INDIANA LAW UPDATE

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By Ronald J. Waicukauski
PRICE WAICUKAUSKI & RILEY, LLC
301 Massachusetts Ave., Indianapolis, IN 46204
317-633-8787
rwaicukauski@price-law.com

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ADVOCACY TIPS OF THE MONTH: Don't overuse italics; don't use bold type except in headings; don't use underlining at all.

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: Really, Fewer Hourly Bills

From the National Law Journal, December 21, 2009, by Jeff Jeffrey

For some 40 years, corporate lawyers could be hired one way – by the hour. They doled out their working lives in six-minute increments. Oh, industry visionaries nattered on about "altenative billing arrangements." Lawyers mostly nodded and went back to their time sheets.

Until this past decade. Bookended by major recessions – i.e., periods when potential clients push to cut costs – *this decade looks to be the one in which alternate fee structures finally took root, even in Am Law 100 firms.*

Orrick, Herrington & Sutcliffe set an enviable example in May 2009 when the firm inked a contract with Levi Strauss & Co. that gives it almost all the denim giant's legal work for a flat annual fee, to be paid out in monthly increments.

Other firms are also making the switch. Among those that answered the question in this year's NLJ 250 billing survey, 57% said alternative fee arrangements represented 10% or more of their revenue in 2009.

Pressure from clients has been the driving force behind these real cracks in the hourly billing model. Legal entrepreneurs are also offering clients more options. So-called virtual law firms—officeless groups of lawyers with little overhead—offer much lower rates than traditional firms.

Hildebrant consultant Lisa Smith said she doesn't see Big Law losing much ground to virtual rivals, and the billable hour is far from dead. But alternative arrangements are gunning for it now.

1. Contributory negligence of children; the meaning of "may": *Clay City v. Timberman*, 918 N.E.2d 292 (Ind. 11/30/2009)(Sullivan)

Thirteen-year-old Kodi Pipes attended Clay Jr. High School in the Clay City Consolidated School Corporation ("Clay City Schools"). On Monday, November 17, 2003, Kodi blacked out during basketball practice. On Tuesday and Wednesday of the same week, Kodi attended school without incident. Though a doctor had not cleared Kodi to practice, he participated in Wednesday night's practice without restrictions. During Wednesday night's practice, Kodi's coach required the players to perform a running drill. Early in the drill, Kodi collapsed and died.

Kodi's parents, Ronna Timberman and John Pipes II, filed a complaint against Clay City Schools, alleging that the school was negligent under Indiana's Child Wrongful Death Statute, Ind.Code § 34-23-2-1. The School defended, arguing that Kodi's own negligence contributed to his death. (Under Indiana law, "contributory negligence" has been considered an absolute defense available to governmental entities, including public schools.) Nevertheless, the jury returned a verdict and damage award in favor of Kodi's parents. The School appealed.

The standard of care for a child between the ages of seven and 14 is well-established. Our cases have consistently declared that a child between seven and 14 is required to exercise due care for his or her own safety under the circumstances and that the care required is to be

measured by that ordinarily exercised under similar circumstances by children of the same age, knowledge, judgment, and experience.

How substantive law measures whether a child between the ages of seven and 14 has been negligent is a different inquiry from whether legal procedure erects a presumption that such a child cannot be guilty of contributory negligence. Indiana Evidence Rule 301 governs the application of presumptions in civil actions. It provides:

> In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received.

We now confirm: Indiana law recognizes a rebuttable presumption that children between the ages of seven and 14 are incapable of contributory negligence. We believe this accords with the unquestioned obligation that the alleged tortfeasor bears of proving contributory negligence. In point of fact, given the extraordinary protection that the doctrine of contributory negligence provides alleged tortfeasors, this presumption in favor of youthful alleged victims is a very modest benefit at best.

We emphasize that this holding relates only to an evidentiary presumption in the contributory negligence cases, defining the state of the presumed fact of (no) contributory negligence at the outset of the litigation and, in the words of Evid. R. 301, the "burden of going forward." This holding has no impact on the standard of care applicable to a child between the ages of seven and 14; that standard of care is as set forth above and it applies in all negligence settings, i.e., in cases against a child alleging negligence; in cases involving contributory negligence; and in cases involving comparative fault.

Clay City Schools contends that the trial court committed reversible error when it instructed the jury that it "may" find for the defendant if it found any negligence on the part of Kodi. The school corporation argues that it would be entitled to a judgment as a matter of law if the jury found Kodi guilty of contributory negligence; therefore, the instruction should have directed the jury that it "must," rather than "may," find for the defendant in such a circumstance. In other words, Clay City Schools asserts that "may" was permissive and not mandatory, and that "must" should have been used when instructing the jury.

We agree that the use of "may" in place of "must" was not the most appropriate language based on Indiana law. However, the jury was otherwise instructed in Final Instruction No. 14 that if "Kodi Pipes was contributorily negligent or incurred the risk, your verdict should be for the defendant." Considering the instructions together, the law on the contributory negligence of Kodi was stated with substantial accuracy.

Black's Law Dictionary provides three definitions for the verb "may." The first two accord with Clay City Schools' argument: "to be permitted to" and "to be a possibility." But the third definition accords to what we believe the trial court had in mind here: "Loosely, is required to; shall; must." The entry goes on to say that "[i]n dozens of cases, courts have held *may* to be synonymous with *shall* or *must.*" Though it might have been more precise if words like "shall" or "must" had been used in the jury instruction instead of "may," such substitution does not constitute reversible error in this case.

Lessons:

1. Indiana law recognizes a rebuttable presumption that children between the ages of 7 and 14 are incapable of contributory negligence.
2. "May" sometimes means "must" or "shall." It is not always permissive.

2. The fireman's rule: *Babes Show Club v. Lair*, 918 N.E.2d 308 (Ind. 12/15/2009)(Boehm)

On November 30, 2005, Patrick Lair, an Indianapolis police officer, responded to a report of an unruly customer at Babes Showclub, an adult entertainment business. Lair claims that shortly after he arrived, he was injured in an assault by an underage male who had been consuming alcohol at Babes. Lair sued Babes Showclub and related defendants, alleging that Babes maintained a nuisance and was negligent in failing to provide adequate security. Lair also alleged that Babes's violation of Dram Shop laws and statutes prohibiting the sale of alcohol to minors caused his injuries.

Babes filed a motion to dismiss for failure to state a claim on which relief could be granted, citing Indiana's fireman's rule. The trial court denied Babes's motion but certified its order for interlocutory appeal. The Court of Appeals reversed, holding that the fireman's rule precluded any recovery by Lair.

Both Lair and Babes ask us to reconsider aspects of the fireman's rule in Indiana, and both rely on a series of prior Indiana decisions. The fireman's rule was initially established in Indiana in 1893 by this Court's decision in *Woodruff v. Bowen,* 136 Ind. 431, 34 N.E. 1113 (1893). In that case, a firefighter died fighting a fire in a building in downtown Indianapolis. We held that the property owner had no liability to the firefighter for injuries incurred in responding to a fire caused by the owner's negligence.

Over the ensuing century the "fireman's rule" was upheld and expanded in a number of decisions by the Court of Appeals. The rule was also applied to police officers and other professional emergency responders in addition to firefighters. This Court last addressed the fireman's rule in *Heck v. Robey,* where we invoked the exception to the rule that permitted recovery for "positive wrongful acts." 659 N.E.2d 498, 500 (Ind.1995).

We think the fireman's rule is best understood as reflecting a policy determination that emergency responders should not be able to sue for the negligence that created the emergency to which they respond in their official capacity. Many emergencies are caused by the negligence of some party. The public employs firefighters, police officers, and others to respond to emergencies, and these responders knowingly combat the effects of others' negligence.

In summary, the fireman's rule allows no claim by a professional emergency responder for the negligence that creates the emergency to which he or she responds. However, the emergency responder remains free to sue for damages if an injury is caused by negligent or intentional tortious conduct separate and apart from the conduct that contributed to the emergency. The negligent conduct need not occur after the officer arrives on the scene, but must be separate from and independent of the negligence that caused the situation necessitating the officer's presence.

Lair's complaint alleged nothing suggesting that Babes was negligent in any respect apart from the negligence that produced the emergent situation with the unruly patron. Without any such allegation, the complaint fails to state a claim against Babes in the face of the fireman's rule. The complaint was therefore properly dismissed for failure to state a claim.

Lessons:

1. Emergency responders are barred from making claims for negligence that created the emergency to which they responded in their professional capacity.
2. They are not barred from asserting a claim for negligent conduct that is separate and apart from the situation to which they responded.

3. Constructive retaliatory discharge: *Baker v. Tremco Incorporated*, 917 N.E.2d 650 (Ind. 12/1/2009)(Shepard)

Tremco, Inc. manufactures and sells various products for construction and maintenance of roofing systems. On July 19, 1991, Brennan Baker and Tremco entered into an agreement in which Tremco employed Baker to sell and promote the sale of Tremco's products. Baker resigned from his employment on January 5, 2004, after a dispute arose between Baker and Tremco regarding Tremco's sales and bidding practices. Baker alleges that he concluded that the schools in the Association of Educational Purchasing Agencies ("AEPA") were being overcharged for products and services, and after informing his immediate supervisor Rick Gibson, he refused to continue using company policies and the AEPA contract as a means of selling Tremco's products.

Baker filed a complaint for damages against Tremco asserting claims for wrongful termination, defamation, and violation of Indiana's blacklisting statute. Baker argues that he was wrongfully discharged for refusing to participate in illegal activity—refusing to participate in Tremco's scheme to sell its roofing products and other services by violating public bidding laws and defrauding Indiana public schools. Tremco argues that Baker's employment was not involuntarily terminated, noting that Baker tendered his own resignation.

Indiana follows the doctrine of employment at will, under which employment may be terminated by either party at will, with or without reason. This Court has recognized only three exceptions to the doctrine.

First, if an employee establishes that "adequate independent consideration" supports the employment contract, the Court generally will conclude that the parties intended to establish a relationship in which the employer may terminate the employee only for good cause. Adequate independent consideration is provided when the employer is aware that the employee had a position with assured permanency and the employee accepted the new position only after receiving assurances guaranteeing similar permanency, or when the employee entered into a settlement agreement releasing the employer from liability on an employment related claim against the employer.

Second, we have recognized a public policy exception to the doctrine if a clear statutory expression of a right or a duty is contravened.

Third, this Court has recognized that an employee may invoke the doctrine of promissory estoppel by pleading the doctrine with particularity, demonstrating that the employer made a promise to the employee, that the employee relied on the promise to his detriment, and that the promise otherwise fits within the Restatement test for promissory estoppel.

In this case, Baker argues the second of these, saying that when he refused to participate in Tremco unlawful activities in using the AEPA contract to violate public bidding laws and defraud public schools in Indiana, he was advised that he would be terminated.

In *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E. 2d 390 (Ind. 1988) we extended the public policy exception to include a "separate but tightly defined exception to the

employment at will doctrine" when an employer discharges an employee for refusing to commit an illegal act for which the employee would be personally liable. The decision in *McClanahan* flowed from *Frampton v. Cent. Ind. Gas Co.,* 260 Ind. 249, 297 N.E.2d 425 (1973), where this Court first recognized the public policy exception to the employment at will doctrine. Frampton had filed a claim under workers compensation, and Central Indiana Gas fired him for doing so. We declared that "when an employee is discharged solely for exercising a statutorily conferred right[,] an exception to the general rule must be recognized."

In *Tony v. Elkhart County*, 851 N.E. 2d 1032 (Ind.Ct.App. 2006) , the employee argued that "the court should recognize the doctrine of constructive discharge as a claim under *Frampton* that an employee at will can raise in the context of a common law retaliatory discharge claim brought against his employer." The Court of Appeals held that "a constructive discharge in retaliation for filing a worker's compensation claim falls within the *Frampton* public policy exception and that a cause of action for constructive retaliation discharge exists for an employee that can show that he has been forced to resign as a result of exercising this statutorily conferred right."

The court reasoned that an employer's acts of creating working conditions so intolerable as to force an employee to resign in response to exercise of the employee's statutory right to file a worker's compensation claim also "creates a deleterious effect on the exercise of this important statutory right and would impede the employee's ability to exercise his right in an unfettered fashion without being subject to reprisal."

We find this discussion convincing and conclude that a constructive retaliatory discharge falls within the ambit of the narrowly drawn public policy exception to the employment at will doctrine. Depending on the facts, it is merely retaliatory discharge in reverse. The constructive discharge doctrine acknowledges the fact that some employee resignations are involuntary and further prevents employers who wrongfully force an employee to resign to escape any sort of liability for their actions.

Still, the fulcrum of the discharge must fit within the exception as recognized by *Frampton* and *McClanahan*. Baker's claim is not within the ambit of the recognized exceptions to the general doctrine of at-will employment. The alleged misconduct is not on par with the rights and obligations recognized as a basis for discharge complaints in *Frampton* and *McClanahan.*

Lessons:

1. The public policy exception to the employment at-will doctrine extends to *constructive* retaliatory discharges.
2. The courts will, nonetheless, continue to narrowly apply this exception to situations that clearly fall within either the *Frampton* precedent (where the termination was for exercising a statutorily conferred right, e.g., the right to worker's compensation) or the *McClanahan* precedent (where the termination was for refusing to commit an illegal act for which the employee could held liable, e.g., driving an overweight truck)

4. Fixed Fee: *In the matter of Daniel E. Moore*, 915 N.E.2d 973 (Ind. 11/3/2009)(Shepard)

In May 2004, Respondent was retained by a client ("Client") to represent her in a dissolution of marriage action. Client paid Respondent $15,000 pursuant to an agreement that this would be his total "flat" or "fixed" fee. Respondent diligently and competently worked on

Client's case. In May 2005, Respondent requested Client pay him an additional $5,000 which Client paid. In April 2006, Respondent requested Client pay him an additional $1,500, which Client paid in two installments. In neither instance did Respondent advise Client to consult with independent counsel before agreeing to amend the fee agreement to his advantage.

The parties agree that Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

Rule 1.5(a) (2004): Charging an unreasonable fee.

Rule 1.8(a)(2) (2005): Entering into business transactions with a client (amendments of a fee agreement) unless the client is advised in writing of the desirability of seeking, and is given reasonable opportunity to seek, advice from independent counsel.

For Respondent's professional misconduct, the Court imposes a public reprimand.

Lessons:

1. As a general rule, stand by your fixed fee contracts even when it requires more time than you expected.
2. If you want to change a fixed fee contract, make sure the change is justified and that you advise the client in writing of the desirability of seeking advice from independent counsel and give the client a reasonable opportunity to do so.

5. The reasonableness of contingency attorney fees: *City of New Albany v. Cotner*, 919 N.E.2d 125 (Ind.Ct.App. 12/30/2009)(Vaidik)

In 1992 the City of New Albany and the Town of Georgetown entered into a Sewage Treatment Agreement ("sewage contract") in which the City agreed to treat wastewater generated or transported by Georgetown's sewer system. In 1999 the City retained Fox & Cotner to represent the City in collecting sewer fees from Georgetown. The fee contract provided: "We will charge the City a contingent attorney fee of one third of whatever we are ultimately able to collect from Georgetown."

Fox & Cotner subsequently filed a complaint for breach of the sewage contract against Georgetown on behalf of the City in August 1999 seeking the recovery of back sewer fees, penalties as a result of Georgetown sending an average daily flow in excess of the amount to which it was entitled under the sewage contract, unpaid connection fees, and attorney's fees. In 2003 the City hired Greg Fifer as the attorney for the New Albany Sewer Board ("Sewer Board") and paid him on an hourly basis with regards to the sewer litigation (in addition to Fox & Cotner).

In 2004 the City and Georgetown submitted the case to mediation, and Fifer and Fox & Cotner appeared at the mediation as representatives of the City. The parties reached an agreement in March 2005. In December 2005 the City filed, in the underlying case, a complaint against Fox & Cotner, which sought a determination of whether a valid fee contract existed, and if so, whether the fee was reasonable. In February 2006 Fox & Cotner answered the complaint and counterclaimed for enforcement of the fee contract, that is, its contingent fee of one-third of the entire settlement proceeds.

The settlement agreement was amended in August 2006. Taking both the March 2005 settlement agreement and August 2006 amendment together, Georgetown had a total payment obligation to the City of $900,000: $100,000 as payment for back sewer fees and $800,000 as payment for its "remaining payment obligations."

The trial court granted summary judgment in favor of Fox & Cotner and ordered the City

to pay Fox & Cotner $300,000, one-third of the entire amount the City collected from Georgetown, with interest. The City now appeals.

The City first contends that the scope of Fox & Cotner's representation did not include claims for capital improvements. The fee contract stated that Fox & Cotner would provide representation of the City "in its *sewer fee dispute* with Georgetown." Without looking outside the four corners of the contract, it is impossible to determine whether capital improvements to the sewer system are included in charges for sewer services. We thus conclude that "sewer fee dispute" is ambiguous.

This ambiguity, however, may be resolved by looking to the undisputed evidence designated by the parties. All of the designated evidence points to the fact that "sewer fee dispute" generally involved the enforcement of the sewage contract; specifically, the collection of back sewer fees, unpaid connection fees, *and* penalties for excess flow under the terms of the contract. The purpose of the fee contract was to enforce the sewage contract, and under the undisputed terms of the sewage contract, Georgetown's excess flow could be addressed by either paying penalties or contributing money toward capital improvements. Thus, penalties and capital improvements are two sides of the same coin.

Finally, the City contends that the fee is unreasonable. A contingent fee agreement in a collection case that is the product of a bargain between the attorney and the client is presumed to be reasonable as between them. "The whole point of contingent fees is to remove from the client's shoulders the risk of being out-of-pocket for attorney's fees upon a zero recovery. Instead, *the lawyer* assumes that risk, and is compensated for it by charging what is (in retrospect) a premium rate."

The factors used in determining the reasonableness of a contingent fee contract must be evaluated at the time it was entered into, and to hold that a contingent fee contract can be "re-examined by hindsight" would "encourage almost certain and endless second guessing in all contingent fee contract situations" and thus destroy the concept of contingent fee contracts. The City does not argue that the fee contract was unreasonable when it was entered into. It has been recognized that, as a general matter, a one-third contingent fee is a standard and customary fee in collection cases.

Although the City highlights affidavits from attorneys involved in the dispute between the City and Georgetown stating that the $300,000 requested by Fox & Cotner is unreasonable and points to these affidavits and other designated evidence to persuade us that Fox & Cotner did not expend enough effort to justify such a high fee, we note that none of its evidence addresses the dispositive issue of whether the contingent fee was unreasonable at the time the fee contract was entered into. Without more, 20/20 hindsight is simply not enough to overcome the presumption that the contingent fee is reasonable.

Finally, the City argues that Fox & Cotner is not entitled to the full $300,000 fee because the City paid for the services of Fifer and the City should not be responsible for two fees. The City chose to retain Fifer on an hourly basis at the same time it was retaining Fox & Cotner on a contingency basis. The retention of Fifer did not alter the City's obligations to Fox & Cotner. [The outcome would likely have been different if the City had discharged Fox & Cotner and replaced them with Fifer.]

Lessons:

1. The reasonableness of a contingency fee is to be assessed at the time the fee agreement is entered into.

2. A party who later hires additional counsel on an hourly basis, while retaining the original contingent fee lawyer, will not reduce its obligation to comply with its contingency fee agreement.

6. Determining reasonable attorneys fees in a dissolution case: *Reeder v. Reeder*, 917 N.E.2d 1231 (Ind.Ct.App. 12/9/2009)(Hoffman)

Petitioner-Appellant Stephanie Reeder appeals the trial court's award of attorney fees to the law firm of Appellee Coots, Henke, & Wheeler ("the Coots firm") in a dissolution action involving Respondent-Appellee John Reeder.

In one of the numerous hearings on the petition, Stephanie stated that she owed approximately $245,000.00 in attorney fees and expenses to the Coots firm; and she requested that John be ordered to pay the fees and expenses. In support of her request, Stephanie presented an affidavit summarizing the claim for expenses and an attachment setting forth the details of the claim.

The trial court determined that John should pay Stephanie $1,269,234.00 as part of the marital distribution. The trial court further determined that Stephanie should pay the attorney fees and expenses owed by her to the Coots firm.

Stephanie argues that the trial court failed to hold an evidentiary hearing on the reasonableness of the fees that the Coots firm was owed and attempting to collect. Stephanie cites numerous cases that discuss the determination of attorney fee awards. For example, she cites *Stepp v. Duffy,* for the proposition that when the "amount of the fee is not inconsequential, there must be objective evidence of the nature of the legal services and the reasonableness of the fee." She notes that we have held as a general rule that "the reasonableness of the attorney fee is a matter resolved in an evidentiary hearing."

We understand the wisdom of the general rule, and we hold that the goal of the rule--the determination of a reasonable attorney fee award--is achieved in this case. First, and most importantly, Stephanie made the original claim that the attorney fees claimed by the Coots firm were reasonable, albeit in an effort to have John pay the fees. We cannot fail to see the irony of her present position that she was requesting that John pay an unreasonable amount of attorney fees. Second, the fee award was discussed in a telephone hearing before the evidentiary hearing on the Coots firm's motion to correct error. Third, the attorney fees seem to have been discussed in the evidentiary hearing. Finally, the trial court specifically determined that the fee request was reasonable under the factors set forth in Rule 1.5(a) of the Indiana Rules of Professional Conduct.

We cannot say that the trial court, which is deemed an expert on the question of the propriety of fees and which may judicially know what constitutes a reasonable fee award, abused its discretion in determining that Stephanie made a request that John pay reasonable attorney fees. *See Canaday v. Canaday,* 467 N.E.2d 783 (Ind.Ct.App.1984) (holding that the trial court may make a determination as an expert and upon judicial knowledge). Furthermore, given the facts of this case, we cannot conclude that a separate hearing on the issue of reasonableness was required.

Lessons:

1. An evidentiary hearing is not always required on the reasonableness of requested attorney's fees.
2. Don't challenge the reasonableness of fees charged by your counsel *after* requesting

and losing on a motion to have your opponent pay the same fees.

7. Doctrine of invited error; vehicle storage fees: *Northwest Towing & Recovery v. State of Indiana*, 2010 WL 86140 (Ind.Ct.Appeals 1/11/2010) (Baker)

Sometimes actions that are merely tangential in nature can produce Solomonic judicial actions and results. Today we are called upon to review the resolution of a dispute regarding a vehicle that was towed to and stored at Northwest Towing & Recovery's (Northwest) facility at the Muncie Police Department's request following a deadly traffic accident that ultimately resulted in a criminal conviction against the driver of the vehicle. The vehicle's owner, who was not a party to the criminal proceedings, requested the return of the vehicle, and Northwest sought to recover its unpaid storage fees in excess of $3600.

Appellant, Northwest appeals the denial of its motion to correct error after the trial court limited its storage-fee lien to $1500 in accordance with Indiana Code section 32-33-10-5(b) against appellee Frances Brinkley, the owner of the vehicle. Northwest first argues that the trial court's order cannot stand because Frances was not a party to the criminal proceedings and had not properly intervened in the case. Therefore, Northwest contends that the judgment must be vacated because it was improperly "dragged into a criminal proceeding by a person not a party to that proceeding," in violation of Trial Rule 17(A).

Under the doctrine of invited error, a party may not take advantage of an error that he or she commits or invites or that is the natural consequence of his or her own neglect or misconduct. In this case, both Northwest and Frances were represented by counsel throughout the proceedings and at the February 2, 2009, hearing. The trial court permitted the parties to present evidence, and it issued orders regarding the storage of the vehicle throughout the proceedings. Northwest made no objection under Trial Rule 17(A) until the trial court ruled against it. Thus, to the extent that there was any error pursuant to Trial Rule 17, Northwest expressly and implicitly invited the alleged error by participating in the proceedings and failing to make a timely objection. Therefore, Northwest has waived the issue and we decline to review the alleged error.

Northwest next claims that even if this matter was properly before the trial court, the order limiting its storage charges to $1500 was erroneous. Northwest argues that the trial court failed to acknowledge that there is no limit on vehicle storage charges in light of Indiana Code section 9-22-5-15(a). However, another statute, Indiana Code section 32-33-10-5(b), which became effective in 2005, provides that: "(b) The costs of storing a motor vehicle may not exceed one thousand five hundred dollars ($1,500)".

Indiana code section 32-33-10-5 controls, and Northwest may only recover up to $1500 in storage fees from Frances.

Frances asserts in her cross-appeal that she should not be liable for any amount of the storage fees that were incurred. In essence, Frances claims that she can avoid liability for storage fees because it was her son's conduct that caused the fees to be incurred.

It was the Muncie Police Department that made the initial request for Northwest to store the vehicle. And it was Steven who made the subsequent request to store it prior to trial. However, neither Steven nor Frances requested the vehicle's return at the sentencing hearing, even though they both knew that Northwest was continuing to store it. The trial court could reasonably infer that both Frances and Steven acquiesced in and permitted the continued storage of the vehicle. Therefore, we cannot say that the trial court abused its discretion in ordering

Frances to pay the storage fees from August 27, 2007— the date on which Steven was sentenced--until the trial court ordered Northwest to return the vehicle to her on October 28, 2008.

Lessons:

1. The doctrine of invited error may apply by participating in a proceeding and failing to make a timely objection.
2. There is now a statutory cap of $1,500 on storage fees.
3. Courts, like arbitrators, will sometimes "cut the baby in half."

8. Sanctions for violating motion in limine: *Allied Property and Casualty Insurance Company v. Good*, 919 N.E.2d 144 (Ind.Ct.App. 12/31/2009)(Vaidik)

A fire occurred at Linda and Randall Good's home in Wabash, Indiana, on March 16, 2003. Allied had issued a Homeowners Policy to Linda which provided coverage for the property. In March 2004 Linda filed a complaint against Allied alleging that it breached the policy by failing to pay proceeds following the fire and that it breached its duty to act in good faith.

At the final pretrial conference, the trial court orally issued orders on some of Linda's motions in limine. Specifically, the court ordered that Randall's criminal history was inadmissible during Phase I of the trial, subject to Indiana Evidence Rule 609. Randall's criminal history includes at least one theft conviction from approximately thirty years ago. Further, the court ordered that no mention be made of the Goods' prior fires.

On the third day of trial, Allied witness Arvin Copeland, a fire investigator, responded to a cross-examination question about previous fires he had investigated. He answered that he had investigated a previous fire at the Goods' home in 2000. Mr. Marshall (Randall's counsel) immediately objected because this was in violation of the trial court's order in limine. The trial court reminded Copeland of the order in limine (of which Mr. Jennings (Allied's counsel) assured the court that Copeland had been informed) and instructed Copeland that he was coming very close to being found in contempt of court. The trial court then gave the jury a curative instruction.

Allied's attorneys then called Natalie Hornung as a witness. Hornung testified on direct examination that in 2003 she was a manager for Allied's underwriting department. The following exchange then occurred:

> Q: And would you tell the jury some of those representations that you believe were not truthful based upon what you were told, and the information you acquired?
>
> A: Okay. Some of the representations that I believe were incorrect were regarding the prior cancellations for the Goods *and the prior felony convictions* as well as-

Mr. Guenin (Linda's counsel) informed the court that Linda was "regrettably" moving for a mistrial. The trial court granted the motion for mistrial and awarded sanctions. The new trial proceeded in January 2009. Linda was successful in both phases of trial and was also awarded attorneys' fees. In total, Linda recovered $1,052,977.19 from Allied.

Allied raises one issue in this interlocutory appeal: whether the trial court erred in ordering Allied to pay more than $26,000 in sanctions, including attorneys' fees, expert witness fees, and costs for the jury, when its own employee, Hornung, apparently after having been

warned, violated the trial court's order in limine by testifying on direct examination about felony convictions, which resulted in the mistrial.

A ruling on a motion in limine is not final on the admissibility of evidence and instead is designed to prevent mention of prejudicial material to the jury before the trial court has had the opportunity to consider its admissibility. That is not to say that a party who violates an order in limine may do so with impunity. The sanction is within the discretion of the trial court and under appropriate circumstances might extend to declaration of a mistrial and/or punishment for contempt. As for a mistrial, declaration of a mistrial is generally within the discretion of the trial court. It is "an extreme remedy invoked only when no other measure can rectify the perilous situation."

In responding to Allied's argument that the trial court erred in imposing more than $26,000 in sanctions against it, neither Linda nor Randall cites any Indiana case in which a trial court has awarded sanctions--including attorney's fees, expert witness fees, or costs for the jury--against a party for violating an order in limine and causing a mistrial. This case is about our trial courts' inherent authority to enforce their own orders and not about their statutory contempt power. Our Supreme Court has recognized on multiple occasions that our courts have inherent authority.

It is clear that Indiana trial courts possess inherent power to sanction for discovery violations, contempt, and the government's wrongful conduct pursuant to Trial Rule 65(C). But the question presented in this appeal is whether this inherent power extends to imposing sanctions for violating an order in limine and causing a mistrial. We conclude that Indiana trial courts possess the inherent power to sanction parties and attorneys for violating orders in limine and causing mistrials. This power is designed to protect the integrity of the judicial system and to secure compliance with the court's rules and orders.

Because the trial court determined that Allied intentionally violated the order and such violation required a mistrial, the evidence supports the conclusion that Allied's conduct was egregious and caused a mistrial. Furthermore, the sanctions imposed by the court against Allied were compensatory in nature to reimburse the Goods, their attorneys, and the county for costs incurred as a direct result of Allied's violation of the order in limine. The trial court did not abuse its discretion in sanctioning Allied.

Lessons:

1. Indiana trial courts have the inherent power to sanction attorneys, witnesses and parties for violating orders in limine and causing mistrials.
2. Be forceful and clear in advising witnesses to comply with orders in limine. Warn them about what happened to Allied.

9. Partnership by estoppel: *Reinhart v. Boeck*, 918 N.E.2d 382 (Ind.Ct.App. 12/18/2009) (Najam)

In October of 2005, Ronald G. Thomas began a scheme to lure David Nick Reinhart into a phony real estate business as a "partner" and stalking horse for other marks. In early November of 2005, Thomas invited Reinhart to join the business that Thomas called [TRG]. Reinhart agreed to enter real estate transactions with Thomas for purposes of attempting to realize profits. Reinhart also began to solicit investors for TRG.

In his first contact with Boeck, Reinhart told Boeck that "*we* are looking for investors in our real estate business[";] that there were *three partners including him;* that "*we* buy properties

... in foreclosure ... and in volume from banks[";] that "*we* do two things with these properties; short sale and lease to own[";] that *the partners* concentrated on various aspects of the business; that "*we* make between $12,000 and $15,000 profit on each house sold in a short sale (there were 100 short sales for the partnership in the previous year)[";] and that "*we* made in excess of $1,000,000 last year." Boeck, thinking that he liked what he heard and wanted to hear more, agreed to meet Reinhart and Thomas at a restaurant for breakfast.

On December 22, 2005, a meeting occurred with Boeck, Thomas and Reinhart. Thomas spun a tale of his great real estate experience, acumen and success, and yet it was a sad tale inasmuch as his partners' business was so good that even with the prodigious credit of the partners it was short on capital and needed money. That's why they were looking for five or six more investors--they'd already had found three. On February 16, 2006, and again on February 23, 2006, Boeck invested money with Thomas. In both transactions, Boeck was told by Thomas that he was investing in the partnership and that the partnership would in turn lend the money to two individuals who could turn fast profits and pay back a return. The deadlines for Boeck's splendid returns came and passed without realization. Boeck called Thomas daily. Thomas stonewalled.

On or about May 2, 2006, Boeck got a check for $60,000 from Thomas, albeit from a different account [than the one] into which he had wired the money. Boeck never got another dime out of TRG or Thomas. He thus lost $137,000.00 in principal and further was never repaid any return.

On September 21, 2007, Boeck filed his complaint against Reinhart, in which Boeck alleged that Reinhart was liable for Boeck's lost February 16 and February 23 investments. Specifically, Boeck alleged five theories of liability against Reinhart including "vicarious liab[ility]" for the unlawful and fraudulent acts of a "business partner." Reinhart filed a timely answer and moved for summary judgment on all counts. Boeck then filed a cross-motion for summary judgment on the counts alleging derivative and vicarious liability. After a hearing, the court granted summary judgment for Boeck on those two allegations, as well as the remaining alternative theory of unjust enrichment. The court then entered money judgments for Boeck on each of the three counts. The court capped that monetary award at $229,806.20, the amount Boeck sought on his first theory of liability.

The theory of partnership by estoppel has been recognized in our common law since 1859 and was codified by our General Assembly in 1949 (currently codified at I.C. § 23-4-1-16):

> [w]hen a person, by words spoken or written or by conduct, represents himself, or consents to another representing him ..., as a partner in an existing partnership or with one (1) or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

That is, a person cannot deny the existence of a partnership when that person holds himself out to be in a partnership with another, although no partnership in fact exists, and a third party detrimentally relies on that representation.

Reinhart conceded that he represented himself as Thomas' partner and consented to Thomas representing them as partners in an existing partnership. Reinhart argues that only

“managing partners” under the Indiana Securities Act are derivatively liable for the acts of others. However, Reinhart cites law that is not applicable to this case. Reinhart quotes language from the *current* version of the Act, specifically, Indiana Code Section 23-19-5-9(d) (2008), but in recodifying the Act in 2007 our General Assembly expressly declared that the “predecessor act governs all actions ... pending on June 30, 2008.” P.L. 27-2007 § 38(b) (effective July 1, 2008). This action was filed and pending before that date. And, under the prior statute, all “partner[s]” are jointly and severally liable. Accordingly, Reinhart is estopped from using TRG's corporate identity as a shield from personal liability, and the trial court properly concluded that the undisputed designated evidence showed that Reinhart was Thomas' partner for purposes of the Act.

Lesson:

1. If you hold yourself out as a partner in a business, you may have individual liability even when you are not a partner and even if the business is incorporated.
2. If you share a law office with other lawyers who are not your partners, be sure to publicly disclaim any partnership.

10. Summary judgment procedure: *Miller v. Yedlowski,* 916 N.E.2d 246 (Ind.Ct.App. 11/20/2009) (Vaidik)

In the interlocutory appeal of this medical negligence case, Marvin Jay Miller, M.D., appeals the trial court's denial of his motion for summary judgment. According to established Indiana law, when a nonmoving party fails to respond to a motion for summary judgment within thirty days by either filing a response, requesting a continuance under Indiana Trial Rule 56(I), or filing an affidavit under Indiana Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the thirty-day period.

In this appeal we clarify that when a nonmoving party has received an enlargement of time pursuant to Trial Rule 56(I), any response, including a subsequent motion for enlargement of time, must be made within the additional period granted by the trial court. Because the nonmovants in this case filed their second motion for enlargement of time six days after the deadline set by the trial court, the trial court's order granting their second motion for enlargement of time was a nullity, and the court was precluded from considering their response to Dr. Miller's motion for summary judgment. Because this leaves no evidence to oppose Dr. Miller's motion for summary judgment, we remand this case with instructions for the trial court to enter summary judgment in favor of Dr. Miller.

We acknowledge that prior case law has been somewhat inconsistent regarding the authority of a trial judge to consider affidavits filed after the thirty-day deadline in Rule 56(C). When a nonmoving party fails to respond to a motion for summary judgment within 30 days by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period.

Our Supreme Court has established a bright line rule that prohibits a trial court from considering summary judgment filings after the thirty-day period. The rationale behind the rule requiring a nonmoving party to respond to a motion for summary judgment--by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F)--within thirty days does not vanish because the trial court has happened to grant one extension of time. That is, the nonmoving party should not be rewarded and relieved from the

restriction of responding within the time limit set by the court because he or she has had the good fortune of one enlargement of time. Therefore, any response, including a subsequent motion for enlargement of time, must be made within the additional period granted by the trial court.

Lessons:

1. When opposing a motion for summary judgment, don't miss the deadline for responding.
2. Being late will be fatal; even a sympathetic trial judge won't be able to save you.

11. Equal Protection Clause and sewer taxes; legislative history: *City of Indianapolis v. Armour*, 918 N.E.2d 401 (Ind.Ct.App. 12/18/2009)(Najam)

In this appeal, we are asked to determine whether a resolution ("the Resolution") passed by the Indianapolis Board of Public Works ("the Board") violates the Equal Protection Clause of the United States Constitution, as applied to forty-five property owners in Northern Estates, an Indianapolis neighborhood. The Resolution was designed to move the City of Indianapolis (the "City") from the Barrett Law method of financing sewer projects to a different method under the Septic Tank Elimination Program ("STEP"). The Resolution forgave all Barrett Law assessments due and owing as of November 1, 2005. The Homeowners had already paid their assessments in full prior to that date, and they sought a refund equivalent to the amount the Resolution had forgiven their neighbors, who were making installment payments. The City and the Board refused, and the Homeowners filed a complaint seeking a refund, declaratory relief, or a writ of mandamus.

The Homeowners moved for summary judgment on their federal constitutional claims. The City filed a cross-motion seeking a summary judgment of its own. Following a hearing on both motions, the trial court granted the Homeowners' summary judgment motion, denied the City's motion, and entered judgment against the City in the amount of $380,914.16, including attorney's fees. This appeal ensued.

The dispositive question is whether the City's refusal to issue a refund to the Homeowners in an amount equivalent to the amount forgiven similarly situated Northern Estates property owners violated the Equal Protection Clause.

The City, having made findings and declared its purpose in the Resolution, is foreclosed from offering other subsequent explanations. *See Allied Stores,* 358 U.S. at 530 ("[when the text of a law] specifically declare[s][its] purpose, the [law leaves] no room to conceive of any other purpose for [its] existence.").

Here, the City's reasoning has failed to take into account the particular facts of the Homeowners' case. The Homeowners each paid 100% of their assessment. The other Northern Estates property owners paid between 3.33% and 10% of the identical assessment before the Resolution forgave their remaining debt. Stated another way, the Homeowners have paid from ten to thirty times more than each of their similarly situated neighbors. And the City forgave well over ninety percent of the total assessment against the Northern Estates residents who chose to pay by installment but gave no relief to the Homeowners.

It was the City's burden to demonstrate a plausible policy reason for its disparate treatment of the Homeowners, but the City has failed to demonstrate a rational basis for the differential treatment. We agree with the Homeowners that the Resolution's only stated policy justification--to alleviate financial hardship on middle- to lower-income property owners--bears no rational relation to the Homeowners' equal protection claim. Thus, we must affirm the trial

court's grant of summary judgment to the Homeowners.

In addition to the text of the Resolution, the City attempts to satisfy its burden of proof by designating the Garrard Affidavit, which was prepared for litigation, in response to the Homeowners' showing of disparate treatment. But the opinion of one Board member is not the opinion of the Board. With respect to statutes, our Supreme Court has established a clear "policy that[,] in interpreting statutes, we do not impute the opinions of one legislator, even a bill's sponsor, to the entire legislature unless those views find statutory expression."

We cannot impute Garrard's personal opinions, which are not expressed in the language of the Resolution, to the entire Board. The City may not backfill with parol evidence after-the-fact. The City has failed in its burden to demonstrate that its difference in treatment rationally furthers a legitimate state interest. Consequently, the City's differential tax treatment of the Homeowners violates the Equal Protection Clause.

Lessons:

1. If a governmental entity wants to forgive the outstanding balance owed by installment payers, the Equal Protection Clause requires similar forgiveness to lump sum payers.
2. When the text of a law publicly declares its purpose, the government will not be allowed to defend the law by asserting other purposes.
3. An affidavit stating the purposes of a legislative act when signed by only one member of a governmental body, even the sponsor, will be given little weight by Indiana courts.
4. You can fight City Hall and sometimes win.

P.S. The City has moved for rehearing on the issue of whether a refund is the proper remedy.

12. Voicemail as evidence; personal knowledge foundation; lay opinion: *Dunn v. State of Indiana*, 2010 WL 152169 (Ind.Ct.App. 1/15/2010) (Crone)

Michael P. Dunn appeals his conviction for battery causing serious bodily injury, a class C felony, arguing that the trial court abused its discretion in admitting evidence. Dunn punched Kellen Rollins in the face as they were leaving Shooter's Bar in New Albany. The punch fractured the orbital bone and Rollins now has a permanent metal plate under his right eye.

At trial, Rollins testified that Brittany Mathys, Dunn's girlfriend, called him approximately one hour after the incident and left a voicemail message. When Mathys later testified on Dunn's behalf, the prosecutor asked her whether she apologized to Rollins for Dunn's behavior. She testified that she did not remember. The prosecutor asked her whether she remembered making a phone call to Rollins about an hour after the incident and leaving a voicemail message, and she again stated that she did not remember.

Outside the presence of the jury, the State played the voicemail message to Mathys to refresh her memory. The jury was brought back into the courtroom, the prosecutor asked Mathys whether it was her voice on the voicemail message, and she testified that it was. The trial court then admitted the voicemail message over Dunn's objection, and it was played to the jury. In the voicemail, Mathys said:

> Kellen, it's Brittany. I'm so sorry for what Mike did to you. There's no reason for him to do that. He's just-just jealous and there's no point. I really do apologize for the way that he treated you and he owes you an apology, too. But hopefully you're all right. I'm really sorry about what he did. I'm so sorry.

Dunn admitted to hitting Rollins but claimed self-defense as a justification. Dunn contends that the voicemail message was inadmissible pursuant to Indiana Rules of Evidence 602 and 701. Evidence Rule 602 provides: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Evidence Rule 701 states: "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to the clear understanding of the witness's testimony or the determination of a fact in issue."

Dunn concedes that "[i]t is well settled in Indiana law that a lay witness may express an opinion on numerous subjects if based upon personal knowledge and the proper factual basis for the opinion has been established." However, he asserts that Mathys did not have personal knowledge that Dunn hit Rollins because she testified that she "did not witness it." Although Mathys's testimony does not establish that she had personal knowledge of the incident, Evidence Rule 602 does not require that personal knowledge be established by the witness's testimony. Here, other evidence establishes that Mathys had personal knowledge of the incident. Courtney Anderson, who was with Mathys at the bar, testified that "[Mathys] was out there, she did see [Dunn] hit [Rollins] and she was trying to stop him from doing so, so she was saying, Mike, stop." As such, we conclude that a proper foundation was laid to establish that Mathys had personal knowledge of the incident.

Dunn also challenges the admissibility of the voicemail message based on Mathys' statement that Dunn was "just jealous." Dunn asserts that there was no foundation laid to show that Mathys knew anything about Dunn's thinking, his intent, or his motive for acting. We disagree. We observe that "[t]he requirement that proffered opinion testimony be rationally based on the witness's perception means simply that the opinion must be one that a reasonable person normally could form based on the perceived facts." Here, Mathys testified that she had dated Dunn "off and on for a couple of years." Further, there is no dispute that she was at Shooter's that evening and that she went there with Dunn. Her personal knowledge of Dunn's personality over the course of a couple of years and her presence at Shooter's that evening and at the scene of the incident constitute a rational basis for her perception of Dunn's emotional state.

In addition to requiring that a witness's opinion or inference be rationally based on the perception of the witness, Evidence Rule 701 requires that the opinion or inference be helpful to the clear understanding of the witness's testimony or the determination of a fact in issue. Here, whether Dunn or Rollins initiated the first act of aggression was disputed. Mathys's statement that "[t]here's no reason for [Dunn] to do that. He's just-just jealous and there's no point[,]" is helpful to the determination of whether Dunn provoked, instigated, or participated willingly in the violence. Accordingly, we conclude that the admission of the voicemail message did not violate either Evidence Rule 602 or 701.

Lessons:

1. The personal knowledge required for admission of a statement under Evid.R.602 may be established by other evidence even when the witness denies knowledge.
2. A lay opinion that the defendant was "just jealous" is admissible under Evid.R.701 when evidence is of record that the witness had personal knowledge as the defendant's girlfriend over the course of a couple of years and witnessed the defendant's emotional state.

13. Guaranties; dicta: *Grabill Cabinet Company, Inc. v. Sullivan*, 2010 WL 129795 (Ind.Ct.App. 1/14/10) (Bradford)

Appellant/Plaintiff Grabill Cabinet Company appeals from the trial court's grant of summary judgment in favor of Appellee/Defendant Debra Sullivan. On May 18, 2006, Kitchens, Bath & More, LLC ("KBM") submitted a credit application to Grabill, which application listed Sullivan as president and accounts payable contact for KBM. Also on May 18, 2006, Sullivan and Richard Knoll signed a personal guaranty of any KBM debt that it might accrue to Grabill.

In September of 2006, Sullivan assigned her interest in KBM to Knoll and resigned from the company. Sullivan did not send notice to Grabill of termination of her personal guaranty. In May and June of 2008, KBM ordered cabinets and accessories from Grabill, accumulating a balance of $52,212.26. On August 10, 2008, Grabill filed suit against KBM, Knoll, and Sullivan, seeking to collect the balance from KBM or, failing that, from Knoll and Sullivan pursuant to their personal guaranty. On October 10, 2008, the trial court entered default judgment in favor of Grabill against KBM and Knoll.

On January 23, 2009, Grabill filed a summary judgment motion against Sullivan, which the trial court denied on April 17, 2009, on the basis that the guaranty was defective because it was not signed by KBM or Grabill. On April 27, 2009, Grabill filed a motion to reconsider, to which Sullivan responded with a summary judgment cross-motion on May 7, 2009. On July 31, 2009, the trial court granted summary judgment in favor of Sullivan, again on the ground that the personal guaranty was "defective on its face pursuant to Indiana law."

Indiana's Statute of Frauds provides in part as follows: "A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent:…(2) An action charging any person, upon any special promise, to answer for the debt, default, or miscarriage of another."

Sullivan contends that the guaranty is invalid because Grabill never signed it. Sullivan relies on the proposition that Indiana case law, although in conflict with the Statute of Frauds, requires three parties to "execute" a guaranty for it to be valid.

The Statute of Frauds makes it clear that only the guarantor's signature is necessary to render a guaranty a complete instrument. The proposition that three parties must execute a guaranty, even if one assumes that "execution" requires a signature, has only ever appeared three times in Indiana case law and then only as dicta. It is worth noting that all three of the opinions arguably grafting a signing requirement onto guaranties came from this Court and conflict not only with the plain language of the Statute of Frauds but also with consistent Indiana Supreme Court precedent.

The Indiana Supreme Court has never wavered from the statutorily-mandated proposition that a guaranty need only be in writing and signed by the guarantor in order to be valid. In light of the clear language of the Statute of Frauds and Indiana Supreme Court precedent regarding guaranties, we are compelled to reverse the trial court's entry of summary judgment in favor of Sullivan and its denial of Grabill's motion to reconsider the denial of Grabill's summary judgment motion. We remand for entry of summary judgment in favor of Grabill on the issue of the enforceability of the guaranty and for calculation of Grabill's award.

Lessons:

1. To be effective, a guaranty need only be signed by the guarantor.
2. Dicta, even when recited three times by the Court of Appeals, remains dicta and is not binding.

14. Statute of limitation for claim against general contractor: *Powers & Sons Construction Company, Inc. v. Healthy East Chicago*, 919 N.E.2d 137 (Ind.Ct.App. 12/30/2009)(Robb)

Healthy East Chicago hired Powers & Sons pursuant to a contract to serve as the construction manager for the construction of a health service facility in East Chicago, Indiana. On February 15, 2007, Healthy East Chicago filed a complaint against Powers & Sons alleging breach of contract. Specifically, Healthy East Chicago alleged Powers & Sons knew or should have known the proposed building site contained toxic and organic materials and a high water table, it failed to have the toxic and organic materials removed, failed to properly supervise the installation of the concrete slab underlying the building, and failed to warn Healthy East Chicago of the presence of the toxic and organic materials and/or improper installation of the concrete slab could damage the floors, walls, and ceilings of the building.

On July 21, 2008, Powers & Sons filed a motion for summary judgment, contending Healthy East Chicago's complaint was governed by a two-year statute of limitation, and further contending there was no genuine issue of material fact that Healthy East Chicago knew of the damage more than two years prior to February 15, 2007. Following a hearing, the trial court entered an order denying Powers & Sons's motion for summary judgment.

This case turns upon resolution of which statute of limitation applies to Healthy East Chicago's cause of action. Powers & Sons contends the two-year statute of limitation found in Indiana Code section 34-11-2-4 applies. Indiana Code section 34-11-2-4(2) provides "[a]n action for ... injury to personal property ... must be commenced within two (2) years after the cause of action accrues."

Powers & Sons characterizes Healthy East Chicago's complaint as a "request for damages suffered as a result of Powers & Sons's alleged negligent performance which caused injury to the personal property of Healthy East Chicago." Indiana courts "have consistently viewed 'personal property' in its broad and natural sense" to include goods and chattels as well as "violations to a person's rights and interests in or to such property." Even in the broad and natural sense of the term, Healthy East Chicago's building is not "personal property," however. "Personal property" refers to property of a "personal or moveable nature as opposed to property of a local or immovable character." Permanent structures erected on land are ordinarily considered part of the real estate. We therefore reject Powers & Sons's contention the two-year statute of limitation applies.

We turn then to the question of whether the substance of Healthy East Chicago's action is in contract--allowing for a ten-year statute of limitation--or in tort--imposing a six-year statute of limitation. Powers & Sons contends the action is in tort, citing *Whitehouse,* 477 N.E.2d 270. In *Whitehouse,* the trial court dismissed the plaintiff's complaint alleging his attorney breached a contingent fee contract by failing to secure all relief available to him in a personal injury action by applying the two-year statute of limitation for injury to personal property. The court, holding

the essence of the plaintiff's claim was not for injury caused by breach of a promise contained in the contingent fee contract but for injury caused by the lost right to receive money from defendants who were not sued during the attorney's representation; in other words, a lost right to personal property.

"[C]ertain professionals, by virtue of the nature of their business, make representations, render opinions, and give advice in the course of performing a contract." Such professionals may be held liable in tort if they fail to exercise reasonable care in fulfilling their contractual duties. Powers & Sons casts itself in the same class and claims the basis of Healthy East Chicago's complaint is professional negligence. We have never held the responsibility of a general contractor to be akin to that of an attorney or a doctor, however.

The relationship between the parties and Powers & Sons's duties and responsibilities as general contractor arose from the contract rather than from a standard of care imposed by law. Healthy East Chicago's complaint seeks to recover damages sustained as a result of Powers & Sons's failure to perform according to the contract; that is, to hire and supervise subcontractors and construct a building conforming to the plans and specifications suitable for Healthy East Chicago's needs. We therefore hold Healthy East Chicago's complaint is governed by the ten-year statute of limitation applicable to written contracts.

We also note that "[w]here either of two statutes of limitations may apply to a claim, any doubt should be resolved in favor of applying the longer limitation."

Healthy East Chicago's claim is for breach of contract and a ten-year statute of limitation applies. As Healthy East Chicago's complaint was filed within ten years after construction was completed, it was timely filed. The trial court's denial of Powers & Sons's motion for summary judgment is affirmed.

Lessons:

1. The statute of limitations for injury to personal property does not apply to injury to a building because it is real property.
2. The statute of limitations for beach of contract applies to a claim against a general contractor for negligence.
3. Unlike doctors and lawyers, the law imposes no standard of care on general contractors.

15. Intervening/Superceding cause: *Scott v. Retz*, 916 N.E.2d 252 (Ind.Ct.App. 11/10/2009)(Robb)

George Scott, a Clarian Health Partners, Inc. ("Clarian") safety and security investigator, was stuck by a used uncapped syringe while investigating missing narcotics at Indiana University Hospital, which is operated by Clarian. Scott sued Malissa Retz, R.N., for negligence and Indiana University ("IU"), Retz's employer, for respondeat superior and negligent retention and supervision.

On May 31, 2007, Retz stole morphine from an AccuDose room at the Hospital, injected herself with the morphine (in an apparent suicide attempt), and disposed of the used uncapped needles, syringes, and empty vials in the trash container of a women's restroom at the Hospital. The used, uncapped needles ended up in a brown paper bag that was delivered to the Hospital's emergency department and given to the emergency department physician attending Retz.

On June 1, 2007, Scott was told a package relating to the narcotics investigation was available for him to pick up. Scott arrived at the dispatch center and saw the brown paper bag

with an incident report attached. Scott picked up the bag to read the report, and he was stuck by a needle inside the bag. Upon opening the bag, Scott found four or five uncapped needles.

On January 30, 2008, Scott filed his complaint for damages against Retz and IU, alleging Retz's liability for negligence and IU's liability under separate counts of 1) respondeat superior and 2) negligent retention and supervision. On January 29, 2009, the trial court granted summary judgment to Retz and IU. This appeal followed.

In general, a defendant's act is a proximate cause of an injury if the injury "is the natural and probable consequence of the act and should have been reasonably foreseen and anticipated in light of the circumstances." However, under the doctrine of superseding causation, a chain of causation may be broken if an independent agency intervenes between the defendant's negligence and the resulting injury. The key to determining whether an intervening agency has broken the original chain of causation is to determine whether, under the circumstances, it was reasonably foreseeable that the agency would intervene in such a way as to cause the resulting injury.

When assessing foreseeability in the context of proximate cause, courts evaluate the particular circumstances of an incident after the incident occurs. In determining whether an intervening agency is unforeseeable and therefore superseding, this court has looked to various factors. First, we have looked to whether the intervening actor is independent from the original actor, or, in other words, whether the intervening actor is an "independent agency." *e.g., Carter v. Indianapolis Power & Light Co.,* 837 N.E.2d 509, 521 (Ind.Ct.App.2005) (motorist's reckless driving was superseding cause of accident, precluding liability for utilities' allegedly negligent placement of utility poles). Second, we have looked to whether the instrumentality of harm is under the complete control of the intervening actor. Third, this court has looked to whether the intervening actor, as opposed to the original actor, is in the better position to prevent the harm.

Here, it is undisputed that Clarian acted as an intervening agency between Retz's alleged negligence and Scott's injury. The undisputed facts are that Retz deposited used, uncapped needles in the restroom trash, and subsequently the needles were placed in a brown paper bag and delivered to the Hospital's emergency department operated by Clarian. It is undisputed the bag containing the needles arrived in the emergency department, was given to an emergency room physician, and following that time was in the custody and control of Clarian employees. Higginson, a Clarian nurse, observed the bag, called Clarian safety and security, and delivered the bag to Harris, a Clarian safety and security employee. Both Higginson and Harris were aware the bag contained the needles Retz used to inject herself, and Harris was aware the needles had been left uncapped by Retz. The bag was then transported to the Clarian safety and security dispatch center, where Scott was telephoned the following day and directed to examine the bag. Based on these facts, this case differs meaningfully from one where someone is injured while retrieving uncapped needles from the restroom trash. Rather, the actions of Clarian employees in transporting the needles intervened between Retz's disposal of the needles in the restroom trash and Scott's exposure to them at the dispatch center.

When applied to the undisputed facts, the superseding cause factors discussed above lead to the further conclusion that Clarian's actions are a superseding cause of Scott's injury, releasing Retz from liability. First, Clarian and its employees were at all times independent from Retz, an IU employee. Retz, who was the subject of Clarian's missing narcotics investigation, could hardly have an expectation of controlling what the Clarian employees did with the used vials, syringes, and uncapped needles once Clarian took custody of the bag.

Second, the bag, which was the instrumentality of harm, came under the complete control of Clarian the day before the needle stick and remained in Clarian's exclusive control. Clarian

employees were aware of the bag's contents and did not take precautions to secure the needles, despite having the opportunity to do so.

Third, once Clarian took custody and control of the bag, it was Clarian, not Retz, that was in the better position to prevent a needle stick injury. Therefore, we conclude Clarian and its employees' actions were a superseding cause of Scott's injury, such that Retz's alleged negligence in improperly disposing of the needles was not a proximate cause of Scott's injury. As a result, the trial court properly granted Retz summary judgment.

Lesson:

In assessing a defense of intervening/superceding cause, the court should look to whether
(1) the intervening actor is an *independent* agency,
(2) whether the instrumentality of harm is under the *control* of the intervening actor, and
(3) whether the intervening actor is in a better position to prevent the harm.

16. **Intervening/Superceding cause: *Humphrey v. Duke Energy*, 916 N.E.2d 287 (Ind.Ct.App. 11/12/2009) (Najam)**

Kristy Humphrey, as personal representative of the estate of Charles Mandrell, Jr., appeals from the trial court's summary judgment for Duke Energy Indiana, Inc. ("Duke Energy"). At about 6:00 a.m. on June 17, 2005, Mandrell was driving southbound on Graham Road in Franklin. Mandrell stopped at the four-way stop at the intersection with Earlywood Drive and then proceeded into the intersection. At the same time, John Albertson, Jr., was driving eastbound on Earlywood Drive. Albertson disregarded the four-way stop and collided with the passenger's side of Mandrell's vehicle. Albertson's vehicle pushed Mandrell's vehicle through and out of the intersection, off the road, and into Duke Energy utility Pole 817-001. Mandrell sustained fatal blunt force trauma as a result of the secondary collision with the Pole and was pronounced dead at the scene. Albertson admitted to the officer that he had smoked marijuana the night before.

In 1981 Duke Energy's predecessor-in-interest took ownership of the Pole. In 1998, Duke Energy replaced the Pole, and the new Pole was placed substantially near to the original location. That location is 6.6 feet southeast of the Earlywood Drive-Graham Road intersection.

Duke Energy asserts that Albertson's acts constituted an intervening cause that relieved Duke Energy of any liability it may have otherwise had in the placement of the Pole. Specifically, Duke Energy notes that Mandrell's vehicle collided with the Pole only after Albertson, with marijuana in his system, disregarded the four-way stop sign and his vehicle struck Mandrell's vehicle. Thus, Duke Energy continues, it was Albertson's conduct and not Duke Energy's placement of the Pole "that set in motion the chain of circumstances that contributed to, or caused, Mandrell's death."

Duke Energy's argument misconstrues Indiana law. There is no dispute here that Mandrell, the injured party, was traveling the roadway with reasonable care at the time of the accident. And Duke Energy cannot rely on the illegal or reckless conduct of a third party to defeat Humphrey's action at the summary judgment stage in the litigation. Rather, the fundamental test of proximate cause remains reasonable foreseeability where there is an independent intervening act. Hence, the proper question at summary judgment is whether Duke Energy could have reasonably foreseen Mandrell's collision with its Pole, not whether Albertson's conduct was an ordinary and normal use of the highway.

Here, we hold it is a question of fact for the jury whether Duke Energy could have reasonably foreseen that a motorist would collide with its Pole given its location. A question of material fact exists as to whether the location of the Pole within the curve radius of the intersection was a reasonably foreseeable hazard. Thus, we cannot say, as a matter of law, that the location of the Pole was not a proximate cause of and did not contribute to Mandrell's death. It is for a jury, not a court, to determine whether Duke Energy could have reasonably foreseen a motorist's collision with the Pole.

Lesson: Reasonable foreseeability is the fundamental test for assessing a potential intervening/superceding cause.

ADVOCACY TIP OF THE MONTH: **Don't overuse italics; don't use bold type except in headings; don't use underlining at all.**

Excerpt from *Making Your Case: The Art of Persuading Judges* by Antonin Scalia and Bryan A. Garner

Italicize to emphasize, but do it sparingly. Remember that when too much is emphasized, nothing is. Constant italicizing gives your brief the tone of an adolescent diary, which is not what you should be striving for.

Whenever possible, replace your italics with the device that provides the usual means of emphasis in written English: word order. In phrasing sentences, try to put the punch word at the end. Instead of writing "She held *a knife* in her hand," write "What she held in her hand was a knife." The latter formulation gives equivalent prominence to the desired word but sounds less excited. But when the only means of making your thought clear is to italicize a word or phrase, do it.

Some brief writers ill-advisedly use boldface type within normal text. The result is visually repulsive. Reserve bold-face for headings.

As for underlining, it's a crude throwback: that's what writers used in typewriting—when italics weren't possible. Nobody using a computer in the 21st century should be underlining text. To the extent that *The Bluebook* suggests otherwise, it should be revised.

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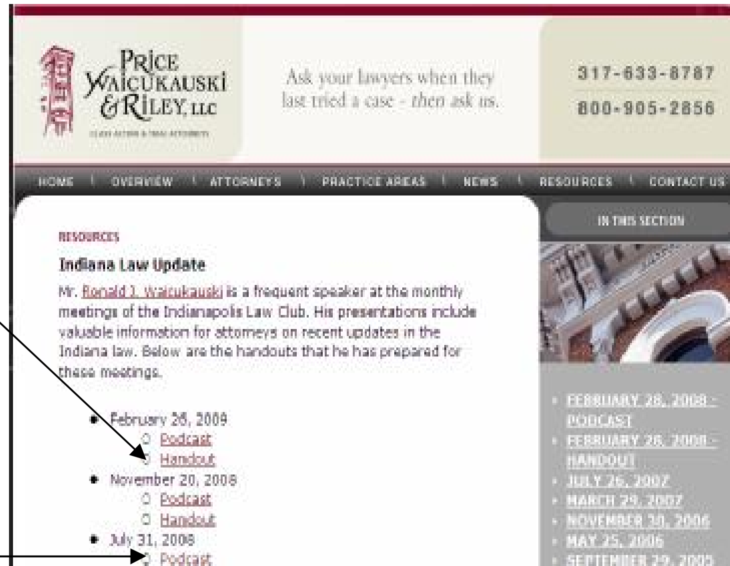

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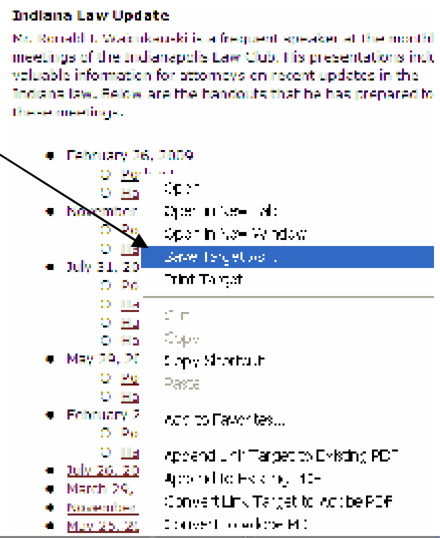

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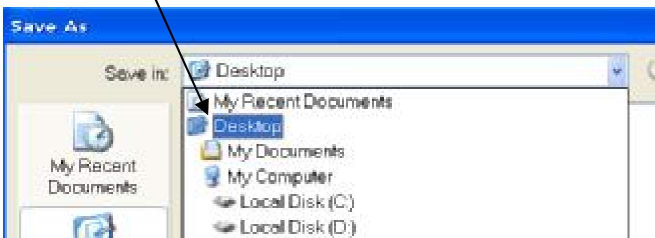

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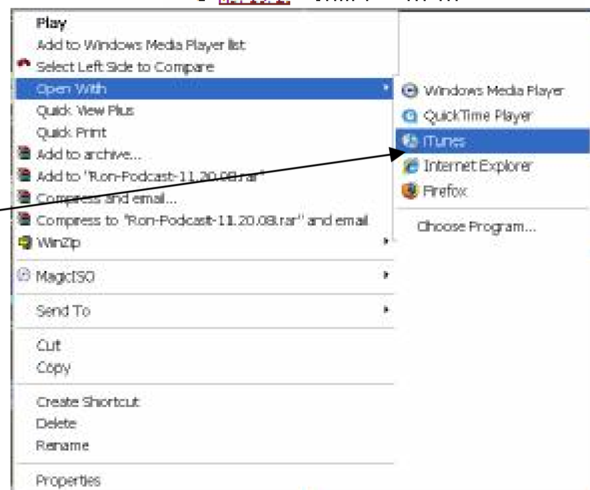

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