

INDIANA LAW UPDATE
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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.

1. IN THE NEWS: “The Times They Are A Changin’”—Bob Dylan

- *Supreme Court Cites Rock Music Lyrics.* Chief Justice John Roberts set a new precedent in the U.S. Supreme Court as the first Supreme Court Justice to cite rock music in support of a legal proposition. Dissenting in a suit filed against AT&T, Roberts argued that a collection company had no standing to sue on behalf of several pay phone providers because it had nothing to gain by the lawsuit. In support of his argument, Roberts quoted Bob Dylan: “When you got nothing, you got nothing to lose.” This was actually a slight misquote, the actual song lyric is: “When you ain’t got nothing, you got nothing to lose.” [From the ABAJournal.com, June 30, 2008]
- *Northwestern University to Launch Two-Year J.D. Program.* Starting in May 2009, Northwestern is offering a program that will allow law students to obtain a law degree in five semesters within two calendar years. Northwestern’s Dean, David Van Zandt said: “I don’t see a pedagogical reason for three years of law school.” It was noted that 95 percent of Northwestern’s current three-year students have at least one year of post-college work experience prior to attending law school. New courses in the accelerated program will include one covering quantitative analysis and project management and one in decision-making designed to improve a student’s ability to understand the client’s strategies. [From Law.com, June 23, 2008].
- *Lawyers being rendered obsolete?* In San Diego, the number of unrepresented parties in family court cases went up to 70 percent in 2004 from 54 percent in the early 1990s. And a 2004 study by the New Hampshire Supreme Court task force said 85 percent of civil cases in district court and 48 percent in superior court were tried without lawyers. Today, all 50 states and the District of Columbia have set up self-help centers to assist pro se’s with forms. The reasons cited for this trend: the high cost of lawyers and information available on the internet that makes it easier for people to research legal matters on their own. [From Law.com, July 16, 2008]

2. “Prevailing party” for purposes of attorney fees--*Reuille v. E.E. Brandenberger Construction, Inc.* 888 N.E.2d 770 (Ind.Ct.App. June 24, 2008) (Shepard)

The parties in this case entered into a construction contract providing that in the event of a legal dispute, the prevailing party would be entitled to reasonable costs and expenses, including attorney fees. The term “prevailing party” was not defined. We hold that in the absence of further definition, such a contract produces fees only when one party or the other wins a judgment.

In 2002, Reuille (the homeowner) filed a complaint against Brandenberger (the builder), alleging breach of contract, breach of warranty, and negligence. Following mediation in 2005, the parties reached a settlement on all issues with the exception of fees, which was explicitly reserved for judicial resolution.

The parties’ contract provides that “the prevailing party shall be entitled to reasonable costs and expenses, including attorney fees.” Reuille argues that he is entitled to fees as a prevailing party because he received all of the relief he demanded in his complaint and was able to completely repair his home from the proceeds. Conversely, Brandenberger contends that Reuille is not a prevailing party under the contract because he did not receive a judgment. The

issue is thus one of contract interpretation.

As the contract at issue does not define the term “prevailing party,” we will turn to sources that reflect the ordinary meaning of the term at the time the contract was executed. At the time of contract execution, Black's Law Dictionary defined “prevailing party” as:

The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.

Black's Law Dictionary 1188 (6th ed.1990). This definition appears to contemplate a trial on the merits and entry of a favorable judgment in order to obtain prevailing party status.

Several Indiana court decisions issued shortly before the parties executed their contract corroborate this approach. See *Heritage House of Salem, Inc. v. Bailey*, 652 N.E.2d 69, 79-80 (Ind.Ct.App.1995) (plaintiff is not a prevailing party where it obtained a preliminary injunction but where judgment ultimately was rendered for the defendant); *State ex rel. Prosser v. Ind. Waste Sys., Inc.*, 603 N.E.2d 181, 189 (Ind.Ct.App.1992) (a favorable ruling on a motion is not a judgment allowing the recovery of costs as a prevailing party).

Reuille contends that in 1997 Indiana followed the catalyst theory, which generally provides that a plaintiff is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. However, the cases Reuille relies on were federal cases that were not binding precedent.

Furthermore, it seems unlikely that parties entering into a contract would intend for a settlement reached during mediation to result in either party obtaining prevailing party status. One of the purposes of mediation is to provide an atmosphere in which neither party feels that he or she has “lost” or “won” a case.

To be sure, contracting parties can readily agree to fee-shifting arrangements that are more prescriptive than the one before us. For example, the contract could say: “The term ‘prevailing party’ shall include, but not be limited to, a party who obtains legal counsel or brings an action against the other by reason of the other's breach or default and obtains substantially the relief sought whether by compromise, settlement, or judgment.”

The agreement before us today is a straightforward and unadorned version. Aside from the dictionary and case law on which we rely, it seems apparent that the bright line approach these represent is the best for most litigants.

Lessons:

1. Parties are free to provide by contract for the award of attorney fees to a prevailing party and may define prevailing party anyway they see fit.
2. If the parties have not otherwise defined prevailing party, attorney fees will be awarded only to a party who obtains a judgment and will not be awarded in the event of a settlement.

3. Right to attorney fees after termination. *Herr v. Carter Lumber, Inc.*, 888 N.E.2d 853 (Ind.Ct.App. June 24, 2008) (Brown)

Thomas J. Herr (an attorney) appeals the trial court's judgment in his action against Carter Lumber, Inc., the Carter Jones Lumber Company (collectively, “Carter Lumber”), and

Brian Oaks for unpaid attorney fees.

Before addressing the argument raised by Herr, we note that he did not submit a transcript of the bench trial upon which the trial court's findings of fact and conclusions thereon are based. Ind. Appellate Rule 9(F)(4) provides:

The Notice of Appeal shall designate all portions of the Transcript necessary to present fairly and decide the issues on appeal. If the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence.

It appears that Herr is not challenging the trial court's findings of fact and is challenging only the trial court's conclusions of law. Based upon prior case law and since Herr is only challenging conclusions of law, we will address the issue raised by Herr even though no transcript was provided.

Herr agreed to represent Carter Lumber on “the basis of a twenty-five percent (25%) contingent fee with the client to pay court costs.” At some point, Carter Lumber terminated Herr's representation. Herr filed a complaint against Carter Lumber seeking “quantum meruit compensation, as measured by his normal fee of \$185.00 per hour for all his work expended” in the cases. Carter Lumber contended that Herr was “not entitled to be compensated until funds are recovered from the debtors.” After a bench trial, the trial court concluded that “where the contract between the client and the attorney did not spell out what the attorney's compensation would be in the event that the client terminated the attorney's services, the Court finds that the attorney must wait to recover his fee until funds are collected on behalf of the client.”

Resolution of this matter is governed by the decision in *Galanis v. Lyons & Truitt*, 715 N.E.2d 858 (Ind.1999) in which the Indiana Supreme Court held that “in the absence of express written fee agreements providing otherwise ... a lawyer retained under a contingent fee contract but discharged prior to the contingency is entitled to recover the value of services rendered *if there is a subsequent settlement or award*.... [T]he fee is to be measured by the proportion of the total fee equal to the contribution of the discharged lawyer's efforts to the ultimate result.” The Court emphasized:

[T]he value of a discharged lawyer's work on a case is not always equal to a standard rate multiplied by the number of hours of work on the case. Where the lawyers have agreed to work on contingent fees and there is no contractual provision governing payment in the event of discharge, compensating the predecessor lawyer on a standard hourly fee could produce either too little or too much, depending on how the total hourly efforts of all lawyers compare to the contingent fee.

Following *Galanis*, this court decided *Four Winds, LLC v. Smith & DeBonis, LLC*, 854 N.E.2d 70 (Ind.Ct.App.2006), *reh'g denied, trans. denied*. On appeal, we relied upon *Galanis* and noted that the Indiana Supreme Court “has approved of the use of termination clauses that provide for an hourly rate in the event of a pre-contingency termination, holding that they are ‘presumptively enforceable, subject to the ordinary requirement of reasonableness.’ ” We also recognized that: “[A]bsent a contrary agreement between the lawyer and the client, attorney fees pursuant to a contingency fee agreement should be taken only when the client receives payment.”

Here, the contingency fee agreement did not contain a termination clause like the one in *Four Winds*. Thus, under *Four Winds* and *Galanis*, Herr should receive his attorney fees pursuant to the contingency fee agreement only when Carter Lumber receives payment.

Lessons:

1. A trial transcript need not be ordered to appeal a conclusion of law.
2. In a contingency fee agreement, you can choose how to handle compensation in the event of termination by the client: hourly (in which event you could try to get your money promptly after termination); or based on the contingency fee (in which event you will have to wait until the case is resolved).
3. If you have a contingency fee agreement that does not specify the method of determining fees upon termination, the fees will be contingent on success and the amount will depend on the lawyer's contribution to the result achieved.

**4. Collateral source rule; valuing medical specials when there are write-offs.
Stanley v. Walker, 888 N.E.2d (Ind.Ct.App. June 3, 2008) (Darden)**

Walker sued Stanley for personal injuries arising from an auto accident. The issue presented on appeal is: Whether the trial court improperly relied on Indiana's collateral source statute as the basis for excluding Stanley's proffered evidence of write-offs to Walker's medical bills, offered to rebut Walker's medical records, which omitted written-off charges and indicated that Walker had incurred greater medical expenses than he actually had.

Stanley argues that he should have been permitted to introduce evidence of Walker's written-off medical expenses to the jury, and that the trial court improperly relied upon Indiana's collateral source statute as the basis for denying his offer of proof. Specifically, Stanley asserts that when the trial court permitted Walker to present his unredacted medical bills in the sum of \$11,569.99; and denied Stanley's request to present evidence of written-off amounts in the sum of \$4,749.84, which neither Walker nor his insurance company were obligated to pay, it enabled Walker to mislead the jury as to the actual extent of Walker's medical expenses and further, led the jury to return an inflated judgment.

The relevant issue herein is whether the write-offs apparently negotiated by Walker's insurer amounted to an "insurance benefit" for which Walker or a member of his family paid directly, and therefore, should be excluded when calculating the actual extent of Walker's pecuniary loss. This appears to be a matter of first impression in Indiana.

As we are of the impression that a key policy rationale underlying the common law collateral source rule--namely, safeguarding those benefits for which the injured party "was himself responsible"--remains in effect, we must conclude that write-offs constitute insurance benefits for which the plaintiff has paid directly, and therefore, defendants cannot be allowed to introduce evidence of write-offs to reduce damage awards.

That the plaintiff's insurance company developed a relationship with the plaintiff's medical providers such that favorable discounts and reductions in rates could be negotiated, to the plaintiff's benefit, should not serve to diminish the tortfeasor's liability for harm caused.

Based upon the foregoing, we conclude that fundamental notions of tort law, surviving policy justifications of the common law collateral source rule, and concerns of equity warrant the finding that write-offs secured by insurance companies for the benefit of their insureds, constitute insurance benefits for which the plaintiff or the plaintiff's family has paid directly, and therefore, must be excluded from consideration when calculating the extent of the injured party's pecuniary loss.

We note that pursuant to Indiana Trial Rule 413, statements of charges for medical

expenses for diagnosis or treatment after an injury are admissible into evidence, and are *prima facie* evidence of the reasonableness of the charges. Although we have found, here, that the trial court properly denied Stanley's attempts to introduce the write-offs, this is not to say that Stanley was not entitled to refute the reasonableness of the proffered medical expenses.

Lessons:

1. The collateral source rule will preclude the introduction of write-offs to medical bills obtained by the plaintiff's health insurance carrier if offered as evidence that the actual costs were less than the numbers reflected in the initial bills.
2. There may be a different result if offered to prove that the initial bills did not reflect reasonable charges but you may need an expert to say the initial bills were excessive.

5. Premises Liability; Attractive nuisance. *Kopczynski v. Barger*, 887 N.E.2d 928 (Ind. June 4, 2008) (Boehm)

This case presents two issues of first impression. We hold that under some circumstances a minor's invitation to enter the premises may bind the landowner for purposes of premises liability, and that a trampoline may constitute an attractive nuisance. In this case both issues turn on facts not appropriately resolved on summary judgment.

Alisha Palmer (12 years-old) was injured while jumping on a neighbor's trampoline after being invited to do so by Bryan Barger (6 years-old). If Alisha entered the Bargers' property without authority, she was a trespasser. If her entry was authorized, she was either a licensee or an invitee. Because her visit was solely social, Alisha was not a licensee, and was either a trespasser or an invitee. Alisha's status as trespasser or invitee, therefore, depends on whether she was authorized to be on the Bargers' property.

Bryan's invitation to join the group on the trampoline is the only evidence suggesting Alisha had permission to enter the Bargers' property and use the trampoline. An invitation does not have to come directly from the landowner. Although Bryan was only six years old, his parents left him alone in the unfenced backyard. Bryan's age might suggest to an adult that he lacked authority. But Alisha is also a minor. A landowner's greater duties to children may arise "taking into account the abilities, age, experience, and maturity of the child...."

The reasonableness of twelve-year-old Alisha's belief that she had permission to jump on the Barger's trampoline by virtue of six-year-old Bryan's invitation presents a genuine issue of material fact that precludes a determination of her status as a matter of law. Summary judgment as to Count I must be reversed.

The plaintiffs argue that even if Alisha was a trespasser, they may recover under the attractive nuisance doctrine, which imposes on a landowner a duty of care for a child trespasser if the following elements are met: 1) the structure or condition complained of is maintained or permitted on the property by the owner or renter; 2) the structure or condition is particularly dangerous to children and unlikely to be comprehended by children; 3) the structure or condition is especially attractive to children; 4) the owner or renter has actual or constructive knowledge of both the structure or condition and the likelihood that children will trespass and be injured; and 5) the injury is a natural, probable, and foreseeable result of the wrong.

The Court of Appeals held that the attractive nuisance doctrine does not apply because in general the dangers of jumping on a trampoline should be as obvious to children as "the dangers of falling from heights." In this case the designated evidence conflicts regarding whether Alisha

could have appreciated the dangers of jumping on a trampoline, particularly with multiple jumpers. Further, the designated evidence reveals that in 1998 about 75 percent of the roughly 95,000 emergency room treatments for trampoline-related injuries involved patients under fifteen. Accordingly, the Bargins have not established a lack of disputed material facts with regard to the open and obvious nature to Alisha of the dangers of trampolines. The trial court's grant of summary judgment is reversed.

Lessons:

1. A six-year-old can provide an invitation sufficient to make another child an invitee under premises liability law.
2. A trampoline can be an attractive nuisance.
3. Trampolines are really dangerous for kids.

6. Premises Liability; Duty. *Yates v. Johnson County Board of Commissioners*, 888 N.E.2d 842 (Ind.Ct.App. June 20, 2008) (Barnes)

In the spring of 2005, the Town of Edinburgh ("the Town") decided to host a circus. The Town decided that it wanted to hold the Circus on a plot of land known as "School Hill." To use School Hill, the Town executed a "Facility Usage Request" with the School Corporation. The request gave the Town permission to use School Hill on May 10, 2005, for the express purpose of hosting a circus with an expected attendance of "lots of people."

Yates (the plaintiff) decided to attend the Circus. When Yates left the Circus, dusk was approaching and she was carrying her three-year-old grandson. When she reached the last, extended step of the stairs [on School Hill], she did not consciously realize there was another drop-off to the sidewalk and/or did not see the drop-off. This apparently caused her to fall, resulting in a broken toe and alleged lingering hip and back pain.

The trial court specifically found that the School Corporation owed no duty to Yates. The question of whether a duty is owed in premises liability cases depends primarily upon whether the defendant was in control of the premises when the accident occurred. The School Corporation argues extensively that it gave up possession and control of School Hill to the Town for the duration of the Circus. The trial court specifically found that that was the case.

Actual physical possession of property at the precise moment an accident happens is not always dispositive on the question of "control" for premises liability purposes, if there was evidence that another party was in a better position to prevent the harm that occurred. Here, the School Corporation built and was in charge of maintaining the stairs. If the stairs were unsafe to climb or descend, because of faulty design, a lack of handrails, or lack of lighting, the School Corporation was in the best position to remedy that situation. The trial court erred in concluding that the School Corporation owed no duty to Yates.

The nature and extent of a landowner's duty to persons coming on the property is defined by the visitor's status as an invitee, licensee, or trespasser.

- The highest duty of care is owed to an invitee; that duty being to exercise reasonable care for the invitee's protection while he or she is on the premises.
- As to a licensee, the duty is to refrain from willfully or wantonly injuring him or her or acting in a manner to increase his or her peril; this includes the duty to warn a licensee of any *latent* (non-obvious) danger on the premises of which the

landowner has knowledge.

- Finally, the duty owed to a trespasser is the duty merely to refrain from wantonly or willfully injuring him or her after discovering his or her presence.

An invitee is a person who is invited to enter or to remain on another's land. There are three categories of invitee:

- the public invitee,
- the business visitor, and
- the social guest.

Licensees and trespassers are persons who enter the land of another for their own convenience, curiosity, or entertainment and take the premises as they find them. Unlike trespassers, however, licensees have a privilege to enter or remain on the land by virtue of the landowner's or occupier's permission or sufferance. In determining whether an individual is an invitee or a licensee, the distinction between the terms "invitation" and "permission" is critical.

It does not appear Yates could have been considered a "business visitor" of the School Corporation, because it received no economic benefit by her going to the Circus or in allowing the Town to use School Hill. Nor does it appear she was a "social guest" of the School Corporation. We focus our attention on whether she was a "public invitee." A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

Although the School Corporation itself was not putting on the Circus or benefiting from it financially, to a reasonable person it would appear that by facilitating the Circus, the School Corporation was at least impliedly inviting members of the public to come and use School Hill. We conclude that by knowingly allowing a public event to be held on School Hill, those attending the Circus were the School Corporation's public invitees and their presence was not merely "tolerated," but "expected and desired."

Reversed.

Lessons:

1. A property owner may be found to be "in control" of property even when physical possession of the premises has been temporarily granted to someone else if there was evidence that another party was in a better position to prevent the harm that occurred.
2. An owner may have a duty to "public invitees" by allowing a public event to be conducted by another party.

7. Duty of Care; Foreseeability. *Clark v. Aris, Inc.*, 2008 WL 2839478 (Ind.Ct.App. July 24, 2008) (Baker)

Appellant-plaintiff John W. Clark, individually and as personal representative of the Estate of Cory R. Clark, deceased (collectively, the Estate), appeals the trial court's order entering summary judgment in favor of appellee-defendant Aris, Inc. (Aris), on the Estate's complaint for negligent hiring and retention. The defendant had hired Frederick Baer to control traffic at construction sites. On February 25, 2004, while assigned to work at a Madison County construction site, Baer left the job site, drove his personal vehicle several miles, broke into the home of Cory and Jenna Clark and murdered them both. Suit was brought on behalf of Cory Clark's estate against Baer's employer, Aris.

Finding that Aris did not owe a duty of care to the victims as a matter of law, we affirm.

Our Supreme Court has said that to determine whether to impose a duty of care, three factors must be considered: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns. More specifically, imposition of a duty is *limited to those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm*.

Here, Aris hired Baer to flag traffic at a construction site. This job did not put him into personal contact with citizens, it did not provide access to people's homes or property, and it authorized him to do nothing more than stand on the street and control the flow of traffic. To commit the murders of the Clarks, Baer left his job in the middle of a shift, got into his personal vehicle, drove several miles, broke into the Clarks' residence, and murdered Cory and Jenna Clark. We simply cannot conclude that Cory and Jenna Clark, who lived miles from the construction site in a residence that Baer was not authorized to enter for any purpose whatsoever, were reasonably foreseeable victims, or that the tragic harm that befell them was reasonably foreseeable.

Thus, as a matter of law, Aris did not have a duty of care to the Clarks and the trial court properly granted summary judgment in Aris's favor.

Lesson: A defendant will owe a duty of care only in those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm.

8. Skilled lay witness opinion. *Linton v. Davis*, 887 N.E.2d 960 (Ind.Ct.App. June 3, 2008) (Riley)

The plaintiff Lawanda Davis won a jury verdict of \$1,250,000 against Michael Linton, M.D., for medical mismanagement of Davis' labor and delivery. On appeal, Dr. Linton contends that the trial court abused its discretion by limiting the trial testimony of Ivana Prcevski, the registered nurse who was assigned to Davis during her labor and delivery.

In essence, the main dispute between the parties concerns the qualification of Nurse Prcevski's testimony. While Dr. Linton considers her to be a skilled lay witness pursuant to Evid. R. 701, Davis refers to her as an expert witness, in accordance with Evid. R. 702.

The testimony of an observer, skilled in an art or possessing knowledge beyond the ken of the average juror may be nothing more than a report of what the witness observed, and therefore, admissible as lay testimony. This type of evidence is not a matter of "scientific principles" governed by Evid. R. 702(b), rather, it is a matter of the observations of persons with specialized knowledge.

Such witnesses possessing specialized knowledge are often called skilled witnesses or skilled lay observers. A "skilled witness" is a person with "a degree of knowledge short of that sufficient to be declared an expert under Evid. R. 702, but somewhat beyond that possessed by the ordinary jurors." Skilled witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge. In order to be admissible under Evid. R. 701, opinion testimony of a skilled witness or lay observer must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."

Specifically, in his offer of proof Dr. Linton established that Nurse Prcevski would testify to the following:

- She performed at least one ultrasound that showed the baby was doing well. During periods where the fetal heart monitor strips were non-diagnostic, Nurse [Prcevski] was auscultating and palpating and relaying the information to Dr. Linton, that the fetus was doing well.
- From 7:30 to 10:00 p.m., Nurse [Prcevski] saw no need to stop the Pitocin being administered to [Davis] because she felt the contractions were not too strong and the fetus was doing well throughout this period of time.

In light of this offer of proof, Nurse Prcevski should have been qualified as a skilled lay witness. The record establishes that she is a registered nurse with more than thirty years of experience, and was assigned to Davis during her labor and delivery. Accordingly, she can testify about her observations concerning the baby's heart rate monitor strips and her inferences derived thereof. Nevertheless, we find the trial court's improper exclusion of Nurse Prcevski to be harmless. Prcevski's testimony would have been merely cumulative to Dr. Linton's.

Note: The court somewhat inconsistently said: Nurse Prcevski is “a witness possessing specialized nursing knowledge, short of that sufficient to be declared an expert under Evid. R. 702” and then in a footnote: “Our opinion today should not be construed as a limitation on the qualification of nurses as expert witnesses under Ind. Evid. R. 702. . . . A registered nurse testifying in a medical malpractice case could equally testify as an expert witness ‘qualified by knowledge, skill, experience, training or education.’”

Lessons:

1. A skilled witness may offer opinions at trial, similar to that of an expert witness and without making the usual expert witness disclosures.
2. To qualify as a skilled witness, the witness should have (1) some specialized knowledge, (2) base her opinions on personal observations, and (3) and the opinions are deemed to be helpful to the jury to further their education.
3. A nurse who is a fact witness may testify to opinions based on her observations as either a skilled witness or as an expert witness.

9. Motions to strike testimony; opening the door in opening statement; expert testimony on causation in medmal case. Singh v. Lyday, 889 N.E.2d 342 (Ind. Ct. App. June 27, 2008)(Robb)

Surjit Singh, M.D., a psychiatrist, was accused of inappropriate sexual touching by three women patients. Singh appeals from the trial court’s grant of a Motion to Correct Error filed by the plaintiffs. In granting this motion, the trial court vacated the jury’s verdict in favor of Singh on the Patients’ claims of malpractice, gross negligence, and battery, and ordered a new trial. The trial court granted the motion because it concluded after trial that it had improperly excluded evidence from two other women patients.

On appeal, the plaintiffs argued that Singh had opened the door to the evidence as a result of the following exchange with plaintiffs’ counsel (after Singh had been called as an adverse witness):

Q: Now had there been other patients of yours besides the three plaintiffs who made similar allegations during the approximately same period of time?

A: No

Singh's Counsel: I'm going to object to that, Your Honor, as being irrelevant and outside the scope of the motion in limine, that's something that has already been covered.
Court: Sustained, although he already answered it.

Initially, Singh argues that because he objected to the question, and the trial court sustained the objection, Singh's response was not part of the record. However, Singh did not move to strike his response from the record, and it therefore remained in evidence. *Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212, 1230 (Ind.Ct.App.1983) (holding that a party could not complain that testimony violated a motion in limine where the party did not object before the answer was given and failed to move to strike the prohibited response).

The Patients also argue that Singh opened the door through his counsel's opening argument. Singh counters that he could not have opened the door through his counsel's opening statement, as such statements are not considered evidence. We agree that opening statements are not substantive evidence. However, counsel may open the door to permit the admission of otherwise inadmissible evidence through an opening statement. However, having reviewed Singh's counsel's opening statement, we find nothing in it that opened the door to impeachment [by using the complaint of one of the non-plaintiff women patients].

We [next] turn to the question of whether expert testimony on causation is required in a case of alleged sexual misconduct by a psychiatrist, or whether such a situation falls into the "common knowledge" exception. The Patients in this case all had pre-existing conditions, and other factors, such as drug use, could conceivably have contributed to their current symptoms. . We conclude that the Patients were required to present expert testimony on the issue of whether Singh's alleged misconduct was a proximate cause of their alleged injuries or symptoms.

Based on the Patients' failure to introduce expert medical testimony on the issue of causation, we conclude that the trial court's decision to deny Singh's motion for judgment on the evidence regarding the Patients' medical malpractice and gross negligence claims was clearly erroneous.

Lessons:

1. An order in limine will not always be sufficient to protect against objectionable evidence.
2. A contemporaneous objection will not always be sufficient to preserve the issue.
3. If the witness has answered, be sure to move to strike the answer. Without the motion to strike, the answer may remain in the record and subject to consideration by the court and jury.
4. Comments in opening statement can open the door to evidence that would otherwise be inadmissible.
5. Expert testimony on medical causation is required as to damages due to inappropriate sexual touching by a psychiatrist.

10. Workers' Comp immunity for medmal claim. *ProCare Rehab Services of Community Hospital v. Vitatoe*, 888 N.E.2d 349 (Ind.App. June 18, 2008) (Crone)

Vitatoe was employed by Community Hospital as a registered nurse. On April 14, 2002, during her shift and while on corporate premises, Vitatoe slipped and fell and injured her right

hamstring. On April 7, 2004, Vitatoe filed with the Indiana Department of Insurance a proposed medical malpractice complaint alleging negligence. Specifically, Vitatoe alleged that she did not have proper medical care for her complete hamstring tear. She received this medical care from a division of her employer, raising the question of whether her exclusive remedy against Community is a claim under the Indiana Worker's Compensation Act.

Prior case law has established that, if an employee's injury that arose out of and in the course of her employment is aggravated by treatment for that injury, regardless of where, when, by whom, and for how long the treatment was provided, the injury caused by the treatment shall be deemed as a matter of law to have arisen out of and in the course of her employment for purposes of the Act; as such, the employee's exclusive remedy against her *employer* for the injury caused by the treatment is under the Act.

In contending otherwise, Vitatoe attempts to resurrect the dual-capacity doctrine, in which an employee is allowed to maintain a separate cause of action against his employer where the employer occupies, in addition to his capacity as an employer, a second capacity that confers upon him obligations independent of those imposed upon him as an employer. The justification for the imposition of liability under the dual capacity doctrine notwithstanding the receipt of worker's compensation benefits is that an employer may breach a duty which does not arise out of the employer-employee relationship. In other words, an employer may cause an injury in a role other than the role of employer.

The dual-capacity doctrine has been rejected by both this Court and the Seventh Circuit Court of Appeals. Vitatoe claims that her situation is unique because "she was foremost a patient at the time of the injury, facing the same risks of medical negligence faced by any patient receiving rehabilitative treatment from Procare Rehab." Based on the aforementioned precedent regarding the dual-capacity doctrine and the aggravation of an employee's work-related injuries, as well as the plain language of Indiana Code Section 22-3-2-6, we find this to be a distinction without a meaningful difference. Consequently, we reverse the denial of Community's motion to dismiss Vitatoe's proposed medical malpractice complaint for lack of subject matter jurisdiction.

BARNES, Judge, concurring. I concur with the majority's analysis and agree that the outcome here is dictated by precedent. That does not mean that I believe such an outcome is logical or fair. The proposition that merely because an injured employee is treated at a facility that has links to the employment site where the original injury was sustained, he or she is prohibited from bringing a separate action for neglectful or reckless care makes no sense to me. This result seems to single out hospital or healthcare provider employees for unequal treatment under the Act. Perhaps our legislature will examine what I consider to be this inequity in the future.

Lesson: Worker's comp immunity applies to medical malpractice claims brought by employees of a health care provider if the care was a consequence of a job-related injury.

11. Enforcement of arbitration award. *MBNA America Bank, N.A. v. Kay*, 888 N.E.2d (Ind.Ct.App. June 12, 2008) (Barteaue)

MBNA submitted a purported dispute with Kay over the non-payment of a credit card

account to arbitration with the National Arbitration Forum. On February 1, 2006, Kay filed a response with the NAF objecting to the arbitration. On February 13, 2006, the NAF arbitrator found that there was a valid arbitration agreement between MBNA and Kay and entered an award in favor of MBNA in the amount of \$17,637.16. On May 17, 2006, MBNA filed an application to confirm arbitration award with the trial court in Marion County, Indiana. On September 13, 2007, the trial court denied MBNA's application and dismissed it with prejudice. MBNA appeals.

The instant action is governed by the Federal Arbitration Act (“the FAA”). Although Indiana has adopted the Uniform Arbitration Act, Ind.Code § 34-57-2-1, *et seq.* (“the Indiana Act”), Ind.Code § 34-57-2-1(b) provides that the Indiana Act does not apply to loan contracts. All consumer leases, sales, and loan contracts, as they are defined in the Uniform Consumer Credit Code are exempted from the Indiana Act. A loan includes the creation of debt pursuant to a lender credit card or similar arrangement.

9 U.S.C.A. § 4 [of the FAA] provides as follows:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court...for an order directing that such arbitration proceed in the manner provided for in such agreement.... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Therefore, contrary to MBNA's argument, the party seeking to pursue arbitration, where the other party has refused to arbitrate, may petition a court with jurisdiction over the matter to hear the parties' arguments and enter an appropriate order either compelling the submission of the matter to arbitration, or dismissing the matter upon a finding of no agreement to arbitrate. Once a party objects to the arbitration, a court must determine if a valid arbitration agreement exists.

The trial court had before it evidence of Kay's objection to the arbitration, and the order by the NAF arbitrator finding that a valid agreement to arbitrate existed. There was no federal court determination that a valid agreement to arbitrate existed. Hence, the arbitration award that MBNA was asking the trial court to confirm was not properly obtained. The procedure outlined in the FAA was not followed. As a result, the trial court did not err by dismissing MBNA's application to confirm the arbitration award.

Lessons:

1. On arbitrations governed by the FAA, once a party objects to the arbitration, the party seeking the arbitration is required to obtain a federal court ruling regarding the validity of the arbitration agreement.
2. The Indiana Arbitration Act does not apply to loan contracts.

12. Statute of limitation for contribution and stigma damages. *Pflanz v. Foster*, 888 N.E.2d 756 (Ind. June 19, 2008) (Shepard)

The question here is whether a property owner's claim for contribution toward environmental cleanup costs is barred by the statute of limitation if the owner should have known about the contamination more than ten years before the complaint was filed. We hold that the statute of limitation does not begin to run until the owner is ordered to cleanup the property, regardless of whether an owner earlier knew or should have known about the need for cleanup. The parties agree that the general ten-year statute of limitation applies to the Pflanzes' contribution claim.

The resolution of this case turns on when the ten-year limitation began to run. In the American legal system, demonstrated harm is an indispensable element of virtually every type of civil claim. In cases ranging from contract to tort to medical malpractice, a claimant cannot recover a monetary judgment unless he has suffered actual damage. This notion that the statute of limitation begins to run when all the elements of a cause of action can be shown (including whether some damages have been felt) is part of how we determine when a cause “accrues.” Under Indiana's discovery rule, a cause of action accrues, and the statute of limitation begins to run, when a claimant knows or in exercise of ordinary diligence should have known of the injury.

Foster contends that the statute of limitation began running when the Pflanzes knew or should have known about the contamination. The Pflanzes' contribution claim, however, is not a claim for damage to the property itself. Rather, they seek to recover for the cleanup costs IDEM required, which resulted from Foster's use of the land. In contribution or indemnification cases, the damage that occurs is the incurrence of a monetary obligation that is attributable to the actions of another party. That is why, generally, parties bringing contribution and indemnification claims must wait until after the obligation to pay is incurred, for otherwise the claim would lack the essential damage element.

Because the damage at issue in the Pflanzes' contribution claim is the cleanup obligation assessed by IDEM that resulted from Foster's use of the land, the statute of limitation did not begin to accrue until after the Pflanzes were ordered to clean up the property.

Indiana law permits recovery of “stigma damages” for losses in the fair market value of property after remediation of environmental contamination. A claim for such damages cannot ripen until remediation has been substantially completed because only then can the impact of the former environmental contamination on property value be determined. Claims for stigma damages are governed by a six-year statute of limitation. As with contribution claims, the “damage” in stigma damage claims is not the environmental contamination itself. Rather, the damage is a diminution in property value despite acceptable remediation of the environmental contamination. Stigma damages cannot be determined prior to substantial completion of the remediation. The Pflanzes' claim for stigma damages cannot possibly have been outside the statute of limitation period.

Lessons:

1. A cause of action accrues for statute of limitations purposes only after some actual damage has been suffered.
2. In a contamination case, a contribution claim for clean-up costs does not accrue until after there has been a clean-up order.
3. A claim for stigma damages does not accrue until after substantial completion of the remediation.

13. Service of Process--*Goodson v. Carlson*, 888 N.E.2d 217 (Ind.Ct.App. June 3, 2008) (Darden)

On July 17, 2001, Barbara and David Carlson filed a complaint against Phillip Goodson, alleging that Goodson was negligent in the operation of his vehicle, resulting in an accident with personal injury to Marsha. On July 18, 2001, the Lake County Sheriff attempted to serve Goodson with a summons at his address, as listed on the Crash Report: 2130 Meadow Lane, Schererville. The service, however, was “[u]nsuccessful” because the summons did not list an apartment unit for Goodson, which was noted on the return of service to the clerk's office. The Carlsons later provided service by publication and then obtained a default judgment. On appeal, the issue presented was whether the Carlsons had performed the required “diligent search” required by Trial Rule 4.13 before service by publication is authorized.

The court concluded: “Given the evidence, we cannot say that the Carlsons exercised due diligence in attempting to locate Goodson where the Carlsons utilized only one method to determine Goodson's address; failed to file an alias summons after being granted leave to do so; and did not attempt further notice until nearly two years after commencement of their case. Accordingly, the trial court never obtained personal jurisdiction over Goodson, and the default judgment therefore is void.”

Lesson: The appellate court will require genuine diligence in trying to obtain personal service before you can rely on service by publication.

14. Statute of Frauds. *Reich v. Lincoln Hills Christian Church, Inc.*, 888 N.E.2d 239 (Ind.Ct.App. June 3, 2008) (Vaidik)

Robert Reich, who had a remainder interest in a property, and Lincoln Hills Christian Church, Inc. entered into a written agreement for the exchange of two properties. When the church did not follow through on the agreement, Reich sued for specific performance. The issue presented on appeal was whether the written agreement satisfied the Statute of Frauds.

Under the Statute, an enforceable contract for the sale of land must be evidenced by some writing: (1) which has been signed by the party against whom the contract is to be enforced or his authorized agent; (2) *which describes with reasonable certainty each party and the land*; and, (3) which states with *reasonable certainty the terms and conditions* of the promises and *by whom* and to whom the promises were made.

Reich admits that at the time the written agreement was executed in August 2005 his mother Mary had a life estate in the property, yet the agreement itself does not describe with reasonable certainty either Mary or the fact that she had a life estate in the property and would have to take some additional steps to terminate her interest so that title to the property would pass in fee simple, which the parties agree is what they intended. Because the written agreement does not describe with reasonable certainty each party and does not state with reasonable certainty the terms and conditions of the promises and by whom the promises were made, the written agreement does not satisfy the Statute of Frauds.

Lesson: It is not enough to get a contract for sale of land in writing, you must also make sure you have covered with reasonable certainty the terms and conditions.

15. Relation back; T.R. 15(c); constructive notice. *Sinks v. Caughey*, N.E.2d, 2008 WL 2746488 (Ind.Ct.App. July 16, 2008) (Vaidik)

In this personal injury case, the plaintiff's initial complaint specifically named as defendants the owners of the other vehicle (Jackie and Kathy Grover) and their son, Michael Grover. The plaintiff Krista Caughey had been told by an adjuster for American Family Insurance (which insured both vehicles) that Michael was the driver of the vehicle. After learning later that Tim Sinks was the driver, Caughey moved to amend her complaint to name Sinks as a defendant but this motion occurred after the two-year statute of limitations expired.

The issue presented on appeal was whether Caughey could belatedly add Sinks as a party defendant after the statute of limitations period has run. Indiana Trial Rule 15(C) states:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within one hundred and twenty (120) days of commencement of the action, the party to be brought in by amendment:

- (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and
- (2) knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Sinks maintains that he did not receive actual or constructive notice of the institution of the lawsuit within 120 days of the commencement of the action. Both parties agree that Sinks did not have actual notice. We therefore must determine if Sinks had constructive notice.

Four days before the applicable statute of limitations was to expire, Caughey's attorney served notice of her lawsuit through the service of a summons to Michael and to defendant "John Doe c/o American Family Insurance Group." We conclude that this notice to American Family was constructive notice to Sinks.

Essentially, this suit is a suit seeking insurance proceeds from American Family's liability policy. Here, Sinks could not have been prejudiced in maintaining his defense because it is American Family's insurance proceeds that Caughey seeks, and American Family received a summons within the statute of limitations against "John Doe." Furthermore, at the time of receiving the summons, American Family knew that Sinks was the "John Doe" driver of the truck.

The overarching concern of Trial Rule 15(C) is fairness to the added defendant. When the suit seeks only insurance proceeds and the insurance company had actual notice of the suit, the fairness component is satisfied.

In a footnote, the court added: "Here, we have what appears to be a tangled web of procedural posturing with American Family at the forefront in a seeming attempt to "game" the system. We have consistently rejected a "gaming view" of litigation proceedings. The purpose behind discovery and pretrial procedures is to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."

Lessons:

1. Service on an insurance company can provide constructive notice to an un-named

defendant for purposes of Trial Rule 15(C).

2. If you're "gaming" the system, you will not find a sympathetic ear in the Court of Appeals.

16. Dismissal for attorney's failure to sign complaint. *Turner v. Franklin County Four Wheelers Inc.*, 889 N.E.2d 903 (Ind.Ct.App. July 15, 2008) (Brown)

On May 25, 2007, the complaint in this case was filed without the signature of counsel either due to human error or an error in the computer program plaintiff's counsel uses to generate his signature on pleadings. The absence of the signature violated the requirement in Trial Rule 11(A) that a pleading "shall be signed by at least one attorney." The defendant moved to strike the complaint because of the missing signature and the plaintiff moved to amend. Defendant then objected to the motion to amend and moved to dismiss the complaint which the trial court granted. The statute of limitations ran on May 29, 2007, very shortly after the complaint was filed.

The issue on appeal "is whether the trial court abused its discretion by denying Turner's motion to amend her complaint and granting the Defendants' motion to dismiss." In considering this issue, the Court of Appeals looked to language in *S.T. v. State*, 764 N.E.2d 632, 635 (Ind.2002) where the Supreme Court stated: "As a general proposition, ... all litigants, as well as the court, are bound by the rules." *Id.* However, a court should not blindly adhere to all of its rules. *Id.*

Although our procedural rules are extremely important, it must be kept in mind that they are merely a means for achieving the ultimate end of orderly and speedy justice. We must examine our technical rules closely when it appears that invoking them would defeat justice; otherwise we become slaves to the technicalities themselves and they acquire the position of being the ends instead of the means.

In *Rueth Dev. Co., v. Muenich*, 816 N.E.2d 880 (Ind.Ct.App.2004), *trans. denied*, the defendant filed a motion for more definite statement under Ind. Trial Rule 12(E), and the trial court ordered the plaintiffs to amend their complaint within twenty days. Due to a calendaring error, the plaintiff filed the amended complaint either one or three days late. The defendants then filed a motion to dismiss, which the trial court granted.

On appeal, we held that the action had been dismissed under Ind. Trial Rule 41(E) for failure to comply with the trial rules. We noted that the amended complaint was only a couple of days late, the plaintiffs promptly corrected their mistake, the plaintiffs did not have a history of failing to comply with other court orders, and we have a preference for deciding cases on their merits. We concluded that dismissal of the plaintiffs' complaint was an abuse of discretion.

We conclude that the trial court abused its discretion by granting the Defendants' motion to strike and that the trial court abused its discretion by denying Turner's motion to amend her complaint. Consequently, we conclude that the trial court abused its discretion by granting the Defendants' motion to dismiss.

Some of the Defendants argue that "[m]echanical signatures to individual claims in civil cases have not been sanction [sic] or allowed and it would seem that such a practice defeats the purposes of Ind. T.R. 11(A) because the attorney is charged with the duty to establish that he/she 'read the pleading.' They cite no authority for this proposition, and we note that mechanical signatures have been permitted in other contexts. Moreover, it is irrelevant here how the signature was supposed to be affixed. Rather, the only relevant consideration is that the

complaint was filed without a signature by mistake.

Lessons:

1. Be sure to sign all pleadings.
2. If you don't or you miss a deadline just a little bit, there are times when the courts will cut you some slack (but don't count on it).

17. Advocacy Tip of the Month: Attitude in Oral Argument

From The Circuit Rider, June 2008: The Use *and* Uses of Oral Argument by Barry Sullivan

Obviously, an advocate must have a positive attitude about his case. He must believe in it. If he does not believe in his case, that will be obvious to the court, and they will not believe in it either. But attitude also requires more than that. The advocate must also manifest his belief in the importance of the process and of what he is doing. Justice Jackson put it succinctly: "If making an argument is not a great day in your life, don't make it; and, if it is, give it everything in you." In other words, the advocate should give the argument, not because his client expects it, or because his stature in the firm demands it, but simply because he cannot imagine anything that he would rather do than argue this appeal to this court on the appointed day.

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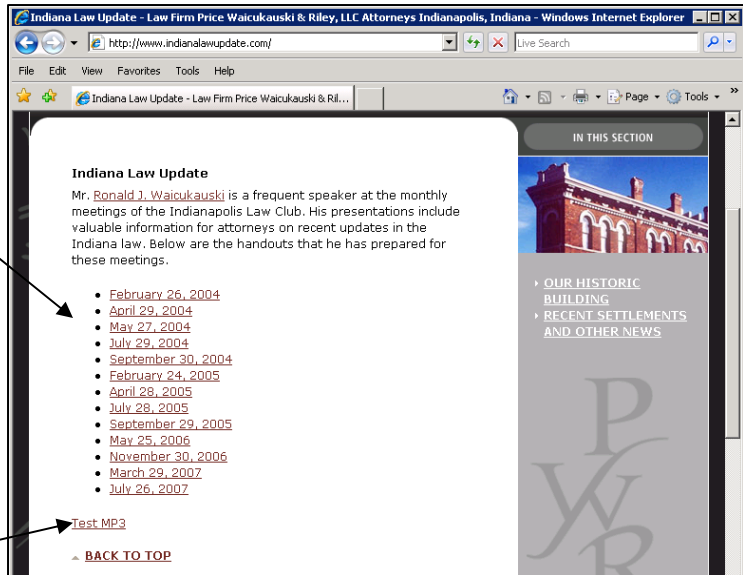
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