

**INDIANA LAW UPDATE**  
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LITIGATION TIP OF THE MONTH: Conclude Powerfully

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:

### **Hamilton Nominated To 7<sup>th</sup> Circuit**

From the official White House Press Release, March 17, 2009:

WASHINGTON, DC - Today, President Barack Obama announced his intent to nominate Judge David Hamilton to the United States 7th Circuit Court of Appeals. Hamilton has served for 14 years as a federal district judge in Indiana. He was appointed United States District Judge for the Southern District of Indiana in 1994 and was named Chief Judge in January of 2008.

President Obama said, "Judge Hamilton has a long and impressive record of service and a history of handing down fair and judicious decisions. He will be a thoughtful and distinguished addition to the 7th circuit and I am extremely pleased to put him forward to serve the people of Illinois, Indiana and Wisconsin."

### **As Jurors Turn to Web, Mistrials Are Popping Up**

From The New York Times, March 17, 2009:

Last week, a juror in a big federal drug trial in Florida admitted to the judge that he had been doing research on the case on the Internet, directly violating the judge's instructions and centuries of legal rules. But when the judge questioned the rest of the jury, he got an even bigger shock. Eight other jurors had been doing the same thing. The federal judge, William J. Zloch, had no choice but to declare a mistrial, a waste of eight weeks of work by federal prosecutors and defense lawyers.

It might be called a Google mistrial. The use of BlackBerrys and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country, upending deliberations and infuriating judges. Last week, a building products company asked an Arkansas court to overturn a \$12.6 million judgment, claiming that a juror used Twitter to send updates during the civil trial. And on Monday, defense lawyers in the federal corruption trial of a former Pennsylvania state senator, Vincent J. Fumo, demanded before the verdict that the judge declare a mistrial because a juror posted updates on the case on Twitter and Facebook.

Judges have long amended their habitual warning about seeking outside information during trials to include Internet searches. But with the Internet now as close as a juror's pocket, the risk has grown more immediate — and instinctual.

- 1. Evidence; Admissibility of Hearsay Medical Opinions; Cumulative Evidence and Harmless Error; Admissibility of Opinion on Unnecessary Treatment. *Sibbing v. Cave*, 901 N.E.3d 1155 (Ind. Ct. App. March 5, 2009). (Mathias)**

Eric P. Sibbing ("Sibbing") appeals the judgment of the Marion Superior Court in favor of Amanda N. Cave ("Cave"), individually and as the mother and guardian of Mercy M. Cave ("Mercy"), in Cave's negligence action against Sibbing stemming from an automobile accident.

On appeal, Sibbing presents two issues: (1) whether the trial court erred in allowing into evidence testimony from Cave regarding medical test results and the cause of her pain, and (2) whether the trial court erred in granting Cave's motion to strike portions of the testimony of Sibbing's expert medical witness.

Sibbing claims that the trial court erroneously admitted hearsay evidence when it permitted Cave to testify regarding what Dr. Saquib told her about diagnostic tests and the cause of her pain. At issue here is the following hearsay exception contained in Evidence Rule 803(4):  
(4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Sibbing claims that this exception applies only to statements made *by* patients, not statements made *to* patients.

In response, Cave cites *Coffey v. Coffey*, 649 N.E.2d 1074, 1078 (Ind.Ct.App.1995), wherein a panel of this court held that the trial court erred in excluding a letter from the husband's physician which addressed the husband's physical diagnosis and treatment agenda and further opined that the husband was unable to work due to his physical condition. The court concluded that the letter should have been admitted pursuant to the hearsay exception contained in Rule 803(4).

Sibbing claims that *Coffey* is distinguishable from the present case because, in *Coffey*, only the physician's letter was deemed admissible, not testimony from the husband regarding what his physician had said. To us, this is a distinction without difference. The physician's out-of-court statements would be hearsay regardless of whether they were admitted through the letter or by the testimony of a witness.

However, even if we were to agree with Sibbing's interpretation of Rule 803(4), he must still establish that the trial court's evidentiary decisions constituted reversible error. Cave's alleged hearsay testimony was cumulative of other evidence admitted without objection. Sibbing goes to some length to argue that, even if this evidence is cumulative, its admission was not harmless error. It is well established, however, that any error caused by the admission of evidence is harmless if it is cumulative of other evidence appropriately admitted. Therefore, reversible error cannot be predicated upon a trial court's erroneous admission of evidence that is merely cumulative of other evidence that has already been properly admitted.

Sibbing also claims that the trial court erred in granting Cave's motion to strike portions of the videotaped testimony of his expert medical witness, Dr. Kern. Specifically, Sibbing claims that the trial court erred in striking those portions of Dr. Kern's testimony in which he stated that, in his opinion, some of the treatment Cave had received from her medical care providers was unnecessary. Dr. Kern had opined that nerve conduction studies and passive chiropractic care beyond one month following the accident were medically unnecessary.

Cave claims that this testimony was impermissible, citing *Whitaker v. Kruse*, 495 N.E.2d 223 (Ind.Ct.App.1986). In *Whitaker*, the defendants admitted their negligence but sought to reduce their liability by arguing that the plaintiff's injuries were aggravated by unnecessary and negligent medical treatment. The trial court in that case instructed the jury that the defendant was not responsible for the aggravation of the plaintiff's injuries caused by unnecessary or negligent medical treatment. Upon appeal, the court held that the jury instruction was erroneous, quoting the Restatement (Second) of Torts § 457 (1965):

If the negligent actor is liable for another's bodily injury, he is also subject to liability for

any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

The *Whitaker* court held that recovery is permitted whether the aggravated injuries are caused by a misdiagnosis of the injury and a subsequent unnecessary operation or by a proper diagnosis and a negligently performed necessary operation.

The court noted that Indiana follows the general rule that a plaintiff's recovery may be reduced if he fails to obey his physician's instructions and thereby exacerbates or aggravates his injury. *Id.* Thus, if the court had adopted the opposite position, then "the injured party would be placed in the unenviable position of second-guessing his physicians in order to determine whether the doctor properly diagnosed the injury and chose the correct treatment." *Id.* The court refused to "place innocent parties who have been injured by another's negligence in such a position." *Id.*

The justifications for the rule in *Whitaker* apply equally whether the unnecessary treatment aggravates the plaintiffs injuries or is simply ineffective. Either way, a plaintiff should not be put in the position of second-guessing the treatment chosen by her medical care provider. Our holding means that Sibbing could not challenge the specific course of treatment chosen by Cave's doctors, but it does not mean that he could not challenge the expenses that were incurred as a result of these treatments as excessive.

**BAKER, Chief Judge, concurring in result in part and dissenting in part.**

Contrary to the majority's view, I do not believe that this court's holding in *Whitaker v. Kruse*, 495 N.E.2d 223 (Ind.Ct.App.1986), precludes a defendant from calling an expert witness to render an opinion as to whether all of a plaintiff's treatment was reasonable or necessary under the circumstances.

**Lessons:**

1. Rule 803(4) creates a hearsay exception to statements made in the course of treatment *to* patients as well as statements made *by* patients; so an injured plaintiff may testify to what her doctor has told her in the course of treatment, including statements about test results and diagnosis.
  2. The erroneous admission of evidence will be found to be harmless error if the evidence is cumulative, that is, if there is other proper evidence to the same effect, without considering the strength of the properly admitted evidence.
  3. A defense medical expert generally may not challenge the necessity of a course of treatment that an injured plaintiff received. The expert may opine on whether the cost of the treatment was excessive and whether the plaintiff was uninjured or that the treatment addressed symptoms unrelated to the accident.
2. **Evidence; Admissibility of Photographs; Silent Witness Theory. *Rogers v. State of Indiana*, 2009 WL 708963 (Ind. Ct. App. March 17, 2009). (Darden)**

William Rogers was convicted of theft as a Class D Felony based on footage from surveillance cameras at a CVS drug store. On appeal, Rogers argued that the State had failed to lay a proper foundation for the admission of this photographic evidence.

Before photographic evidence may be admitted, an adequate foundation must be laid. “Our courts have consistently held this requires the testimony of a witness who can state the photograph is a true and accurate representation of the things it is intended to depict.” Generally, photographs and videotapes are treated as demonstrative evidence. “As such, a photograph is not evidence in itself, but is used merely as a nonverbal method of expressing a witness’ testimony and is admissible only when a witness can testify it is a true and accurate representation of a scene personally viewed by that witness.” Where, however, the photographic evidence must speak for itself, such as in this case, it may be admitted under the “silent witness” theory.

In order for substantive photographic evidence to be admitted under the “silent witness” theory, “there must be a strong showing of authenticity and competency . . . .” In cases involving photographs taken by automatic cameras, there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera. The showing of authenticity also must include proof that the photograph has not been altered in any way.

Shanze Sizemore, a CVS supervisor, testified extensively regarding CVS’s security system and the procedure he used to view, copy, and edit the footage. We find that the discs and photographs admitted into evidence conformed to the requirements under the “silent witness” theory. We therefore find no abuse of discretion in admitting the evidence.

**Lessons:**

1. Generally, to admit photographic evidence all you need is testimony that the photograph is a true and accurate representation of the things depicted by someone who personally viewed the scene.
  2. In the absence of such a witness, photographic evidence may be admitted under the “silent witness” theory.
  3. The foundation for admission under the “silent witness” theory must include proof of authenticity including evidence of chain of custody.
- 3. The Meaning of “Liability”; Admissibility of Risk of Death Evidence. *Atterholt v. Herbst*, 2009 WL 61344 (Ind. March 10, 2009). (Boehm)**

On March 6, 2002, thirty-four-year-old Jeffry Herbst suffered from a fever, congestion, nausea, loss of appetite, and decreased urine output. At 10:30 a.m. that day, Herbst's primary care physician diagnosed the condition as bilateral pneumonia and sent Herbst to the hospital, where he died at 9:00 that night. An autopsy determined that Herbst died of fulminant myocarditis, an inflammation of the heart characterized by acute and severe onset. A medical malpractice lawsuit followed for failure to properly assess and treat Herbst’s condition.

Under the Indiana Medical Malpractice Act, the total recovery in a medical malpractice action is limited to \$1,250,000 per “injury or death.” The Act caps a health care provider's malpractice liability at \$250,000 per occurrence if the provider maintains sufficient insurance and pays the required surcharge to the Patient's Compensation Fund. Recovery of excess damages from the Fund is allowed only after a health care provider or the provider's insurer has paid the first \$250,000, or made a settlement in which the sum of the present cash payment and cost of future periodic payments exceeds \$187,000. If the Fund and claimant cannot agree on the amount to be paid from the Fund, the court must hold a hearing to “determine the amount for

which the fund is liable.” *Id.* § 34-18-15-3(4)-(5). *In determining this amount, “the court shall consider the liability of the health care provider as admitted and established.” Id.* § 34-18-15-3(5).

In this case, the Estate filed a petition to access the Fund after settling with the health care providers under an agreement in which the providers contributed a total of \$187,001 in cash and payments to purchase an annuity. At a bench trial, the Fund attempted to introduce expert testimony that even with proper care, Herbst had a less than ten percent chance of surviving the hospitalization, and had he survived, he would have been unable to return to work. The trial court excluded this evidence and awarded the Estate the statutory maximum of \$1 million. The Fund appealed, arguing that the trial court erred in granting the partial summary judgment and also in excluding the expert testimony. The Court of Appeals affirmed.

The Estate and the Fund dispute the meaning of the statutory provision that “liability” is to be treated as “established” by the settlement. The Estate argues that “liability” includes causation and the statute therefore precludes the Fund from introducing evidence related to causation issues. The Estate thus argues that any evidence of Herbst's risk of death bears on causation-whether the death results from malpractice-and is therefore precluded. The Fund responds that its evidence is admissible because it is relevant to the amount of damages for which it is liable.

The Medical Malpractice Act does not define “liability.” According to *Black's Law Dictionary* (8th ed.2004), liability is the “quality or state of being legally obligated or accountable.” To say that one is “liable” does not establish the amount of damages. In this case evidence of Herbst's underlying risk of death whether or not he was properly treated is relevant to both liability-whether malpractice caused his death-and to damages-the amount for which the Fund is responsible. For this reason, it is admissible and its exclusion was error.

We hold that when a claimant seeks excess damages from the Patient's Compensation Fund after obtaining a judgment or settlement from a health care provider in a medical malpractice case, the Fund may introduce evidence of the claimant's preexisting risk of harm if it is relevant to establish the amount of damages, even if it is also relevant to liability issues that are foreclosed by the judgment or settlement.

**Lessons:**

1. Liability is the “quality or state of being legally obligated or accountable.”
2. Proof of causation is necessary to establishing liability.
3. Proof of risk of death, while relevant to liability, is also relevant and admissible to prove damages even when liability is established by a qualifying settlement into the Fund.

**4. Proof of Death. *Malone v. Reliastar Life Insurance*, 08-1734, 08-2377 (7<sup>th</sup> Cir. March 12, 2009). (Kanne)**

“This is a case about death. To be entitled to the death benefit payable under a life insurance policy, a beneficiary must prove that the insured is *actually*, or, in the alternative, perhaps only *legally*, dead. There is a difference between the two. As is often the case in the law, words and concepts so familiar in everyday life assume esoteric identities when cloaked in legal rhetoric. It should come as no surprise, then, that not even death, perhaps the most sobering and forthright fact in life, is immune from legal definition.”

Gordon Beeler, a husband, father, and businessman, disappeared on January 31, 1998. At the time of his disappearance, Beeler left behind a wife of almost thirty years, Kathy; four living children, ranging in ages from twelve to twenty-two; and a business partner, John Martin. None of these individuals has seen or heard from Beeler since that day in 1998. Beeler was fifty-one years old at the time he disappeared.

Beeler had obtained no fewer than six different life insurance policies, three of which are at issue in this case. Added together, these three policies are to pay a total of \$2.6 million to the named beneficiary upon the death of Gordon Beeler.

At a jury trial held from May 21 to May 29, 2007, the Beeler Trust presented evidence to demonstrate Beeler's death. The plaintiff showed that Beeler had been missing since the day of his disappearance nine years earlier in 1998. The insurance companies argued that Beeler could not be presumed dead; they claimed that he had left simply to extricate himself from an increasingly troublesome family situation. The insurance companies also presented witnesses who testified that they had seen Beeler since 1998.

Following deliberations, the jury returned a verdict in favor of the defendants. Pursuant to the questions posed in the special verdict form, the jury found, specifically, that the plaintiff had not established the elements necessary to raise the presumption of death.

In the state of Indiana, a claimant seeking to prove an insured's death may pursue two separate avenues of proof. Under the first, a claimant may use direct or circumstantial evidence to prove by a preponderance of the evidence that the insured is, in fact, dead. Under the second, a claimant may seek to prove death by means of a common law presumption. Indiana law dictates that a person is presumed dead if the following conditions are met: first, that the individual has been "*inexplicably absent*" for a continuous period of seven years; second, that the individual has not communicated with those persons who would be most likely to hear from him; and third, that the missing individual cannot be found "despite diligent inquiry and search." *Roberts v. Wabash Life Ins. Co.*, 410 N.E.2d 1377, 1382 (Ind.Ct.App.1980). Once raised, however, the presumption of death may be rebutted "by proof of facts and circumstances inconsistent with, and sufficient to overcome, such presumption."

We conclude, based on our analysis of Indiana law, that the *Roberts* requirement of an inexplicable absence for the common law presumption of death to arise is, at worst, the result of inartful drafting or, at best, a term of art with a far different interpretation than its common meaning. The common law presumption of death arises if the party seeking to prove a person's death presents evidence demonstrating (1) that person's continued absence for a period of seven years; (2) that person's failure to communicate with those individuals who would be most likely to hear from him; and (3) the inability to find that person, despite diligent inquiry and search. Evidence offered to explain an individual's absence goes toward the rebuttal of the presumption, not to prevent the presumption from first arising.

**Lesson:** The presumption of death may arise without proof that the seven year absence is inexplicable.

**5. Preferred Venue; meaning of "Regularly located." *Gulf Stream Coach v. Cronin and Cronin*, 2009 WL 736202 (Ind. Ct. App. March 19, 2009). (Riley)**

Gulf Stream Coach, Inc. (Gulf Stream), appeals from the trial court's denial of its motion to transfer venue on a claim of breach of warranty by Joseph and Dawn Cronin (the Cronins). On June 29, 2004, the Cronins, who are residents of the state of Pennsylvania, purchased a 2004

Gulf Stream recreational vehicle (RV) in the State of Florida. On September 18, 2006, the Cronins filed a complaint against Gulf Stream in Madison Circuit Court, alleging breach of express warranty and seeking rescission of the purchase agreement.

On September 27, 2006, Gulf Stream filed a Motion to Dismiss and/or Transfer pursuant to Indiana Rule of Trial Procedure 12(B)(3), asserting that Madison County is not a county of preferred venue under Trial Rule 75. On July 2, 2008, after a hearing and briefing by the parties, the trial court issued an order denying Gulf Stream's motion, stating, "Madison County qualifies as a county of preferred venue in these circumstances. The motor home was regularly kept in Madison County for several months prior to the filing of the suit, and it continues to be kept there."

Rule 75(A)(2) provides that preferred venue lies in: "The county where the land or some part thereof is located or the chattels or some part thereof are regularly located or kept, if the complaint includes a claim for injuries thereto or relating to such land or such chattels ...." It is undisputed that the RV was located, *i.e.*, being kept, in Madison County at the time that the Cronins filed their complaint and had been there for approximately seven months.

Gulf Stream argues that the RV was brought to Madison County only for purposes of this litigation and therefore was not "regularly" located or kept in Madison County. Our research reveals that the meaning of the word "regularly" in Rule 75(a)(2) has not been the subject of any Indiana appellate opinion. In ascertaining the meaning of words in a statute or court rule, courts may consult English dictionaries. The WEBSTER'S II NEW COLLEGE DICTIONARY 934 (2001) defines "regular," in part, as "[c]ustomary, usual, or normal." Here, there is no evidence that the RV was brought to Madison County for any reason other than this litigation. Whatever the usual or normal location of the RV was, it was taken out of that location and brought to Madison County for purposes of this litigation.

It would seem that the word "regularly" was included in Rule 75(A)(2) in order to prevent a party from establishing preferred venue by simply moving a chattel to a certain county in anticipation of litigation. We hold that, when a party moves a chattel to a county, whether from out-of-state or from another Indiana county, solely for purposes of litigation, that county does not become the county where the chattel is "regularly located and kept" under Rule 75(A)(2) and therefore is not a preferred venue under Rule 75.

**Lesson:** You cannot establish preferred venue by moving a chattel to a county and keeping it there for several months for litigation purposes.

**6. Cross Appeal of Interlocutory Order; Right to Jury Trial on Equitable Claims. *Murray v. City of Lawrenceburg*, 2009 WL 736071 (Ind. Ct. App. March 19, 2009). (Mathias)**

Gloria Murray et al. ("the Plaintiffs") brought suit against the City of Lawrence ("the City"), the Lawrenceburg Conservancy District ("the Conservancy District"), and Indiana Gaming Company, L.P. ("Indiana Gaming") (collectively "the Defendants"), claiming ownership of a certain portion of land being used by the Defendants. The Defendants wish to raise on cross-appeal an issue which is not directly related to the interlocutory order which the Plaintiffs are appealing. Instead, they seek to challenge on cross-appeal an entirely separate interlocutory order. This interlocutory order was certified by the trial court and timely presented to this court, but we previously declined to accept interlocutory jurisdiction over this order.

The Plaintiffs claim that the issue presented in the Defendants' cross-appeal is not properly before us because it is unrelated to the Plaintiffs' interlocutory appeal. The question before us involves the interplay between the rules governing cross-appeals and those governing interlocutory appeals. In *Harbour v. Arelco*, 678 N.E.2d 381, 386 (Ind. 1997), our supreme court explained that trial courts certify *orders*, not specific issues or questions, for interlocutory appeal. In fact, the applicable Appellate Rule "does not require *or even permit* certification of particular issues." Therefore, "[a]ny issues that were properly raised in the trial court in ruling on the [certified interlocutory] order are available on interlocutory appeal." Issues which were not properly raised in the trial court in its ruling on the interlocutory order are not available on interlocutory appeal.

We may reconsider rulings by the motions panel of this court because we may reconsider any of our decisions while an appeal remains *in fieri*. Although we may reconsider our earlier decisions, we generally will not do so in the absence of clear authority establishing that the motions panel erred as a matter of law. In rare instances reconsideration of motions to accept or oppose discretionary interlocutory appeals may be appropriate, such as where a successive motion demonstrates good cause why the motion panel's initial ruling should be reconsidered.

Here, we conclude that such good cause has been shown. Although we initially declined to accept interlocutory jurisdiction, circumstances have since changed. Specifically, we have accepted interlocutory jurisdiction over the Plaintiffs' discretionary interlocutory appeal. Moreover, the question at issue in the Defendants' cross-appeal is potentially dispositive, and judicial economy is certainly served by consideration of both certified interlocutory orders simultaneously.

The thrust of the Plaintiffs' interlocutory appeal is that the trial court erred in denying their demand for a jury trial. The trial court concluded that since most of the Plaintiffs' claims were equitable, the entire case was drawn into equity and triable to the court. This issue is controlled by the holding of our supreme court in *Songer v. Civitas Bank*, 771 N.E.2d 61 (Ind. 2002), which discussed Indiana's right to a trial by jury at length.

Trial Rule 38(A) sets forth three general principles: (1) suits for which jurisdiction was exclusively equitable prior to 1852 are to be tried to the bench; (2) issues of fact in all other suits are to be tried "as the same are now triable"; and (3) when both equitable and legal causes of action or defenses are joined in a single case, the equitable causes of action are to be tried by the court while the legal causes of action are to be tried by a jury. *Songer*, 771 N.E.2d at 64.

The *Songer* court emphasized that if the essential features of a suit as a whole are equitable, and the individual causes of action are not distinct or severable, the entitlement to a jury trial is extinguished. *Id.* at 68. Conversely, if a single cause of action in a multi-count complaint is plainly equitable, and the other causes of action assert claims that are sufficiently distinct and severable, Trial Rule 38(A) requires a jury trial on the severable, legal claims. *Id.* The simple inclusion of an equitable claim, standing alone, does not warrant drawing an entire case into equity.

Count I of the complaint seeks to quiet title of the Disputed Property in favor of the Plaintiffs. Historically, an action to quiet title was equitable in nature. However, our courts have long held that, despite its equitable origins, a statutory action to quiet title *is* triable to a jury. But it has also been held that an action to quiet title, though triable by jury, is governed by equitable principles.

Count VI seeks a judgment against the defendants for past income they have earned as a result of their use of the Disputed Property under a theory of unjust enrichment. It has been held that unjust enrichment is an “equitable concept.” However, “the phrases quasi-contract, contract implied-in-law, constructive contract, and *quantum meruit*” have been used synonymously to describe “*legal* fictions providing a remedy to prevent unjust enrichment....” These legal fictions were created by courts of law, and “were triable at law and not in equity, thus one is entitled to a jury trial upon them.” Thus we conclude that the Plaintiffs’ claim for unjust enrichment requesting a simple money judgment is a claim for legal, not equitable, relief.

We conclude that the essential features of the Plaintiffs’ complaint do not sound any equity. Indeed, of the twelve claims in the complaint, eight are legal in nature, and the equitable claims depend upon the resolution of the question of ownership-which is accomplished by means of the quiet title and ejectment claims, both of which are triable to the jury. Instead, the legal claims are sufficiently distinct and severable. Therefore, pursuant to *Songer* and Trial Rule 38(A), jury trials are required on these claims.

**Lessons:**

1. The courts certify orders, not issues, for interlocutory appeal.
2. An interlocutory cross appeal must arise out of the same order or seek separate certification of the order being cross appealed.
3. A right to jury sometimes arises as to claims that are equitable in nature..

Note: In a footnote, Judge Mathias observed that the *Songer* court had noted the difference between a “cause” and a “cause of action.” A “cause” is a lawsuit; a “cause of action” is a legal theory of a lawsuit. Thus, several causes of action may be encompassed in a single cause.

**7. Issue Preclusion. *Miller Brewing Co., v. Indiana Department of State Revenue, 2009 WL 690278 (Ind. March 13, 2009).* (Shepard)**

This case concerns the percentage of Miller’s nationwide income that is subject to Indiana income tax in 1997, 1998, and 1999. Indiana taxes a portion of the income of corporations doing business in this state, measured by the percentage of sales allocated to Indiana. Specifically, the issue is whether sales to Indiana customers are allocated to Indiana if the customer arranged for a common carrier to pick up the product at Miller’s facility in another state. *Miller Brewing Co. v. Ind. Dep’t of State Revenue* (Miller I), 831 N.E.2d 859 (Ind. Tax Ct. 2005), addressed this issue as to 1994-1996. Miller contends that the ruling of the Tax Court in Miller I resolved this issue in Miller’s favor and binds the Department under the doctrine of issue preclusion.

In its 1994, 1995, and 1996 Indiana tax returns, Miller reported all sales to Indiana customers as Indiana sales irrespective of the means of delivery to the customer. The Tax Court held that sales to customers who arranged transportation to Indiana by common carrier did not constitute Indiana sales for the purpose of allocation of income to this state. Miller was therefore entitled to a refund of the taxes paid as a result of treating these sales as allocable to Indiana.

In 2001, the Department completed an audit of Miller’s 1997, 1998, and 1999 returns and issued proposed assessments for all three years based on including in the sales factor all sales shipped by common carrier to customers in Indiana. Miller filed a protest, and after a hearing the

Department issued a Letter of Findings denying Miller's request for a refund on the ground that Indiana's sales factor was based on a "destination rule," which allowed Indiana to treat sales of products picked up by common carriers for delivery to Indiana as sales derived from this state.

Miller appealed to the Tax Court, arguing that issue preclusion barred the Department from denying a refund for customer-arranged carrier-pickup sales and moved for summary judgment on that ground. The Tax Court denied Miller's motion for summary judgment, holding that "while issue preclusion may be appropriate in certain property tax cases, it is generally not applicable in revenue cases."

Miller claims that issue preclusion applies in tax cases in general, and in this case in particular because: (1) the issue was decided in the prior case; (2) the issue was adjudicated to a final judgment; (3) the parties are the same; (4) the facts and the law are the same; and (5) "the purposes supporting issue preclusion apply." The Department responds first that issue preclusion does not apply in different tax years. The Department also raises issues not presented in Miller I and contends that issue preclusion does not bar these new considerations.

In general, issue preclusion bars subsequent litigation of the same fact or issue that was necessarily adjudicated in a former suit. Issue preclusion applies only to matters actually litigated and decided, not all matters that could have been decided. The matters decided must have been appealable in the original suit. Issue preclusion may not apply where there are new facts or where a change in the law or legal climate would dictate a different outcome. However, generally facts available at the time of the first suit are foreclosed in a subsequent suit, as are new arguments based on the same legal theory.

Issue preclusion is less favored against a government agency responsible for administering a body of law that affects the general public, such as tax law. Issue preclusion is more narrowly applied against government entities to prevent statements, oversights, or conduct of government officers or agents from interfering with the public interests or the performance of governmental function. Accordingly, fairness to the private citizen is a proper consideration but may be subordinated to "the government's paramount responsibility to represent all of the people." More recently, federal courts require affirmative misconduct by the government for issue preclusion to apply.

The Tax Court rejected issue preclusion principally because it concluded that "the Department has a right to pursue this litigation on a different legal theory than it pursued in Miller I." We agree that this contention is available to be raised in this case.

The sales factor of Indiana's statutory apportionment formula tracks the language of section 16 of the Uniform Division of Income for Tax Purposes Act (UDITPA), which is incorporated into article IV, section 16 of the Multistate Tax Compact. The Department asserts that all states that follow UDITPA construe "their statutory sales factor to require a destination rule" and that every state that "has a corporate income tax uses a destination rule."

Ordinarily a new argument is insufficient to reopen an issue of law already determined as between two parties. We think, however, that in tax cases that principle should be relaxed. If failure to raise an omitted argument can forever preclude the Department from relitigating a legal issue, the state is in effect barred by the omission of its agents who generally do not bind the government by a mistake of law. We have also noted the concerns for equity in taxation and for potential competitive effects that perpetuating a legal rule for one taxpayer can produce.

**Lessons:**

1. If you lose a tax issue for one year, you might be able to again raise the same issue on the next year's taxes, particularly if there has been a change in the facts or a change in the legal climate.
2. Issue preclusion is limited when litigating similar claims in successive years against the government.
3. Issue preclusion is the new preferred terminology for what used to be collateral estoppel.

**8. Premises liability of seller on Installment Contract. *Jackson v. Scheible*, 2009 WL 613456 (Ind. March 10, 2009). (Boehm)**

On July 5, 2005, ten-year-old Travis Scheible was killed in an accident in Columbus, Indiana. According to the complaint, Travis was riding his bicycle and started to cross the street from behind a mature tree that overhung the sidewalk and obscured his view of oncoming traffic. As he rode into the street, Travis was struck by an oncoming car.

The tree was located on residential property previously owned by Fred and Dorothy Jackson. About six months before the accident, the Jacksons sold the property to Ronald Smith under a two-year installment contract, and Smith began residing on the property.

Travis's mother, Christine Scheible, brought a wrongful death action against Fred Jackson and Smith. Jackson moved for summary judgment, arguing that he had no duty to Travis because he did not own, possess, or control the property at the time of the accident. The trial court granted summary judgment in favor of Jackson.

The Court of Appeals reversed. The Court of Appeals held that a vendor may be liable for harm caused by the condition of sold property if the vendor retains control of the property. The majority concluded that there was a genuine issue of material fact regarding whether Jackson controlled the property after the sale.

The issue here is one of first impression: under what circumstances a vendor of land may be liable to a third party for harm resulting from the condition of trees on the land near a highway. A theme throughout our premises liability cases is that liability arises from actual control over the condition causing the injury. Generally, a vendor in a land-sale contract will have no liability under because the vendor no longer occupies or controls the condition of the property even if the vendor retains legal title as security.

Here Scheible acknowledges that a vendor will typically have no post-sale liability, but argues that Jackson can be held liable because he continued "acting like a landowner" after the sale. First, Scheible notes that Smith needed Jackson's permission to make changes to the property. Even when viewed most favorably to Scheible, this evidence does not suggest that Jackson controlled the condition of the property. The evidence merely reflects that the property was security for the installment contract, and Jackson required permission for major changes to protect his security interest.

Second, Scheible points to the fact that Jackson alone held the casualty and liability insurance for the property as evidence that Jackson controlled the property. Jackson's maintaining insurance on the property is consistent with his desire to protect his financial investment and does not demonstrate his control.

Upon execution of the land-sale contract, Smith took exclusive possession of the property, leaving Jackson with no control over the maintenance of the property. As a matter of

law, liability lies with Smith as the possessor of the land.

In *Valinet v. Eskew*, 574 N.E.2d 283, 285 (Ind.1991), we adopted *Restatement (Second) of Torts* section 363 permitting possessors of land to be held liable for harm caused by the condition of trees on land near a highway. A seller of land may be liable for harm caused by the condition of trees on the land near a highway if the seller is in possession or control of the condition of the trees when the harm occurs. In this case, the seller did not retain possession or control of routine maintenance, including trimming of trees, and the trial court correctly entered summary judgment for the seller.

**Lessons:**

1. Only a party who has actual control of the premises will generally be held liable for dangerous conditions on property.
2. The seller on a land contract, who gives up possession and control, will generally not be liable for a maintenance problem on the property.

**9. Premises Liability; Known and Obvious Danger; Assumption of Duty by Conduct. *Smith v. King*, 2009 WL 708965 (Ind. Ct. App. March 17, 2009). (Brown)**

In 2000, the Kings began construction of a new residence on their property. Gerhard King acted as a general contractor on the project. The Kings hired Harbrecht to perform the framing and carpentry work and hired Lake Heating and Ventilating to perform the heating and air conditioning work. Kenneth Smith, Jr., (“Kenneth”) is the owner of Lake Heating and Ventilating.

In June 2000, Harbrecht had not yet completed the stairs from the residence’s first floor to the basement, leaving an open hole in the floor. Gerhard was concerned about the open hole and nailed a plywood sheet against the opening. Kenneth was using a tape measure over his head and was walking “sideways” when he stepped into the uncovered stairway opening and fell into the basement. The plywood sheet was not in place. Kenneth sustained severe injuries as a result of his fall.

Indiana has adopted § 343 of the Restatement (Second) of Torts, which provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Further, section 343A(1) of the Restatement (Second) of Torts provides, “a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land *whose danger is known or obvious to them*, unless the possessor should anticipate the harm despite such knowledge or obviousness.”

The Kings are not liable if the danger was known or obvious to Kenneth, unless the Kings should have anticipated the harm despite such knowledge or obviousness. The trial court essentially found that the danger of the hole was known and obvious to Kenneth. We agree. The

designated evidence demonstrates that Kenneth was aware of the hole leading to the basement. Consequently, we conclude that the trial court did not err by granting the Kings' motion for summary judgment on this issue, *i.e.*, (the Kings' alleged breach of duty as property owners).

A duty of care may arise where a party gratuitously or voluntarily assumes a duty by conduct. "The assumption of such a duty creates a special relationship between the parties and a corresponding duty to act in the manner of a reasonably prudent person." On appeal, the Smiths argue that the Kings assumed a duty to Kenneth by placing a plywood board against the opening to the basement.

We addressed a similar situation in *Robinson v. Kinnick*, 548 N.E.2d 1167, 1169 (Ind. Ct. App. 1989). We noted that "the Kinnicks did not appoint a safety director to supervise the job site, did not hold safety meetings, and did not prescribe any safety precautions to be taken on the project or provide written safety rules to persons at the site." 548 N.E.2d at 1169. "Further, the Kinnicks did not conduct daily inspections of the project in general or of the roof in particular or advise any of the workers at the site about what safety equipment to utilize." With respect to the toeboards nailed on the roof, we concluded that "in the absence of any other evidence indicating the contrary, one or two instances of safety precautions taken by the defendant does not raise a jury question as to whether a duty was assumed."

Here, because Harbrecht had not yet completed the stairs from the residence's first floor to the basement, leaving an open hole in the floor, Gerhard King nailed a plywood sheet against the opening. As in *Robinson*, this one instance of a safety precaution taken by the Kings does not raise a jury question as to whether a duty was assumed.

**Lessons:**

1. A party who knows of a dangerous condition may not generally recover from a property owner for injuries arising from the known dangerous condition.
2. A property owner does not assume any additional duty of care by taking one or two safety precautions for others but could by taking a more active role in safety at a job site.

**10. Comity; Dismissal or Stay when there is a prior action between parties in another state. *Jallali v. National Board of Osteopathic Medical Examiners, Inc.*, 2009 WL 736939 (Ind. Ct. App. March 20, 2009). (Barnes)**

NBOME is a non-profit corporation formed under Indiana law, with its main office in Illinois, that administers certification exams to persons attempting to become licensed osteopathic physicians in the United States and Canada. Jallali is a Florida resident who has taken a number of NBOME exams. On August 7, 2007, Jallali sued NBOME in Broward County, Florida, seeking to access the exams NBOME had administered to him, the answer keys to those exams, and NBOME's methodology of scoring the COMLEX-USA exams.

Meanwhile, on February 26, 2008, NBOME filed suit against Jallali in Marion County, Indiana. Count I of the complaint sought a declaratory judgment that Jallali has no contractual or other legal right to access any of the COMLEX-USA exams, the answer keys to those exams, or NBOME's methodology for testing and scoring those exams.

On March 12, 2008, Jallali moved to dismiss NBOME's complaint because of the already pending Florida lawsuit. On March 31, 2008, NBOME moved for summary judgment on Count

I of its complaint. The trial court denied Jallali's motion to dismiss and granted NBOME's motion for partial summary judgment.

The dispositive issue we address is whether NBOME's Indiana complaint should have been dismissed on comity grounds, because it was filed after Jallali initiated legal action in Florida. Comity differs from full faith and credit in that it applies to matters other than final judgments and is not a constitutional requirement. Rather, comity is "a willingness to grant a privilege, not as a matter of right, but out of deference and good will. Its primary value is to promote uniformity of decision by discouraging repeated litigation of the same question." Under comity, an Indiana state court may dismiss a case in order to respect proceedings pending in another state's court.

Courts in other jurisdictions likewise have concluded that where an action concerning the same parties and the same subject matter has been commenced in another jurisdiction capable of granting prompt and complete justice, comity ordinarily should require staying or dismissal of a subsequent action filed in a different jurisdiction, in the absence of special circumstances.

Factors this court has considered in addressing comity questions include whether the first filed suit has been proceeding normally, without delay, and whether there is a danger the parties may be subjected to multiple or inconsistent judgment. Allowing both the Florida lawsuit and the Indiana lawsuit to proceed to completion potentially could expose Jallali (and NBOME for that matter) to two directly contradictory results. That would be untenable.

Because the Florida case already was pending when NBOME filed this action, the Florida case should be allowed to proceed to completion. We conclude, given the substantial similarity between the parties, subject matter, and remedies sought in both the Indiana and Florida lawsuits, the trial court here ought to have exercised its discretion in favor of deferring to the already-pending Florida litigation in the interests of comity.

**Lesson:** Indiana courts should dismiss or stay a lawsuit as a matter of comity whenever a substantially similar case has been first filed in another state.

**11. Bona Fide Purchaser Doctrine. *Kumar v. Bay Bridge, LLC*, 2009 WL 736203 (Ind. Ct. App. March 19, 2009). (Mathias)**

Bay Bridge LLC ("Bay Bridge") filed a complaint in Lake Superior Court to quiet title to a parcel of real estate commonly known as 149<sup>th</sup> and Colfax, Cedar Lake, Indiana ("the real estate") and named Atul Kumar ("Kumar") as a defendant. On September 25, 2001, Kumar purchased the real estate at a tax sale. Kumar failed to record the deed at that time. On December 13, 2004, Bank One Trust Company conveyed the property to Bay Bridge. Bay Bridge recorded the trustee's deed shortly thereafter.

Indiana Code § 32-21-4-1 provides that a conveyance, mortgage of land, a lease for more than three years, or any interest in the land must be recorded in the recorder's office of the county where the land is situated. Further, "A conveyance, mortgage, or lease takes priority according to the time of its filing. The conveyance, mortgage or lease is fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration if the purchaser's, lessee's, or mortgagee's deed, mortgage, or lease is first recorded." The purpose of the recording statute is to provide protection to subsequent purchasers, lessees, and mortgagees.

Consistent with the recording statute, Indiana has long recognized the bona fide purchaser doctrine. To qualify as a bona fide purchaser, one has to purchase in good faith, for a

valuable consideration, and without notice of the outstanding rights of others. The theory behind a bona fide purchaser defense is that every reasonable effort should be made to protect a purchaser of legal title for a valuable consideration without notice of a legal defect.

Kumar failed to record his tax deed as required by Indiana Code § 32-21-4-1, and it remained unrecorded until after Bay Bridge filed its complaint to quiet title. Therefore, Bay Bridge did not have constructive notice of Kumar's interest in the real estate at issue.

With regard to actual notice, prior to purchasing the property, Bay Bridge requested a title search, which "found of record no lis pendens, no certificate of tax sale, no tax deed, nor any other record of interest of Atul Kumar in the property purchases by Bay Bridge." Moreover, Kumar did not designate any evidence to the trial court which would establish that Bay Bridge had actual notice of his claimed interest in the property.

From our review of the record before us, we conclude that Bay Bridge designated evidence establishing that it was a bona fide purchaser for value, and Kumar failed to designate any evidence that would create a genuine issue of material fact on this issue. Therefore, the trial court properly granted Bay Bridge's motion for summary judgment on its complaint to quiet title.

**Lesson:** Any acquisition of an interest in land should be promptly recorded and if not, could be rendered void by a subsequent bona fide purchaser.

**12. Railroad Easement. *Timberlake, Inc., v. Daniel P. O'Brien*, 2009 WL 690291 (Ind. Ct. App. March 13, 2009). (Riley)**

In 1973, Timberlake purchased 40 acres of wooded property, including an 8 acre lake, in LaPorte County, Indiana, pursuant to a warranty deed. At the time of the purchase, CSX, a railroad company, held a right-of-way easement over a 99 foot wide strip of land (Railroad Property) running in a northwestern direction over and adjoining sections of Timberlake's property as part of a railroad corridor.

This right-of-way easement was originally conveyed to the Indiana and Michigan Railroad Company, the predecessor railroad company of CSX, in 1881 by the owners of three separate but adjoining parcels of land pursuant to three deeds. On June 28, 1990, CSX conveyed its interest in the Railroad Property by quitclaim deed to O'Brien, who already owned a nearby golf course and parcels of land adjacent to the Railroad Property.

The general rule is that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put or in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to a right-of-way in such conveyance typically leads to its construction as conveying only an easement. The handwritten Deeds contain, along with the term "a strip of land for a right of way," additional language indicating the purpose for which the land was to be used: "to build, construct and maintain a railroad in and over said strip of land, and at all times to pass and repass by themselves, their servants, agents and employees with their engines, cars, horses, cattle, cars, wagons and other vehicle, and transport freight and passengers, and do all other things properly connected with or incident to the location, building, maintaining and servicing said road."

In support of his argument that the three Deeds convey a fee simple, O'Brien focuses on the usage of the word "forever" in the granting clause of each Deed. Although the use of the temporal descriptor "forever" favors the construction of the deed as conveying a fee simple

absolute to the railroad company, such language is merely a factor in determining whether the parties intended to grant a fee or an easement.

In light of the clear language indicating the conveyance of a right-of-way combined with the limiting purpose to which the land was to be put, we conclude that the Deeds are properly construed as passing only an easement to the railroad, its successors, lessees and assigns and not a fee simple. Because an easement is a “right to use or control the land, . . . , for a specific limited purpose,” O’Brien’s use to transport goods or materials over the Railroad Property is necessarily restricted by the terms of the Deeds. Granting O’Brien anything more would effectively transform the easement into a fee simple. Because of the Deeds’ restrictive language, O’Brien’s use of the easement is limited to the purposes set forth in the 1881 Deed documents.

**Lesson:** A railroad’s interest in right-of-way property is often limited to an easement for railroad purposes only.

**13. Joint Venture. *DLZ Indiana, LLC, v. Green County, Indiana, 60A04-0808-CV-479* (Ind. March 12, 2009). (Najam)**

In this appeal, we are asked once again to consider what constitutes a joint venture. As in a partnership, the parties to a joint venture are jointly and severally liable.

On June 25, 2001, the County entered into an Agreement for Design Services (“the Agreement”) with United Consulting Engineers, Inc. (“United”) and DLZ Indiana, LLC (“DLZ”) to design the expansion and renovation of the Greene County Courthouse in Bloomfield. DLZ contends that the trial court erred when it concluded that there was a joint venture based upon the Agreement.

The elements of a joint venture are well settled: “[I]n the seminal Indiana case on joint venture, *Baker v. Billingsley*, it was established that ... an agreement to share profits is necessary and that “a right of mutual control over the subject matter of the enterprise or over the property engaged therein is essential to a joint adventure.” *Lafayette Bank & Trust Co. v. Price*, 440 N.E.2d 759, 762 (Ind. Ct. App. 1982).

The County first asserts that United and DLZ were engaged in a joint venture because the County contracted with United and DLZ as a single entity, which, the County continues, indicates that United and DLZ intended to engage in mutual control over the Project. The Agreement also indicates that United and DLZ were acting “jointly and in collaboration” and “collectively” as “the Firm,” and there are references to “the Firm” throughout the Agreement. A joint venture is a specific type of business organization with clearly defined attributes. The fact that two or more parties agree to work “jointly and in collaboration” and “collectively” does not necessarily mean that they are doing business as a joint venture. And while the word “firm” suggests a single entity, the word is a generic term that has no particular or specialized meaning in the law, and the use of that word does not in itself determine the relationship or liability of the parties. A party’s characterization of an association as a joint venture is not, standing alone, conclusive proof of a joint venture. Thus, we must look beyond labels to the substance of the underlying relationship between United and DLZ to determine whether they had agreed to do business as a joint venture under the Agreement.

In sum, the Agreement is unambiguous with respect to whether United and DLZ were doing business as a joint venture. First, there is no evidence that they exercised joint or mutual control over the Project, which is an essential element. Section 23 of the Agreement allocates

responsibility and liability between them, limits DLZ's responsibility and liability, and identifies United as the "principal." If "the Firm" were a joint venture, both United and DLZ would exercise joint or mutual control over the Project and would be jointly and severally liable as principals. But Section 23 makes it clear that United and DLZ do not have "an equal right to direct and govern the undertaking."

Second, and of equal significance, there is no evidence within the Agreement that United and DLZ shared profits. An agreement to share profits is essential to a joint venture.

**Lessons:**

1. To have a joint venture, there must be (1) joint control and (2) shared profits.
2. The fact that the parties call their relationship a joint venture does not make it so.

**14. Duty of Casino to Not Exploit Compulsive Gamblers. *Caesars Riverboat Casino, LLC v. Kephart*, 2009 WL 736927 (Ind. Ct. App. March 20, 2009). (Mathias)**

On March 18, 2006, Genevieve Kephart visited Caesar's Riverboat Casino after Caesar's offered her a free hotel room, drinks, and meals. While at the casino, Kephart gambled and lost \$125,000 in a single evening through the use of six counter checks provided to her by Caesar's. Subsequently, Kephart's checks were returned for insufficient funds. Caesar's filed suit against Kephart on January 23, 2007, for payment of the checks, treble damages, and attorney fees, all as provided by Indiana law.

On April 2, 2007, Kephart filed an answer and counterclaim in which she alleged that she is a pathological gambler and that Caesar's knew of her condition and took advantage of her condition to enrich itself. Caesar's moved to dismiss the counterclaim pursuant to Trial Rule 12(B)(6) and the trial court denied that motion. We subsequently accepted interlocutory jurisdiction.

Indiana courts have not addressed the precise issue now before us. Kephart argues that, because Caesar's knew her to be a compulsive gambler at all relevant times, the casino owes her a duty under common law to protect her from its enticements to gamble.

We conclude that a casino operator does not act in a reckless manner by marketing to individuals it knows to be compulsive gamblers. For gamblers, compulsive or otherwise, just as for shoppers, compulsive or otherwise, marketing by a vendor is not reckless conduct.

The bilateral foreseeability of the harm associated with gambling does not support the establishment of a common law duty on the part of Caesar's. The small opportunity to win and the substantial likelihood of losing is implicit in the act of gambling and is reasonably and equally foreseeable to the casino and to the gambler alike.

While Caesar's actions in allowing Kephart to write six checks totaling \$125,000 are extremely concerning and should be examined by the Indiana Gaming Commission, Kephart has a responsibility to protect herself from her own proclivities and not rely on a casino to bear sole responsibility for her actions.

There is no common law duty obligating a casino operator to refrain from attempting to entice or contact gamblers that it knows or should know are compulsive gamblers. Caesar's motion to dismiss under Trial Rule 12(B)(6) therefore should have been granted by the trial court.

**CRONE, J., dissents with separate opinion.**

If the legislature believes that casinos are free to exploit the most vulnerable among us for economic and tax gain, then they should explicitly indicate that is the public policy of our state. In the absence of such a declaration, I believe that the common law affords some minimum level of protection. It is estimated that “27 percent to 55 percent of all casino revenues come from just pathological gamblers[.]” John Warren Kindt, *“The Insiders” for Gambling Lawsuits: Are the Games “Fair” and Will Casinos and Gambling Facilities be Easy Targets for Blueprints for RICO and Other Causes of Action?*, 55 MERCER L. REV. 529, 545 (Winter 2004) (footnote omitted).

In my view, all three *Webb* factors [for determining whether a duty exists] militate in favor of imposing a duty on Caesars to refrain from enticing to its casino know pathological gamblers who have not requested that they be removed from the casino’s direct marketing list or excluded from the casino. To hold otherwise would be to conclude that there is no level below which a casino (and thus the State of Indiana) may not go in enticing patrons and encouraging their reckless behavior. I believe that Hoosiers would expect more from their government and the businesses that operate here. Therefore, I would hold that Caesars does have such a duty and that they trial court properly denied its motion to dismiss Kephart’s counterclaim.

**Lesson:** While “from a moral standpoint, Caesars’ predation and prosecution of a pathological gambler is repugnant,” from a legal standpoint, the gambler is out of luck.

**15. Excessive Executive Compensation. *Menard v. Commissioner of Internal Revenue*, 2009 WL 595587 (7<sup>th</sup> Cir. March 10, 2009). (Posner)**

The Internal Revenue Code allows a business to deduct from its taxable income a “reasonable allowance for salaries or other compensation for personal services actually rendered,” 26 U.S.C. § 162(a)(1). Occasionally the Internal Revenue Service challenges the deduction of a corporate salary on the ground that it’s really a dividend. A dividend, like salary, is taxable to the recipient, but unlike salary is not deductible from the corporation’s taxable income. So by treating a dividend as salary, a corporation can reduce its income tax liability without increasing the income tax of the recipient.

Courts have considered multiple factors that relate to optimal compensation. Multifactor tests with no weight assigned to any factor are bad enough from the standpoint of providing an objective basis for a judicial decision. Multifactor tests when none of the factors is concrete are worse, and that is the character of most of the multifactor tests of excessive compensation. They include such semantic vapors as “the type and extent of the services rendered,” “the scarcity of qualified employees,” “the qualifications ... of the employee,” his “contributions to the business venture,” and “the peculiar characteristics of the employer’s business.”

All businesses are different, all CEOs are different, and all compensation packages for CEOs are different. Menard, Inc. is a Wisconsin firm that under the name “Menards” sells hardware, building supplies, and related products through retail stores scattered throughout the Midwest. It had 138 stores in 1998 and was the third largest retail home improvement chain in the United States; only Home Depot and Lowe’s were larger. It was founded by John Menard in 1962, and, at least through 1998, the tax year at issue in this case, he was the company’s chief executive. Under his management Menards’ revenues grew from \$788 million in 1991 to \$3.4 billion in 1998 and the company’s taxable income from \$59 million to \$315 million. The

company's rate of return on shareholders' equity that year was, according to the Internal Revenue Service's expert, 18.8 percent-higher than that of either Home Depot or Lowe's.

Like the other executives of Menards, John Menard is paid a modest base salary but participates along with them in a profit-sharing plan. In 1998, his salary was \$157,500 and he received a profit-sharing bonus of \$3,017,100, and the Tax Court did not suggest that there was anything amiss with these amounts. But the bulk of his compensation was in the form of a "5% bonus" that yielded him \$17,467,800, as a result of which his total compensation for the year exceeded \$20 million. [Note: Menard owned all the voting shares of the company and 57% of the nonvoting shares].

The 5% bonus program (5 percent of the company's net income before income taxes) was adopted in 1973 by the company's board of directors at the suggestion of the company's accounting firm. Besides thinking Menard's compensation excessive, the Tax Court thought it was intended as a dividend. The main focus of the Tax Court's decision was not on the issue of "concealed dividend" (that is, whether the company was acting in good faith in paying \$17.5 million as a bonus rather than as a dividend); it was on whether Menard's compensation exceeded that of comparable CEOs in 1998—that is, whether it was objectively excessive, and hence (in part) functionally if not intentionally a dividend rather than a bonus.

The CEO of Home Depot was paid that year only \$2.8 million, though it is a much larger company than Menards; and the CEO of Lowe's, also a larger company, was paid \$6.1 million. The 5 percent bonus plan was in effect for a quarter of a century before the IRS pounced; was it just waiting for Menard to have such a great year that the IRS would have a great-looking case? The Tax Court ruled that any compensation paid Menard in 1998 in excess of \$7.1 million was excessive. The court allowed Menard to treat as salary slightly more than twice the salary he supposedly would have had if he had been Home Depot's CEO and if Home Depot had had as high a return on investment as Menards did.

This was an arbitrary as well as dizzying adjustment. It disregarded differences in the full compensation packages of the three executives being compared, differences in whatever challenges faced the companies in 1998, and differences in the responsibilities and performance of the three CEOs. We conclude that in ruling that Menard's compensation was excessive in 1998, the Tax Court committed clear error, and its decision is therefore REVERSED.

**Lesson:** The Seventh Circuit will be generous in allowing a company to award compensation to CEO's, at least when confronted with a claim that the award was really a dividend.

## **LITIGATION TIP FOR THE MONTH: CONCLUDE POWERFULLY**

FROM: BRYAN GARNER, THE WINNING BRIEF (2004):

**TIP 89:** Conclude powerfully. Avoid weak phrases such as "Wherefore, premises considered," "For the forgoing reasons," and "For the reasons stated." Like your opening words, your closing words are critical. They're your leave-taking. And you should no more use a formulaic closer that you should send off a trusted ally on an important mission with a perfunctory "See ya."

One way to conclude strongly is to capsule the two or three or however many reasons why the court should do what you urge. And leave it at that. Another way to conclude is to find

a different slant or angle on the dispositive arguments. With this approach, you don't merely sum up what has preceded – you discuss it from a different point of view. Here's another approach:

“We are asking this Court to change its mind. We think this to be not only possible, but necessary. And there is a long tradition of great judges who have thought better on second thought, as Justice Jackson once observed when doing an about-face:

Precedent . . . is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Taney, *License Cases*, 5 How. 504, recanting views he has pressed upon the Court as Attorney General of Maryland in *Brown v. Maryland*, 12 Wheat. 419. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, “The Matter does not appear to me now as it appears to have appeared to me then.” *Andrews v. Styrax*, 26 L.T.R., N.S. 704, 706. And Mr. Justice Story, accounting for his contradiction of his former opinion, quite properly adopted by this Court . . . .” *United States v. Gooding*, 12 Wheat. 460, 478. Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary – ‘Ignorance, sir, ignorance.’ But an escape less self-deprecating was taken by Lord Westbury, who, it is said, rebuffed a barrister’s reliance upon an earlier opinion of his Lordship: ‘I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.’ If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all. [Footnoted citation to *McGrath v. Kristensen*, 340 U.S. 162, 177-78 (1950) (Jackson, J., concurring).]

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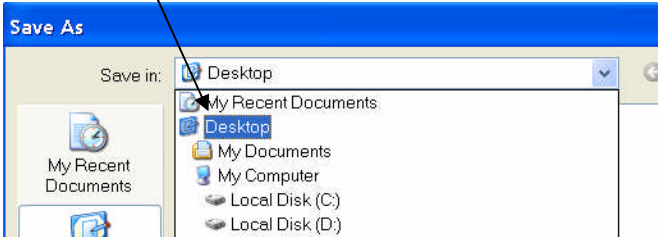
The screenshot shows the website for Price Waicukauskis & Riley, LLC. The header includes the firm's name, logo, and contact information: 317-633-8787 and 800-905-2856. A navigation bar contains links for HOME, OVERVIEW, ATTORNEYS, PRACTICE AREAS, NEWS, RESOURCES, and CONTACT US. The main content area is titled 'RESOURCES' and features a section for 'Indiana Law Update'. It describes Mr. Ronald J. Waicukauskis as a frequent speaker at the Indianapolis Law Club meetings. Below this, there is a list of resources with dates and links for Podcast and Handout. An arrow from the text on the left points to the 'Podcast' link for the February 26, 2009 entry. On the right side of the page, there is a sidebar titled 'IN THIS SECTION' with a list of dates from February 28, 2008, to September 29, 2005, each with a link to a podcast or handout.

Date	Podcast	Handout
February 26, 2009	<a href="#">Podcast</a>	<a href="#">Handout</a>
November 20, 2008	<a href="#">Podcast</a>	<a href="#">Handout</a>
July 31, 2008	<a href="#">Podcast</a>	

Click on the podcast link. →

If you want to download this podcast through iTunes right click on the “Podcast” link and select: “Save Target As...”.

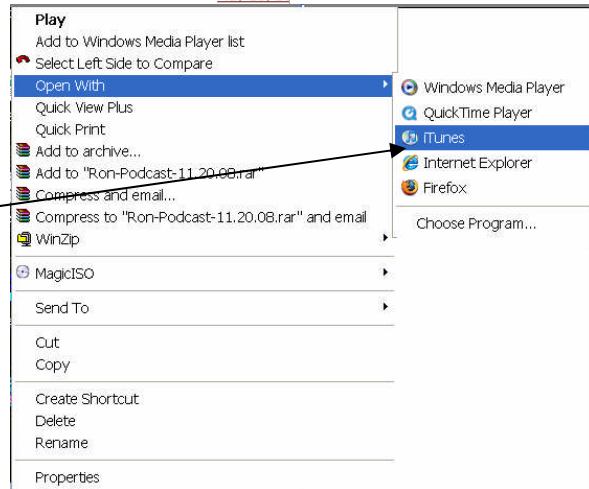
Save in a location where it can be easily located, like the “Desktop”.



#### Indiana Law Update

Mr. [Ronald J. Waicukauski](#) is a frequent speaker at the monthly meetings of the Indianapolis Law Club. His presentations include valuable information for attorneys on recent updates in the Indiana law. Below are the handouts that he has prepared for these meetings.

- February 26, 2009
  - Podcast
  - Ha
- November
  - Po
  - Ha
- July 31, 20
  - Po
  - Ha
- May 29, 20
  - Po
  - Ha
- February 2
  - Po
  - Ha
- July 26, 20
- March 29,
- November
- May 25, 20



Once the download is complete, locate the icon on your desktop, right click, select “Open with” and “iTunes”.

You may then sync your device to your library to have it include this podcast.