

INDIANA LAW UPDATE
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ADVOCACY TIP OF THE MONTH: Be careful about the shoes you wear and the motions you file; they may have unanticipated consequences.

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:

Employees Turn Tables, Win \$370M Counterclaim

Posted on ABAJournal.com 7/29/09

A lawsuit filed by the co-founder of the Guess? Inc. jeans company accusing five former employees of embezzlement has gone spectacularly wrong, resulting in a \$370 million damages verdict this week for the defendant workers in their counterclaim against plaintiff Georges Marciano for defamation and harassment.

Los Angeles County Superior Court Judge Elizabeth White threw out Marciano's 2007 lawsuit accusing the five of conspiring to steal from him as well as his response to the workers' counterclaim after he repeatedly failed to cooperate with the proceedings. White earlier found Marciano liable for defamation in a bench trial of the counterclaim. A jury then heard the damages portion of the case, deciding Monday that each former employee should be awarded \$74 million, for a total of \$370 million in damages. The verdict is the fourth-largest jury award so far in 2009.

Think the Hoosier State Brims with Attorneys? Guess Again—They're Comparatively Scarce

Posted on IBJ.com 6/27/09

If the country indeed has too many lawyers, as the knock on the profession suggests, Indiana may be exempt from the conversation. Only North and South Dakota, Tennessee and Wisconsin have smaller proportions of lawyers within their working populations, U.S. Bureau of Labor Statistics figures show. In Indiana 0.24 percent of the work force of 2.9 million are attorneys—one third the concentrations of New York's. What does that say about Indiana? The government counts 7,110 lawyers in Indiana. Overall, though, roughly 17,100 attorneys are licensed to practice in the state, according to the Indiana Supreme Court. The total includes about 2,000 lawyers who are not Hoosiers.

The figures only count lawyers at law firms who are eligible to receive unemployment benefits. Omitted are equity partners, who are considered company owners, as well as sole practitioners, corporate counsel and government lawyers.

The annual mean wage for Indiana attorneys is \$92,600, 10th lowest in the nation, according to the government. By comparison, the annual mean wage in New York is \$145,400. In neighboring Illinois, it's \$136,780.00

1. Discovery Sanctions against Lawyers and Law Firms: *1100 West, LLC v. Red Spot Paint & Varnish Co., Inc.* (S.D. Ind. 6/5/09) (McKinney)

1100 West, LLC sued Red Spot Paint & Varnish Co., Inc. alleging that Red Spot's paint manufacturing operations had caused TCE and PCE contamination of 1100 West's nearby property. Red Spot took the position that it had never used TCE and PCE in its operations. 1100 West sought discovery of all documents that might reflect the chemicals used in Red Spot's operations but a number of problems arose in discovery and 1100 West filed a motion for sanctions against Red Spot and its attorneys, Bose McKinney & Evans.

When parties turn to the courts of the United States for resolution of disputes, they agree to abide by the rules of those courts. Those rules include the rules of procedure and the rules of evidence. But those are not the only guide for parties' behavior because an appearance in court also includes the attorneys' responsibility to adhere to the rules of professional conduct. More specifically, attorneys must abide by their responsibility to be candid with the Court. *Attorneys have the responsibility to objectively direct the client in abiding by the rules of procedure, including the rules of discovery, and the rules of evidence.*

In this case, the evidence is replete with examples of violations of discovery rules, and those violations contributed to the time it has taken to resolve this dispute. The evidence in this case shows that Red Spot's response—in answers to interrogatories, in responses to request for production of documents, and in depositions—have been a derogation of the rules and have extended this litigation beyond a reasonable time.

Red Spot has made a mockery of the discovery process and has subjected the truth to ridicule. Under the circumstances of this case, the Court is compelled to find that Red Spot's conduct was contumacious, willful, and egregious. Therefore, the Court must conclude that only the most onerous sanction, default, can remedy Red Spot's violation of the rules of discovery, or can remedy Red Spot's complete disregard of the legal process as protected by the inherent authority of the Court.

Charles Storms, President of Red Spot, knew about Red Spot's historical use of chlorinated solvents as a degreaser for product development and troubleshooting purposes before he testified in this case. Yet, at his May 24, 2007 deposition, Storms denied that Red Spot used either TCE or PCE. Storms' decision to evade the truth makes a mockery of a witness' oath to testify to the whole truth.

Susan Henry is little better than Storms. As Red Spot's designated Rule 30(b)(6) witness, Henry was required at each deposition for which she was so designated, to testify about the collective knowledge of Red Spot, or what was "known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). By accepting Storms' view of the facts and withholding what she had been told by others, Henry obstructed 1100 West's ability to understand the nature and extent of Red Spot's use of TCE and PCE on Red Spot's property. Henry's continued reluctance to admit that Red Spot used either TCE or PCE as a degreaser in a parts washer outside Building 3 is the definition of contumacious. Henry evaded questions and told half truths at every turn and, as she admitted, no one at BME ever told her to do so. Moreover, a litigant cannot hide behind its own failure to organize its records then rely upon its lawyers to straighten up its mess. Henry's ability to evade questions and twist facts was evident in nearly every deposition, and was clear during the hearing before the Court.

As a Rule 30(b)(6) witness, however, Henry cannot decide the facts for herself, whether she received two conflicting reports or ten conflicting reports, but all responsive, she must disclose them all. After reviewing countless pages of Henry's Rule 30(b)(6) testimony, and after

listening to Henry at the sanctions hearing, the Court can only conclude that Henry's obstreperous conduct during this litigation has prolonged the discovery of relevant information and has led to countless hours of fruitless deposition testimony.

But Bose McKinney & Evans ("BME"), through both Amy Cueller and Richard VanRheenen and, to a lesser extent, Kathleen Lucas, had opportunities to steer Red Spot, particularly Henry and Storms, on a different path and it never did. If all BME had was one individual who wished to ignore a small amount of information, it would be one thing. In this case, however, the evidence that Red Spot had used TCE and/or PCE was too pervasive for BME to continue to ignore. Henry disclosed to BME in 2005 that historical records indicated that PCE was a constituent of a raw material. VanRheenen requested more detailed information, but, after one inquiry of information systems, Henry responded that there was no other information. VanRheenen never followed up or pressed Henry to look further.

On June 16, 2006, Henry reported to Cueller that two Red Spot employees had disclosed the use of TCE at Red Spot during the 1970's. Cueller forwarded the email to both VanRheenen and Lucas. BME, on the same day, allowed Red Spot to respond to 1100 West's First Request for Admission No. 8, which asked Red Spot to admit that it stored, used or handled TCE, commencing on January 1, 1980, with an answer of "no knowledge."

By June 2006, Cueller had been to the basement of Building 3 and had seen the condition of the information in that room. Yet, despite VanRheenen's and apparently, Lucas' concern over the completeness of Red Spot's discovery, and in light of the disclosures to Henry and Cueller about the potential for TCE and/or PCE used in the degreaser, Cueller decided not to do a complete inventory of the information contained in the sixty-eight boxes and two filing cabinets in the basement.

At this point, BME had heard enough deposition testimony, had questioned enough of Red Spot's discovery responses itself, and had heard enough information from historical employees to guide Red Spot to make complete disclosure about any use of TCE or PCE on the property that it knew so that the lawyers could argue and a fact finder could determine the merits of the case. Yet, BME pressed on with Red Spot's litigation strategy that neither of those two materials was ever used on the Red Spot property. On March 28, 2007, BME filed a brief in which it asserted that Red Spot had never used TCE. In May 2007, Henry searched Red Spot's Provision database for PCE. The results of the search indicated that PCE was contained in Super Ad-It, at a concentration of 10%. Henry forwarded the information to VanRheenen and Cueller on May 22, 2007. On May 23, 2007, Henry testified that Red Spot had never used TCE in a parts washer; Cueller represented Henry at that deposition. Storms testified on May 24, 2007, that Red Spot did not use TCE or PCE on its property. Cueller represented Storms at this deposition. Again, BME had an opportunity to guide Red Spot to make a complete disclosure and it did not.

BME attorneys had sat through Henry's depositions, BME attorneys had questioned the thoroughness of Henry's production of documents, and a BME attorney had physically visited the room where Henry had searched for documents. Even in the face of Storms' insistence that Red Spot did not currently use TCE or PCE, there was enough historical information for BME to insist that Red Spot dig deeper. Being a zealous lawyer does not mean zealously believing your client in light of evidence to the contrary. Moreover, when BME obtained the EPA RCRA file, there is no excuse for BME's failure to ensure that "responsive" documents therein did not get to 1100 West.

The Court notes that it may be unusual to sanction a law firm for conduct that

violates the Federal Rules of Civil Procedure. However, in this case, where three partners of the firm had knowledge of its client's apparent disregard for those rules and failed to properly supervise an associate and paralegal who had knowledge of adverse facts that remained undisclosed to the opposing party, the Court can only conclude that the firm must be held accountable under its inherent authority to deter such conduct in the future.

The Court concludes that Red Spot's conduct can only be described as contumacious, willful, and egregious. BME compounded the problem by, like a chameleon, becoming indistinguishable from its client and allowing Red Spot, namely Storms and Henry, to evade the truth. Through its defiant conduct, Red Spot has forfeited the right to have the issues determined on the merits. Therefore, the Court must conclude that only the most onerous sanction, default, can remedy Red Spot's violation of the rules of discovery; or can remedy Red Spot's complete disregard of the legal process as protected by the inherent authority of the Court. The Court, therefore, **GRANTS** 1100 West's Motion for Sanctions.

Lessons:

1. Be proactive in insuring accuracy and completeness in your client's discovery responses.
2. A lawyer has a duty to "take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false." Rules of Prof. Conduct, Rule 3.3, Comment 1.
3. Lawyers and law firms are at risk when a client fails to provide accurate and complete discovery responses.

2. Federal Time Computation Rules

Effective December 1, 2009, the way in which time is calculated in federal courts will change. Rule 6 of the Federal Rules of Civil Procedure, as well as Appellate Rule 26 and the comparable criminal and bankruptcy rules, are being changed to make calculating time periods simpler, clearer and consistent.

The big changes:

1. All days will be counted, including weekends and holidays ("days are days"). It will still be true that if the last day is a weekend or legal holiday, the period will continue to run until the next work day.
2. Most deadlines of less than 30 days will be in multiples of seven, so deadlines will fall on weekdays. Most 10 day periods, will become 14 day periods.

3. No Constitutional Right to a Quality Education: *Bonner v. Daniels*, 2009 WL 1562813 (Ind.S.Ct. June 2, 2009) (Dickson)

The plaintiffs/appellants, a group of Indiana public school students, appeal the trial court's dismissal of their complaint, which sought a declaratory judgment to establish that the Indiana Constitution imposes an enforceable duty on state government to provide a standard of quality education to public school students and that such duty is not being satisfied. The Court of Appeals reversed. We granted transfer and now affirm the trial court. Although recognizing the Indiana Constitution directs the General Assembly to establish a general and uniform system of public schools, we hold that it does not mandate any judicially enforceable standard of quality,

and to the extent that an individual student has a right, entitlement, or privilege to pursue public education, this derives from the enactments of the General Assembly, not from the Indiana Constitution.

In their complaint and in this appeal, the plaintiffs focus almost exclusively on the Education Clause, Article 8, Section 1, of Indiana's Constitution of 1851, which states:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; *it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.*

The plaintiffs argue that the totality of the Education Clause “demonstrates the centrality of education to civic life in Indiana.” They urge that its surrounding history reflects a prevailing public sentiment in 1850 that a public education system was needed to eliminate illiteracy and to protect Indiana's democracy. While there is strong evidence of these general concerns, the plaintiffs point to no historical evidence that the framers intended more than their historic accomplishment of requiring the legislature to establish a system of free common schools. The historical facts do not evidence any intention to require the establishment of a public education system with any particular standards of educational output. We decline the plaintiffs' invitation to amplify the words and meaning of our Constitution as crafted by its framers and approved by its ratifiers.

Guided as we are by the text of the constitutional provision in the context of its history, we conclude that the Education Clause of the Indiana Constitution does not impose upon government an affirmative duty to achieve any particular standard of resulting educational quality. This determination is delegated to the sound legislative discretion of the General Assembly. And in the absence of such a constitutional duty, there is no basis for the judiciary to evaluate whether it has been breached.

Lessons:

1. The Education Clause of the Indiana Constitution does not impose a duty on government to achieve any particular standard of educational quality.
2. It does require that the system be “uniform” and that citizens be treated “even handedly.”

P.S. Fn. “The plaintiffs use Roman numerals to identify the articles of the Indiana Constitution. In contrast, we refer to them by the Arabic numerals that were used by the framers.”

P.S.S. Post on Indiana Law Blog: “Many, if not most, of the court's recent opinions have used Roman not Arabic numbers. For example, if you do a Lexis search of Indiana cases from the last five years, "Article VII, Section 4" yields 39, while "Article 7, Section 4" yields 19.”

4. Juror's Cell Phone Use During Deliberations; *Henry v. Curto* (June 17, 2009) (Dickson)

Ms. Henri further challenges the verdict on the ground that one juror's receipt of an incoming mobile telephone call during deliberations created pressure to reach a hasty verdict. This claim is based on the following assertions in the juror's affidavit:

While deliberation was ongoing, the mobile telephone of one juror rang. That juror . . . appeared to turn the telephone off. Deliberation continued and her telephone rang again. At that point she left the jury room to get the bailiff. She returned with the bailiff, and the bailiff stood in the doorway of the jury room while [the other juror] took the call. I was able to hear [the other juror] tell the other party to the telephone call that she would get to class as soon as she could.

Ms. Henri acknowledges that the jury had been instructed: "Once you begin your deliberations, do not use cellular telephones or any other device to communicate with anyone outside the jury room. If you need to make a telephone call during deliberations, inform the bailiff."

To merit a new trial upon a claim of juror misconduct, the challenger "must show that the misconduct was gross and probably harmed" the challenging party. This standard is equally applicable to civil jury trials. Determining whether gross misconduct in all likelihood harmed the complaining party is within the trial court's discretion.

Ms. Henri presented her claim of error due to the juror's cell phone use in her motion to correct error. It was denied by the trial court, which concluded that "[n]othing about these events comprise[s] misconduct in any form." On appeal, Ms. Henri has not established that the alleged receipt of a cell phone call with the apparent approval of the bailiff constituted misconduct, and has shown neither gross misconduct nor probable harm. Reversal and a new trial are not warranted on this issue.

We additionally observe that permitting jurors, other trial participants, and observers to retain or access mobile telephones or other electronic communication devices, while undoubtedly often helpful and convenient, is fraught with significant potential problems impacting the fair administration of justice. These include the disclosure of confidential proceedings or deliberations; a juror's receiving improper information or otherwise being influenced; and a witness's or juror's distraction or preoccupation with family, employment, school, or business concerns. These and other detrimental factors are magnified due to swift advances in technology that may enable a cell phone user to engage in text messaging, social networking, web access, voice recording, and photo and video camera capabilities, among others. *The best practice is for trial courts to discourage, restrict, prohibit, or prevent access to mobile electronic communication devices by all persons except officers of the court during all trial proceedings, and particularly by jurors during jury deliberation.*

Lessons:

1. You're not likely to get a verdict overturned due to cell phone use during deliberations.
2. Trial judges should consider excluding cell phones in the jury room during deliberations.

5. Standard of Review of Summary Judgment Ruling by Administrative Agency: *Northern Indiana Public Service v. United States Steel Corporation*, 907 N.E.2d 1012 (Ind.S.Ct. June 23, 2009) (Shepard)

In 1999, NIPSCO and U.S. Steel settled a longstanding electric power dispute involving U.S. Steel's electric generation and transmission facilities in Illinois. They submitted the Settlement and Contract to the Indiana Utility Regulatory Commission, which approved it by an order dated July 8, 1999 after notice and an evidentiary hearing. Six years later, when a price adjustment provision in the Contract became effective, the parties disagreed on its application. NIPSCO maintained the price adjustment applied both to the Energy Charge (a fixed number of hours of use each month given by the agreement) and the Demand Charge (for energy use beyond the number of hours given for the Energy Charge's fixed number). U.S. Steel insisted it applied only to the Energy Charge.

On November 17, 2006, U.S. Steel filed a complaint seeking to enforce its interpretation of the Contract. U.S. Steel then filed its motion for summary judgment. After briefing and oral argument, the Commission granted U.S. Steel's motion for summary judgment. NIPSCO appealed to the Court of Appeals, which reversed.

The Indiana Code authorizes judicial review of Commission orders. This amounts to a multiple tiered review. On the first level, it requires a review of whether there is substantial evidence in light of the whole record to support the Commission's findings of basic fact. At the second level, the order must contain specific findings on all the factual determinations material to its ultimate conclusions. *McClain* described the judicial task on this score as reviewing conclusions of ultimate facts for reasonableness, the deference of which is based on the amount of expertise exercised by the agency. Insofar as the order involves a subject within the Commission's special competence, courts should give it greater deference. If the subject is outside the Commission's expertise, courts give it less deference. NIPSCO advocates that we apply a *de novo* standard because the case involves summary judgment and a question of law.

NIPSCO argues that the current appeal is not the product of a regulatory settlement but rather a dispute between two private parties over interpreting the Contract. Because a court's role in interpreting a contract is "to give effect to the parties' intent at the time the contract was made and as reflected by the language they used," NIPSCO says that interpreting the Contract is a question of law appropriate for *de novo* review by the judiciary.

Regulatory settlements bear important differences from agreements governed purely by the law of contracts. Such an agreement does not become effective until and unless the Commission acts on the agreement. A contract between private parties takes on public interest ramifications once the Commission approves it. The Commission maintains the authority and statutory responsibility to supervise and regulate the Contract. As it commonly does in hearing the disputes before it, the Commission did more than find facts; it deployed its expertise in the subject matter, one source of judicial deference to the Commission's decision-making. Agencies are not judicial bodies. They are executive branch institutions which the General Assembly has empowered with delegated duties. As such, an adjudication by an agency deserves a higher level of deference than a summary judgment order by a trial court falling squarely within the judicial branch. We therefore apply the established standard of review for judicial review of Commission orders.

As our opinion in *McClain* summarized the statutory standard of review, "basic facts are reviewed for substantial evidence, legal propositions are reviewed for their correctness."

Ultimate facts or “mixed questions” are evaluated for reasonableness, with the amount of deference depending on whether the issue falls within the Commission's expertise.

We therefore consider this question as a mixed question of law and fact with a high level of deference, examining the logic of the inferences made and the correctness of legal propositions without replacing our own judgment for that of the Commission. In light of these considerations and the deference owed to the Commission, NIPSCO's assertion does not persuade us that the Commission's interpretation of the Contract is unreasonable. None of the Commission's conclusions run afoul of reasonable application of the well-established principles of contract law. We affirm the Commission's order.

Lessons:

1. Summary judgments are available in some administrative proceedings.
2. The Indiana Supreme Court gives more deference to administrative agencies than courts in reviewing summary judgment rulings.

6. Medical Malpractice; Incurred Risk; Lack of Informed Consent: *Spar v. Cha*, 97 N.E.2d 974 (Ind.S.Ct. June 16, 2009) (Boehm)

We hold that, with possible exceptions not relevant here, incurred risk is not a defense to medical malpractice based on negligence or lack of informed consent. Brenda Spar brought this medical malpractice action against obstetrician/gynecologist Jin S. Cha, who performed laparoscopic surgery on Spar in 2001. Spar alleged negligence in failing to advise her of less risky procedures and also failure to obtain informed consent. Spar initiated the present suit by submitting a complaint to a medical review panel in accordance with the Indiana Medical Malpractice Act, Ind.Code § 34-18-8-4 (2004). The panel unanimously found that Dr. Cha had failed to meet the standard of care, and the case proceeded to trial under two theories: (1) negligence in failing to employ alternative diagnostic procedures in lieu of surgery, and (2) failure to obtain Spar's informed consent to the chosen course of treatment. Although the experts and medical review panel members agreed that bowel perforation commonly occurs during laparoscopy without negligence.

Spar testified that she would not have consented to the laparoscopy had Dr. Cha informed her that other forms of testing and treatment were available, that the surgery would be purely diagnostic, and that even if the surgery were performed correctly, it could result in a bowel injury that would necessitate more serious operations.

The jury returned a general verdict in favor of Dr. Cha. Spar appealed, arguing that the trial court erred by submitting incurred risk to the jury and by admitting evidence of Spar's consent to prior surgeries.

Lack of informed consent is a distinct theory of liability. Lack of informed consent is premised on the physician's duty to disclose to the patient material facts relevant to the patient's decision about treatment. To succeed on a lack of informed consent action, the plaintiff must prove “(1) nondisclosure of required information; (2) actual damage ... (3) resulting from the risks of which the patient was not informed; (4) cause in fact, which is to say that the plaintiff would have rejected the medical treatment if she had known the risk; and (5) that reasonable persons, if properly informed, would have rejected the proposed treatment.”

Spar's lack-of-informed-consent theory was that her consent was not informed because Dr. Cha did not explain the less risky alternatives and also failed to explain the “risks, benefits and alternatives to the elective diagnostic laparoscopy.”

The notion of “incurred” or “assumed” risk has largely become obsolete in an era of comparative fault. In Indiana this has been accomplished by the Comparative Fault Act as construed in *Heck v. Robey*, 659 N.E.2d 498, 504-05 (Ind.1995). Contributory negligence has been said to remain a complete defense in medical malpractice actions. The parties assume that because medical malpractice is not subject to the Comparative Fault Act, the traditional doctrine of incurred or assumed risk remains intact in that arena, and we decide the case on that basis.

The term “assumption of risk,” as it is known in most jurisdictions, has been used in at least four different senses:

1. “Express,” in which “the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care ..., and agrees to take his chances as to injury from a known or possible risk.” *Restatement (Second) of Torts* § 496A cmt. c (1965).
2. “Implied primary,” in which “the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk,” and is deemed to have impliedly agreed to relieve the defendant of responsibility, and to take his own chances. A spectator at a baseball game consents to the game's proceeding without precautions to protect from being hit by the ball.
3. “Implied secondary,” in which “the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it.” An example is an independent contractor who knows that he has been furnished by his principal with a machine in dangerous condition but reasonably continues to work with it.
4. “Unreasonable,” in which the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence.

The first three categories of assumption of risk are predicated on the plaintiff's expressed or implied consent. They prevent one who consents to a known risk from suing for damages arising from that risk. Under Indiana precedent, the consent must be based on actual knowledge of the risk, not merely “general awareness of a potential for mishap.” Assumption of risk is often described as an affirmative defense but that depends on the category of incurred risk. A defense of express or implied primary assumption of risk negates the “duty” or “breach” required for a negligence claim. These forms of assumption of risk may not require pleading as an affirmative defense under Trial Rule 8, because they negate an element of the claim. Express and implied primary assumption of risk nevertheless bar recovery in the face of what would otherwise be negligent conduct, and the burden of proof to establish the plaintiff's consent is on the defendant. Finally, assumed risk and contributory negligence may in some cases be supported by the same facts, but they are separate defenses.

We agree with the Court of Appeals that assumption of risk-whether in the express, primary, or secondary sense-has little legitimate application in the medical malpractice context. As the District of Columbia Court of Appeals has explained, “the disparity in knowledge between professionals and their clientele generally precludes recipients of professional services from knowing whether a professional's conduct is in fact negligent. The patient is entitled to expect that the services will be rendered in accordance with the standard of care, however risky the procedure may be.”

Moreover, even if the incurred-risk defense is available in some medical malpractice cases, the record in this case is devoid of any evidence that Spar somehow incurred the risk of

negligent care. Accordingly, Dr. Cha's incurred-risk defense to Spar's claim of negligent advice was not supported by the evidence and should not have been submitted to the jury.

Lessons:

1. Lack of informed consent is a distinct theory of liability for medical malpractice.
2. Incurred risk is largely obsolete in comparative fault cases.
3. Incurred risk is not solely an affirmative defense; it may also negate an element of the claim (for example, whether the defendant owed a duty to plaintiff) and be used even if not pled.
4. Incurred risk will almost never apply to medical malpractice – a patient will never consent to less than ordinary care.

7. Common Enemy Doctrine: *Long v. IVC Industrial Coating, Inc.*, 2009 WL 1897856 (Ind.App.Ct. July 2, 2009) (Brown)

David Long and Connie Long have owned a parcel of land located on the east side of County Road N. 300 E. in Clay County, Indiana since about 1978. The Longs constructed two farm ponds on their property in 1985 or 1986 and stocked the ponds with fish. IVC owns a parcel of land directly across from the Longs' property.

In approximately May of 2001, IVC began construction of a manufacturing facility on its property. The construction project involved earthwork, and “a rather large mound of earth piled up. Between approximately July of 2001 and continuing until approximately June of 2002, when it rained, water, mud, silt, and sediment ran off of the mound of surplus dirt located on IVC's property. The mud and sediment settled in the Longs' ponds creating buildup. During that one-year period, the Longs' ponds were muddy, which prevented any fishing in them.

In April 2003, the Longs filed a complaint against IVC and MacDougall. On November 13, 2008, the trial court granted all the defendants' motions for summary judgment. In its order granting summary judgment, the trial court stated: “In reaching this conclusion, the Court finds the Plaintiffs have no cause of action because of the common enemy doctrine of water diversion.

In its most simplistic and pure form the rule known as the “common enemy doctrine,” declares that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.

Under the common enemy doctrine of water diversion, it is not unlawful for a landowner to improve his land in such a way as to accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of the land even where his land is so situated to the land of an adjoining landowner that the improvement will cause water either to stand in unusual quantities on the adjacent land or to pass into or over the adjacent land in greater quantities or in other directions than the waters were accustomed to flow.

If the water here is characterized as surface water, then the common enemy rule may apply to preclude the Longs' claims for damages caused by rainwater runoff from the IVC parcel. On the other hand, if the water here is a natural watercourse, then the common enemy doctrine is not applicable.

Construing the facts and reasonable inferences drawn from the designated facts in the Long's favor, we cannot say that a jury could not conclude that the rainwater which accumulated at the collection point on the IVC property (or in the ditches that guided the rainwater to the

collection point) began “to flow in a definite direction” with “unity, regularity, and dependability” and therefore constituted a watercourse. Although the water may have flowed through the ditches, culverts, and ravines only when it rained, it is not necessary that the water flow be continual. In addition, there was testimony that the water had followed the same path for all of David Long's life. We conclude there is a genuine issue of material fact with respect to whether the water at issue here was surface water or a natural watercourse. Therefore, summary judgment on this issue is not appropriate.

The Longs also argue that the common enemy doctrine does not apply because the water contained mud, silt, and sediment. We also note that the common enemy doctrine applies only to surface water. In our view, whether mud, silt, or sediment contained in rainwater runoff is discharged in such quantities that the water ceases to be characterized as surface water is a question of fact. Construing the facts and reasonable inferences drawn from the facts in the Longs' favor, we cannot say that a jury could not determine that the discharge here, with its large content of mud, silt, and sedimentary material, ceased to be mere surface water.

Lessons:

1. You cannot sue your neighbor for damage due to the flow of surface water from his property to yours.
2. You can sue if the substance contains so much mud that it ceases to be mere surface water.
3. You can also sue if the water from his property has become a natural water course.

8. Anticipatory Rebuttal Expert Testimony; Rule 702(b) Challenge during Trial; Exclusion of Witness for Failure to Disclose Contact Information; Rescue Doctrine: *Francoise v. Jones*, 2009 WL 1499600 (Ind.Ct.App. May 29, 2009) (Vaidik)

While driving through snowy weather, Ray Ramirez, III, lost control of his truck and crashed into guardrails on both sides of an interstate highway. The truck became stuck in the passing lane of the interstate. The occupants of the truck made their way to the side of the interstate. After another motorist stopped her car to block traffic and two semi-trucks created a barrier between the stranded truck and approaching traffic. Aaron A. Jones, one of Ramirez's passengers, approached Ramirez's truck to push it off the interstate so that other motorists would not crash into it. Mark P. Franciose came upon the traffic jam, drove his car on the shoulder of the interstate, and hit Jones, causing injuries. Jones sued Franciose and Ramirez. During the jury trial, Franciose unsuccessfully objected to the testimony of Jones's expert witness. The jury found in Jones's favor and awarded damages against both defendants.

Franciose contends that the trial court committed reversible error by refusing to strike the testimony of Dr. Yarkony. Before trial, the trial court entered an order requiring that Jones submit to an independent medical examination performed by Dr. Michael Owens. The order also provided Jones “the right to name a rebuttal witness to Doctor Owens.” During trial, Jones called Dr. Yarkony as an expert witness. Dr. Yarkony testified about Jones's future medical needs and the attendant costs stemming from his foot injuries. After Dr. Yarkony finished testifying, Franciose made an oral motion to strike his testimony, arguing that Dr. Yarkony, as a rebuttal witness, should have testified after Dr. Owens. The trial court delayed ruling on the motion. When Franciose reiterated his argument right before Dr. Owens testified, the trial court responded that its ruling “probably would depend on what your witness testifies to and whether

it's what Dr. Yarkony actually said as rebuttal or goes beyond what would be rebuttal. So that's the best I can guide you at this point....” Franciose failed to raise the issue again after Dr. Owens testified.

First, Franciose has waived his challenge to Dr. Yarkony's testimony because he failed to make a motion to strike the testimony after Dr. Owens testified. The trial court delayed ruling upon Franciose's earlier motions to strike the evidence and commented that its ultimate ruling on the motion would “probably ... depend on what [Dr. Owens] testifies to and whether it's what Dr. Yarkony actually said as rebuttal or goes beyond what would be rebuttal.”*Id.* Where evidence is admitted subject to being connected up later, and no subsequent motion to strike the evidence is made, any error in the admission of the evidence is waived.

Further, Franciose is incorrect that Dr. Yarkony's testimony was not proper rebuttal evidence. The trial court had the discretion to allow Dr. Yarkony to testify before Dr. Owens testified, and to admit Dr. Yarkony's testimony conditionally, subject to the content of Dr. Owens's subsequent testimony.

Franciose's next argument is that the trial court abused its discretion by permitting Anthony M. Gamboa, Ph.D., a vocational economic analyst, to testify regarding Jones's diminished future earning capacity. Franciose argues that “the trial court committed reversible error by permitting Dr. Gamboa to testify because his testimony lacked sufficient reliability to be admissible.”

As a preliminary matter, the parties agree that Dr. Gamboa is an expert witness but dispute whether his testimony constitutes scientific testimony. During trial, before testifying to his opinions regarding Jones's diminished future earning capacity, Dr. Gamboa explained his area of expertise as follows: “What I do is define what effect a disability has on a person's capacity to work and earn money. I function like an appraiser, except I'm appraising human beings who have become disabled in defining what loss of earning capacity is probably as a result of a disability.” Dr. Gamboa's testimony about his analysis and conclusions constitutes scientific testimony.

The basis upon which a party may object to scientific testimony by an expert witness is Indiana Evidence Rule 702(b), which provides: “Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.” In the seminal case, *Steward v. State*, our Supreme Court explained how to apply Indiana Evidence Rule 702(b):

The concerns driving *Daubert [v. Merrell Dow Pharmaceuticals, Inc.]*, 509 U.S. 579 (1993), interpreting Federal Rule of Evidence 702] coincide with the express requirement of Indiana Rule of Evidence 702(b) that the trial court be satisfied of the reliability of the scientific principles involved. Thus, although not binding upon the determination of the state evidentiary law issues, the federal evidence law of *Daubert* and its progeny is helpful to the bench and bar in applying Indiana Rule of Evidence 702(b).

Steward v. State, 652 N.E.2d 490, 498 (Ind.1995), *reh'g denied*. Therefore, it behooves trial courts to consider the factors enunciated in *Daubert* when deciding whether to admit an expert witness's scientific testimony.

The trial judge is the gatekeeper for expert evidence proffered under Indiana Evidence Rule 702. In order for the trial court to know that a *Steward* analysis needs to be conducted, however, the party opposing the evidence needs to alert the trial court that the gate is squeaking. Here, Franciose failed to sufficiently alert the trial court that he objected to Dr. Gamboa's

testimony pursuant to Indiana Evidence Rule 702(b).

This objection did not alert the trial court that Franciose desired an inquiry into the reliability of the scientific principles upon which Dr. Gamboa rested his testimony. Nor did the court hear any additional evidence to enable it to determine that it was “satisfied that the scientific principles upon which [Dr. Gamboa's] testimony rests are reliable.” Ind. Evidence Rule 702(b). Additionally, there was no discussion of the list of *Daubert* factors. If Franciose desired a ruling on the reliability of Dr. Gamboa's scientific methodology, it was his responsibility to make that clear to the court. Grounds for objection must be specific, and any grounds not raised in the trial court are not available on appeal.

In most cases, including the case before us today, whether an expert's scientific testimony meets the requirements of Indiana Evidence Rule 702(b) will not be apparent. In all cases, it is wise for a party to inform the trial court before trial that it wishes to raise an objection to the reliability of the expert witness's scientific methodology. Where a party waits until trial to raise a challenge requiring a *Steward* analysis, that party places a significant burden upon the trial court by asking the court to halt its proceedings and engage in what will possibly be a very lengthy hearing separate from the trial, often while an impaneled jury sits idle. Further, it is wise for a trial court to include in a pretrial order that parties must raise this issue before trial. For the trial court to do so is within its discretion under Indiana Evidence Rule 611(a).

Franciose next argues that the trial court abused its discretion by excluding the testimony of defense witness Matthew Lackey. At trial, Franciose sought to call Lackey as a witness. Jones's counsel filed a motion to exclude Lackey's testimony, contending that Franciose had failed to properly disclose Lackey's contact information during discovery and had failed to comply with an order requiring Lackey to appear for a deposition as a prerequisite to testifying at trial. Franciose does not refute that he failed to provide reliable contact information for Lackey to Jones before the date on which Lackey missed his scheduled deposition, which was less than a week before the trial began. Here, while Lackey may have been a difficult witness to locate, before making its decision to exclude Lackey's testimony the trial court received information that Franciose knew how to contact him. It is apparent that it was Franciose's own failure to timely share this contact information that led to the last-minute deposition, which Lackey then missed, and, ultimately, the trial court's decision not to subject Jones to a “trial by ambush.” We cannot say that the trial court abused its discretion by excluding Lackey's testimony.

The Indiana Supreme Court has adopted the “rescue doctrine,” which is the rule that “[o]ne who has, through his negligence, endangered the safety of another may be held liable for injuries sustained by a third person in attempting to save such other from injury.”

the ‘rescue doctrine’ under any conception of it contemplates a voluntary act by a rescuer who in an emergency attempts a ‘rescue’ prompted by a spontaneous, humane motive to save human life, and which ‘rescue’ the rescuer had no duty to attempt in the sense of a legal obligation or in the sense of a duty fastened on him by virtue of his employment.

Jones witnessed Ramirez's disabled truck blocking a lane of Interstate 65. This created an immediately apparent danger to other motorists, and there is a continuous link between the original negligence and Jones's effort to physically remove the truck from the interstate. The trial court did not abuse its discretion in this regard by giving the instruction on the rescue doctrine.

Lessons:

1. Don't forget to renew a motion to strike anticipatory rebuttal testimony if judge

- defers ruling until later testimony in the trial.
2. Testimony regarding lost earning capacity due to disability is “scientific testimony.”
 3. Give the trial court advance and clear warning when you have a Rule 702/Daubert/Steward objection, preferably before trial.
 4. A “*Steward* analysis” is used to consider *Daubert* factors when making an objection under Rule 702(b).
 5. Under the rescue doctrine, a negligent party may be held liable if someone trying to effect a rescue is injured in that process.
- 9. Daubert Challenge; Medical Causation: *Cunningham v. Masterwear Corporation*, 569 F.3d 673 (7th Circuit, June 23, 2009) (Posner)**

The Plaintiffs, a couple named Cunningham, appeal from the dismissal, on the defendants’ motion for summary judgment, of a suit for common law nuisance. From 1986 to the beginning of 2004, the plaintiffs operated a photographic studio in Martinsville, Indiana. In December 2003, the EPA warned them that their building contained perchlorethylene (PCE) vapors in a concentration of 200 parts per billion and that “this amount of the compound could be significant and pose a health concern over the long term.” The district court granted summary judgment for the defendants after disqualifying the plaintiffs’ expert medical witness under Fed. R. Evid. 702.

When ruling on whether the plaintiffs’ medical expert, Dr. D. Duane Houser, a physician who specializes in the treatment of respiratory diseases, would be permitted to testify about the cause of the symptoms about which the plaintiffs complaint, the judge had before him Dr. Houser’s expert report plus deposition testimony. From these materials and Houser’s curriculum vitae we learn that he is an experienced physician who has never however treated a respiratory illness caused or aggravated by exposure to PCE. He has nevertheless formed the definite opinion that all the symptoms of which the plaintiff’s complaint were caused by that exposure.

Houser is not a toxicologist and did not present, either directly or by citation to a scientific literature, a theory that would link the level and duration of the exposure of the plaintiffs to PCE to their symptoms. Houser thus presented no evidence from which a trier of fact could infer that the plaintiffs’ exposure to PCE is likely to have contributed significantly (or for that matter at all) to their ailments. The district court was therefore right to dismiss the case.

Lessons:

1. Federal judges have created a very high standard for admissible testimony on medical causation.
2. Avoid federal court if there’s any concern about the scientific basis for your expert testimony.

10. Pleadings; “All Other Proper Relief”: *The Money Store Investment Corporation v. Summers*, 2009 WL 2003963 (Ind.Ct. App. July 10, 2009) (Sharpnack)

This appeal involves issues of liens and priorities between Paula Phillips (“Phillips”), a judgment creditor and assignee of a first mortgage holder (“National City”), and The Money Store Investment Corporation, d/b/a First Union Small Business Capital (“Money Store”), the holder of a second mortgage, for the cost of repairs, insurance, and taxes with respect to the mortgaged property owned by Neal Summers, on a part of which Phillips has been operating a

restaurant.

Money Store contends that the trial court erred in holding it personally liable and ordering it to “reimburse” Phillips \$355,476.40 for “total amounts expended on the Real Estate...all of which is secured by a first priority lien on the Real Estate.” Money Store is correct. Phillips’ complaint did not petition the court to order Money Store to reimburse her. Rather, she petitioned for an in rem judgment against the mortgaged real estate. This court has previously explained that a judgment cannot stand without a pleading to support it. Further, neither Phillip’s final argument to the trial court nor her proposed findings of fact and conclusions of law requested such relief. We reverse the part of the judgment that holds Money Store personally liable to Phillips.

In addition, Money Store argues that the trial court erred in including prejudgment interest in the lien whether Phillips did not request it. Phillips, on the other hand contends that her request for “all other just and proper relief” included the award of prejudgment interest. Phillips is correct.

The award of prejudgment interest is founded solely upon the theory that there has been a deprivation of the use of money or its equivalent and that unless interest is added the injured party cannot be fully compensated for the loss suffered. Interest is not recoverable as interest but as additional damages to accomplish full compensation. The statutory interest rate is used only as a measure for the value of the lost use of property.

In *Sentry*, Sentry Insurance requested “any further relief which the court shall deem equitable” in its cross claim. This court found that prejudgment interest is “further proper relief” once the trial court determines that the prerequisites for prejudgment interest existed. Here, as in *Sentry*, prejudgment interest is “other just and proper relief” once the trial court determines that the prerequisites for prejudgment interest exist.

Lessons:

1. Be sure to include “all other just and proper relief” in your complaint; it will be sufficient to get you prejudgment interest without a specific request.
2. But it won’t be enough to support other damages if all you’ve asserted is an *in rem* claim.

11. Amending Pleading to Conform to the Evidence: *Highland Springs v. Reinstatler*, 907 N.E.2d 1067 (Ind.Ct. App. June 16, 2009) (Robb)

Highland Springs South Homeowners Association (“HOA”) filed a complaint for injunctive relief against Vanessa Reinstatler, seeking to keep her from building an addition to her home in the Highland Springs South subdivision. HOA appeals the trial court’s order dismissing its complaint with prejudice as premature. HOA also appeals the trial court’s subsequent denial of its motion to amend to conform to the evidence.

After entry of the trial court’s judgment, HOA filed a motion to amend the pleadings to conform to the evidence. HOA’s complaint alleged that Reinstatler “requested from [the Committee] a variance from the covenant/plat established setback line.” HOA’s motion to amend alleges that “the evidence actually shows that Reinstatler requested approval for a room addition” and that her request was denied for three reasons: 1) that the proposed addition violated the setback lines established in the plat; 2) the design of the proposed addition was not in harmony with the general surroundings of the lot, adjacent structures or buildings, and the

subdivision; and 3) the proposed addition was contrary to the interest, welfare, and rights of other owners in the subdivision.

Indiana Trial Rule 15(B) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment....

A trial court has discretion to allow amendments to promote relief for a party based upon the evidence actually forthcoming at trial. A trial court should not grant a motion to amend where the opposing party establishes that amendment would prejudice his action or defense. The amendment would allow the complaint to reflect the entirety of HOA's position as set forth over the course of the proceedings: that is, that the set back violation is not the only reason Reinstatler's request for approval of her room addition was denied. *Cf. Bailey v. State Farm Mut. Auto. Ins. Co.*, 881 N.E.2d 996, 1001 (Ind.Ct.App.2008) ("A party should ... be permitted to amend its pleadings to change its theory of recovery if that theory of recovery is supported by the facts as presented at trial.").

The trial court abused its discretion in denying HOA's motion to amend.

Lesson: A party should be allowed to amend its pleading to conform to the evidence unless prejudice to the opposing party is shown.

12. Double Hearsay and Admissions of Party Opponent: *Irmscher Suppliers v. Schuler, July 22, 2009 (Ind. Ct. App.)(Vaidik)*

The plaintiffs, Scott and Kelly Schuler purchased thirty-two windows manufactured by Pella Corporation from Irmscher Suppliers, Inc. Because insects were invading their home through gaps in the screens, the Schulers sued Pella and Irmscher for a breach of the implied warranty of merchantability. After a bench trial, the trial court found in favor of the Schulers, awarding \$47,827.85.

On appeal, Pella and Irmscher object to the admission of two letters written to the Schulers by Siela, an Irmscher employee, reporting a Pella employee's conclusion that the windows were defective. The letter, written on March 23, 2004, by Siela to the Schulers, provides in part:

The field quality engineer from Pella Corporation visited our sales branch last week. One of the things we addressed with him was your insect issue and part of that discussion was the viewing of your video tape. After viewing the tape, there is no denial from him, that the insects are coming through the windows (obviously). *He further admitted this to be a design flaw, and he will work on getting the designs changed.*

The letter Siela wrote on April 12, 2004, to the Schulers provides in part:

The Pella Field Quality Engineer paid us a visit a couple of weeks ago, and one of the issues we covered with him was your insect problem. *His conclusion is that this is a definite product flaw*, but unfortunately, cannot come up with a solution to eliminate the insect infiltration completely with the rolscreens in place.

At trial, Pella and Irmscher argued that the letters included inadmissible double hearsay. The trial court admitted the letters over the defendants' objection. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. When a statement contains within it another statement, each layer of hearsay must qualify under an exception to the hearsay rule before the evidence at issue is admissible.

However, a statement is not hearsay if the "statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity; or (B) a statement of which the party has manifested an adoption or belief in its truth; . . . or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]" Ind. Evidence Rule 801(d)(2).

Here, the Schulers offered the letter as evidence to prove the truth of the matter asserted; that is, that the windows were defective. The statements that the windows were defective were admissible against Pella for the truth of the matter asserted because they were made by a Pella employee charged with investigating the Schulers' insect situation, offered at trial against Pella, and reported by Irmscher, who was acting as Pella's agent or intermediary in regard to fixing the problems with the Pella windows. Evid. R. 801(d)(2)(A), (D).

The statements were admissible against Irmscher as an adoptive admission under Indiana Rule of Evidence 801(d)(2)(B). Indiana law on adoptive admissions since the adoption of the Indiana Rules of Evidence is scarce, but Indiana's rule is identical to Federal Rule of Evidence 801(d)(2)(B), and we may use federal cases for guidance. Federal Rule of Evidence 801(d)(2)(B) governing adoptive admissions does not require the party to specifically adopt another person's statements, but a "manifestation of a party's intent to adopt another's statements, *or evidence of the party's belief in the truth of the statements*, is all that is required for a finding of adoptive admission." *United States v. Rollins*, 862 F.2d 1282, 1296 (7th Cir. 1988), *reh'g denied*.

We conclude that the Pella engineer's statements that the windows were defective were admissible against Irmscher because an Irmscher employee charged with handling the Schulers' insect situation offered to replace the windows, thereby manifesting Irmscher's adoption or belief in the truth of the Pella engineer's conclusion that the windows were defective. Evid. R. 801(d)(2)(B). Because both layers of the statements were admissible, the trial court did not abuse its discretion by admitting the letters against Irmscher.

As a final matter on this issue, we note that the Pella and Irmscher employee declarants did not testify at trial and they were not required to do so for the letters to be admissible, contrary to the defendants' argument on appeal. Indiana Rule of Evidence 801(d)(2) does not include a requirement that the declarant testify at trial. *Cf.* Ind. Evidence Rule 801(d)(1) (which does contain a requirement that the declarant testify for the witness's prior statement to be admissible). In sum, the trial court did not abuse its discretion by admitting the letters into evidence.

Lessons:

1. Passing along the admission of a co-defendant may constitute "adoption" of the admission unless there is a clear statement otherwise.

2. In trying to resolve a complaint, make it clear that any communications are for settlement purposes only and protected by Evidence Rule 408 (statements made in compromise negotiations are inadmissible).

13. Conclusory Affidavit; Tort Claims When There is a Contract: *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 907 N.E.2d 616 (Ind.Ct. App. June 16, 2009) (Crone)

Following the trial court's entry of summary judgment in favor of Integrity Land Title Corp. ("Integrity"), U.S. Bank, N.A. ("U.S. Bank"), filed a motion to correct error and a motion for relief from judgment. U.S. Bank appeals the denial of these motions, as well as the granting of Integrity's motion to strike certain material filed in support of U.S. Bank's motions.

In January 2006, Brenda Daley was the owner of certain real property in Auburn, Indiana. She agreed to sell the property to Michael Davison. Davison's lender, Texcorp Mortgage Bankers, Inc., contracted with Integrity to prepare a title commitment, conduct the mortgage closing, and provide Texcorp, "its successors and/or assigns, with an insured first and superior mortgage lien against the subject real property." Integrity contracted with Rainbow Searchers, Inc., to perform a title search.

Rainbow Searchers' report failed to note the existence of a 1998 foreclosure judgment against Daley, which ultimately was assigned to LPP Mortgage LTD. Integrity issued a title commitment to Texcorp, which indicated that the title search had uncovered no judgments against Daley. In reliance on the title commitment, Texcorp approved a mortgage loan in the amount of \$123,090.00. Texcorp's mortgage was subsequently assigned to U.S. Bank.

In August 2006, LPP Mortgage filed suit against Davison and Texcorp to enforce and foreclose its judgment lien. U.S. Bank intervened in September 2006. In December 2007, U.S. Bank filed a third-party complaint against Integrity and Southern National. The complaint first alleged that U.S. Bank's "pending loss is a direct and proximate result of negligent real estate closing and certification of title by [Southern National], through its agent [Integrity]."

The trial court found that Integrity was not a party to the Policy and therefore owed no contractual duty to U.S. Bank. We note, however, that U.S. Bank alleged in its response to Integrity's summary judgment motion that Integrity owed a contractual duty to U.S. Bank arising out of its relationship with Texcorp, which was described in Grimes's affidavit.^{FN3} Integrity contends that Grimes's affidavit contains inadmissible legal conclusions regarding the existence and legal effect of the contract that the trial court should have disregarded in ruling on the summary judgment motions. *See Paramo v. Edwards*, 563 N.E.2d 595, 600 (Ind.1990) ("Affidavits supporting or opposing summary judgment must set forth such facts as would be admissible in evidence. T.R. 56(E). Conclusory statements not admissible at trial should be disregarded when determining whether to grant or deny a summary judgment motion.").

Integrity further contends that Grimes's affidavit failed to provide factual support for such conclusory statements. For instance, the Affidavit did not state: (1) whether the contract was written or oral, (2) essential terms of the contract, (3) the specific representative(s) of [Texcorp] and [Integrity] who entered into the contract on behalf of each, (4) the date on which the contract was entered into, or (5) the consideration provided.

We do not believe that the affidavit was either impermissibly conclusory or that it was required to contain such specific details to raise a genuine issue of material fact regarding whether Integrity had a contract with Texcorp and whether Integrity breached that contract. Grimes's affidavit establishes that Texcorp requested that Integrity prepare a title commitment, conduct the mortgage closing, and provide "an insured first and superior mortgage lien against

the subject real property”; that Integrity prepared the title commitment, which indicated that it had “performed a title search on the subject property and found no prior judgment liens”; that, in reliance on the commitment, Texcorp approved the mortgage loan in the amount of \$123,090.00; and that Integrity provided Texcorp with the Policy, which insured “a first and superior mortgage against the real estate[.]” From Grimes's use of the word “contracted,” one may reasonably infer that Integrity received valuable consideration for its services; this inference is supported by the HUD-1 settlement statement. Although Grimes's affidavit does not disclose the precise terms of the contract or whether they were reduced to writing, we conclude that it states facts sufficient to suggest that a contract existed between Integrity and Texcorp.

As for its tort claim, U.S. Bank asserts that the issue is one of first impression in Indiana, namely, “whether or not a title company, after issuing an incorrect title commitment in which the recipient (mortgage company) relied upon to its detriment, owes a duty to the recipient to [which] it certified clear title to the subject real property.” The fact remains, however, that any liability arising from Integrity's alleged breach of this duty does not extend beyond its “mere failure to fulfill [its] contractual obligations”-whether as a party or a third party-to Texcorp/U.S. Bank. As such, a tort remedy is not available to U.S. Bank. “When the parties have, by contract, arranged their respective risks of loss, ... the[n] tort law should not interfere.” Therefore, we conclude that the trial court did not abuse its discretion in denying U.S. Bank's motion to correct error and motion for relief from judgment as to its tort claim.

Lessons:

1. An affidavit that contains facts as well as a conclusory statement need not be stricken.
2. When the parties have a contract, tort law should not interfere.

14. Statute of Limitation; Discovery Rule: *Martin Oil Marketing LTD v. Katzioris*, 2009 WL 183723 (Ind.Ct. App. July 1, 2009) (Friedlander)

Upon interlocutory appeal, Martin Oil Marketing Ltd. (Martin Oil) and Speedway SuperAmerica LLC (SSA) (collectively, the Appellants) appeal the trial court's denial of their motion for summary judgment as to claims asserted by John L. Katzioris concerning the alleged contamination of Katzioris's property by Martin Oil.

Martin Oil owned the property abutting Katzioris's property on the south and operated a retail establishment there, which included the sale of gasoline stored in underground tanks. In 1994, Martin Oil sold its property to SSA. At that time, it was discovered that an environmental release from the Martin Oil property had contaminated the soil. In 1994, Martin Oil hired The Environmental Solutions Group (ESG) to determine the extent of and to remediate the contamination. ESG decided it should conduct tests to determine whether the contamination extended onto Katzioris's property. ESG claims it obtained Katzioris's permission before conducting the testing.

On August 9, 2006, Katzioris filed a complaint for damages and injunctive relief against Martin Oil and SSA. Under the theory of continuing trespass, Katzioris sought damages for the discharge of hazardous pollutants on Katzioris's property, as measured by the diminution of the value of the property caused by the contamination.

On January 30, 2008, the Appellants filed a motion for summary judgment claiming that Katzioris's lawsuit was barred by the six-year statute of limitations set out in Ind.Code Ann. § 34-11-2-7. The trial court denied the motion on May 30, 2008.

The threshold issue in this appeal involves the application of a statute of limitations. In a nutshell, Katzioris sued the Appellants under the theory of continuing trespass for coming onto his property without authorization and contaminating his land. A determination of whether Katzioris's complaint is time-barred by I.C. § 34-11-2-7 requires that we fix the time when the cause of action accrued.

A cause of action accrues under this statute “when a claimant knows, or in the exercise of ordinary diligence should have known of the injury.” For claims to accrue, it is not necessary that the full extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred. Katzioris's complaint was filed on August 9, 2006. Thus, we must determine if Katzioris knew of, or reasonably could have discovered, the damage to his property before August 9, 2000.

Returning now to the pivotal question, we must determine whether a question of fact remains as to whether, before August 9, 2000, Katzioris knew or in exercise of ordinary diligence should have known of contamination of his property. The Appellants presented evidence that he did. A report sent in 1994 from ESG to Martin Oil indicated that Katzioris had given oral permission to enter onto his property to test for and, if necessary, remediate contamination. Kiest, then president of ESG, submitted an affidavit stating that “ESG sought and received permission to conduct tests, take samples, monitor and conduct remediation efforts on Johnny's Property from the City of Gary *and from John L. Katzioris* in late fall of 1994 .” If true, this means that in 1994 Katzioris was apprised by ESG that his property might have been contaminated and that such might require clean-up efforts, or remediation. Of course, the “if true” qualification is the all-important question here.

Did Katzioris present evidence sufficient to call that assertion into question? Katzioris was asked, “Can you dispute that you ever ... gave permission to enter on Johnnie's [sic] Gyros property in 1994?”*Id.* at 104. Katzioris answered in the negative. Repeating now the all-important question from the Appellants' counsel, Katzioris was asked (through an interpreter), “I'd like to know if he remembers giving permission or if he remembers not giving permission or he just doesn't remember.”*Id.* at 104-05. Katzioris replied, “I don't remember at all.”

Yet, citing Katzioris's response and noting Katzioris's ill health and limited command of the English language, the trial court concluded that there remained a question of fact as to whether Katzioris did, in fact, give permission in 1994 as Kiest claimed. We reach the opposite conclusion. The foregoing authority reflects that we apply an objective standard to the plaintiff's actions, not a subjective one. That is, we determine what a reasonable person would have done under the circumstances. ESG's request for permission surely constituted “sufficient information to cause him to inquire further in order to determine whether a legal wrong ha[d] occurred.”

NAJAM, Judge, dissenting.

Katzioris presented evidence-namely, Louis' testimony-that demonstrated that, before October of 2000, Katzioris and his family believed the capped pipes were installed by the water department. The inference from that evidence is that he and his family were unaware that an entity other than the water department-ESG-had installed the pipes.

Lessons:

1. Giving permission to conduct tests for contamination is sufficient “discovery” to start the statute of limitations running on a contamination claim.
2. The court applies an objective standard in determining if there has been discovery.

15. Contract Law; Third Party Beneficiary: *City of East Chicago v. East Chicago Second Century, Inc.* (Ind.S.Ct. June 30, 2009) (Shepard)

The present appeal is a continuation of the original matter filed by Second Century, seeking a declaration that Second Century was a third-party beneficiary of the letter agreements and are entitled to continue receiving funds from the riverboat operation. The Commission announced that much of the \$16 million forwarded to Second Century could not be accounted for and could be traced to Second Century's principals. Based on financial irregularities found in that investigation, the Commission issued Resolution 2006-58, disapproving continued payments by Resorts to Second Century.

The City contends that it was entitled to summary judgment on the claim by Second Century and the Foundations that they are third-party beneficiaries of the agreements and the license who possess enforceable rights to continue receiving riverboat revenue indefinitely. As long ago as the *Restatement of Contracts*, approved in 1932, the law began to recognize that in certain situations, such beneficiaries should be entitled to rely upon and enforce the promises other parties had made to each other. Subsequent debate has thus focused on which beneficiaries should be entitled to enforce contracts made by others and when in the course of contract activities the interests of a beneficiary become such that they should prevail over the ordinary ability of the promisor and promisee to alter or rescind their agreement, a question often styled as inquiring when the beneficiary's interest has "vested." E. Allan Farnsworth, *Farnsworth on Contracts* § 10.8 (2004).

The First Restatement's division of third-party beneficiaries into categories (donee, creditor, and incidental) having received only lukewarm acceptance. The Second Restatement, adopted in 1979, abandoned this structure. The present Restatement declares (1) that modification of an arrangement may be subject to a beneficiary's consent where it explicitly so provides, (2) that absent such a provision the promisor and promisee retain the power to discharge or modify their agreement without the beneficiary's consent, and, (3) that this power to discharge or modify "terminates" when the beneficiary "materially changes his position in justifiable reliance on the promise." This third concept is the one argued by the Foundations.

"If a recognized beneficiary has justifiably relied on a contract," Eisenberg writes, "the importance of protecting that reliance outweighs the interests of the contracting parties, but only to the extent of the reliance." That principle appears suitable to the case before us. While the Foundations can be said to have justifiably relied on the revenue that has flowed as a result of the local development agreements and the license issued by the Gaming Commission, that reliance should not be a permanent bar to altering the methods employed to further economic development in East Chicago.

To the extent the City's motion sought a determination that the agreements and the license were susceptible of alteration, it was entitled to such a holding.

Lessons:

1. A third party beneficiary's interest in a contract is said to have "vested" when his rights will prevail over the ordinary ability of the contracting parties to alter or rescind the agreement.
2. The third party beneficiary's interest will vest when he materially changes his position in reliance on the promise.

3. The remedy for 3rd party beneficiary reliance will be limited to the costs of reliance; he cannot bar forever any agreed alternation of a contract.

16. Known Loss Doctrine; Sham Affidavit/Deposition: *Crawfordsville Square v. Monroe Guaranty Insurance*, 2009 WL 1507289 (Ind.Ct. App. May 29, 2009) (Bradford)

The “known loss” doctrine is a common law concept deriving from the fundamental requirement in insurance law that the loss be fortuitous. Simply put, the known loss doctrine states that one may not obtain insurance for a loss that has already taken place. *Id.* Describing the known loss doctrine, commentators have noted that “losses which exist at the time of the insuring agreement, or which are so probable or imminent that there is insufficient ‘risk’ being transferred between the insured and insurer, are not proper subjects of insurance.

This principle has been referred to by various names, including “loss in progress,” “known risk,” and “known loss.” Although the term “known loss” has been limited to those situations where a loss has actually occurred, most courts have defined the doctrine to also include losses which are “substantially certain” to occur or which were a “substantial probability.” Therefore, we will use the term “known loss” to encompass the fortuity principle.

We hold that if an insured has actual knowledge that a loss has occurred, is occurring, or is substantially certain to occur on or before the effective date of the policy, the known loss doctrine will bar coverage. This is not to say, however, that parties may not explicitly agree to cover existing losses. Indeed, the known loss doctrine is inapplicable “if the insurer also knew of the circumstances on which it bases the defense.”

On September 29, 1998, Kleinmaier, a member of Crawfordsville Square, LLC (“CS”), sent a letter to Hedrick indicating that “[c]lean up [sic] of both petroleum and cleaning agent contamination must happen. The law requires it.” In deposition testimony, Kleinmaier’s response indicates knowledge only of *potential* contamination at the time, which is inconsistent with the positive declarations contained in the letter. Essentially, what CS is attempting to do is show that a genuine issue of material fact exists because Kleinmaier’s deposition testimony contradicts the assertions in his earlier letter to Hedrick.

It has long been the law in Indiana and many other jurisdictions that “contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant.” Here, the factual posture is different than that of the typical “sham affidavit” case, in which an affidavit contradicts that party’s prior sworn deposition testimony. Given the rationale for the rule and the facts before us, however, we conclude that it applies in this case as well.

When an affidavit is impeached by prior sworn testimony without sufficient explanation, the court must view that affidavit with profound skepticism. We see nothing in this record to indicate that we should view Kleinmaier’s deposition with any less skepticism, especially when one considers that the letter to Hedrick preceded the current litigation by several years and the deposition was taken after commencement of the lawsuit. Moreover, we see nothing in the record that would explain the discrepancy, other than the strong implication that CS may have deliberately misled Chaney regarding its knowledge of contamination on the parcel. This sort of explanation, however, will not suffice.

“Where deposition and affidavit are in conflict, the affidavit is to be disregarded unless it

is demonstrable that the statement in the deposition was mistaken, perhaps because the question was phrased in a confusing manner or because a lapse of memory is in the circumstances a plausible explanation for the discrepancy.” There is no indication that any of Kleinmaier’s statements, either in the letter or in the deposition, were the result of mistake or confusion. In this case, at least, we believe that application of the general rule is warranted, given that its overriding purpose is to prevent a party from generating its own genuine issue of material fact by providing self-serving contradictory statements without explanation. As such, we reject for appellate consideration that portion of Kleinmaier’s deposition indicating that CS was aware only of the possibility of contamination on the parcel. We are left, then, with only Kleinmaier’s letter, which clearly indicates knowledge of actionable contamination.

Kleinmaier’s letter represents specific knowledge of a loss that had already occurred, not an attempt to warn management to take measures to prevent potential future losses, none of which had already occurred. Kleinmaier’s letter goes beyond mere knowledge of a potential future risk and demonstrates actual knowledge of a loss that had already occurred.

Lessons:

1. The known loss doctrine extends to losses that are substantially certain to occur but will not protect an insurer who knew of the loss.
2. Deposition testimony will not create a genuine issue for trial if there is pre-existing documentary evidence authored by the deponent to the contrary.

17. Duty of Adjacent Landowners to Intoxicated Driver: *Witmat Development Corp. v. Dickison*, 2009 WL 1579067 (Ind.Ct.App. June 4, 2009) (Mathias)

Randall Dickison, individually and as personal representative of the Estate of Gregory Dickison, filed a complaint against Witmat Development Corporation alleging that Witmat negligently failed to warn of a water-filled strip pit adjacent to a public highway, which pit is located on Witmat’s property. Witmat moved for summary judgment arguing that it owed no duty to Gregory Dickison (“Dickison”), or in the alternative, that Dickison’s own negligence was the cause of the accident that resulted in his death. The trial court denied Witmat’s motion for summary judgment. Witmat appeals and raises three arguments, but we address only the following dispositive issue: whether Witmat owed a duty to Dickison as a matter of law.

Our courts’ holdings are consistent with Section 368 of the Restatement (Second) of Torts (1965), which provides:

§ 368. Conditions Dangerous to Travelers on Adjacent Highway

A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition *while traveling with reasonable care upon the highway*, is subject to liability for physical harm thereby caused to persons who

- (a) are traveling on the highway, or
- (b) foreseeably deviate from it in the ordinary course of travel.

Therefore, “the risk posed by an excavation on property adjacent to a public way might,

in some situations, create a relation sufficient to give rise to a tort duty to guard against foreseeable injuries to persons exercising due care.”

Dickison, who was operating a motor vehicle with a blood alcohol level of more than two times the legal limit, drove his vehicle off of a relatively flat and straight roadway, and traveled 230 feet before the vehicle entered the water-filled strip pit. The Estate designated no evidence in opposition to Witmat's evidence concerning Dickison's level of intoxication.

This evidence leads us to one conclusion: that Witmat owed no duty to Dickison because Dickison, whose blood alcohol was 0.172 to 0.204 at the time of his death, was not traveling the roadway with reasonable care. In addition and equally important to our conclusion, the Estate failed to designate any evidence tending to establish that some other factor may have caused Dickison's accident.

For all of these reasons, we conclude that the trial court erred when it denied Witmat's motion for summary judgment.

Lessons:

1. There are circumstances where adjacent landowners may be liable for an excavation or other conditions near a highway to a driver who leaves the roadway.
2. No duty will be found on which a driver may rely who himself, by intoxication or otherwise, fails to exercise reasonable care.

ADVOCACY TIP OF THE MONTH: Be careful about the shoes you wear and the motions you file, they may have unanticipated consequences.

Recently, during a personal injury trial in Florida, the plaintiff’s attorney, Bill Bone, filed a “Motion to Compel Defense Counsel to Wear Appropriate Shoes at Trial.” The defense counsel, Michael Robb, was wearing shoes with holes in the soles. Mr. Bone believed that this was part of the defense strategy to “present Mr. Robb and his client as modest individuals who are so frugal that Mr. Robb has to wear shoes with holes in the soles.”

The motion argued: “Mr. Robb is known to stand at sidebar with one foot crossed casually beside the other so that the holes in his shoes are readily apparent to the jury who are intently watching all counsel and the Court at that moment. Then, during argument and throughout the case Mr. Robb throws out statements like ‘I’m just a simple lawyer’ with the obvious suggestion that Plaintiff’s counsel and the Plaintiff are not as sincere and down to earth as Mr. Robb. Mr. Robb should be required to wear shoes without holes in the soles at trial to avoid the unfair prejudice suggested by this conduct.” The motion noted that “Robb’s shoe tactics are ‘well known’ among other lawyers.”

Mr. Robb explained that his “12-year-old loafers” were his “trial shoes,” that they’re comfortable and “I’ve had pretty good luck with these shoes.” He acknowledged that the shoes “were close to being retired” but “you ride that horse until it completely collapses.”

The motion was denied. But that’s not the end of this story. A humorous column about the motion appeared during the trial in the local newspaper, the Palm Beach Post. Both attorneys urged the columnist not to run the column until the trial was over, noting that the “story would have the same entertainment value if told next week” and that publishing the column could cause a mistrial. One of the lawyers also urged that if the column ran, it should be preceded by a warning, something like, “This is an actual legal case in progress. If you are sitting on a Palm Beach County Jury, don’t read my column today.”

The columnist was not persuaded. The column ran on Sunday during the trial, without any such warning. On Monday, the day after the column ran, one of the jurors brought the column to court and read it to the others in the jury room. After the judge learned this fact, he allowed the trial to proceed. The jury returned a \$2.2 million verdict for the plaintiff, but the judge then granted the defense motion for a mistrial based on prejudice due to the newspaper column about the “holes in soles” motion.

Lessons:

1. If the trial is going well, don't file motions that could lead to a mistrial.
2. When you're trying to get a reporter to hold off on printing an article that could lead to a mistrial, keep this story on hand to prove that the risk is real.

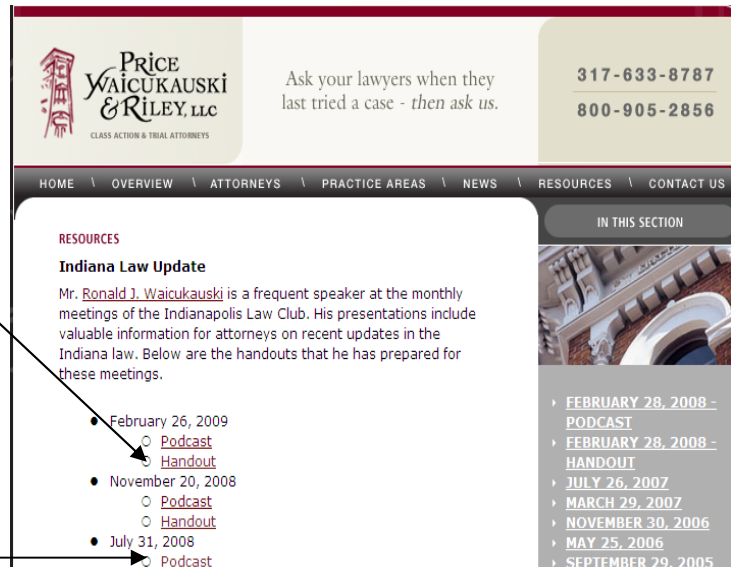
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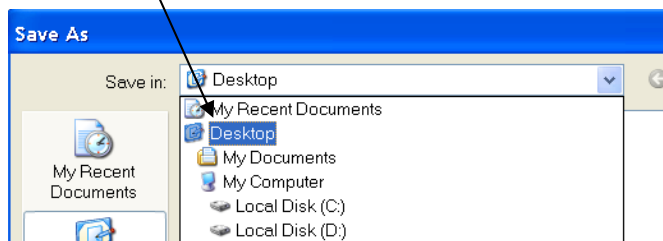
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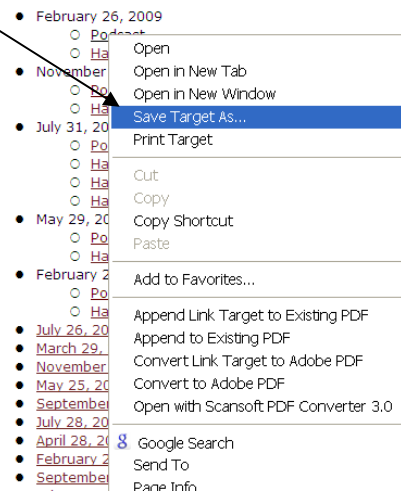
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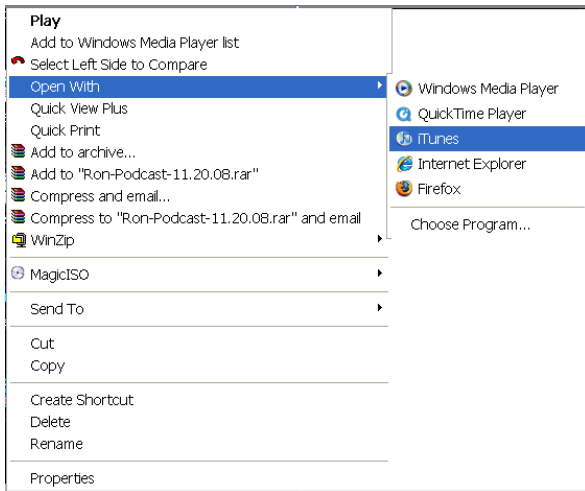
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