation and sanctions. Parties long not so much for data as for evidence that data have been lost or destroyed. The prospects for meaningful sanctions are generally much higher in federal than in state court.

• **2007: *Bell Atlantic v. Twombly***--The Supreme Court rewrote federal pleading requirements in 2007, without even amending the pleading rules, by issuing its decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). *Twombly* reversed a 50-year-old precedent holding that a complaint should not be dismissed for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Instead, the plaintiff must make “a ‘showing,’ rather than a blanket assertion, of entitlement to relief,” and this necessitates “some factual allegation in the complaint....” The new duty is to furnish factual “allegations plausibly suggesting (not merely consistent with)” an “entitlement to relief.”

As of November 10, 2007 — less than six months after it was rendered — the revolutionary *Twombly* opinion had been cited in a remarkable 2,000 cases.

Conclusion

Collectively, rule changes, legislation and Supreme Court decisions over the past quarter century have made federal court procedurally more complex, risky to prosecute and very expensive. It is a Bentley, not a Ford. Plaintiffs who can avoid federal court do so, while defendants strain to achieve a federal forum. Forum-shopping incentives have been institutionalized.”

Litigation Tip for the Month: The Little “i” is a Romanette.

From the November 10, 2008 post of Tony Mauro on the Blog of Legal Times:

“Today's oral argument in *United States v. Hayes* was dense with debate over rules of grammar and statutory interpretation, all aimed at figuring out what Congress meant when it passed a statute in 1996....

One bright spot in the colloquy came during Assistant to the Solicitor General Nicole Saharsky's defense of an expansive view of the law. In discussing the statute at issue, 18 U.S.C. 922 (a)(33)(A)(i) and (ii), justices had been referring, awkwardly, to sections "little eye" and "little eye eye." But Saharsky had a far better way. She called them "Romanette one and two," using an obscure but self-explaining and almost whimsical term for a lower-case Roman numeral.

"Romanette?" asked Chief Justice John Roberts quizzically.

"Oh, little Roman numeral," Saharsky replied offhandedly. No biggie.

"I've never heard that before!" said Roberts. "That's ... Romanette."

In all his days in the solicitor general's office and in private practice, Roberts had apparently never run across the term. The audience laughed -- including many, to be sure, who had never heard the word before themselves. Chief justices, along with everyone else, can learn something new every day.”

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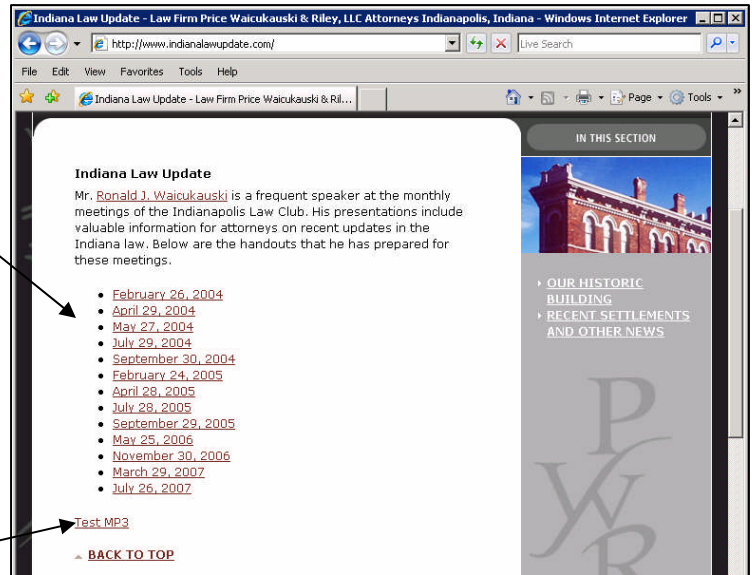
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