

**INDIANA LAW UPDATE**  
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#### 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: THE SUPREME COURT AND RELIGIOUS AFFILIATION

From CNNPolitics.Com of May 27, 2009:

As Supreme Court hopeful Sonia Sotomayor breaks ground for Hispanics, she is poised to add an exclamation point to another historic demographic shift: the move to a Catholic court. Sotomayor was raised Catholic and if she is confirmed, six out of nine, or two-thirds of the justices on the court will be from the faith. "Presidents used to reserve a Catholic seat and a Jewish seat on the Supreme Court," Barbara Perry, a government professor at Sweetbriar College told CNN Radio. "Now we've moved from a Catholic seat on the court to a Catholic court."

The current court is composed of two Jewish members -- Justices Stephen Breyer and Ruth Bader Ginsburg. If Sotomayor joins the bench, Justice John Paul Stevens would be the solitary Protestant on a court once dominated by white Protestant men. "What that tells is that in our politics, religion doesn't matter anymore," Perry said. Then she added: "I don't think our politics are ready for an Islamic justice at this point."

### **1. Statute of limitations for federal claims in state court; sovereign immunity: *Januchowski v. Northern Indiana Commuter Transportation District, 2009 WL 1272304 (Ind.Ct.App. May 7, 2009) (Vaidik)***

While working for the Northern Indiana Commuter Transportation District ("NICTD") as a carman, plaintiff Steven Januchowski alleged that he was injured by shifting panels as a result of NICTD's negligence. NICTD operates a passenger commuter rail service from South Bend, Indiana, to Chicago, Illinois. Januchowski brought his claim under the Federal Employers' Liability Act (FELA), which provides a federal cause of action for railroad employees injured as a result of negligence. Januchowski brought his claim more than two years, but less than three years, after the alleged injuries.

At trial, Januchowski argued that FELA's three-year statute of limitation applied to his case. NICTD argued that Indiana's general two-year statute of limitation for personal injury torts applied because of the Indiana Tort Claims Act (ITCA), and that, as a result, Januchowski's claim was time-barred. Agreeing with NICTD on this point, the trial court granted summary judgment in favor of NICTD.

The trial court determined first that NICTD was a political subdivision. As a result, Januchowski was required under the ITCA to file notice with NICTD's governing body and the Indiana political subdivision risk management commission within 180 days after the loss occurred. The trial court next determined that Januchowski had substantially complied with the notice requirements. Even though he did not send notice within 180 days to the political subdivision risk management commission as required by the ITCA for political subdivisions, because Januchowski sent notice to NICTD within sixty days of his accident the purpose of the notice statute was fulfilled.

In an action against a private entity, the United States Supreme Court has determined that the right to bring a FELA claim within the time provided in the FELA statute of limitation is a substantive right that controls in an action brought in a state court, regardless of any state statute of limitation. Although it is settled that the FELA statute of limitation applies over a state statute of limitation in suits against private entities, it has not been settled as to which statute of

limitation applies in suits in Indiana against political subdivisions such as NICTD, where issues of sovereign immunity come into play.

To answer this question, we turn to Indiana's body of sovereign immunity law. Historically, a state may not be sued in its own courts unless it has waived its sovereign immunity by expressly consenting to such suit through a clear declaration of that consent. In 1972, the Indiana Supreme Court abolished the doctrine of common law sovereign immunity in this state, leaving several limited exceptions, and determined that the legislature alone was responsible for considering which specific types of governmental conduct would result in immunity from liability. In 1974, the General Assembly enacted the ITCA. The ITCA is comprehensive, and it provides that governmental entities are subject to liability for their torts in Indiana state courts, unless the activity giving rise to the tort falls within its list of enumerated exceptions.

We find the omission of a statute of limitation in the ITCA to be significant. This is because the General Assembly knows how to include a statute of limitation into the body of an act. For example, the legislature has included a statute of limitation into the Indiana Contract Claims Act ("ICCA"). The ITCA contains many requirements, but a statute of limitation is not one of them. This is crucial. The well-established rule of statutory construction known as *expressio unius est exclusio alterius*, that is, the enumeration of certain things in a statute necessarily implies the exclusion of all others. Because the ITCA does not expressly contain a statute of limitation, we find no support for NICTD's argument that Indiana's two-year statute of limitation applies to all tort claims against the State no matter the type of tort. If the legislature had intended for that statute of limitation to apply to all claims under the ITCA, it would have inserted such a requirement into the ITCA. We find that compliance with Indiana's personal injury statute of limitation is not a condition for suit under the ITCA when the claim is controlled by FELA.

DARDEN, Judge, dissenting.

The FELA provides for a three-year statute of limitation for filing a claim, *see* 45 U.S.C.A. § 56; whereas, the Indiana Tort Claims Act contains no express statute of limitation provision. The majority finds the latter dispositive, as constituting the choice of Indiana's legislature *not to include* a statute of limitation for the Indiana Tort Claims Act, thereby permitting application of FELA's statute of limitation provision when a FELA claim is filed in an Indiana state court. However, such ignores the fact that Indiana does have a statute of limitation for personal injury claims, to wit: two years and the long-standing principle that statutes addressing the same subject are *in pari materia* and to be read in harmony if possible.

Given the concurrent subject matter jurisdiction of Indiana and federal courts, Januchowski had a choice of forums. However, the forum he chose was the state court. I find that by choosing to file his action in the state court, he brought himself within the jurisdiction of Indiana's procedural laws--including the Indiana procedural statute providing for a two-year statute of limitations for personal injury claims.

**Lessons:**

1. The FELA 3-year statute controls; not Indiana's two-year statute for torts.
2. Substantial compliance with the notice requirements of the Tort Claims Act will sometimes suffice in lieu of full compliance.
3. Latin expressions are still popular in the Court of Appeals.

Note: “Some Latin expressions are convenient shorthand for rules or principles that have no English shorthand equivalent (res ipsa loquitur, or inclusion unius est exclusion alterius). But avoid using other Latin phrases, such as *ceteris paribus*, *inter alia*, *mutatis mutandis*, and *pari passu*. Judges are permitted to show off in this fashion, but lawyers are not. And the judge who does not happen to know the obscure Latin phrase you have flaunted will think you a twit.” From *Making Your Case, The Art of Persuading Judges* by Antonin Scalia and Bryan Garner (2008), p. 114.

**2. Lemon Law: *Metro Health Professionals, Inc. v. Chrysler, LLC*, 2009 WL 1227868 (Ind.Ct.App. May 5, 2009) (Brown)**

Metro Health Professionals, Inc. (“MHP”), appeals the trial court's grant of summary judgment to Chrysler, LLC. Brent A. Losier, the president of MHP, purchased a Jeep from an authorized Chrysler dealership. The designated evidence reveals that Losier took the Jeep to an authorized repair facility on five occasions. On the first three occasions, Chrysler returned the Jeep to Losier without making any repairs. On the fourth occasion, Chrysler performed a diagnostic test but made no repairs, and the Jeep again malfunctioned. MHP then wrote a letter to Chrysler “advising [Chrysler] of a claim under the Indiana Motor Vehicle Protection Act.” MHP thus asserted its rights under Indiana's Lemon Law following the fourth unsuccessful repair attempt and prior to taking the vehicle in for yet another repair attempt. After writing the letter, Losier took the Jeep to Chrysler a fifth time and the technicians finally made repairs to it. Specifically, the technicians “replaced the front control module.”

MHP filed a complaint against Chrysler seeking relief under the Indiana Motor Vehicle Protection Act, commonly known as the Lemon Law, which provides:

If a motor vehicle suffers from a nonconformity and the buyer reports the nonconformity within the term of protection to the manufacturer of the vehicle, its agent, or its authorized dealer then the manufacturer of the motor vehicle or the manufacturer's agent or authorized dealer shall make the repairs that are necessary to correct the nonconformity, even if the repairs are made after expiration of the term of protection.

“Nonconformity” means “any specific or generic defect or condition or any concurrent combination of defects or conditions that: (1) substantially impairs the use, market value, or safety of a motor vehicle; or (2) renders the motor vehicle nonconforming to the terms of an applicable manufacturer's warranty.” Ind.Code § 24-5-13-6.

Ind.Code § 24-5-13-10 provides:

If, after a reasonable number of attempts, the manufacturer, its agent, or authorized dealer is unable to correct the nonconformity, the manufacturer shall accept the return of the vehicle from the buyer and, at the buyer's option, either, within thirty (30) days, refund the amount paid by the buyer or provide a replacement vehicle of comparable value.

Ind.Code § 24-5-13-15(a)(1) provides that “[a] reasonable number of attempts is considered to have been undertaken to correct a nonconformity if: ... the nonconformity has been subject to repair at least four (4) times by the manufacturer or its agents or authorized dealers, but the nonconformity continues to exist.”

MHP argues that the nonconformity in this case was subject to repair four times but continued to exist. MHP cites *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 827 N.Y.S.2d 88, 860 N.E.2d 705 (N.Y.2006), where the court held: “The plain language of the provision obligates a consumer to demonstrate that the vehicle was subject to repair at least four times and that the same defective condition remained unresolved after the fourth attempt. Therefore, once a consumer has met the four-repair threshold, the presumption arises regardless of whether the manufacturer later remedies the problem. It is clear that the Legislature intended to create [a] bright-line presumption[ ] by which a consumer can demonstrate that the manufacturer was accorded a reasonable number of attempts to alleviate the problem....”

Chrysler cites *Computer Network, Inc. v. AM Gen. Corp.*, 265 Mich.App. 309, 696 N.W.2d 49, 62 (2005), where the Michigan Court of Appeals held that “there must be a showing that a *reported condition under* [the Michigan Lemon Law], *continues to exist* before a remedy may be obtained.”

We find the reasoning of the Court of Appeals of New York in *Spitzer* to be persuasive. We therefore adopt the reasoning in *Spitzer* insofar as it resolves the case before us, where a claim is made shortly after the fourth repair attempt. Thus, to the extent that *Computer Network* conflicts with the holding in *Spitzer*, we decline to follow it.

Chrysler may not avoid liability under the Lemon Law by simply doing nothing when faced with a customer's complaints. Therefore, Chrysler was obligated at the MHP's option, either, within thirty days, to refund the amount paid by MHP or provide a replacement vehicle of comparable value. MHP is entitled to summary judgment as a matter of law.

**Lesson:** For auto manufacturers, after four strikes, you're out. That is, you get four chances to the make the repair, and if you don't, the buyer gets a refund or a replacement vehicle.

**3. Name changes; preliminary injunction. *Leone v. Commissioner, Indiana Bureau of Motor Vehicles*, 2009 WL 1361491 (Ind.Ct.App. May 15, 2009) (Bradford)**

The plaintiffs in this class action appeal from the trial court's denial of their motion for a preliminary injunction against the Commissioner of the Indiana Bureau of Motor Vehicles, *et al.*, (“the BMV”). Because we conclude that the Class has shown that the BMV's challenged policy violates constitutional guarantees of due process by failing to provide ascertainable standards, but that a preliminary injunction would not be in the public interest, we affirm the trial court's denial of the Class's request.

Sometime in 2005, the BMV entered into an agreement with the Social Security Administration (“SSA”) allowing the BMV to verify its records against those kept by the SSA. A series of checks performed in 2007 uncovered a number of BMV records that did not match records kept by the SSA. Beginning in November of 2007, the BMV sent a series of three letters to, among others, persons whose names on file with the BMV did not match those on file with the SSA (“the Class”).

On April 9, 2008, the trial court certified the Class, numbering over 15,000, as “all persons who are currently threatened with invalidation of their BMV-issued drivers licenses or identification cards, or have had their licenses or identification cards invalidated, because there exists a discrepancy with their names on file with the BMV and their names on file with the Social Security Administration.”

The Class contends that the BMV's policy violates Indiana and federal law, which, if true, would also relieve the Class of the burden of showing irreparable harm or that the balance of harms between the parties is in its favor. “[W]here the action to be enjoined is unlawful, the unlawful act constitutes *per se* “irreparable harm” for purposes of the preliminary injunction analysis. When the *per se* rule is invoked, the trial court has determined that the defendant's actions have violated a statute and, thus, that the public interest is so great that the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm or whether the plaintiff will suffer greater injury than the defendant. Accordingly, invocation of the *per se* rule is only proper when it is clear that a statute has been violated.”

The Class argues that the BMV violates Indiana law by essentially deferring to the SSA on the question of one's legal name, when the matter is purely one of Indiana law. While we agree that it is the law of Indiana that a person can change his or her legal name without resort to formal legal process, it does not follow that all others, including governmental agencies like the BMV, are required to simply accept the word of the applicant that he is who he claims to be. In other words, the ability to change one's name at will does not equate to freedom from all of the consequences of such a decision. We believe that the public interest in preventing identity theft requires that one must bear the consequences, including the inconveniences, of changing one's name.

In any event, we conclude that the BMV has, in fact, failed to articulate ascertainable standards for current license and identification card holders, and the policy therefore fails to comport with the requirements of due process. One does not know whether the BMV's information must be made to match the SSA's (or vice versa) or whether the discrepancy may remain if it is adequately explained. In short, class members are given no clear indication regarding how their individual cases will be evaluated and no clear instruction on how they might avoid the revocation of their licenses or identification cards. So, while we conclude that the BMV can require and is requiring a match between its information and SSA's, we believe that the BMV has failed to give the class members fair notice regarding this requirement.

The question, then, is whether the presence of an unresolved discrepancy between BMV and SSA records is a rational basis for suspending or revoking a driver's license or identification card. We conclude that it is. In short, the policy effectively blocks a well-known avenue for identity theft by making it much more difficult to appropriate another's social security number in order to obtain state identification.

Detective Eads testified that detection of fraudulent attempts to obtain state-issued identification had increased significantly since the program started, that the program assisted in the prevention of identity theft, and that granting the injunction request would hinder investigation of crime.

We conclude that the BMV policy does not violate Indiana law by using the SSA's files to verify the accuracy of its own information and by requiring that individuals correct any discrepancies. We also conclude, however, that the policy fails to provide ascertainable standards and so violates the federal Constitution's guarantee of due process.

RILEY, Judge, dissenting:

The majority relies upon the testimony of Detective Eads to find a “rational basis” for the BMV's ultra vires acts. However, the law as codified by our legislature is that a person applying for a driver's license or identification card must provide the BMV with their “full legal name.” It has been the long standing law of our state that: “a full name consists of one christian or given

name, and one surname or patronymic [derived from the name of the father]. The two, using the christian name first and the surname last, constitute the legal name of the person. Any one may have as many middle names or initials as are given to him, or as he chooses to take; they do not affect his legal name. No person is bound to accept his patronymic as a surname, nor his christian name as a given name, though the custom to do so is almost universal amongst English-speaking people, who have inherited the common law.” *Schofield v. Jennings*, 68 Ind. 232, 234-35, 1879 WL 5847, 1 (1879). There is no law preventing a man from taking whatever name he has a fancy for, nor are there any particular formalities required to be observed on adopting a fresh surname.

If the BMV now thinks that in the day and age of identity theft that applicants for drivers licenses or identification cards should provide their name as it appears in the SSA database, then the BMV has the opportunity to approach our legislature and seek an amendment to Indiana Code sections 9-24-11-5(a)(1) and 9-24-16-3(b)(1).

**Lessons:**

1. A person can change his or her name without legal process.
2. Your “legal name” does not include a middle name or initial.
3. BMV can require that the name match social security records before issuing a license or identification card but must establish a clear process for resolving the problem when a discrepancy arises

**4. Failure to comply with discovery: *Gallagher v. State of Indiana*, 2009 WL 1440288 (Ind.Ct.App. May 22, 2009) (Kirsch)**

Stephan Gallagher was convicted of drug dealing as a Class A felony following a jury trial. On appeal, Gallagher argues that the trial court erred when it admitted the audio recording of the drug transaction because the copy sought to be admitted at the trial was of a better quality than the one given to Gallagher. He contends that the copy that was given to him through discovery was inaudible and that he formed his trial strategy around this fact. When the State sought to admit a copy of the recording, which Gallagher claims was of better quality than his copy, at trial, he asserts it was too late to cure the prejudice that resulted.

Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. If remedial measures are warranted, a continuance is usually the proper remedy, but exclusion of evidence may be appropriate where the violation has been flagrant and deliberate, or so misleading or in such bad faith as to impair the right to a fair trial.

A defendant will waive any alleged error regarding noncompliance with the trial court's discovery order by failing to request a continuance. Although Gallagher argued at trial that he was prejudiced in his trial strategy because the copy of the recording he was provided was of a poorer quality than the one sought to be introduced, he did not request a continuance to reevaluate and alter his trial strategy. Therefore, he has waived this issue.

**Lesson:** To preserve your objection to a discovery failure, request a continuance.

**5. Physician testimony by deposition: *Beldon v. State of Indiana*, 2009 WL 1424616 (Ind.Ct.App. May 21, 2009) (Riley)**

Clint Beldon appeals his conviction for operating a motor vehicle while intoxicated. Dr. Michelle Bache, an emergency room physician, treated Beldon upon his arrival. During the course of her treatment, and absent any request by law enforcement to do so, Dr. Bache ordered that samples of Beldon's blood and urine be collected and tested. The test results revealed that Beldon's blood alcohol content was 0.27.

Over Beldon's objection, the trial court allowed the State to present Dr. Bache's video deposition into evidence for the jury to watch. Beldon argues that Dr. Bache's deposition was hearsay, and thus, its admission violated his fundamental rights to confront witnesses under both the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution.

Generally, an absent witness' deposition testimony offered in court to prove the truth of the matter asserted constitutes classic hearsay. However, possible exceptions to the hearsay rule exist under both Indiana Trial Rule 32 and Indiana Evidence Rule 804. These rules allow the use of prior recorded testimony in lieu of live testimony when special circumstances exist. Nevertheless, the constitutional right of confrontation restricts the range of admissible hearsay by requiring (1) that the State either produce the declarant or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant and (2) that the statements bear sufficient indicia of reliability. Depositions that comport with the principal purposes of cross-examination provide sufficient indicia of reliability.

However, our supreme court has noted that Trial Rule 32 is not applicable to claims involving a violation of the defendant's Sixth Amendment right of confrontation. As such, Trial Rule 32 plays no part in our analysis of the instant case. The issue here is not whether "exceptional circumstances" existed so as to justify admitting Dr. Bache's deposition into evidence at trial, but rather, the issue is whether the State made a good faith effort to obtain Dr. Bache's attendance at trial.

The record does not reflect that the State made a good faith effort to obtain Dr. Bache's attendance at trial. Granted, after Dr. Bache filed an affidavit stating that she would not be available to testify on the day of trial because of her work schedule, the State took steps to preserve her testimony through a videotaped deposition. However, a busy work schedule is not sufficient to circumvent the constitutional right to confrontation. The State could have asked Dr. Bache to rearrange her work schedule, or ask another doctor to manage her patient responsibilities for the short duration of the trial. Likewise, the record indicates that the State failed to make any effort to attempt to secure Dr. Bache's attendance at trial by subpoena. We conclude that the trial court erred when it determined that Dr. Bache was unavailable to testify and that it abused its discretion when it admitted Dr. Bache's videotaped deposition in lieu of live testimony.

We conclude that Dr. Bache's videotaped deposition was merely cumulative of this other evidence. As such, we hold that although the trial court erred by admitting the videotaped deposition of Dr. Bache, the error was harmless beyond a reasonable doubt.

**Lesson:** In a criminal case, the State must make a good faith effort to produce physician at trial before using deposition testimony. A work schedule conflict will not be a sufficient excuse without more.

**6. Raising issue for first time in Appellee’s Brief: *Hardley v. State of Indiana*, 2009 WL 1229428 (Ind.Ct.App. May 5, 2009) (Dickson)**

To address conflicting opinions from the Court of Appeals and to consider the import of recent decisions of this Court, we grant transfer and hold that the State may challenge the legality of a criminal sentence by appeal without first filing a motion to correct erroneous sentence, and that such appeal need not be commenced within thirty days of the sentencing judgment.

The defendant was convicted and sentenced for three criminal offenses. His appeal presented claims of insufficient evidence and double jeopardy. Among the arguments made in the State's reply brief was that the trial court had erroneously imposed concurrent sentences in contravention of statute. As to the State's contention, the Court of Appeals, asserting the doctrine of fundamental error, refused to require such claim to be preserved by contemporaneous objection at trial, declined to require the State to challenge the allegedly erroneous sentence within thirty days of final judgment, and declared “[w]e cannot ignore an illegal sentence, even if the State did fail to properly preserve the issue.”

The defendant sought transfer, in part arguing that the State waived any right to challenge the sentence because it failed to raise an objection in the trial court, did not file a motion to correct an erroneous sentence, and did not raise the issue until cross-appeal. This position is consistent with *Hoggatt v. State*, 805 N.E.2d 1281, 1284 (Ind.Ct.App.2004). The Court of Appeals majority expressly declined to follow *Hoggatt*.

The fundamental error doctrine serves, in extraordinary circumstances, to permit appellate consideration of a claim of trial error even though there has been a failure to make a proper contemporaneous objection during the course of a trial, which failure would ordinarily result in procedural default as to the claimed error. The doctrine applies to those errors deemed “so prejudicial to the rights of a defendant as to make a fair trial impossible.” By its very nature, the doctrine exists to protect the fair trial rights of the defendant, not the State. And while sound judicial policy requires permitting the State to challenge an illegal sentence, the fundamental error doctrine is an inapposite rationale.

Notwithstanding the limited statutory list of permissible criminal appeals by the State and the inappropriateness of fundamental error as a rationale, a separate additional source of statutory authority empowers the State to challenge illegal sentences. As to erroneous sentences, the legislature has also specifically authorized:

If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

Ind.Code § 35-38-1-15. The plain language of this provision, with its requirement of notice to a defendant, is not limited only to defendants, but by clear implication is also available to the State.

Considering the clear unacceptability of sentences that plainly exceed or otherwise violate statutory authority and the fact that the legislature has authorized the State to challenge erroneous sentences, we hold that sound policy and judicial economy favor permitting the State to present claims of illegal sentence on appeal when the issue is a pure question of law that does

not require resort to any evidence outside the appellate record.

In conclusion, we grant transfer and hold that: (1) fundamental error is not a satisfactory rationale to justify the State's challenge to an illegal sentence; (2) the legislature intended to permit the State to challenge erroneous criminal sentences; (3) the State's appellate sentence challenge, when the issue is a pure question of law and does not require resort to evidence outside the appellate record, is an acceptable substantial equivalent to the motion to correct erroneous sentence; (4) the State's appellate challenge to an illegal sentence is not limited to facially erroneous sentences; and (5) such an appellate challenge need not be initiated in the trial court nor commenced within thirty days of the sentencing judgment.

BOEHM, J., dissents with separate opinion in which RUCKER, J., concurs.

We do not ordinarily allow parties to raise issues for the first time in an appellate court. I believe the reasons for this rule apply equally here and that permitting the State to resurrect a dead issue in its appellee's brief raises some undesirable collateral issues. It does not seem unreasonable to require the State to speak up within thirty days or forever hold its peace as to claimed sentencing errors that are not apparent on the face of the judgment.

**Lessons:**

1. In some circumstances, an issue can be raised for the first time in the appellee's brief.
2. The Court of Appeals does not always follow recent rulings by another panel.
3. The fundamental error doctrine does not apply to errors adverse to the State.

**7. Preferred venue; principal office: *Painters District Council 91 v. Calvert Enterprises Electronic Services, Inc.*, 2009 WL 1424625 (Ind.Ct.App. May 21, 2009) (Darden)**

Painters District Council 91 ("Painters") appeals the trial court's order granting Calvert Enterprises Electronic Services, Inc.'s ("Calvert") motion to transfer venue. Painters consists of twelve local unions with offices throughout Indiana, as well as offices in Kentucky and Tennessee. Calvert is a Kentucky corporation with its principal place of business in Henderson, Kentucky.

Stephen Shofstall, as Painters' business manager and secretary-treasurer ("BMST"), and Calvert entered into a service agreement (the "Agreement"), whereby Calvert would provide information technology ("IT") support to Painters for a period of sixty months. Painters filed a complaint for declaratory judgment against Calvert in Marion Superior Court. It alleged that Shofstall entered into the Agreement without authority. It further alleged that Calvert breached the Agreement by providing unsatisfactory service.

Calvert filed a motion to transfer venue, seeking transfer of venue to Vanderburgh County. The trial court entered its order, granting Calvert's motion and transferring the case to Vanderburgh County.

Generally, "[p]referred venue is determined by reference to subsections (1)-(9) of Rule 75(A)." However, preferred venue may be established under subsection (10): (1) when none of the preceding nine subsections establish preferred venue or (2) when all of the defendants are nonresident individuals or nonresident organizations without a 'principal office in the state.'" The parties do not dispute that subsection (10) applies in this case.

Trial Rule 75(A)(10) provides that preferred venue lies in: "The county where either one of more individual plaintiff resides, *the principal office of any plaintiff organization or*

*governmental organization is located, or the office of any such plaintiff organization or governmental organization to which the claim relates or out of which the claim arose is located....”* Painters, as an unincorporated association is a plaintiff organization.

In *American Family*, the Indiana Supreme Court addressed the term “principal office” as used in Trial rule 75(A). It determined that the term “principal office” refers to an organization’s registered office; namely, the place where its registered agent can be found. In this case, neither the parties’ affidavits nor documentary evidence addressed the location, if any, of Painters’ registered agent.

Subsection (10), however, further allows that preferred venue may lie in “the office of any such plaintiff organization...to which the claim relates or out of which the claim arose is located...” T.R. 75(A)(10). Thus, preferred venue does not necessarily lie only in the county of a plaintiff organization’s principal office. Rather, it also may lie in the county of a plaintiff organization’s “specific, non-principal office” if the claim relates to or out of that office.

The parties presented conflicting evidence regarding whether Painters’ claim related to or arose out of its Marion County office. Given this conflicting evidence as well as the lack of evidence regarding the location of Painters’ principal office, if any, we hereby reverse and remand to the trial court for a hearing on the evidence.

**Lessons:**

1. An organization’s principal office is the place where the registered agent can be found.
2. It’s not only the principal office that matters; venue can also be based on the locus of the specific office related to the dispute.
3. An evidentiary hearing may be necessary to establish venue.

**8. Worker’s Comp lien; collateral source evidence: *Travelers Indemnity Co. of America v. Jerry Jarrells*, 2009 WL 1424621 (Ind.Ct.App. May 21, 2009) (Darden)**

Jarrells suffered serious injuries when a wall fell on him at a Hamilton County construction site under the control of the general contractor, R.D.J. Custom Homes, Inc. (“R.D.J.”). The accident occurred in the scope of Jarrells’ employment with LeMaster, and Jarrells submitted worker’s compensation claims to Travelers in the approximate amount of \$66,135.67. Travelers paid Jarrells’ submitted worker’s compensation claims in full.

Jarrells brought a third-party personal injury action against R.D.J. and Armando Delgadillo, the general contractor and subcontractor, respectively, at the construction site. Travelers notified Jarrells’ counsel that Travelers was asserting a statutory lien in the amount of \$66,135.67 for the worker’s compensation payments that it had made on Jarrells’ behalf. Jarrells’ lawsuit against R.D.J. and Delgadillo proceeded to jury trial. At trial, the parties presented documentary evidence and argued to the jury that Travelers had made approximately \$66,135.67 in worker’s compensation payments on behalf of Jarrells and had asserted a lien in that amount.

The trial court gave the following final instruction: “If you find that Jerry Jarrells is entitled to recover, you shall consider evidence of payment made by some collateral source to compensate Jarrells for damages resulting from the accident in question. In determining the

amount of Jarrells [sic] damages, you must consider the following type of collateral source payments: Payments for workers compensation. In determining the amount received by Jarrells from collateral sources, you may consider any amount Jarrells is required to repay to a collateral source and the cost to Jarrells of collateral benefits received. Jarrells may not recover more than once for any item of loss sustained.”

The jury awarded Jarrells a judgment of \$508,750.00. Counsel for Jarrells informed Travelers that Travelers was not entitled to receive any of the judgment proceeds because the jury had already taken into consideration Travelers’ payment of worker’s compensation and had deducted that amount from its final award of damages to Jarrells.

At issue is whether Travelers has a right to a worker’s compensation lien. Indiana Code Section 22-3-2-13 provides, in pertinent part, the following: “If the injured employee or his dependents shall agree to receive compensation from the employer or the employer’s compensation insurance carrier or to accept from the employer or the employer’s compensation insurance carrier, by loan or otherwise, any payment on account of the compensation, or institute proceedings to recover the same, the employer or the employer’s compensation insurance carrier shall have a lien upon any settlement award, judgment or fund out of which the employee might be compensated from the third party.”

In 1986, the Indiana Legislature enacted the collateral source statute found in Indiana Code section 34-44-1-2. Specifically, Indiana Code section 34-44-1-2 provides: “In a personal injury or wrongful death action, the court shall allow the admission into evidence of: proof of collateral source payments other than payments of life insurance or other death benefits (and other exceptions) that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought.”

Travelers asserts that it is entitled to a statutory lien and/or *pro rata* reimbursement for the worker’s compensation payments that it had paid on behalf of Jarrells. Jarrells counters by citing to *Pendelton v. Aguilar*, 827 N.E.2d 614 (Ind.Ct.App. 2005), in support of its contention that the jury had already deducted the amount of the worker’s compensation payments from its award of damages to Jarrells, and therefore, granting Travelers’ motion for a set-off would result in a double set-off against Jarrells and a windfall to Travelers.

By its language in Indiana Code section 22-3-2-13, the Indiana Legislature expressed a clear intent to create a statutory lien in and for the benefit of any employer’s compensation insurance carrier who has made worker’s compensation payments on behalf of an injured worker, where the injured worker has recovered a judgment against a third party who has been found liable for the worker’s injuries.

We conclude that Travelers is entitled to a statutory lien and/or reimbursement from the judgment for the worker’s compensation it paid on Jarrells’ behalf, “subject to [ ] paying its pro-rata share of the expenses of the reasonable and necessary costs and expenses of asserting the third party claim.”

Vaidik, concurring in result: “It cannot be correct that Jarrells, who tendered the collateral source evidence jury instruction given by the trial court, can eradicate as a matter of law through his tendered jury instruction his statutory obligation under Indiana Code § 22-3-2-13 to repay his employer’s insurance carrier for the worker’s compensation benefits he received.”

Riley, dissenting in separate opinion: “Because the jury was instructed that Jarrells could not recover more than once for any item of loss sustained, it adjusted its damage award

downwards. By enforcing the lien, the majority is in effect imposing a double set-off on Jarrells. Here, the majority failed to make Jarrells whole.”

Fn.: “We strongly advise counsel to familiarize themselves with our supreme court’s opinion in *Filip v. Block*, 879 N.E.2d 1076, 1081 (Ind. 2008) (“[T]he entire designation must be in a single place, whether as a separate document or appendix or as a part of a motion or other filing”). Because these documents were not properly designated, they cannot be relied upon by the trial court or the appellate court in its review of the summary judgment proceedings.”

**Lesson:** The courts are struggling to reconcile the collateral source statute (which allows jurors to be informed of collateral source payments--suggesting the jury may appropriately reduce the award by the amount of the monies already received) with the worker’s compensation lien statute (which allows those monies to be paid over to the workers comp carrier after verdict).

**9. Bystander emotional distress claim based on medical malpractice: *Indiana Patient’s Compensation Fund v. Gary Patrick*, 2009 WL 1384732 (Ind.Ct.App. May 18, 2009) (Riley)**

Gary Patrick is the natural father of Christopher Patrick (Christopher). Christopher was involved in an automobile accident. He was treated at St. Mary’s Medical Center in Evansville, Indiana, and discharged the next day. That evening Christopher died due to an untreated ruptured colon from seatbelt trauma.

As a result of his son’s death, Patrick, individually and as personal representative of Christopher’s estate, brought a medical malpractice action against the physician who treated Christopher and against St. Mary’s Medical Center. In addition to claiming damages for his son’s death, Patrick asserted a claim for his own emotional distress. Patrick settled his claims against the health care providers. After the settlement, Patrick, individually and as personal representative of Christopher’s Estate, filed his petition for payment of excess damages against the Fund.

The Fund moved for summary judgment on Patrick’s individual claim for emotional distress damages, arguing that damages for negligent infliction of emotional distress are not recoverable under the Adult Wrongful Death Statute, I.C. § 34-23-1-2. The trial court concluded that Patrick’s claim for emotional distress damages was independent of his claim for damages under the Adult Wrongful Death Statute and awarded him \$600,000.00 on his independent emotional distress claim. The Fund asserts that the trial court erred when it granted Patrick an independent claim for emotional distress damages.

Patrick asserted that his emotional damages arose from the negligence of the medical personnel treating his son. His claim thus arises in the context of medical malpractice. Christopher was clearly a “patient” as defined by the Act. Patrick, being Christopher’s parent and having a “claim of any kind,” is also considered a “patient”. Thus, the trial court properly characterized Patrick’s claim for damages for emotional distress as independent of and in addition to the adult wrongful death claim.

On June 7, 2000, our supreme court signaled a new significant development in the law of negligent infliction of emotional distress when it decided *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000). In *Groves*, the court adopted the bystander rule. The holding recognizes that the emotional distress claim does not arise from the death of another, but rather from the direct involvement of the individual bringing the claim in the events which have caused the emotional

distress. Patrick is asserting damages for emotional distress as a bystander pursuant to the *Groves*' criteria.

Here, although Patrick was not present when the medical malpractice occurred—the health care provider's failure to diagnose Christopher's ruptured colon—he did deal with its aftermath. After Christopher was discharged from the hospital, Patrick took him home. That evening, Christopher called out to his father because he was vomiting blood. While Patrick was calling an ambulance, he saw Christopher throw up again, with blood coming out of his nose and mouth.

It is clear that Patrick witnessed the death of a loved one, a death caused by the negligent conduct of health care providers. As a result, we find that the trial court properly concluded that Patrick, as a bystander pursuant to *Groves*, could bring an independent claim for the negligent infliction of his emotional distress upon Christopher's death.

**Lessons:**

1. A surviving parent may collect for medical malpractice under the Adult Wrongful Death Statute and assert an independent claim for emotional distress.
2. A parent can be a "patient" if he has a "claim of any kind."

**10. Liquidated damages; noncompete agreement: *Coffman v. Olson & Company, P.C.*, 2009 WL 1384947 (Ind.Ct.App. May 18, 2009) (Kirsch)**

Craig Coffman, an accountant, signed a noncompete agreement with his employer, Olson & Company. Coffman attacks the Agreement as void as a matter of public policy. Coffman likens accounting services to legal services in that they both involve a relationship with a client in which the professional learns the peculiarities of each client's needs. Coffman notes that attorneys are prohibited from noncompetition agreements by Indiana Rule of Professional Conduct 5.6. However, there is no such ethical rule restricting employees and employers in the accounting profession from entering into noncompetition agreements. In the present case, the Agreement contains both a geographical limitation, Lawrence County and Monroe County, and a two-year time limitation on the restraint of trade. The noncompetition provision here is not against public policy.

We addressed liquidated damages in *Gershin v. Demming*, 685 N.E.2d 1125, 1127-28 (Ind.Ct.App. 1997): "A typical liquidated damages provision provides for the forfeiture of a stated sum of money upon breach without proof of damages. Where the sum stipulated in the agreement is not greatly disproportionate to the loss likely to occur, the provision will be accepted as a liquidated damages clause and not as a penalty, but where the sum sought to be fixed as liquidated damages is *grossly disproportionate* to the loss which may result from the breach, the courts *will treat the sum as a penalty* rather than as liquidated damages. In determining whether a stipulated sum payable on a breach of contract constitutes liquidated damages or a penalty, the facts, the intention of the parties and the reasonableness of the stipulation under the circumstances of the case are all to be considered. The distinction between a penalty provision and one for liquidated damages is that a penalty is imposed to secure performance of the contract and liquidated damages are to be paid in lieu of performance. Notwithstanding a plethora of abstract tests and criteria for the determination of whether a

provision is one for a penalty or liquidated damages, there are no hard and fast guidelines to follow.”

In *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208 (Ind.Ct.App. 1982), the liquidated damages clause of the contract between an accountant and an accounting firm called for payment by the former employee of three times the former employer’s gross annual billing to clients contacted, advised, visited, or in any way solicited by the former employee. We held that the liquidated damages clause created a penalty, and was therefore void and unenforceable.

We find that the trial court correctly found the liquidated damages clause in the present case to be a penalty and there, unenforceable. Coffman was to pay twice the prior year’s gross billings for each client in the event Coffman failed to notify Olson.

In the absence of an enforceable liquidated damages clause, lost profits are an appropriate measure of damages in actions involving noncompetition provisions. Here, the trial court awarded Olson \$79,263 *i.e.*, the gross revenue from the Olson clients for the year preceding Coffman’s termination from employment with Olson. In awarding lost profits, net profits, and not gross profits, are generally the proper measure of recovery. In a way, the trial court took into consideration the fact that gross revenue is not equivalent to lost profits, and by limiting the recovery to one year’s worth of gross revenue, Coffman’s salary could be accounted for, making the damages award more closely resemble lost profits. Here, reflecting the potential loss of such clients in any event, the trial court simply used gross revenue without a multiplying factor.

**Lessons:**

1. Accountants are subject to noncompetes (unlike lawyers).
2. Multiples of gross profits are unenforceable as liquidated damages.

**11. Substantive changes to deposition testimony;** from an article by Gregory P. Joseph © 2009.

Fed. R. Civ. P. 30(e)(1) provides that, on request, a deponent is entitled to 30 days within which to review the transcript and, “if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.” Given the seemingly clear language of the Rule, most courts permit any change, including substantive changes, to deposition testimony. *See Betts v. General Motors Corp.*, 2008 U.S. Dist. LEXIS 54350 (N.D. Miss. July 16, 2008).

There is, however, tension between this approach and the sham affidavit rule, which is also applied in most courts and which bars the submission on summary judgment of an affidavit that contradicts the affiant’s deposition testimony. The Seventh, Ninth and Tenth Circuits hold that, on summary judgment, a substantive Rule 30(e) correction should be stricken, just like a sham affidavit. *See Hambleton Bros. Lumber Co. v. Balkin Enters.*, 397 F.3d 1217, 1225 (9th Cir. 2005); *Burns v. Bd. of County Comm’rs*, 330 F.3d 1275, 1282 (10th Cir. 2003); *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

Note: Ind. T.R. 30(e) does not specifically authorize a change to the substance of an answer in a deposition transcript. It also does not restrict the changes that can be made. It merely says “the reason therefor” should be stated.

## ADVOCACY TIP OF THE MONTH: Beware invited concessions.

From *Making Your Case, The Art of Persuading Judges* by Antonin Scalia and Bryan Garner (2008), pp. 199-200:

“The unduly accommodating lawyer—a frequently observed creature, especially in appellate courts—has given away many a case. The lawbooks are filled with affirmances that would have been reversals or remands for further proceedings were it not for the concession of a crucial fact by accommodating counsel. And propositions of law that might well have been exceedingly difficult for an opinion to establish have often been happily resolved (for purposes of the case at hand, at least) by foolish concessions.

It is not unusual for a judge to come to the bench, having read all the briefs, with a clear idea of what the judgment ought to be *but for* one missing fact, or *but for* one possible legal obstacle. If the judge can get you to concede that fact, or to concede a point that would make that legal obstacle irrelevant, the opinion is all but written. You should not cooperate in your own destruction.”

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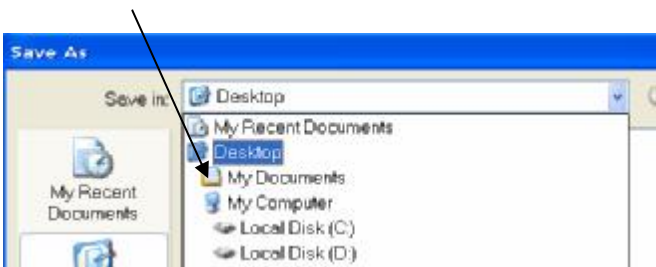
The screenshot shows the website for Price Waicukauski & Riley, LLC. The header includes the firm's name and logo, a tagline "Ask your lawyers when they last tried a case - then ask us.", and phone numbers: 317-633-8787 and 800-905-2856. The navigation menu includes HOME, OVERVIEW, ATTORNEYS, PRACTICE AREAS, NEWS, RESOURCES, and CONTACT US. The main content area is titled "RESOURCES" and "Indiana Law Update". It features a paragraph about Mr. Ronald J. Waicukauski and a list of updates. The list includes:

- February 26, 2009: Podcast, Handout
- November 20, 2008: Podcast, Handout
- July 31, 2008: Podcast

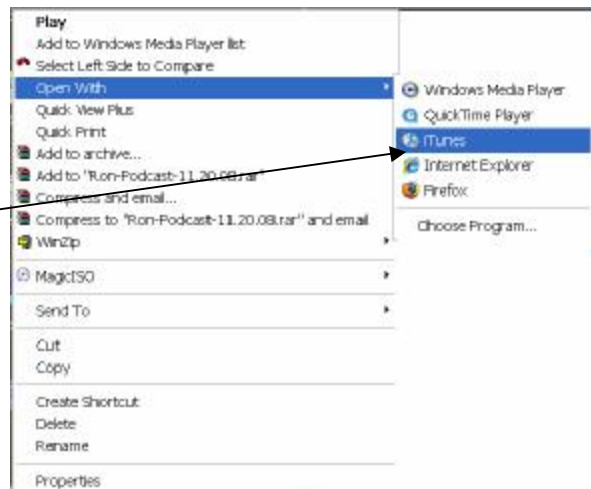
A context menu is open over the "Podcast" link for the July 31, 2008 update, showing options: Open in New Window, Open in New Window, Save Target As..., Print Target, Copy, Copy Shortcut, Paste, Add to Favorites..., Append Link Target to Existing PDF, Append Link Target to Existing PDF, Convert Link Target to Adobe PDF, Convert Link Target to PDF, Open with Existing PDF, Convert to 30...

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**INDIANA LAW UPDATE**  
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### ADVOCACY TIP OF THE MONTH: Beware invited concessions

#### 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: THE SUPREME COURT AND RELIGIOUS AFFILIATION

From CNNPolitics.Com of May 27, 2009:

As Supreme Court hopeful Sonia Sotomayor breaks ground for Hispanics, she is poised to add an exclamation point to another historic demographic shift: the move to a Catholic court. Sotomayor was raised Catholic and if she is confirmed, six out of nine, or two-thirds of the justices on the court will be from the faith. "Presidents used to reserve a Catholic seat and a Jewish seat on the Supreme Court," Barbara Perry, a government professor at Sweetbriar College told CNN Radio. "Now we've moved from a Catholic seat on the court to a Catholic court."

The current court is composed of two Jewish members -- Justices Stephen Breyer and Ruth Bader Ginsburg. If Sotomayor joins the bench, Justice John Paul Stevens would be the solitary Protestant on a court once dominated by white Protestant men. "What that tells is that in our politics, religion doesn't matter anymore," Perry said. Then she added: "I don't think our politics are ready for an Islamic justice at this point."

### **1. Statute of limitations for federal claims in state court; sovereign immunity: *Januchowski v. Northern Indiana Commuter Transportation District, 2009 WL 1272304 (Ind.Ct.App. May 7, 2009) (Vaidik)***

While working for the Northern Indiana Commuter Transportation District ("NICTD") as a carman, plaintiff Steven Januchowski alleged that he was injured by shifting panels as a result of NICTD's negligence. NICTD operates a passenger commuter rail service from South Bend, Indiana, to Chicago, Illinois. Januchowski brought his claim under the Federal Employers' Liability Act (FELA), which provides a federal cause of action for railroad employees injured as a result of negligence. Januchowski brought his claim more than two years, but less than three years, after the alleged injuries.

At trial, Januchowski argued that FELA's three-year statute of limitation applied to his case. NICTD argued that Indiana's general two-year statute of limitation for personal injury torts applied because of the Indiana Tort Claims Act (ITCA), and that, as a result, Januchowski's claim was time-barred. Agreeing with NICTD on this point, the trial court granted summary judgment in favor of NICTD.

The trial court determined first that NICTD was a political subdivision. As a result, Januchowski was required under the ITCA to file notice with NICTD's governing body and the Indiana political subdivision risk management commission within 180 days after the loss occurred. The trial court next determined that Januchowski had substantially complied with the notice requirements. Even though he did not send notice within 180 days to the political subdivision risk management commission as required by the ITCA for political subdivisions, because Januchowski sent notice to NICTD within sixty days of his accident the purpose of the notice statute was fulfilled.

In an action against a private entity, the United States Supreme Court has determined that the right to bring a FELA claim within the time provided in the FELA statute of limitation is a substantive right that controls in an action brought in a state court, regardless of any state statute of limitation. Although it is settled that the FELA statute of limitation applies over a state statute of limitation in suits against private entities, it has not been settled as to which statute of

limitation applies in suits in Indiana against political subdivisions such as NICTD, where issues of sovereign immunity come into play.

To answer this question, we turn to Indiana's body of sovereign immunity law. Historically, a state may not be sued in its own courts unless it has waived its sovereign immunity by expressly consenting to such suit through a clear declaration of that consent. In 1972, the Indiana Supreme Court abolished the doctrine of common law sovereign immunity in this state, leaving several limited exceptions, and determined that the legislature alone was responsible for considering which specific types of governmental conduct would result in immunity from liability. In 1974, the General Assembly enacted the ITCA. The ITCA is comprehensive, and it provides that governmental entities are subject to liability for their torts in Indiana state courts, unless the activity giving rise to the tort falls within its list of enumerated exceptions.

We find the omission of a statute of limitation in the ITCA to be significant. This is because the General Assembly knows how to include a statute of limitation into the body of an act. For example, the legislature has included a statute of limitation into the Indiana Contract Claims Act ("ICCA"). The ITCA contains many requirements, but a statute of limitation is not one of them. This is crucial. The well-established rule of statutory construction known as *expressio unius est exclusio alterius*, that is, the enumeration of certain things in a statute necessarily implies the exclusion of all others. Because the ITCA does not expressly contain a statute of limitation, we find no support for NICTD's argument that Indiana's two-year statute of limitation applies to all tort claims against the State no matter the type of tort. If the legislature had intended for that statute of limitation to apply to all claims under the ITCA, it would have inserted such a requirement into the ITCA. We find that compliance with Indiana's personal injury statute of limitation is not a condition for suit under the ITCA when the claim is controlled by FELA.

DARDEN, Judge, dissenting.

The FELA provides for a three-year statute of limitation for filing a claim, *see* 45 U.S.C.A. § 56; whereas, the Indiana Tort Claims Act contains no express statute of limitation provision. The majority finds the latter dispositive, as constituting the choice of Indiana's legislature *not to include* a statute of limitation for the Indiana Tort Claims Act, thereby permitting application of FELA's statute of limitation provision when a FELA claim is filed in an Indiana state court. However, such ignores the fact that Indiana does have a statute of limitation for personal injury claims, to wit: two years and the long-standing principle that statutes addressing the same subject are *in pari materia* and to be read in harmony if possible.

Given the concurrent subject matter jurisdiction of Indiana and federal courts, Januchowski had a choice of forums. However, the forum he chose was the state court. I find that by choosing to file his action in the state court, he brought himself within the jurisdiction of Indiana's procedural laws--including the Indiana procedural statute providing for a two-year statute of limitations for personal injury claims.

**Lessons:**

1. The FELA 3-year statute controls; not Indiana's two-year statute for torts.
2. Substantial compliance with the notice requirements of the Tort Claims Act will sometimes suffice in lieu of full compliance.
3. Latin expressions are still popular in the Court of Appeals.

Note: “Some Latin expressions are convenient shorthand for rules or principles that have no English shorthand equivalent (res ipsa loquitur, or inclusion unius est exclusion alterius). But avoid using other Latin phrases, such as *ceteris paribus*, *inter alia*, *mutatis mutandis*, and *pari passu*. Judges are permitted to show off in this fashion, but lawyers are not. And the judge who does not happen to know the obscure Latin phrase you have flaunted will think you a twit.” From *Making Your Case, The Art of Persuading Judges* by Antonin Scalia and Bryan Garner (2008), p. 114.

**2. Lemon Law: *Metro Health Professionals, Inc. v. Chrysler, LLC*, 2009 WL 1227868 (Ind.Ct.App. May 5, 2009) (Brown)**

Metro Health Professionals, Inc. (“MHP”), appeals the trial court's grant of summary judgment to Chrysler, LLC. Brent A. Losier, the president of MHP, purchased a Jeep from an authorized Chrysler dealership. The designated evidence reveals that Losier took the Jeep to an authorized repair facility on five occasions. On the first three occasions, Chrysler returned the Jeep to Losier without making any repairs. On the fourth occasion, Chrysler performed a diagnostic test but made no repairs, and the Jeep again malfunctioned. MHP then wrote a letter to Chrysler “advising [Chrysler] of a claim under the Indiana Motor Vehicle Protection Act.” MHP thus asserted its rights under Indiana's Lemon Law following the fourth unsuccessful repair attempt and prior to taking the vehicle in for yet another repair attempt. After writing the letter, Losier took the Jeep to Chrysler a fifth time and the technicians finally made repairs to it. Specifically, the technicians “replaced the front control module.”

MHP filed a complaint against Chrysler seeking relief under the Indiana Motor Vehicle Protection Act, commonly known as the Lemon Law, which provides:

If a motor vehicle suffers from a nonconformity and the buyer reports the nonconformity within the term of protection to the manufacturer of the vehicle, its agent, or its authorized dealer then the manufacturer of the motor vehicle or the manufacturer's agent or authorized dealer shall make the repairs that are necessary to correct the nonconformity, even if the repairs are made after expiration of the term of protection.

“Nonconformity” means “any specific or generic defect or condition or any concurrent combination of defects or conditions that: (1) substantially impairs the use, market value, or safety of a motor vehicle; or (2) renders the motor vehicle nonconforming to the terms of an applicable manufacturer's warranty.” Ind.Code § 24-5-13-6.

Ind.Code § 24-5-13-10 provides:

If, after a reasonable number of attempts, the manufacturer, its agent, or authorized dealer is unable to correct the nonconformity, the manufacturer shall accept the return of the vehicle from the buyer and, at the buyer's option, either, within thirty (30) days, refund the amount paid by the buyer or provide a replacement vehicle of comparable value.

Ind.Code § 24-5-13-15(a)(1) provides that “[a] reasonable number of attempts is considered to have been undertaken to correct a nonconformity if: ... the nonconformity has been subject to repair at least four (4) times by the manufacturer or its agents or authorized dealers, but the nonconformity continues to exist.”

MHP argues that the nonconformity in this case was subject to repair four times but continued to exist. MHP cites *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 827 N.Y.S.2d 88, 860 N.E.2d 705 (N.Y.2006), where the court held: “The plain language of the provision obligates a consumer to demonstrate that the vehicle was subject to repair at least four times and that the same defective condition remained unresolved after the fourth attempt. Therefore, once a consumer has met the four-repair threshold, the presumption arises regardless of whether the manufacturer later remedies the problem. It is clear that the Legislature intended to create [a] bright-line presumption[ ] by which a consumer can demonstrate that the manufacturer was accorded a reasonable number of attempts to alleviate the problem....”

Chrysler cites *Computer Network, Inc. v. AM Gen. Corp.*, 265 Mich.App. 309, 696 N.W.2d 49, 62 (2005), where the Michigan Court of Appeals held that “there must be a showing that a *reported condition under* [the Michigan Lemon Law], *continues to exist* before a remedy may be obtained.”

We find the reasoning of the Court of Appeals of New York in *Spitzer* to be persuasive. We therefore adopt the reasoning in *Spitzer* insofar as it resolves the case before us, where a claim is made shortly after the fourth repair attempt. Thus, to the extent that *Computer Network* conflicts with the holding in *Spitzer*, we decline to follow it.

Chrysler may not avoid liability under the Lemon Law by simply doing nothing when faced with a customer's complaints. Therefore, Chrysler was obligated at the MHP's option, either, within thirty days, to refund the amount paid by MHP or provide a replacement vehicle of comparable value. MHP is entitled to summary judgment as a matter of law.

**Lesson:** For auto manufacturers, after four strikes, you're out. That is, you get four chances to the make the repair, and if you don't, the buyer gets a refund or a replacement vehicle.

### **3. Name changes; preliminary injunction. *Leone v. Commissioner, Indiana Bureau of Motor Vehicles*, 2009 WL 1361491 (Ind.Ct.App. May 15, 2009) (Bradford)**

The plaintiffs in this class action appeal from the trial court's denial of their motion for a preliminary injunction against the Commissioner of the Indiana Bureau of Motor Vehicles, *et al.*, (“the BMV”). Because we conclude that the Class has shown that the BMV's challenged policy violates constitutional guarantees of due process by failing to provide ascertainable standards, but that a preliminary injunction would not be in the public interest, we affirm the trial court's denial of the Class's request.

Sometime in 2005, the BMV entered into an agreement with the Social Security Administration (“SSA”) allowing the BMV to verify its records against those kept by the SSA. A series of checks performed in 2007 uncovered a number of BMV records that did not match records kept by the SSA. Beginning in November of 2007, the BMV sent a series of three letters to, among others, persons whose names on file with the BMV did not match those on file with the SSA (“the Class”).

On April 9, 2008, the trial court certified the Class, numbering over 15,000, as “all persons who are currently threatened with invalidation of their BMV-issued drivers licenses or identification cards, or have had their licenses or identification cards invalidated, because there exists a discrepancy with their names on file with the BMV and their names on file with the Social Security Administration.”

The Class contends that the BMV's policy violates Indiana and federal law, which, if true, would also relieve the Class of the burden of showing irreparable harm or that the balance of harms between the parties is in its favor. “[W]here the action to be enjoined is unlawful, the unlawful act constitutes *per se* “irreparable harm” for purposes of the preliminary injunction analysis. When the *per se* rule is invoked, the trial court has determined that the defendant's actions have violated a statute and, thus, that the public interest is so great that the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm or whether the plaintiff will suffer greater injury than the defendant. Accordingly, invocation of the *per se* rule is only proper when it is clear that a statute has been violated.”

The Class argues that the BMV violates Indiana law by essentially deferring to the SSA on the question of one's legal name, when the matter is purely one of Indiana law. While we agree that it is the law of Indiana that a person can change his or her legal name without resort to formal legal process, it does not follow that all others, including governmental agencies like the BMV, are required to simply accept the word of the applicant that he is who he claims to be. In other words, the ability to change one's name at will does not equate to freedom from all of the consequences of such a decision. We believe that the public interest in preventing identity theft requires that one must bear the consequences, including the inconveniences, of changing one's name.

In any event, we conclude that the BMV has, in fact, failed to articulate ascertainable standards for current license and identification card holders, and the policy therefore fails to comport with the requirements of due process. One does not know whether the BMV's information must be made to match the SSA's (or vice versa) or whether the discrepancy may remain if it is adequately explained. In short, class members are given no clear indication regarding how their individual cases will be evaluated and no clear instruction on how they might avoid the revocation of their licenses or identification cards. So, while we conclude that the BMV can require and is requiring a match between its information and SSA's, we believe that the BMV has failed to give the class members fair notice regarding this requirement.

The question, then, is whether the presence of an unresolved discrepancy between BMV and SSA records is a rational basis for suspending or revoking a driver's license or identification card. We conclude that it is. In short, the policy effectively blocks a well-known avenue for identity theft by making it much more difficult to appropriate another's social security number in order to obtain state identification.

Detective Eads testified that detection of fraudulent attempts to obtain state-issued identification had increased significantly since the program started, that the program assisted in the prevention of identity theft, and that granting the injunction request would hinder investigation of crime.

We conclude that the BMV policy does not violate Indiana law by using the SSA's files to verify the accuracy of its own information and by requiring that individuals correct any discrepancies. We also conclude, however, that the policy fails to provide ascertainable standards and so violates the federal Constitution's guarantee of due process.

RILEY, Judge, dissenting:

The majority relies upon the testimony of Detective Eads to find a “rational basis” for the BMV's ultra vires acts. However, the law as codified by our legislature is that a person applying for a driver's license or identification card must provide the BMV with their “full legal name.” It has been the long standing law of our state that: “a full name consists of one christian or given

name, and one surname or patronymic [derived from the name of the father]. The two, using the christian name first and the surname last, constitute the legal name of the person. Any one may have as many middle names or initials as are given to him, or as he chooses to take; they do not affect his legal name. No person is bound to accept his patronymic as a surname, nor his christian name as a given name, though the custom to do so is almost universal amongst English-speaking people, who have inherited the common law.” *Schofield v. Jennings*, 68 Ind. 232, 234-35, 1879 WL 5847, 1 (1879). There is no law preventing a man from taking whatever name he has a fancy for, nor are there any particular formalities required to be observed on adopting a fresh surname.

If the BMV now thinks that in the day and age of identity theft that applicants for drivers licenses or identification cards should provide their name as it appears in the SSA database, then the BMV has the opportunity to approach our legislature and seek an amendment to Indiana Code sections 9-24-11-5(a)(1) and 9-24-16-3(b)(1).

**Lessons:**

1. A person can change his or her name without legal process.
2. Your “legal name” does not include a middle name or initial.
3. BMV can require that the name match social security records before issuing a license or identification card but must establish a clear process for resolving the problem when a discrepancy arises

**4. Failure to comply with discovery: *Gallagher v. State of Indiana*, 2009 WL 1440288 (Ind.Ct.App. May 22, 2009) (Kirsch)**

Stephan Gallagher was convicted of drug dealing as a Class A felony following a jury trial. On appeal, Gallagher argues that the trial court erred when it admitted the audio recording of the drug transaction because the copy sought to be admitted at the trial was of a better quality than the one given to Gallagher. He contends that the copy that was given to him through discovery was inaudible and that he formed his trial strategy around this fact. When the State sought to admit a copy of the recording, which Gallagher claims was of better quality than his copy, at trial, he asserts it was too late to cure the prejudice that resulted.

Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. If remedial measures are warranted, a continuance is usually the proper remedy, but exclusion of evidence may be appropriate where the violation has been flagrant and deliberate, or so misleading or in such bad faith as to impair the right to a fair trial.

A defendant will waive any alleged error regarding noncompliance with the trial court's discovery order by failing to request a continuance. Although Gallagher argued at trial that he was prejudiced in his trial strategy because the copy of the recording he was provided was of a poorer quality than the one sought to be introduced, he did not request a continuance to reevaluate and alter his trial strategy. Therefore, he has waived this issue.

**Lesson:** To preserve your objection to a discovery failure, request a continuance.

**5. Physician testimony by deposition: *Beldon v. State of Indiana*, 2009 WL 1424616 (Ind.Ct.App. May 21, 2009) (Riley)**

Clint Beldon appeals his conviction for operating a motor vehicle while intoxicated. Dr. Michelle Bache, an emergency room physician, treated Beldon upon his arrival. During the course of her treatment, and absent any request by law enforcement to do so, Dr. Bache ordered that samples of Beldon's blood and urine be collected and tested. The test results revealed that Beldon's blood alcohol content was 0.27.

Over Beldon's objection, the trial court allowed the State to present Dr. Bache's video deposition into evidence for the jury to watch. Beldon argues that Dr. Bache's deposition was hearsay, and thus, its admission violated his fundamental rights to confront witnesses under both the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution.

Generally, an absent witness' deposition testimony offered in court to prove the truth of the matter asserted constitutes classic hearsay. However, possible exceptions to the hearsay rule exist under both Indiana Trial Rule 32 and Indiana Evidence Rule 804. These rules allow the use of prior recorded testimony in lieu of live testimony when special circumstances exist. Nevertheless, the constitutional right of confrontation restricts the range of admissible hearsay by requiring (1) that the State either produce the declarant or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant and (2) that the statements bear sufficient indicia of reliability. Depositions that comport with the principal purposes of cross-examination provide sufficient indicia of reliability.

However, our supreme court has noted that Trial Rule 32 is not applicable to claims involving a violation of the defendant's Sixth Amendment right of confrontation. As such, Trial Rule 32 plays no part in our analysis of the instant case. The issue here is not whether "exceptional circumstances" existed so as to justify admitting Dr. Bache's deposition into evidence at trial, but rather, the issue is whether the State made a good faith effort to obtain Dr. Bache's attendance at trial.

The record does not reflect that the State made a good faith effort to obtain Dr. Bache's attendance at trial. Granted, after Dr. Bache filed an affidavit stating that she would not be available to testify on the day of trial because of her work schedule, the State took steps to preserve her testimony through a videotaped deposition. However, a busy work schedule is not sufficient to circumvent the constitutional right to confrontation. The State could have asked Dr. Bache to rearrange her work schedule, or ask another doctor to manage her patient responsibilities for the short duration of the trial. Likewise, the record indicates that the State failed to make any effort to attempt to secure Dr. Bache's attendance at trial by subpoena. We conclude that the trial court erred when it determined that Dr. Bache was unavailable to testify and that it abused its discretion when it admitted Dr. Bache's videotaped deposition in lieu of live testimony.

We conclude that Dr. Bache's videotaped deposition was merely cumulative of this other evidence. As such, we hold that although the trial court erred by admitting the videotaped deposition of Dr. Bache, the error was harmless beyond a reasonable doubt.

**Lesson:** In a criminal case, the State must make a good faith effort to produce physician at trial before using deposition testimony. A work schedule conflict will not be a sufficient excuse without more.

**6. Raising issue for first time in Appellee’s Brief: *Hardley v. State of Indiana*, 2009 WL 1229428 (Ind.Ct.App. May 5, 2009) (Dickson)**

To address conflicting opinions from the Court of Appeals and to consider the import of recent decisions of this Court, we grant transfer and hold that the State may challenge the legality of a criminal sentence by appeal without first filing a motion to correct erroneous sentence, and that such appeal need not be commenced within thirty days of the sentencing judgment.

The defendant was convicted and sentenced for three criminal offenses. His appeal presented claims of insufficient evidence and double jeopardy. Among the arguments made in the State's reply brief was that the trial court had erroneously imposed concurrent sentences in contravention of statute. As to the State's contention, the Court of Appeals, asserting the doctrine of fundamental error, refused to require such claim to be preserved by contemporaneous objection at trial, declined to require the State to challenge the allegedly erroneous sentence within thirty days of final judgment, and declared “[w]e cannot ignore an illegal sentence, even if the State did fail to properly preserve the issue.”

The defendant sought transfer, in part arguing that the State waived any right to challenge the sentence because it failed to raise an objection in the trial court, did not file a motion to correct an erroneous sentence, and did not raise the issue until cross-appeal. This position is consistent with *Hoggatt v. State*, 805 N.E.2d 1281, 1284 (Ind.Ct.App.2004). The Court of Appeals majority expressly declined to follow *Hoggatt*.

The fundamental error doctrine serves, in extraordinary circumstances, to permit appellate consideration of a claim of trial error even though there has been a failure to make a proper contemporaneous objection during the course of a trial, which failure would ordinarily result in procedural default as to the claimed error. The doctrine applies to those errors deemed “so prejudicial to the rights of a defendant as to make a fair trial impossible.” By its very nature, the doctrine exists to protect the fair trial rights of the defendant, not the State. And while sound judicial policy requires permitting the State to challenge an illegal sentence, the fundamental error doctrine is an inapposite rationale.

Notwithstanding the limited statutory list of permissible criminal appeals by the State and the inappropriateness of fundamental error as a rationale, a separate additional source of statutory authority empowers the State to challenge illegal sentences. As to erroneous sentences, the legislature has also specifically authorized:

If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

Ind.Code § 35-38-1-15. The plain language of this provision, with its requirement of notice to a defendant, is not limited only to defendants, but by clear implication is also available to the State.

Considering the clear unacceptability of sentences that plainly exceed or otherwise violate statutory authority and the fact that the legislature has authorized the State to challenge erroneous sentences, we hold that sound policy and judicial economy favor permitting the State to present claims of illegal sentence on appeal when the issue is a pure question of law that does

not require resort to any evidence outside the appellate record.

In conclusion, we grant transfer and hold that: (1) fundamental error is not a satisfactory rationale to justify the State's challenge to an illegal sentence; (2) the legislature intended to permit the State to challenge erroneous criminal sentences; (3) the State's appellate sentence challenge, when the issue is a pure question of law and does not require resort to evidence outside the appellate record, is an acceptable substantial equivalent to the motion to correct erroneous sentence; (4) the State's appellate challenge to an illegal sentence is not limited to facially erroneous sentences; and (5) such an appellate challenge need not be initiated in the trial court nor commenced within thirty days of the sentencing judgment.

BOEHM, J., dissents with separate opinion in which RUCKER, J., concurs.

We do not ordinarily allow parties to raise issues for the first time in an appellate court. I believe the reasons for this rule apply equally here and that permitting the State to resurrect a dead issue in its appellee's brief raises some undesirable collateral issues. It does not seem unreasonable to require the State to speak up within thirty days or forever hold its peace as to claimed sentencing errors that are not apparent on the face of the judgment.

**Lessons:**

1. In some circumstances, an issue can be raised for the first time in the appellee's brief.
2. The Court of Appeals does not always follow recent rulings by another panel.
3. The fundamental error doctrine does not apply to errors adverse to the State.

**7. Preferred venue; principal office: *Painters District Council 91 v. Calvert Enterprises Electronic Services, Inc.*, 2009 WL 1424625 (Ind.Ct.App. May 21, 2009) (Darden)**

Painters District Council 91 ("Painters") appeals the trial court's order granting Calvert Enterprises Electronic Services, Inc.'s ("Calvert") motion to transfer venue. Painters consists of twelve local unions with offices throughout Indiana, as well as offices in Kentucky and Tennessee. Calvert is a Kentucky corporation with its principal place of business in Henderson, Kentucky.

Stephen Shofstall, as Painters' business manager and secretary-treasurer ("BMST"), and Calvert entered into a service agreement (the "Agreement"), whereby Calvert would provide information technology ("IT") support to Painters for a period of sixty months. Painters filed a complaint for declaratory judgment against Calvert in Marion Superior Court. It alleged that Shofstall entered into the Agreement without authority. It further alleged that Calvert breached the Agreement by providing unsatisfactory service.

Calvert filed a motion to transfer venue, seeking transfer of venue to Vanderburgh County. The trial court entered its order, granting Calvert's motion and transferring the case to Vanderburgh County.

Generally, "[p]referred venue is determined by reference to subsections (1)-(9) of Rule 75(A)." However, preferred venue may be established under subsection (10): (1) when none of the preceding nine subsections establish preferred venue or (2) when all of the defendants are nonresident individuals or nonresident organizations without a 'principal office in the state.'" The parties do not dispute that subsection (10) applies in this case.

Trial Rule 75(A)(10) provides that preferred venue lies in: "The county where either one of more individual plaintiff resides, *the principal office of any plaintiff organization or*

*governmental organization is located, or the office of any such plaintiff organization or governmental organization to which the claim relates or out of which the claim arose is located....”* Painters, as an unincorporated association is a plaintiff organization.

In *American Family*, the Indiana Supreme Court addressed the term “principal office” as used in Trial rule 75(A). It determined that the term “principal office” refers to an organization’s registered office; namely, the place where its registered agent can be found. In this case, neither the parties’ affidavits nor documentary evidence addressed the location, if any, of Painters’ registered agent.

Subsection (10), however, further allows that preferred venue may lie in “the office of any such plaintiff organization...to which the claim relates or out of which the claim arose is located...” T.R. 75(A)(10). Thus, preferred venue does not necessarily lie only in the county of a plaintiff organization’s principal office. Rather, it also may lie in the county of a plaintiff organization’s “specific, non-principal office” if the claim relates to or out of that office.

The parties presented conflicting evidence regarding whether Painters’ claim related to or arose out of its Marion County office. Given this conflicting evidence as well as the lack of evidence regarding the location of Painters’ principal office, if any, we hereby reverse and remand to the trial court for a hearing on the evidence.

**Lessons:**

1. An organization’s principal office is the place where the registered agent can be found.
2. It’s not only the principal office that matters; venue can also be based on the locus of the specific office related to the dispute.
3. An evidentiary hearing may be necessary to establish venue.

**8. Worker’s Comp lien; collateral source evidence: *Travelers Indemnity Co. of America v. Jerry Jarrells*, 2009 WL 1424621 (Ind.Ct.App. May 21, 2009) (Darden)**

Jarrells suffered serious injuries when a wall fell on him at a Hamilton County construction site under the control of the general contractor, R.D.J. Custom Homes, Inc. (“R.D.J.”). The accident occurred in the scope of Jarrells’ employment with LeMaster, and Jarrells submitted worker’s compensation claims to Travelers in the approximate amount of \$66,135.67. Travelers paid Jarrells’ submitted worker’s compensation claims in full.

Jarrells brought a third-party personal injury action against R.D.J. and Armando Delgadillo, the general contractor and subcontractor, respectively, at the construction site. Travelers notified Jarrells’ counsel that Travelers was asserting a statutory lien in the amount of \$66,135.67 for the worker’s compensation payments that it had made on Jarrells’ behalf. Jarrells’ lawsuit against R.D.J. and Delgadillo proceeded to jury trial. At trial, the parties presented documentary evidence and argued to the jury that Travelers had made approximately \$66,135.67 in worker’s compensation payments on behalf of Jarrells and had asserted a lien in that amount.

The trial court gave the following final instruction: “If you find that Jerry Jarrells is entitled to recover, you shall consider evidence of payment made by some collateral source to compensate Jarrells for damages resulting from the accident in question. In determining the

amount of Jarrells [sic] damages, you must consider the following type of collateral source payments: Payments for workers compensation. In determining the amount received by Jarrells from collateral sources, you may consider any amount Jarrells is required to repay to a collateral source and the cost to Jarrells of collateral benefits received. Jarrells may not recover more than once for any item of loss sustained.”

The jury awarded Jarrells a judgment of \$508,750.00. Counsel for Jarrells informed Travelers that Travelers was not entitled to receive any of the judgment proceeds because the jury had already taken into consideration Travelers’ payment of worker’s compensation and had deducted that amount from its final award of damages to Jarrells.

At issue is whether Travelers has a right to a worker’s compensation lien. Indiana Code Section 22-3-2-13 provides, in pertinent part, the following: “If the injured employee or his dependents shall agree to receive compensation from the employer or the employer’s compensation insurance carrier or to accept from the employer or the employer’s compensation insurance carrier, by loan or otherwise, any payment on account of the compensation, or institute proceedings to recover the same, the employer or the employer’s compensation insurance carrier shall have a lien upon any settlement award, judgment or fund out of which the employee might be compensated from the third party.”

In 1986, the Indiana Legislature enacted the collateral source statute found in Indiana Code section 34-44-1-2. Specifically, Indiana Code section 34-44-1-2 provides: “In a personal injury or wrongful death action, the court shall allow the admission into evidence of: proof of collateral source payments other than payments of life insurance or other death benefits (and other exceptions) that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought.”

Travelers asserts that it is entitled to a statutory lien and/or *pro rata* reimbursement for the worker’s compensation payments that it had paid on behalf of Jarrells. Jarrells counters by citing to *Pendelton v. Aguilar*, 827 N.E.2d 614 (Ind.Ct.App. 2005), in support of its contention that the jury had already deducted the amount of the worker’s compensation payments from its award of damages to Jarrells, and therefore, granting Travelers’ motion for a set-off would result in a double set-off against Jarrells and a windfall to Travelers.

By its language in Indiana Code section 22-3-2-13, the Indiana Legislature expressed a clear intent to create a statutory lien in and for the benefit of any employer’s compensation insurance carrier who has made worker’s compensation payments on behalf of an injured worker, where the injured worker has recovered a judgment against a third party who has been found liable for the worker’s injuries.

We conclude that Travelers is entitled to a statutory lien and/or reimbursement from the judgment for the worker’s compensation it paid on Jarrells’ behalf, “subject to [ ] paying its pro-rata share of the expenses of the reasonable and necessary costs and expenses of asserting the third party claim.”

Vaidik, concurring in result: “It cannot be correct that Jarrells, who tendered the collateral source evidence jury instruction given by the trial court, can eradicate as a matter of law through his tendered jury instruction his statutory obligation under Indiana Code § 22-3-2-13 to repay his employer’s insurance carrier for the worker’s compensation benefits he received.”

Riley, dissenting in separate opinion: “Because the jury was instructed that Jarrells could not recover more than once for any item of loss sustained, it adjusted its damage award

downwards. By enforcing the lien, the majority is in effect imposing a double set-off on Jarrells. Here, the majority failed to make Jarrells whole.”

Fn.: “We strongly advise counsel to familiarize themselves with our supreme court’s opinion in *Filip v. Block*, 879 N.E.2d 1076, 1081 (Ind. 2008) (“[T]he entire designation must be in a single place, whether as a separate document or appendix or as a part of a motion or other filing”). Because these documents were not properly designated, they cannot be relied upon by the trial court or the appellate court in its review of the summary judgment proceedings.”

**Lesson:** The courts are struggling to reconcile the collateral source statute (which allows jurors to be informed of collateral source payments--suggesting the jury may appropriately reduce the award by the amount of the monies already received) with the worker’s compensation lien statute (which allows those monies to be paid over to the workers comp carrier after verdict).

**9. Bystander emotional distress claim based on medical malpractice: *Indiana Patient’s Compensation Fund v. Gary Patrick*, 2009 WL 1384732 (Ind.Ct.App. May 18, 2009) (Riley)**

Gary Patrick is the natural father of Christopher Patrick (Christopher). Christopher was involved in an automobile accident. He was treated at St. Mary’s Medical Center in Evansville, Indiana, and discharged the next day. That evening Christopher died due to an untreated ruptured colon from seatbelt trauma.

As a result of his son’s death, Patrick, individually and as personal representative of Christopher’s estate, brought a medical malpractice action against the physician who treated Christopher and against St. Mary’s Medical Center. In addition to claiming damages for his son’s death, Patrick asserted a claim for his own emotional distress. Patrick settled his claims against the health care providers. After the settlement, Patrick, individually and as personal representative of Christopher’s Estate, filed his petition for payment of excess damages against the Fund.

The Fund moved for summary judgment on Patrick’s individual claim for emotional distress damages, arguing that damages for negligent infliction of emotional distress are not recoverable under the Adult Wrongful Death Statute, I.C. § 34-23-1-2. The trial court concluded that Patrick’s claim for emotional distress damages was independent of his claim for damages under the Adult Wrongful Death Statute and awarded him \$600,000.00 on his independent emotional distress claim. The Fund asserts that the trial court erred when it granted Patrick an independent claim for emotional distress damages.

Patrick asserted that his emotional damages arose from the negligence of the medical personnel treating his son. His claim thus arises in the context of medical malpractice. Christopher was clearly a “patient” as defined by the Act. Patrick, being Christopher’s parent and having a “claim of any kind,” is also considered a “patient”. Thus, the trial court properly characterized Patrick’s claim for damages for emotional distress as independent of and in addition to the adult wrongful death claim.

On June 7, 2000, our supreme court signaled a new significant development in the law of negligent infliction of emotional distress when it decided *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000). In *Groves*, the court adopted the bystander rule. The holding recognizes that the emotional distress claim does not arise from the death of another, but rather from the direct involvement of the individual bringing the claim in the events which have caused the emotional

distress. Patrick is asserting damages for emotional distress as a bystander pursuant to the *Groves*' criteria.

Here, although Patrick was not present when the medical malpractice occurred—the health care provider's failure to diagnose Christopher's ruptured colon—he did deal with its aftermath. After Christopher was discharged from the hospital, Patrick took him home. That evening, Christopher called out to his father because he was vomiting blood. While Patrick was calling an ambulance, he saw Christopher throw up again, with blood coming out of his nose and mouth.

It is clear that Patrick witnessed the death of a loved one, a death caused by the negligent conduct of health care providers. As a result, we find that the trial court properly concluded that Patrick, as a bystander pursuant to *Groves*, could bring an independent claim for the negligent infliction of his emotional distress upon Christopher's death.

**Lessons:**

1. A surviving parent may collect for medical malpractice under the Adult Wrongful Death Statute and assert an independent claim for emotional distress.
2. A parent can be a "patient" if he has a "claim of any kind."

**10. Liquidated damages; noncompete agreement: *Coffman v. Olson & Company, P.C.*, 2009 WL 1384947 (Ind.Ct.App. May 18, 2009) (Kirsch)**

Craig Coffman, an accountant, signed a noncompete agreement with his employer, Olson & Company. Coffman attacks the Agreement as void as a matter of public policy. Coffman likens accounting services to legal services in that they both involve a relationship with a client in which the professional learns the peculiarities of each client's needs. Coffman notes that attorneys are prohibited from noncompetition agreements by Indiana Rule of Professional Conduct 5.6. However, there is no such ethical rule restricting employees and employers in the accounting profession from entering into noncompetition agreements. In the present case, the Agreement contains both a geographical limitation, Lawrence County and Monroe County, and a two-year time limitation on the restraint of trade. The noncompetition provision here is not against public policy.

We addressed liquidated damages in *Gershin v. Demming*, 685 N.E.2d 1125, 1127-28 (Ind.Ct.App. 1997): "A typical liquidated damages provision provides for the forfeiture of a stated sum of money upon breach without proof of damages. Where the sum stipulated in the agreement is not greatly disproportionate to the loss likely to occur, the provision will be accepted as a liquidated damages clause and not as a penalty, but where the sum sought to be fixed as liquidated damages is *grossly disproportionate* to the loss which may result from the breach, the courts *will treat the sum as a penalty* rather than as liquidated damages. In determining whether a stipulated sum payable on a breach of contract constitutes liquidated damages or a penalty, the facts, the intention of the parties and the reasonableness of the stipulation under the circumstances of the case are all to be considered. The distinction between a penalty provision and one for liquidated damages is that a penalty is imposed to secure performance of the contract and liquidated damages are to be paid in lieu of performance. Notwithstanding a plethora of abstract tests and criteria for the determination of whether a

provision is one for a penalty or liquidated damages, there are no hard and fast guidelines to follow.”

In *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208 (Ind.Ct.App. 1982), the liquidated damages clause of the contract between an accountant and an accounting firm called for payment by the former employee of three times the former employer’s gross annual billing to clients contacted, advised, visited, or in any way solicited by the former employee. We held that the liquidated damages clause created a penalty, and was therefore void and unenforceable.

We find that the trial court correctly found the liquidated damages clause in the present case to be a penalty and there, unenforceable. Coffman was to pay twice the prior year’s gross billings for each client in the event Coffman failed to notify Olson.

In the absence of an enforceable liquidated damages clause, lost profits are an appropriate measure of damages in actions involving noncompetition provisions. Here, the trial court awarded Olson \$79,263 *i.e.*, the gross revenue from the Olson clients for the year preceding Coffman’s termination from employment with Olson. In awarding lost profits, net profits, and not gross profits, are generally the proper measure of recovery. In a way, the trial court took into consideration the fact that gross revenue is not equivalent to lost profits, and by limiting the recovery to one year’s worth of gross revenue, Coffman’s salary could be accounted for, making the damages award more closely resemble lost profits. Here, reflecting the potential loss of such clients in any event, the trial court simply used gross revenue without a multiplying factor.

**Lessons:**

1. Accountants are subject to noncompetes (unlike lawyers).
2. Multiples of gross profits are unenforceable as liquidated damages.

**11. Substantive changes to deposition testimony;** from an article by Gregory P. Joseph © 2009.

Fed. R. Civ. P. 30(e)(1) provides that, on request, a deponent is entitled to 30 days within which to review the transcript and, “if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.” Given the seemingly clear language of the Rule, most courts permit any change, including substantive changes, to deposition testimony. *See Betts v. General Motors Corp.*, 2008 U.S. Dist. LEXIS 54350 (N.D. Miss. July 16, 2008).

There is, however, tension between this approach and the sham affidavit rule, which is also applied in most courts and which bars the submission on summary judgment of an affidavit that contradicts the affiant’s deposition testimony. The Seventh, Ninth and Tenth Circuits hold that, on summary judgment, a substantive Rule 30(e) correction should be stricken, just like a sham affidavit. *See Hambleton Bros. Lumber Co. v. Balkin Enters.*, 397 F.3d 1217, 1225 (9th Cir. 2005); *Burns v. Bd. of County Comm’rs*, 330 F.3d 1275, 1282 (10th Cir. 2003); *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

Note: Ind. T.R. 30(e) does not specifically authorize a change to the substance of an answer in a deposition transcript. It also does not restrict the changes that can be made. It merely says “the reason therefor” should be stated.

**ADVOCACY TIP OF THE MONTH: Beware invited concessions.**

From *Making Your Case, The Art of Persuading Judges* by Antonin Scalia and Bryan Garner (2008), pp. 199-200:

“The unduly accommodating lawyer—a frequently observed creature, especially in appellate courts—has given away many a case. The lawbooks are filled with affirmances that would have been reversals or remands for further proceedings were it not for the concession of a crucial fact by accommodating counsel. And propositions of law that might well have been exceedingly difficult for an opinion to establish have often been happily resolved (for purposes of the case at hand, at least) by foolish concessions.

It is not unusual for a judge to come to the bench, having read all the briefs, with a clear idea of what the judgment ought to be *but for* one missing fact, or *but for* one possible legal obstacle. If the judge can get you to concede that fact, or to concede a point that would make that legal obstacle irrelevant, the opinion is all but written. You should not cooperate in your own destruction.”

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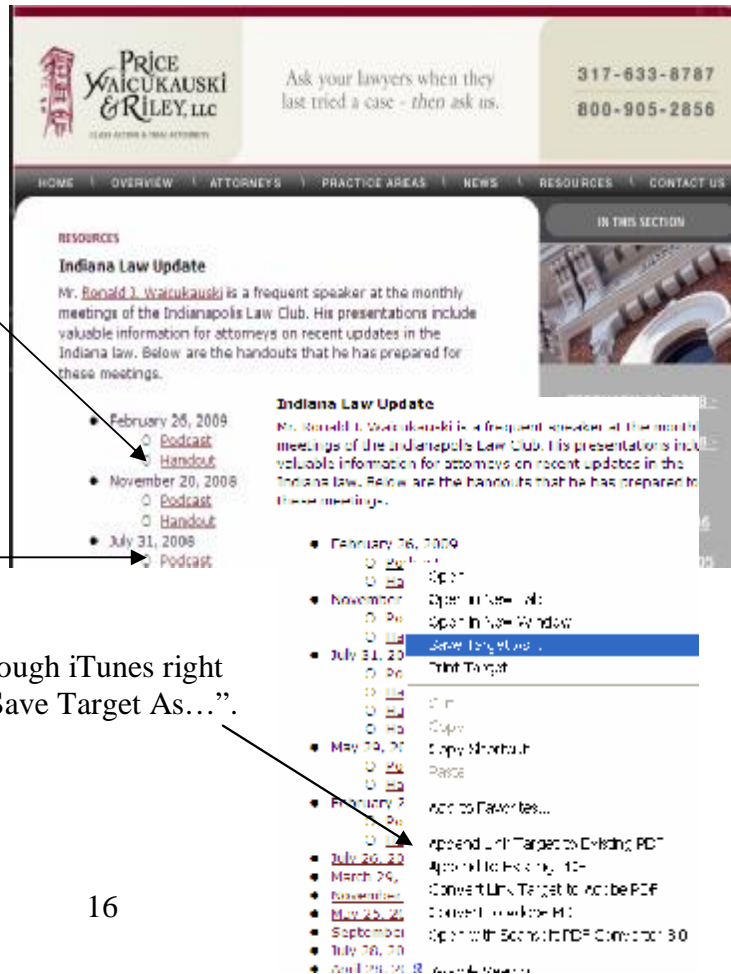
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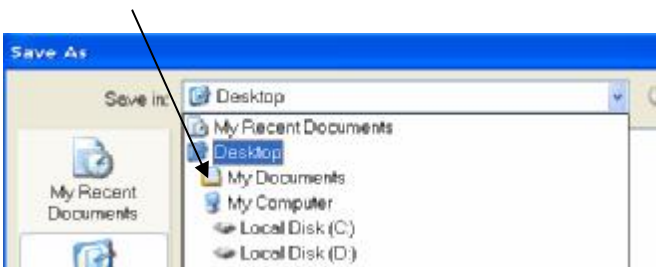
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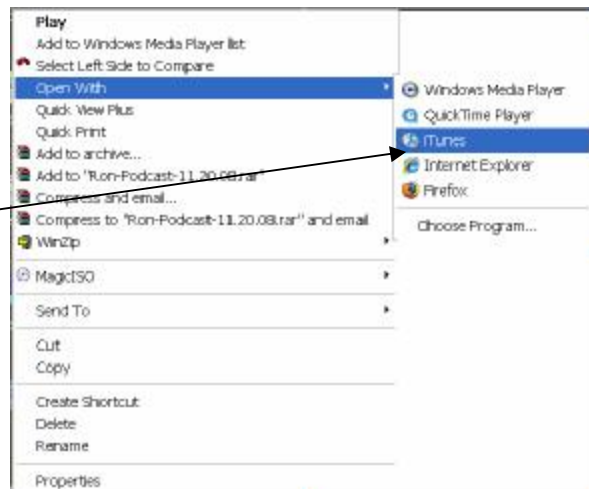


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