

INDIANA LAW UPDATE
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LITIGATION TIP OF THE MONTH: Overprepare but undertry.

HOW TO ACCESS THE INDIANA LAW UPDATE HANDOUT AND PODCAST

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.

IN THE NEWS: “LAWYERS CRITICAL OF JUDGES FIGHT FOR RIGHTS”

The National Law Journal, February 9, 2009:

“Maybe it’s something in the air. In Florida, an attorney faces discipline this spring over a blog entry on a courthouse blog in which he described a judge as an “evil, unfair witch” with an “ugly, condescending attitude” and questioned her mental stability. The Florida Supreme Court refused to hear the lawyer’s constitutional argument in October. He will be reprimanded in April and has to pay a \$1,200 fine. *Florida State Bar v. Conway*, No. SC08-326 (Fla.).

In Michigan, flamboyant trial attorney Geoffrey Fieger, the one-time lawyer to Dr. Jack Kevorkian, is pursuing a highly watched right-to-criticize-judges lawsuit. Fieger is challenging a state rule that was used to sanction him for calling state appeals judges “jackasses” in a radio show and comparing them to Nazis for overturning a \$15 million verdict he had won.

“Even though we all thought we had First Amendment rights, be careful,” Conway warned. “It’s going to cost you a lot of money and maybe even your practice.”

1. **Statute of Limitations for Wrongful Death/Medical Malpractice. *Newkirk v. Bethlehem Woods Nursing and Rehabilitation Center*, 898 N.E.2d 299 (Ind., December 24, 2008). (Sullivan)**

On September 10, 2001, Martha O’Neal was admitted to Bethlehem Woods Nursing and Rehabilitation Center (“Bethlehem”) for rehabilitation following surgery. During her stay at Bethlehem, O’Neal was the victim of several acts of medical malpractice. On September 22, 2001, a Bethlehem employee discovered O’Neal lying in a pool of her own blood. She was transferred to the hospital. O’Neal died on November 6, 2001.

On October 22, 2003, more than two years after the medical negligence occurred, but within two years of O’Neal’s death, the Estate of Martha O’Neal (“Estate”) filed a complaint under the Wrongful Death Act, [Ind.Code § 34-23-1-2](#), against Bethlehem alleging that Bethlehem provided negligent medical care to O’Neal that ultimately led to her death. Bethlehem moved for summary judgment, arguing that the Estate’s action was barred by the requirement to bring an action for medical malpractice within two years of the alleged act or omission. The trial court agreed and granted Bethlehem’s motion.

The Court of Appeals reversed. It held (as had the trial court) that the Estate’s claim arose under the Indiana Professional Services Statute (“PSS”), [I.C. § 34-11-2-3](#), not the Indiana Medical Malpractice Act (“MMA”), [I.C. § 34-18-7-1](#)(b), because Bethlehem was not a “qualified provider” under the MMA and, therefore, not eligible for its protections. But the Court of Appeals went on to hold that because the Estate’s lawsuit had been filed within the limitations period of the WDA, its claim was timely filed.

In this case, the substantive tort claim underlying the wrongful death action is precisely the same as it was in the [Ellenwine](#) [*v. Fairley*, 846 N.E.2d 657 (Ind. 2006)] scenario: medical malpractice. The PSS did not create or establish the medical malpractice claim but the Legislature did establish a two-year limitations period for filing such claims. As we said in

Ellenwine: “Because a patient who has been the victim of medical negligence could well live many more than two years beyond the occurrence of the malpractice only to ultimately die as a result of it, applying the two-years-after-death limitations period of the wrongful death statute where a patient dies from the malpractice seems to us totally inconsistent with this legislative goal.” [846 N.E.2d at 664](#).

The Estate filed its complaint on October 22, 2003, more than two years after the last date upon which Bethlehem's alleged negligent conduct could have occurred, but less than two years from O'Neal's death. If death is caused by the malpractice, the malpractice claim terminates at the patient's death, and a wrongful death claim must be filed by the personal representative within two years of the occurrence of the malpractice. *Id. at 665*. O'Neal's death was alleged to have been caused by Bethlehem's medical malpractice. As such, the wrongful death claim was required to have been filed by her personal representative within two years of the occurrence of the malpractice. The Estate did not do so and the trial court properly concluded that its claim was not timely filed.

Lesson: A wrongful death claim for medical malpractice must be filed within 2 years of the malpractice; within two years of death may be too late.

2. Statute of Limitations for Wrongful Death/Products Liability. *Technisand, Inc. v. Melton*, 898 N.E.2d 303 (Ind., December 24, 2008). (Sullivan)

Patty Melton (“Patty”) died from [leukemia](#) on July 25, 2002. Her husband, Jessie Melton (“Jessie”), is the personal representative of her estate. In July, 2003, KIPT [Patty’s employer] provided Jessie's counsel with a letter from KIPT and a Material Safety Data Sheet for resin-coated sand made by Technisand. The letter stated that Patty might have been exposed to the resin-coated sand during her work at KIPT. The data sheet said that the use of the resin-coated sand could create formaldehyde fumes, and that formaldehyde was a carcinogen. On November 29, 2004, Patty's doctor, Dr. James K. Hwang, wrote to Jessie and disclosed that formaldehyde exposure “may have placed [Patty] at a greater risk for [leukemia](#).”

Jessie contends that the limitations period under the Indiana Products Liability Act controls the time limitation on his ability to bring a claim. The PLA allows a product liability action to be filed within two years after the cause of action accrues. [I.C. § 34-20-3-1\(b\)\(1\)](#). A cause of action “accrues” under the PLA, “[o]nce a plaintiff's doctor expressly informs the plaintiff that there is a 'reasonable possibility, if not a probability' that an injury was caused by an act or product.” [Degussa Corp. v. Mullens](#), 744 N.E.2d 407, 411 (Ind.2001). Jessie's claim was clearly filed within two years of the accrual of the products liability claim.

Technisand argues that Jessie's claim was required to be filed within the limitations period of Indiana’s Wrongful Death Act (“WDA”). Because Patty died more than two years before Jessie's claim was amended to name Technisand, Technisand maintains that Jessie's claim against it should be dismissed as untimely.

The Court of Appeals reasoned that because Jessie's claim “involves products liability,” and Technisand was added timely pursuant to the PLA, Jessie's claim against Technisand could proceed. The Court of Appeals was incorrect in this regard because it failed to take into account the operation of Indiana's Survival Statute (“Survival Act”), [I.C. § 34-9-3-1](#). The Survival Act provides that if an individual who has a personal injury claim or cause of action dies, the claim or cause of action does not survive-unless the individual dies from causes other than those

personal injuries. The claim here is that Patty died from personal injuries allegedly caused by Technisand. As such, once Patty died, Jessie's claim was a claim for wrongful death.

The Legislature's intent was that the limitations period provided in the WDA always serves as an outside limit on the amount of time that the personal representative of a person whose death is caused by the wrongful act or omission of another will have to file the lawsuit.

The injuries forming the basis for the substantive tort claim, that of products liability, caused Patty's death. Pursuant to the Survival Act, Patty's products liability claim against Technisand terminated at her death; only the WDA claim survived. The WDA requires that a wrongful death action be commenced within two years of the decedent's date of death. Jessie conceded that he did not bring suit against Technisand within two years of Patty's death. Jessie cannot use the PLA statute of limitations as an alternative to the statute of limitation contained within the WDA. His claim against Technisand was not timely filed.

Lesson: A wrongful death claim based on an underlying product liability claim must be filed within two years of the date of the decedent's death; two years after accrual of the product liability claim may be too late.

3. Statute of Limitations; Successor Liability Following Asset Sale. *Cooper Industries v. South Bend*, 899 N.E.2d 1274 (Ind., January 22, 2009). (Shepard)

The City of South Bend now owns much of the land where Studebaker Corp. once manufactured automobiles. It has sued Cooper Industries, LLC and others for environmental damage done to the site.

Cooper contends that South Bend's claims are barred by the statute of limitation. In response, South Bend argues that its cause of action for damages to the Studebaker property did not accrue for limitation purposes until it became the owner of the property and had a right to commence the action. We cannot agree. Indiana adheres to the rule that "third parties are usually held accountable for the time running against their predecessors in interest." Accepting South Bend's argument would have the practical effect of allowing the mere transfer of property to resurrect the claims of prior landowners and predecessors-in-interests who had actual knowledge of injuries to property.

One of South Bend's claims is an "environmental legal action" (ELA) to recover costs of removal or remedial action pursuant to a statute enacted in 1997. "A statute of limitation does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff." [*Martin v. Richey*, 711 N.E.2d 1273, 1284 n. 12 \(Ind.1999\)](#). The substance of a cause of action, rather than its form, determines the applicability of the statute of limitation. Cooper asserts that "South Bend had several ways to sue exactly the same parties for the same contamination under the same (or more stringent) standards long before the ELA amendments."

If the ELA simply amends, for clarification or other purposes, pre-existing environmental claims, any change would apply strictly on a prospective basis. On the other hand, if the ELA creates an entirely new action, no cause of action could have existed until its effective date. ELA seems to fall somewhere in the middle. In this case, however, South Bend did not have a complete cause of action until the ELA became effective. Therefore, the statute of limitation could not have begun to accrue until that date.

Cooper further asserts that the statute of limitation should have run against South Bend in accord with standard discovery rule principles-when it knew or should have known of the injury. This misses a broader point about applying statutes of limitation: a statute does not run until a cause of action is complete.

Cooper claims that under this logic a claim could be brought based on facts known for a hundred years. Such a claim still must be brought, however, within the applicable statute of limitation from the point of a new cause of action's effective date. In other words, any opening of the floodgates would have a time limit. That time for the ELA passed either on February 28, 2004 or February 28, 2008, depending on which statute of limitation applies.

Though the parties join in debate over whether South Bend has agreed that the property damage statute of limitation applies in this case, we will adopt six years as the applicable time period. Six years from the accrual date was February 28, 2004. Because South Bend filed this action March 19, 2003, it filed within even the shortest arguable limitation.

Both parties moved for summary judgment on whether Cooper is the corporate successor of Studebaker with regard to the environmental liabilities involved in this case. Cooper contends that the liabilities did not pass from Studebaker to Studebaker-Worthington in the 1967 asset sale and therefore did not end up with Cooper. Cooper's theory is that asset purchases do not transfer liability, so the liabilities stayed with Studebaker until Studebaker terminated its corporate existence, at which point the liabilities expired. South Bend argues that the liabilities were transferred to Studebaker-Worthington in the 1967 sale, and, in any event, the situation merits application of either the *de facto* merger or the "mere continuation" doctrines.

Under Indiana law, where a corporation purchases the assets of another, the general rule is that the buyer does not assume the liabilities of the seller. There are well-recognized exceptions to this rule. The "*de facto* merger" and "mere continuation" doctrines are widely accepted in the law of American states, including Indiana. Courts sometimes treat asset transfers as *de facto* mergers where the economic effect of the transaction makes it a merger in all but name. Some pertinent findings might include continuity of the predecessor corporation's business enterprise as to management, location, and business lines; prompt liquidation of the seller corporation; and assumption of the debts of the seller necessary to the ongoing operation of the business. We conclude that the facts here suffice to warrant the trial court's finding that the 1967 transaction constituted a *de facto* merger such that Cooper may be held to answer South Bend's claims.

The doctrine of "mere continuation" has a slightly different focus. It asks whether the predecessor corporation should be deemed simply to have re-incarnated itself, largely aside of the business operations. Factors pertinent to this determination include whether there is a continuation of shareholders, directors, and officers into the new entity. The trial court properly found that the 1967 transaction was a mere continuation of the earlier corporate forms.

The trial court was correct that the ELA claim is timely, and that Cooper is the rightful corporate successor of Studebaker.

Lessons:

1. A statute of limitations may begin to run on a claim under a new law even before its enactment if the substance of the cause of action already existed.
2. A new statute may create a timely cause of action for events 100 years ago.

3. The “de facto” merger and “mere continuation” doctrines create exceptions to the general rule that the purchaser in an asset sale does not assume the seller’s liabilities.
4. **Consolidation of Preliminary Injunction Hearing with Trial on the Merits. *Roberts v. Community Hospital of Indiana*, 897 N.E.2d 458 (Ind., December 9, 2008). (Boehm)**

On May 31, 2006, Dr. John Roberts sued Community for breach of his residency contract. He did not request a jury trial, but moved for both a temporary restraining order and a preliminary injunction reinstating him as a resident at Community. Approximately two months after the suit was filed, the trial court held a preliminary injunction hearing. Over the course of approximately eight hours, testimony was received from several witnesses and the parties also introduced several dozen documents.

After the hearing, in a single order entitled “Final Judgment,” the trial court consolidated the preliminary injunction hearing with a trial on the merits pursuant to [Trial Rule 65\(A\)\(2\)](#), denied Dr. Roberts's application for a preliminary injunction, and entered final judgment in favor of Community on the breach of contract claim. The court had not provided notice of consolidation to the parties prior to the entry of judgment. Dr. Roberts filed a Motion to Correct Error challenging the consolidation.

[Indiana Trial Rule 65\(A\)\(2\)](#) provides that “[b]efore or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.” Neither [Trial Rule 65\(A\)\(2\)](#) nor [FRCP 65\(a\)\(2\)](#) expressly requires trial courts to provide notice to litigants prior to advancement and consolidation. However, federal courts have interpreted [FRCP 65\(a\)\(2\)](#) to require notice so that parties are afforded a fair opportunity to present their cases on the merits. But the prevailing federal rule has long been that consolidation without notice is not reversible error absent a showing of prejudice.

Further, the prevailing federal rule is that allegations of prejudice must be specific. We agree and think prejudice requires more than simply identifying steps that might possibly produce evidence not adduced at the preliminary injunction stage. Bare assertions that discovery was incomplete or witnesses were not called will not suffice, at least where, as here, there was time for significant discovery. Rather, prejudice from a surprise consolidation ordinarily requires either admissible, material evidence that would be produced at trial and that would have likely changed the outcome on the merits, or a persuasive showing why available evidence was not accessible in the time between filing the complaint and the hearing.

In the instant case, Dr. Roberts's counsel recited in an affidavit and in argument at the hearing on the Motion to Correct Error actions he asserted he would have taken had he been on notice of consolidation. Those included calling additional witnesses, and retaining an expert on the custom and usage of medical residency contracts. But there was no identification of the names of those witnesses, or any explanation of the substance of their testimony or how their testimony would affect the result. The record suggests that all the principal players testified at the hearing, and Dr. Roberts points to no relevant documents that were unavailable.

We are not persuaded by the plaintiff's proposal to present expert testimony on the custom and usage of medical residency contracts. To be sure, there are some potential ambiguities in Dr. Roberts's contract. But even if we assume the contract's due process requirements are ambiguous, and if we assume further that expert testimony on the custom and

usage of residency contracts would be admissible to interpret the contract, plaintiff's counsel has still not shown what the evidence of custom and usage would be or how it would resolve any ambiguity. Most importantly, there is no suggestion how an interpretation of this contract would entitle Dr. Roberts to relief on the merits.

In short, by failing to identify admissible and material evidence that would have changed the outcome on the merits, counsel's post-hearing motion failed to show Dr. Roberts was prejudiced by the trial court's surprise consolidation.

We recognize that a stricter requirement of showing of prejudice has the potential to produce unfair results and may need to be relaxed in some situations. That may be the case where a party has had little to no opportunity for discovery of matters that are largely known only to the opponent. The case against surprise consolidation is stronger if the opponent of consolidation is also the party opposing preliminary injunctive relief. We therefore stress that any determination of prejudice following a surprise consolidation must consider (1) the scope of the issues in the case, (2) the opportunity that the parties have had for discovery, (3) the degree to which continuance and discovery requests have been honored, (4) the extent to which the parties litigated the merits of the case at the preliminary injunction hearing, and/or (5) the realistic ability of the trial court to render judgment using the testimony and evidence elicited at the preliminary injunction hearing.

None of the foregoing considerations justifies a finding of prejudice in Dr. Roberts's case. Given the scope of the issues litigated, the availability of witnesses and discovery, and the extent to which the merits were tried, we find no circumstances require relaxing the requirement of identification of specific evidence that was not available to be presented at the preliminary injunction hearing.

Lessons:

1. Notice is required before a trial court may consolidate a preliminary injunction hearing with the trial on the merits.
2. Failure to give notice will not be reversible error absent a showing of prejudice.
3. To show prejudice from a surprise consolidation, a party will generally need to present admissible material evidence that would have been produced at trial and would likely have changed the outcome on the merits.

5. Attorney Misconduct for Pre-Suit Subpoena. *In the Matter of Anonymous*, 896 N.E.2d 916 (Ind. November 21, 2008). (Per Curiam)

Respondent represented an insurance company. A third person made a claim against the company, asserting that an insured had caused personal injury to him. Before any legal action had been filed, Respondent served the third person on three separate occasions with a subpoena duces tecum commanding the third person to appear for an examination under oath with specified documents. Each subpoena commanded production of the documents pursuant to "[Indiana Trial Rule 45\(B\)](#)" and purported to be issued "pursuant to the provisions of [Trial Rule 34\(C\)](#) and [45\(A\)\(2\)](#) of the Indiana Rules of Procedure." The third party did not comply with any of the subpoenas.

The parties agree that Respondent had no authority to use subpoenas before litigation had commenced and that Respondent violated these Professional Conduct Rules, which prohibit the following misconduct:

Rule 4.4(a): Using means in representing a client that have no substantial purpose other than to embarrass or burden a third person or using methods of obtaining evidence that violate the legal rights of a third person.

Rule 8.4(d): Engaging in conduct prejudicial to the administration of justice.

By using subpoenas, Respondent purported to issue orders on behalf of a court, rather than simply making requests on behalf of an insurance company. Respondent's improper use of subpoenas tended to give the third party (who apparently was unrepresented) the false impression that he could be held in contempt of court if he failed to appear and produce the documents requested.

An offense of this gravity would usually have warranted discipline more severe than a private reprimand, but in light of the lack of adverse consequences and Respondent's cooperation with the Commission, the Court approves the agreed discipline.

Lessons:

1. An attorney cannot issue a subpoena duces tecum before suit is filed.
2. An attorney who does so is subject to disciplinary action.

Note: Rule 27 authorizes the taking of depositions pre-suit to preserve testimony but only after obtaining an order from a court.

6. Appealable Judgment; Summary Judgment and Waiver of Defenses. *Reisweg v. Statom*, 897 N.E.2d 490 (Ind. Ct. App., December 5, 2008). (Brown)

In this legal malpractice case, the plaintiff Pam Statom filed a motion for partial summary judgment against Joseph Reisweg and Cohen Garelick & Glazier (“CGG”), alleging that “they were negligent as a matter of law.” After Reisweg failed to file a timely response, Judge David Shaheed granted Statom's motion for partial summary judgment as to Reisweg and denied the motion as to CGG. At Statom’s request, the Court found that “there was no just reason for delay and expressly directed entry of final judgment as to the entry of partial summary judgment against Reisweg.” Reisweg then appealed this “final judgment.”

Reisweg argues that the trial court could not grant final judgment on the order because issues of damages and allocation of fault remained outstanding. Reisweg relies upon [Ramco Industries, Inc. v. C & E Corp.](#), 773 N.E.2d 284 (Ind.Ct.App.2002). On appeal, Ramco argued that the trial court improperly certified the order as a final, appealable order. We noted that to be properly certifiable as a final order under either [Ind. Trial Rule 54\(B\)](#) or [56\(C\)](#), a trial court order must “possess the requisite degree of finality, and must dispose of at least a single substantive claim.” Under [Ind. Trial Rule 8\(A\)](#), a claim consists of two elements: 1) a showing of entitlement to relief, and 2) the relief. “Furthermore, a judgment that fails to determine damages is not final.” We concluded that the order did not possess “the requisite degree of finality to

completely dispose of a single substantive claim in order to be properly certifiable.” As a result, we dismissed the appeal.

Here, the trial court's order on partial summary judgment against Reiswerg addressed liability only and left issues of damages and allocation of fault for trial. As in [Ramco](#), the order did not completely dispose of a single substantive claim and was not properly certifiable as a final, appealable judgment.

Because the order is not a final, appealable order, Reiswerg asks that we “reverse” the trial court's entry of partial summary judgment. However, the proper disposition of this appeal is not reversal. Rather, because we do not have appellate jurisdiction to review the trial court's entry of the order on partial summary judgment, we must dismiss the appeal of the trial court's entry of final judgment.

The next issue is whether the trial court abused its discretion by striking Reiswerg's motion for summary judgment on statute of limitations grounds. Reiswerg did not request summary judgment on his statute of limitations defense until after the trial court had granted partial summary judgment to Statom on Reiswerg's liability for legal malpractice. By failing to assert the statute of limitations defense in response to Statom's motion for partial summary judgment, which the trial court granted, Reiswerg has waived the defense.

The final issue is whether the trial court abused its discretion by striking CGG's motion for summary judgment on statute of limitations grounds. We conclude that, because Statom's motion for partial summary judgment was denied as to CGG, CGG did not waive its statute of limitations defense.

Lessons:

1. The T.R. 54(b) magic language for a final, appealable judgment [“upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment”] is not magic if the judgment does not completely dispose of a single substantive claim.
2. A statute of limitations defense, if not raised in response to a plaintiff's motion for summary judgment, will be waived if summary judgment is granted but not if summary judgment is denied.
3. Don't take the risk.

7. Attorney's Fees for Frivolous Claims. *Smyth v. Hester*, 2009 WL 367379 (Ind. Ct. App., Feb. 12, 2009). (Darden)

The law firm of Plews Shadley Racher and Braun LLP (“PSRB”), as intervenor, appeals the trial court's order awarding attorney fees to the Estate of Timothy P. Brazill (“Estate”) and to attorney Judy G. Hester (“Hester”) for actions by PSRB on behalf of its client James W. Smyth. The trial court awarded the fees after entering an order stating: “DECREEED that Smyth and his attorneys' actions at the January 16, 2008 hearing illustrate their frivolous, unreasonable, and bad faith conduct in this case, and the Estate is entitled to present evidence of the reasonable attorney's fees and costs it has incurred due to Smyth's and his attorneys' conduct in this matter.”

The trial court appears to have awarded the fees pursuant to [Indiana Code section 34-52-1-1](#), which authorizes “the award of attorney fees for litigating in bad faith or for pursuing frivolous, unreasonable or groundless claims.” Specifically, the statute provides, in relevant part,

that “the trial court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party: (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless; (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless, or (3) litigated the action in bad faith.” Such a statutory award may be made “upon a finding” of any one of the statutory bases.

A claim is frivolous (a) if it is taken primarily for the purpose of harassing or maliciously injuring a person, or (b) if the lawyer is unable to make a good faith and rational argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith and rational argument for the extension, modification, or reversal of existing law.

A claim is unreasonable if, based on a totality of the circumstances, including the law and facts known at the time of the filing, no reasonable attorney would consider that the claim or defense was worthy of litigation or justified.

A claim is groundless if no facts exist which support the legal claim relied on and presented by the losing party. A claim or defense is *not*, however, groundless or frivolous merely because the party loses on the merits.

PSRB argues that the trial court's award of attorney fees cannot stand against it because the order contains no findings of fact to support the judgment that PSRB's representation of Smyth was frivolous, unreasonable, and in bad faith. In general, our review of the judgment leads us to agree. None of the findings of fact contain a specific reference to problematic litigation action, and none of the conclusions of law reflect the legal authority and standard for an award of attorney fees.

The Estate does not appear to argue that the findings support the judgment; rather it argues that the *record* provides support for a judgment awarding attorney fees. Inasmuch as the trial court's findings of fact and conclusions of law do not address the attorney fee award, we may consider that portion of the judgment to be a general judgment; and we may affirm a general judgment on any theory supported by the evidence. That said, we are mindful of our Supreme Court's observation that “the legal process must invite, not inhibit, the presentation of new and creative argument to enable the law to grow and evolve”; and that in reviewing an award of statutory attorney fees, we “must leave breathing room for zealous advocacy and access to the court to vindicate rights,” and “be sensitive to these considerations and view claims of frivolous, unreasonable, or groundless claims or defenses with suspicion.” [*Mitchell v. Mitchell*, 695 N.E.2d 920, 925 \(Ind.1998\)](#).

The order appealed does not provide us with any insight as to the trial court's reason for the award of attorney fees in this case, *i.e.*, what the trial court found to be frivolous, unreasonable, and bad faith conduct. Accordingly, we remand to the trial court for further consideration and explanation of its judgment in that regard. Reversed and remanded.

Lessons:

1. The trial court must explain its basis when awarding attorney’s fees for frivolous claims.
2. There are different standards for frivolous, unreasonable and groundless claims.
3. An award of attorney’s fees is viewed with suspicion on appeal because we “must leave breathing room for zealous advocacy and access to the court to vindicate rights.”

8. Jurisdiction of the Case; Belated Filing of Agency Record. *Indiana Family & Social Services Administration v. Meyer*, 900 N.E.2d 74 (Ind. Ct. App., January 30, 2009). (Bailey)

This case involved an appeal to the Ripley Circuit Court of a final agency action by the Indiana Family and Social Services Administration denying medical assistance. Under the Administrative Orders and Procedures Act, a petitioner appealing such an action must transmit a certified copy of the agency record to the trial court within 30 days after filing of the petition for judicial review and states that failure to do so is “cause for dismissal.” The plaintiff failed to meet that deadline and FSSA moved to dismiss, arguing that in light of the failure to timely file the record, the trial court lacked jurisdiction of the case.

Like the rest of the nation's courts, Indiana trial courts possess two kinds of “jurisdiction.” Subject matter jurisdiction is the power to hear and determine cases of the general class to which any particular proceeding belongs. Personal jurisdiction requires that appropriate process be effected over the parties.

Where these two exist, a court's decision may be set aside for legal error only through direct appeal and not through collateral attack. Other phrases recently common to Indiana practice, like “jurisdiction over a particular case,” confuse actual jurisdiction with legal error, and we will be better off ceasing such characterizations.

Here, there is no question that the Ripley Circuit Court possessed jurisdiction over the subject matter of this case and over the parties. The FSSA makes no argument to this effect but instead refers to a lack of “jurisdiction over the case.” “Jurisdiction over the particular case” is something “now abolished.”

We conclude that [Indiana Code Section 4-21.5-5-13](#) does not speak to subject matter jurisdiction, does not mandate automatic dismissal for procedural error, and must be read to confer upon the trial court discretion in some circumstances. Just as the trial court has discretion to grant an extension of time, subject to the “good cause” requirement, the trial court has the discretion to find that a petition “subject to dismissal” should not, upon a proper showing, be dismissed. Affirmed.

[MATHIAS](#), Judge, dissenting. The timely and complete filing of the agency record is a condition precedent to the acquisition of jurisdiction to consider a petition for judicial review.

Lessons:

1. There is no such thing as “jurisdiction of the case”; only subject matter jurisdiction and personal jurisdiction.
2. The existence of a cause for dismissal does not mandate dismissal.

9. Dismissal without Prejudice and *Res Judicata*. *Zaremba v. Nevarez*, 898 N.E.2d 459 (Ind. Ct. App., December 30, 2008). (Brown)

Peg Zaremba appeals the trial court's dismissal with prejudice of her claim against Jessica Nevarez and John Nevarez for rent and damages. On February 1, 2008, Zaremba filed a small claims eviction complaint against the Nevarezes under Cause Number 64D04-0802-SC-629

(“Cause No. 629”). The trial court entered an order setting a bench trial for May 30, 2008. On May 30, 2008, Zaremba failed to appear, but her counsel appeared and requested dismissal without prejudice. The trial court dismissed the matter without prejudice.

On July 7, 2008, Zaremba filed a second claim against the Nevarezes for \$2,063.39 in connection with the rental property under Cause Number 64D04-0807-SC-3733 (“Cause No. 3733”). On August 14, 2008, the trial court dismissed this claim with prejudice, stating:

[Zaremba]'s Attorney set forth no reason for [Zaremba]'s failure to appear and filed no motion under [Trial Rule 60](#) to set aside the dismissal. The finding of dismissal served as *res judicata* on this subsequent filing, which appears to be an attempt by [Zaremba] to circumvent the dismissal for [Zaremba]'s failure to appear.

Zaremba argues that the dismissal of Cause No. 629 cannot serve as the basis for *res judicata*. We agree. “Under the doctrine of *res judicata*, ‘a judgment rendered on the merits is an absolute bar to a subsequent action between the same parties or those in privity with them on the same claim or demand.’ ” [Gill v. Pollert, 810 N.E.2d 1050, 1057 \(Ind.2004\)](#) “For principles of *res judicata* to apply, there must have been a final judgment on the merits and that judgment must have been entered by a court of competent jurisdiction.” [Matter of Sheaffer, 655 N.E.2d 1214, 1217 \(Ind.1995\)](#). Because Cause No. 629 was dismissed without prejudice, it was not a judgment on the merits. Consequently, we conclude that Zaremba's complaint in Cause No. 3733 was not barred by the doctrine of *res judicata*.

[Small Claims Rule 10\(A\)](#) governs dismissal and default and provides: “If the plaintiff fails to appear at the time and place specified for the trial, or for any continuance thereof, the court may dismiss the action without prejudice If the claim is refiled and the plaintiff again fails to appear such claim may be dismissed with prejudice.” The rule is specific and “[d]ismissal with prejudice is contemplated only when the plaintiff again fails to appear after the claim has been refiled.” Here, the record does not reveal that Zaremba failed to appear after the claim was refiled. Thus, Ind. [Small Claims Rule 10\(A\)](#) does not contemplate dismissal with prejudice under the circumstances.

Lessons:

1. In small claims court, a dismissal without prejudice is available as an option to a plaintiff when a party or witness doesn't show up for trial. (Note: This won't work in other courts.)
2. A dismissal without prejudice can have no *res judicata* effect.

10. Children and Presumption of No Negligence; Proximate Cause. *Clay City Consolidated School v. Timberman*, 896 N.E.2d 1229 (Ind. Ct. App., December 2, 2008). (Riley)

On Monday, November 17, 2003, thirteen-year-old Kodi Pipes (Kodi) blacked out and fell down during the beginning of his eighth grade basketball team practice at Clay Jr. High School. Kodi was back at basketball practice on Wednesday November 19, 2003, and during a running drill, collapsed and died from a malignant type of heart rhythm abnormality known as [ventricular fibrillation](#).

On August 25, 2006, Mother and Father filed a Complaint alleging that Clay City Schools was liable for Kodi's death under Indiana's Child Wrongful Death Statute. On December 13, 2007, the jury returned a verdict in favor of Mother and Father, awarding Mother \$250,000 and awarding Father \$175,000, which was reduced by the court to \$300,000 total on a motion for remittitur.

Clay City Schools argues that the trial court erred by instructing the jury that Indiana law contains a rebuttable presumption that children between the ages of seven and fourteen years are incapable of committing contributory negligence. Specifically, the trial court's final instruction number twenty instructed the jury that: "In deciding whether Kodi Pipes was contributorily negligent, you should know that Indiana law recognizes a rebuttable presumption that children from the age of 7 to 14 years of age are rebuttably presumed to be incapable of [contributory] negligence."

In spite of conflicting language in some cases, we conclude that Indiana law does not conclusively contain a presumption either in favor or against seven to fourteen-year-olds with respect to whether they can be found liable for their negligent acts. Thus, we conclude that the trial court's Final Instruction No. 20, which informed the jury that Indiana law contains a rebuttable presumption that children between the ages of seven and fourteen cannot be contributorily negligent, was a misstatement of Indiana law.

Indiana Pattern Jury Instruction No. 5.25, "Negligence or Contributory," states in pertinent part: "A child age seven (7) through the age of fourteen (14) must exercise the same care that a reasonably careful child of the same age, knowledge, judgment, and experience would exercise in the same situation." However, there is no pattern instruction on a presumption for this age group. Further, our supreme court has stated that an instruction on standard of care is required if warranted, but made no mention of whether an instruction should be given regarding any presumption.

Thus, we conclude that any jury instruction on the contributory negligence of a child between the age of seven and fourteen should focus on the standard of care for children of that age group-not on any presumption either in favor of or against finding them liable for their acts.

By instructing the jury that it should consider any evidence of Kodi's negligence in light of a rebuttable presumption that he could not be contributorily negligent, we cannot say that the verdict would have been the same despite the erroneous instruction. Therefore, we must reverse and remand for a new trial.

Clay City Schools argues that the trial court's instructions on proximate cause are in error because nowhere is it stated that Clay City Schools' act or omission must be a "substantial factor" as required by Indiana law. An instruction that the act or omission of a defendant must be found to be a "but for" cause of the plaintiff's injury cures any error of omitting an instruction on the "substantial factor" test. But here, the jury was not instructed on the "but for" test of proximate cause either.

The Indiana Pattern Jury Instruction (Civil), Instruction No. 5.06 does not define proximate cause by either a "substantial factor" test, or a "but for" test; rather the instruction reads that "an act or omission is a proximate cause of an [injury or death] if the [injury or death] is a natural and probable consequence of the act or omission." The trial court's final instructions twice informed the jury of this requirement of proximate cause.

However, it is well established that: "[a]t a minimum, proximate cause requires that the injury would not have occurred but for the defendant's conduct." Since the "but for" test is the

minimal requirement to determine proximate cause, we conclude that it would be an abuse of discretion to omit language conveying that requirement in a jury instruction on proximate cause.

Lessons:

1. There is no presumption in favor or against 7 to 14-year-olds with respect to whether they can be found liable for their negligent acts.
2. Do not rely on the Pattern Jury Instructions for a complete statement of the meaning of proximate cause; the instructions need to convey the “but for” test for proximate cause.

11. Wrongful Death of Viable Fetus. *Ramirez v. Wilson*, 2009 WL 200027 (Ind. Ct. App., January 29, 2009). (Bailey)

On March 21, 2007, Megan Nelson (“Nelson”), who was then nine months pregnant with S.R., was driving a vehicle on State Road 10 in Newton County, Indiana. Wilson, the owner-operator of Suzy-Q Trucking, LLC, was driving a semi tractor in the opposite direction. During a passing maneuver, the vehicle and semi collided head-on. Nelson was killed and S.R. died *in utero*.

On April 10, 2007, Ramirez filed a complaint under the statute, alleging that he was S.R.'s father and that Wilson's negligence caused S.R.'s death. On February 29, 2008, the Appellees filed a motion for partial summary judgment, asserting that the statute is inapplicable because S.R. was not born alive, and thus the Appellees were entitled to judgment as a matter of law.

Here, the parties do not dispute the relevant facts. They agree that S.R. was a viable, full-term, yet unborn fetus at the time of her death. They disagree as to whether S.R. was a “child” under the statute. In [Bolin v. Wingert, 764 N.E.2d 201 \(Ind.2002\)](#), our Supreme Court reviewed a case where the plaintiff had suffered the miscarriage of an eight to ten week old fetus after an automobile accident and had brought a claim for wrongful death under the statute. Based upon the language of the statute, the Court ultimately concluded that “the legislature intended that only children born alive fall under Indiana's Child Wrongful Death Statute.”

In [Horn v. Hendrickson, 824 N.E.2d 690 \(Ind.Ct.App.2005\)](#), this Court was asked to determine whether [Bolin](#) was inapplicable where a “viable” fetus of six months gestation had died as a result of a vehicular accident. After observing that the [Bolin](#) Court “arguably” addressed a larger question than the facts required, the [Horn](#) Court concluded that the holding of [Bolin](#) was nevertheless clear:

Only a child “born alive” fits the definition of “child” under the child wrongful death statute (“the statute”). In reaching that conclusion, the court declared a “bright line” test. Despite the salient factual difference here, namely, that Horn's fetus was viable, the [Bolin](#) opinion categorically precludes all parents from bringing a wrongful death claim for the death of a viable or non-viable fetus. It is not this court's role to reconsider or declare invalid decisions of our supreme court.

The [Horn](#) Court observed that “our supreme court's words and opinions are not carved in stone, and it is not inappropriate for the parties or the judges of this court to ask the court to

reconsider earlier opinions.” With these precepts in mind, we will not proceed in direct conflict with the controlling precedent of our Supreme Court, and we will affirm the grant of partial summary judgment to the Appellees. However, we urge our Supreme Court to reconsider the appropriate breadth of the [Bolin](#) opinion in the compelling circumstances presented here.

[RILEY](#), J., dissents with opinion.

The [Horn](#) court concludes with a forceful rebuke directed at our supreme court. “The holding in [Bolin](#) that parents in Indiana cannot recover for the wrongful death of a viable fetus is a return to the 19th century when, in tort law, a fetus and its mother were considered one and the same.” It is abundantly clear that the [Bolin](#) decision no longer has any contemporary value and requires modification to serve justice better, especially when a viable fetus is concerned.

I implore the parties here to seek transfer to the Supreme Court, requesting a modification of its [Bolin](#) decision.

I note that Senate Bill 341, introduced in the 2009 legislative session, proposes to amend [Ind Code § 34-23-2-1](#) specifying that the statutory term “child” should include “a fetus that has attained viability.” If successful, a wrongful death action could then be maintained against the person whose wrongful act or omission caused the injury or death of a viable fetus.

Lessons:

1. For now the bright line test remains: There is no wrongful death claim for a viable or non-viable fetus.
2. This could be changed by the Supreme Court, if it grants transfer, or by legislative action.

12. Arbitration; Time-Bar on Motion to Vacate; Assent by Conduct to Arbitration. *Weldon v. Asset Acceptance, LLC*, 896 N.E.2d 1181 (Ind. Ct. App., November 25, 2008). (Baker)

Defendant Kevin M. Weldon appeals the trial court's orders denying his motion to vacate an arbitration award and for summary judgment and entering summary judgment in favor of appellee-plaintiff Asset Acceptance.

The Federal Arbitration Act (“FAA”) explicitly provides that “[n]otice of a motion to vacate ... an award *must* be served upon the adverse party or his attorney within three months after the award is filed or delivered.” Inasmuch as Weldon failed to file his motion to vacate within the applicable statutory timeframe, he is not entitled to that relief and the trial court properly denied his motions to vacate and for summary judgment.

In his reply brief, Weldon argues for the first time that the FAA's three-month time limit does not “prevent a party who did not participate in an arbitration proceeding from challenging the validity of the award *at any time* on the basis that no written agreement to arbitrate existed between the parties.” Weldon's sole argument appears to be that his signature does not appear on the agreement in the record; consequently, Asset Acceptance has offered no valid and binding arbitration agreement. We cannot agree. It is well established that a credit cardholder may agree to arbitration “by conduct.”

Here, MBNA promised to loan Weldon money via a credit card in exchange for Weldon's promise to repay the funds in a timely fashion. The written agreement contains a binding arbitration provision. Although Weldon's signature does not appear on the document, his assent was implied from his conduct-when he used the MBNA credit card repeatedly, he impliedly consented to the terms of the credit agreement, including the binding arbitration provision. Under these circumstances, we find that the arbitration agreement included in the record is valid and binding on both parties. Thus, the arbitrator properly assumed jurisdiction over the arbitration proceedings.

[BROWN](#), Judge, dissenting.

In [MCI Telecommunications Corp. v. Exalox Industries, Inc.](#), 138 F.3d 426 (1st Cir.1998), the court held that, under the FAA, “determining whether there is a written agreement to arbitrate the controversy in question is a first and crucial step in any enforcement proceeding before a district court.” The court concluded that “as a general matter, [9 U.S.C. § 12] ... and the other enforcement provisions of the FAA, do not come into play unless there is a written agreement to arbitrate.”

The court also concluded: “A party that contends that it is not bound by an agreement to arbitrate can therefore simply abstain from participation in the proceedings, and raise the inexistence of a written contractual agreement to arbitrate as a defense to a proceeding seeking confirmation of the arbitration award, without the limitations contained in [9 U.S.C. § 12], which are only applicable to those bound by a written agreement to arbitrate.”

Based upon [MCI Telecommunications Corp.](#), I would conclude that [9 U.S.C. § 12](#) does not come into play if there is no agreement to arbitrate, and that Weldon can argue that there was no agreement to arbitrate.

The majority concludes that Weldon's assent to the arbitration agreement was implied from his conduct when he used his MBNA credit card repeatedly. However, the record reveals that Weldon made his last purchase and payment in 1999, which was two years before the date appearing on the credit card terms containing the agreement to arbitrate on which Asset Acceptance relies. Thus, I would conclude that the 2001 arbitration agreement is inapplicable to the instant claim.

Lessons:

1. To challenge an arbitration award governed by the Federal Arbitration Act, you must file a motion to vacate within 3 months after the award is filed or delivered.
 2. A party may assent to arbitration by using a credit card that is accompanied by a credit agreement with an arbitration term even if the agreement is not signed (and maybe even if the agreement isn't provided until sometime after use).
- 13. Dead Man's Statute in Federal Court. *Estate of Anthony J. Suskovich v. Anthem Health Plans of Virginia, Inc.* 553 F.3d 559 (7th Cir., January 22, 2009) (Flaum)(appeal of decision by Judge Barker)**

The estate argues that the district court improperly considered the testimony of two employees of defendant (Eberhard and Jeschke), who testified that Suskovich did not consider

himself an employee because he routinely rejected offers of regular employment as a computer programmer with WellPoint. Specifically, the estate argues that this testimony is barred by the Indiana Dead Man's Statute, Indiana Code § 34-45-2-4 et seq.

The estate made two federal law claims—under the FLSA and ERISA—and one state law claim. WellPoint and Trasys argue that the Dead Man's Statute should not apply in federal court. The law of this circuit is fairly clear that where state law provides a federal court with the grounds for its decisions, that court should also apply state law restrictions on the competency of witnesses. The evidentiary standard in a case such as this one, where both federal and state law claims are involved, is less certain. District courts in this circuit that have considered the issue have previously held that Federal Rule of Evidence 601, which creates a broad presumption of competency, applies to cases alleging both federal and state law claims.

Accordingly, Rule 601, rather than the Indiana Dead Man's Statute, applies to the competency of witnesses, at least insofar as the evidence relates to any of the federal claims. However, that rule provides that “in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with state law.” Fed.R.Evid. 601. We thus still need to consider whether the Indiana Dead Man's statute would bar testimony if the evidence related solely to the common law claims.

The Indiana Dead Man's Statute states, in brief, that in a case where an executor or administrator of an estate is a party and the estate may receive or be liable for or receive a judgment in the action, a person who is a necessary party to the issue or case and whose interest is adverse to the estate is not competent to testify. While the facts of this case satisfy a few of the requirements of the Dead Man's Statute, it is a stretch to hold that Eberhard and Jeschke are necessary parties or have interests adverse to the estate.

The estate argues that because both are employees of WellPoint, their interests are adverse to the estate's and thus that they are incompetent to testify. But nothing in the record suggests that Eberhard or Jeschke have any personal stake in the outcome of the litigation, and the estate's interpretation of the statute would sweep in any adverse witness who would testify against an estate in a case brought by the estate. Nor are Eberhard and Jeschke “necessary parties” to the action or issue, as they are not named in the suit. The district court thus did not abuse its discretion in considering this testimony on summary judgment.

Lessons:

1. The Indiana Dead Man's statute does not apply to federal causes of action in federal court but will usually apply to state causes of action.
2. When a corporation has an adverse interest to an estate and would be subject to the Dead Man's statute, its employees may still testify.

14. Economic Loss Rule. *The Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*, 2009 WL 280018 (Ind.Ct.App. Feb. 6, 2009)(Baker)

We once again turn the page and delve into another chapter of the saga surrounding the renovation and expansion of the Central Library Project in Indianapolis. The Library appeals the entry of summary judgment in favor Charlier Clark and Linard (CCL)(who provided civil engineering services related to the parking garage), Thornton Tomasetti Engineers (TTE)(who

provided structural engineering services) and Joseph Burns (who provided structural engineering services for TTE).

The trial court found that the Library's claims against all three of these defendants were barred by the economic loss doctrine. The Library had no contractual relationship and was not in privity with any of these defendants. CCL and TTE were retained as consultants by the architectural firm on the project (Woolen Molzen and Partners, Inc.) with whom the Library did have a contract.

In *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150 (Ind. 2005), the Indiana Supreme Court expanded the application of the economic loss doctrine to construction projects and explained that the theory underlying the economic loss rule is that the failure of a product or services to live up to economic expectations is best relegated to contract law or to the law of warranty, where the buyer and seller are able to allocate risks and price the product or service accordingly. Thus, under the economic loss doctrine, "contract is the sole remedy for the failure of a product or service to perform as expected" when there is no personal injury and no physical harm to other property. As for the damages that the Library sustained, it is apparent that no damage to tangible property resulted, other than that contained within the scope of the project itself.

The Library argued that certain exceptions to the economic loss rule should apply. First, relying on a Florida case, the Library argued that the economic loss rule does not bar a cause of action against a professional for his or her negligence even though the damages are purely economic in nature. This court, however, has recognized that third parties, not in privity with a professional, cannot recover in negligence unless there are either recognized exceptions or certain conditions exist.

An exception has been recognized to the economic loss rule when an architect creates a condition that is imminently dangerous to third parties and injury has resulted. However, there is no exception that permits recovery in negligence—absent privity—when there has been no physical injury or damage to property.

Some jurisdictions have recognized a negligent misrepresentation exception to the economic loss doctrine. In order to rely on this exception, however, the Library was required to assert a negligent misrepresentation theory against the defendants in question. Since it did not do so, this exception to the economic loss doctrine is inapplicable here.

We conclude that the negligence claims that the Library brought against the appellees are subject to the economic loss doctrine and are "best relegated to contract law" in accordance with *Gunkel*.

Brown, dissenting:

Because the theory of negligence protects interests related to safety and there is at least a question of fact regarding imminent danger as to TTE, summary judgment based on the economic loss doctrine was inappropriate.

LITIGATION TIP FOR THE MONTH: OVERPREPARE BUT UNDERTRY

Excerpt from Robert S. Bennett's *In The Ring: The Trials of a Washington Lawyer*(2008)

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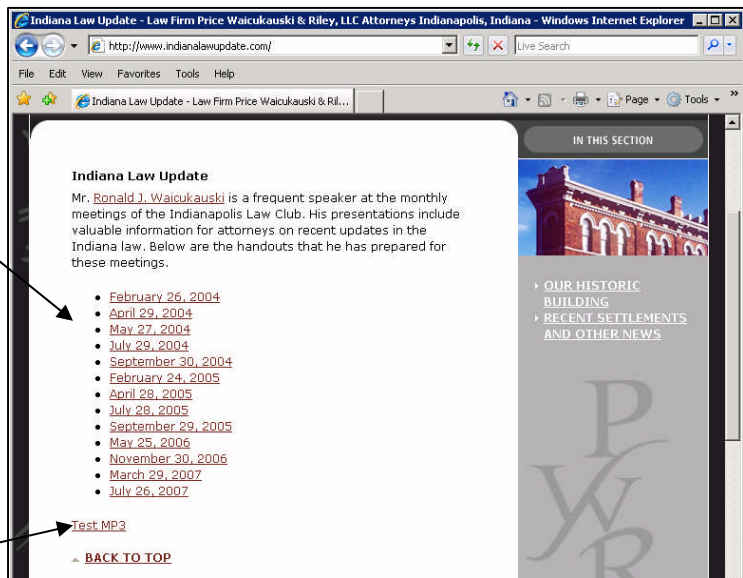
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