

INDIANA LAW UPDATE
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ADVOCACY TIP OF THE MONTH: Avoid taking extreme positions.

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: Black's Law Dictionary Now in iTunes

Posted April 24, 2009 from the ABA Journal

By Molly McDonough

Adding to the ever-expanding toolbox for the wired lawyer who needs to work while on the go, West has launched a Black's Law Dictionary in iTunes. "The idea that you can have a very full, elaborate, complex and richly-textured book like Black's available at your fingertips is fantastic," the dictionary's editor Bryan A. Garner said in a statement.

Before heading to the app store, be forewarned that the price is a bit steep compared to most of the freebies or less-than-a-dollar applications many are used to seeing. The Federal Rules of Evidence are available on The Law Pod app for 99 cents. And the U.S. Constitution is available in a number of apps for free or for a nominal price. So what's West's price for the Black's Law Dictionary? \$49.99.

P.S. Indiana Law Update is also now available in iTunes

1. Continuing objections: *Hayworth v. State of Indiana*, 2009 WL 1058612 (Ind.Ct.App. April 20, 2009) (Vaidik)

At trial, Hayworth's attorney attempted to lodge a continuing objection to the evidence seized pursuant to the search warrant. However, after asking for a continuing objection, Hayworth affirmatively said "No objection" to the vast majority of the evidence. We take the opportunity here to clarify that once counsel lodges a sufficiently specific objection to a particular class of evidence and the trial court grants a continuing objection, the proper procedure is to remain silent during the subsequent admission of that class of evidence. We therefore find that Hayworth has waived her objection to the evidence seized during the search warrant for which she affirmatively stated "No objection."

Indiana recognizes continuing objections. This is because continuing objections serve a useful purpose in trials. That is, they avoid the futility and waste of time inherent in requiring repetition of the same unsuccessful objection each time evidence of a given character is offered.

However, as this case illustrates, there are dangers to using continuing objections. As such, the proper procedure must be carefully followed if attorneys wish to use continuing objections and still properly preserve the admission of specific evidence as an issue on appeal. First, objecting counsel must ask the trial court to consider the same objection to be made and overruled each time a class of evidence is offered. It is within the trial court's discretion to grant counsel a continuing objection. If the trial court grants the continuing objection, then counsel does not have to object each time the class of evidence is subsequently offered. If, however, the trial court does not specifically grant the right to a continuing objection, it is counsel's duty to object to the evidence as it is offered in order to preserve the issue for appeal.

Objecting counsel must ensure, however, that the continuing objection fully and clearly advises the trial court of the specific grounds for the objection. If so, the issue is sufficiently preserved for appeal.

Hayworth's counsel stated: "Judge, I need to make a continuing objection to *all* this evidence because there was a Motion to Suppress filed prior to this with regard to *all of the things they've found* and they wanted-Just note my continuing objection to any of this evidence, pursuant to that motion."

The trial court did not specifically grant Hayworth a continuing objection. Because the court did not grant Hayworth a continuing objection, she must have objected to each and every piece of evidence in order to preserve her challenge to that evidence on appeal.

Even though Hayworth repeated her continuing objection to several exhibits, there were other exhibits to which Hayworth inexplicably said, "No objection." On appeal, Hayworth asserts that "No objection" really meant "no objection *other than the continuing objection.*" However, we will not read "No objection," a simple and powerful two-word phrase, to have such meaning. We thus find that Hayworth has waived her objection to the admission of the evidence seized during the execution of the search warrant.

Although we determined that Hayworth waived her objection to some of this evidence by stating "No objection," we conclude that the admission of this evidence amounts to fundamental error. Given the misleading statements in Detective Southerland's affidavit and the police's utter lack of corroboration of the informant's statements of criminal activity, we find the error to be so prejudicial to the rights of Hayworth as to make a fair trial impossible.

Lesson: To make a continuing objection: (1) Ask the trial judge to allow a continuing objection to a specific class of evidence; (2) Get a clear ruling on the record allowing the continuing objection; and (3) thereafter, remain silent when evidence in the class is offered.

2. The doctrine of completeness: *Donaldson v. State of Indiana*, 2009 WL 997088 (Ind.Ct.App. April 13, 2009) (Riley)

Appellant-Defendant, Jacob A. Donaldson (Donaldson), appeals his conviction for operating a motor vehicle while privileges are suspended, as a Class A misdemeanor. Donaldson argues that the trial court abused its discretion by admitting State's Exhibit 1 as evidence because it did not contain his complete driving record. Donaldson contends that State's Exhibit 1 "purported to be a complete driving record." However, this contention is erroneous. The request for record by the State was entitled "Request for HTV Packet." Donaldson makes no contention that State's Exhibit 1 was not a complete HTV packet. As such, we cannot say that the trial court abused its discretion by determining that State's Exhibit 1 was a complete record.

Moreover, the remedy which Donaldson seeks, reversal of the conviction, would not be the correct remedy even if State's Exhibit 1 was an incomplete record. Donaldson cites to Ind. Evidence Rule 106 for support, which provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it." When applying this rule, we have stated that, "[u]nder the doctrine of completeness, when one party seeks to admit a portion of a document or recorded statement into evidence, the opposing party can place the remainder of the statement into evidence."

Donaldson has access to his own driving record, just as the State does, and was at liberty to admit any portion thereof which promoted his defense.

Lessons:

1. To preserve a Rule 106 objection, the objecting party should offer the remainder of the incomplete record into evidence.
2. A subset of a file can be a complete record for purposes of Rule 106.

3. Jurors reading text messages: *Hape v. State of Indiana*, 903 N.E.2d 977 (Ind.Ct.App. March 31, 2009) (Vaidik)

Darby L. Hape was convicted by a jury of Class A felony possession of methamphetamine with the intent to deliver and Class D felony resisting law enforcement and was found to be a habitual offender. After trial, the parties learned that the jury, during deliberations, read text messages saved in Hape's cellular telephone that were previously undiscovered by the State and the defense. The cellular telephone was admitted into evidence during trial as part of an exhibit showing the items confiscated from Hape at the time of his arrest.

Hape contends that the trial court erred in denying his motion to poll the jury about the effect that the text messages had upon the verdict. He argues that the trial court's denial of this motion "deprived [him] of his ability to question and poll jury members on the issue of prejudicial error."

Indiana Evidence Rule 606(b) provides for the polling of a jury as part of an inquiry into the validity of a verdict in limited circumstances. The rule provides, in part:

Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify ... on the question of whether extraneous prejudicial information was improperly brought to the jury's attention[.]

Thus, as a general matter, a jury's verdict may not be impeached by evidence from the jurors who returned it. However, "extrinsic or extraneous material brought into deliberation may be grounds for impeaching a verdict where there is a substantial possibility that such extrinsic material prejudiced the verdict."

The defendant's cellular telephone was admitted into evidence without objection. Turning on the telephone did not constitute an extrajudicial experiment that impermissibly exposed the jury to extraneous information. First, the text messages themselves are not extraneous to the cellular telephone. We agree with the State that text messages are intrinsic to the cellular telephones in which they are stored. "Intrinsic," as defined by Black's Law Dictionary, means "[b]elonging to a thing by its very nature; not dependent on external circumstances; inherent; essential." We conclude that the text messages at issue here are part and parcel of the cellular telephone in which they were stored, just as pages in a book belong to the book by their very nature, and thus they are intrinsic to the telephone. Hape may not impeach the jury's verdict with affidavits regarding the text messages.

To lay a foundation for the admission of evidence, the proponent of the evidence must show that it has been authenticated. “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Ind. Evidence Rule 901(a).

We see no reason why the writings or recordings generated and saved inside of a cellular telephone should be exempted from the same authentication requirement. The proponent of a piece of evidence has to decide the purpose for which the evidence is offered. Even though we have determined that a text message stored in a cellular telephone is intrinsic to the telephone, a proponent may offer the substance of the text message for an evidentiary purpose unique from the purpose served by the telephone itself. Rather, in such cases, the text message must be separately authenticated pursuant to Indiana Evidence Rule 901(a).

Nevertheless, the presentation of the text messages to the jury without proper authentication did not rise to the level of fundamental error because the jury's exposure to the text messages was harmless error.

Lessons:

1. Be careful when admitting electronic evidence; make sure you know what's on it or in it.
2. Text messages should be authenticated separately from the telephone on which they may be found.

4. Jurors reading newspapers: *Jackson v. State of Indiana*, 903 N.E.2d 542 (Ind.Ct.App. March 31, 2009) (Bradford)

A jury was sworn and impaneled on April 23, 2007. That same day, a local newspaper ran an article about the trial which contained an excerpt from a letter the defendant Jackson had written to Jefferson County's chief deputy prosecutor. Jackson was quoted as writing “I know my life to you doesn't mean anything, just another poor black man the [S]tate can clean up the book on.”

First thing the next morning, the State requested a mistrial. The trial court asked the jury if any members knew of the article and five acknowledged they did. The trial court then held voir dire with each of those five jurors individually to determine what they knew about the newspaper article.

- The first juror questioned stated that he saw the article and read the first couple of sentences, but remembered that he had been instructed to stay away from newspaper articles or radio coverage of the trial, and stopped reading. He testified that what he read would not influence his determination of guilt or innocence.
- The second juror that was questioned stated that he read the article. He stated that he did not know the facts of the case and the article did not influence him to lean toward either side.
- The third juror questioned stated that his wife started reading the article aloud, but he told her to stop.
- The fourth juror stated that her husband started reading the article but she told him to stop. Her husband stopped reading, but told her he knew “that person in [the] article.” She testified that she heard nothing that would cause her to form an opinion either way, and that her husband knowing Roberts would not influence her either.

- The fifth and final juror who knew of the article stated that he had read the article. He testified that the part about the letter to the chief deputy prosecutor meant nothing to him because he did not know the facts of the case. He said the article would not influence him in any way.

After voir dire and taking argument from the State and Jackson, the trial court granted the State's motion for a mistrial.

Before addressing Jackson's contention, we address the State's contention that Jackson has waived this issue for review by failing to object to the grant of the mistrial. Although Jackson's attorney never uttered the words "I object," he did explain to the trial court that all of the jurors questioned about reading the article have "indicated it has not had any impact upon their ability to be fair and impartial jurors in this case, and for that reason we believe a mistrial would not be appropriate." We conclude that this is a sufficient objection to preserve this issue for appeal.

The fact that a juror has read a newspaper article pertaining to a case is not grounds for a mistrial, new trial, or reversal unless it is shown that the jurors were influenced thereby. A mistrial is an extreme remedy in a criminal case and should be granted only when nothing else can rectify the situation.

We conclude that an admonition from the trial court would have been sufficient considering the limited nature of the jury's exposure to the passage from the article and lack of evidence that the article influenced any juror. As such, the trial court abused its discretion by granting the mistrial.

Once jeopardy has attached, the trial court may not grant a mistrial over a defendant's objection unless "manifest necessity" for the mistrial is found. We conclude that the discharge of the jury at Jackson's second trial operated as an acquittal and the subsequent trial of Jackson was a violation of his right to be free from double jeopardy.

Dissent by J. Bradford: The prosecutor argued that the State's case was irretrievably compromised, both because the prosecutor had been branded a racist and because Jackson had been permitted to allege unfairness by the State without risk of cross-examination. Although the jurors had reassured the court that they had not been influenced by the article, the trial court was not required to accept their claims on this point. I would affirm the trial court on the grounds that a "high degree" of necessity existed justifying the State's request for mistrial such that retrial did not violate double jeopardy.

Lessons:

1. Expect some jurors to read (or be told) what's in the newspapers even when instructed otherwise.
2. Declaring a mistrial is not always the safe course in a criminal case where double jeopardy creates risks that are not present in civil cases.
3. You needn't use the word "object" to preserve an objection but your opposition to the motion should be stated clearly on the record.

5. Jurors watching the news: *Morgan v. State of Indiana*, 903 N.E.2d 1010 (Ind.Ct.App. April 7, 2009) (Brown)

The State charged Morgan with murder, felony murder, and robbery as a class A felony. Ocie Brasher was Morgan's friend, and in March 2008, they were incarcerated in the Marion County Jail at the same time. Morgan told Brasher that he and Price had robbed and killed Hager.

Brasher informed the police about Morgan's statements. Brasher was subpoenaed to testify at Morgan's trial. He appeared as required, and the victim's advocate escorted him to the witness waiting room. However, he disappeared from the witness waiting room before he testified. Various agencies and approximately fifty officers attempted to locate Brasher. Over Morgan's objection, Brasher's deposition was read to the jury.

During the trial, the trial court learned that several jurors had been exposed to publicity and information concerning Brasher's disappearance. Seven jurors indicated they had been exposed to such information, and the trial court questioned those jurors individually. Morgan argued at trial and on appeal that Juror Jackson and Juror Peyton should have been dismissed.

Juror Jackson indicated that she heard on the 10:00 p.m. news the night before that a witness was missing and Morgan's name was mentioned. Juror Peyton informed the trial court that his mother had called him that morning and told him that a witness was missing in a murder trial. Other jurors indicated that Juror Jackson and Juror Peyton had mentioned the missing witness in the jury room.

Both jurors indicated that they could disregard the information and base their decision solely upon the evidence presented at trial, and the jurors were admonished that their decision must be "exclusively, solely based on the evidence that [they heard] from the witness stand" and that they were not to consider outside sources.

Given our deference to the trial court in these matters, we conclude that the trial court did not abuse its discretion by denying Morgan's request to dismiss the two jurors.

Lessons:

1. Expect some jurors to watch the news on television even when instructed otherwise.
2. Watching the news need not lead to disqualification if the jurors say that the broadcast will not influence their decision and they'll make their decision solely on the evidence from the witness stand.

6. Waiving challenges for cause; individual voir dire: *Ward v. State of Indiana*, 903 N.E.2d (Ind. April 7, 2009)(Shepard)

The defendant, Roy Lee Ward, appeals his death sentence for the 2001 rape and murder of fifteen-year-old Stacy Payne in Dale, Spencer County, Indiana. The defendant presents two discrete claims of trial court error regarding the conduct of voir dire, the trial court's jury selection process. He contends that the trial court erred (a) in failing to strike ten prospective jurors for cause, and (b) by changing the method of questioning potential jurors about the death penalty from initially speaking with one juror at a time to later discussing the issue with small groups of jurors. To support these claims, the defendant argues that he was forced to use his peremptory challenges on prospective jurors who should have been removed for cause, thus compelling him to accept other jurors who, though not challengeable for cause, held biases

favorable to the death penalty for the pleaded-to offenses and unfavorable to dispassionate consideration of his mitigation evidence.

The United States Supreme Court addressed a similar claim in *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). The Ross Court found that any claim that the jury was partial must focus not on the removed juror, but rather “on the jurors who ultimately sat.” The Court stated:

Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.

The Court concluded that failing to dismiss the juror for cause, while error, “did not deprive petitioner of an impartial jury or of any interest provided by the State.”

In light of this reasoning, it is irrelevant whether the trial court erred in denying any of the defendant's challenges for cause. Of the jurors who were selected to serve, only one was challenged for cause by the defendant, and this challenge was denied by the trial court. The defendant does not question this ruling on appeal. We therefore decline the defendant's request for reversal of his death penalty sentence premised on the trial court's failure to grant his challenges for cause with respect to jurors he later removed by peremptory challenge.

The defendant also contends that the trial court erred by changing the mode of voir dire from individual to group questioning of prospective jurors. This change, he asserts generally, “exposed members of the jury panels to grossly prejudicial opinions and statements.”

Two days before the trial began, the trial judge informed counsel that, in light of the broadcast publicity regarding unidentified “events of last week,” the questioning of prospective jurors regarding the death penalty and publicity would be done individually, away from other prospective jurors. But the trial judge quickly recognized that “[a]t the rate we[']re going, it will be months, not days, before we get a jury picked,” and modified that plan following lunch recess on the first day of voir dire. The court explained that henceforth the “only individual voir dire will be on the issue of pretrial publicity” and that “everybody else will be voir dired together on the death penalty questions.”

Other than his general trial objection to the judge's change in format, however, the defendant does not identify any particular objection made during the ensuing voir dire asserting improper exposure of prospective jurors to prejudicial statements. He does not assert on appeal any claim that specific jurors were permitted to serve following a trial court failure to grant a defense challenge for cause arising out of any such incidents.

A trial court has broad discretionary power to regulate the form and substance of voir dire. Individually sequestered voir dire is not mandated in any case under Indiana law, including capital cases, absent highly unusual or potentially damaging circumstances. The defendant has not established reversible error in the trial court's modification of the format for questioning potential jurors in this case.

Lessons:

1. The improper denial of a challenge for cause is waived by use of a peremptory challenge.
2. There is no right to voir dire individually, separate from other jurors, even in a death penalty case.

7. Just cause for termination due to personal emails: *Coleman v. Review Board of Indiana*, 901 N.E.2d 1176 (Ind.Ct.App. Feb. 11, 2009) (Barnes)

Garry Coleman appeals the denial of unemployment compensation benefits by the Department of Workforce Development (“DWD”) following the termination of his employment with the Indiana Department of Local Government Finance (“DLGF”). We address only one dispositive issue, which is whether there is sufficient evidence that the DLGF terminated Coleman's employment for “just cause.”

We are reminded that emails last forever and can come back to haunt the writer. The DLGF hired Coleman as a systems analyst in June 2005. Coleman signed an “Information Resources Use Agreement” providing a “De Minimis Personal Use” policy that required Coleman to “make every effort to minimize personal use of Information Resources.”

On January 25, 2008, the DLGF Commissioner sent Coleman a letter stating that his employment was terminated for violating the “de minimis” exception and for distributing inappropriate comments or messages via his DLGF email account. The letter listed six dates on which Coleman allegedly had violated these policies, and claimed he had wasted a total of sixteen hours sending improper or excessive emails.

We conclude the record here lacks substantial evidence to support a finding that Coleman knowingly violated a uniformly enforced rule. There might be a situation where email usage is so inordinate that it should be clear to any reasonable person that it exceeded a “de minimis” amount, thus justifying immediate termination. This is not such a case. What is in this record are ten email conversations that Coleman participated in over the course of many months. Coleman did not initiate many of them, and none of them were lengthy dissertations.

On that point, we observe that the termination letter also alleged that Coleman sent “inappropriate” material through email at work. It is abundantly clear that to the extent the DLGF has a ban on sending “inappropriate” messages or items through email, the DLGF does not uniformly enforce that ban. The most explicit sexual material in the record is the emailed photograph appearing to depict two persons having sex atop a bridge. The DLGF employee who originally sent that photograph to numerous recipients, instead of being fired, was given a raise after Coleman was terminated.

Certainly, the DLGF is entitled to restrict the amount of personal emailing that its employees do during work hours. The DLGF could have confronted Coleman about his email usage if it felt that usage exceeded the vague “de minimis” boundary. The DLGF also was entitled to fire Coleman when it did, particularly given his apparent dislike of his superiors at the agency; this is not a wrongful termination case. But the DLGF failed to establish that Coleman's firing, with no advance warning regarding his email usage, was for just cause as that term applies in the context of unemployment insurance.

Lessons:

1. An employer may limit personal email usage on office computers to a de minimis level.
2. Ten email conversations over many months does not clearly exceed that level.

8. Buyer's duty to inspect real property: *Dickerson v. Strand and German*, 2009 WL 1124453 (Ind.App.Ct. April 24, 2009) (Riley)

In 1995, Strand and German purchased a house in Ladoga, Indiana. At that time, S S Pest Control inspected the house and noted visual evidence of active termite infestation in the "crawl space north foundation wall and base sill plate." In early 2000, Strand and German wanted to sell the house and hired Central Indiana Home Inspections to inspect it. In its report, under the heading "Major Structural Defects," Central Indiana Home Inspections stated, "Some floor joists & the box sill on the north side by the deck have termite damage. Some re-enforcement has been done to the joists but not the box sill."

On March 17, 2000, after having toured the house "a couple of times" with Strand and German's agent, the Dickersons signed an agreement to purchase the house. The agreement gave the Dickersons the right to have the house inspected. The Dickersons never had their own inspection done.

In October of 2003, the Dickersons hired Rob Wethington to replace the siding on the house. Wethington uncovered significant termite damage.

On April 12, 2004, the Dickersons filed a Complaint against Strand and German alleging, among other things, fraud. The Dickersons contend that Strand and German made fraudulent statements in two different documents: in the Seller's Residential Real Estate Sales Disclosure form, where they indicated that the house had no structural problems at the time of closing, and in the Purchaser's Response Regarding Inspection, where they indicated that Dawson had re-enforced the floor and wall on the north side of the house.

We need not decide whether Strand and German's representations were fraudulent because, under Indiana law, the Dickersons had no right to rely on those representations. In *Cagney v. Cuson*, 77 Ind. 494, 1881 WL 6689 (1881), the plaintiff alleged that the defendant made certain fraudulent statements in order to induce the plaintiff to buy land and farm equipment. The plaintiff had "a suitable opportunity of examining both the lands and the personal property" but failed to do so. Our supreme court held that, even as to fraudulent representations operating as an inducement to the sale or exchange of property, "the purchaser has no right to rely upon the representations of the vendor as to the quality of the property, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities."

Though we had to dust it off, *Cagney* is still good law, and the Dickersons offer us no way around it. The Dickersons, like the plaintiff in *Cagney*, had a reasonable opportunity to inspect the house. The fact that the Dickersons did not actually inspect the house is irrelevant; under *Cagney*, it is the opportunity to inspect that matters. We encourage our supreme court to reevaluate the social value of a rule allowing a seller of property to lie with impunity as long as the prospective buyer had a reasonable opportunity to inspect the property. But until then, we are bound by that rule.

Fn.: We might have reached a different result if the Dickersons had directed us to evidence tending to show that a reasonable inspection of the house would not have revealed the termite damage in question.

Lessons:

1. A buyer of real estate cannot sue a seller for misrepresentations about the property if the buyer could have learned the truth by inspection.

2. In light of Judge Riley's urging that the Supreme Court to reevaluate the rule and the dissent by Judge Vaidik based on the disclosure statute, this rule could change soon.
 3. In the meantime, if you're a buyer, get an inspection.
- 9. Insurance agent liability: *Mintz v. Connecticut General Life*, 903 N.E.2d (Ind. March 25, 2009) (Rucker)**

By March 1995, then sixty-four-year-old Dr. Jerome Mintz had been a professor at Indiana University for over thirty years. On March 22, 1995, the University sent Mintz a letter advising him that his total life insurance coverage would be reduced from \$178,000 to \$115,700 on his sixty-fifth birthday unless he exercised a conversion option. The letter also instructed Mintz to contact Wayne Gruber with any questions regarding the conversion. Gruber was a servicing agent for the University.

Mintz and his wife Betty telephoned Gruber to make arrangements to convert the group coverage into individual policies. They informed Gruber that Mintz was terminally ill with lung disease and leukemia and wanted to convert the entire value of the group coverage to individual policies. According to Mrs. Mintz, Gruber responded, "Absolutely. Just leave it to me. I will do everything."

In February 1996, Mrs. Mintz discovered that the entire value of the group coverage had not been converted into individual policies; but rather, only coverage worth \$62,300 had been converted. On April 21, 1997, Mintz filed a complaint against Gruber and Connecticut General alleging negligence, breach of contract, and intentional infliction of emotional distress.

The trial court concluded Gruber was entitled to summary judgment on the Estate's negligence claim because Mintz's injuries "were not proximately caused by Gruber's negligence ..." Pointing in part to the letters the Estate received from both Indiana University and Gruber, and characterizing Gruber's representation that he would "take care of everything" as an "initial general statement to offer the Mintzes help through the process of conversion," the Court of Appeals' majority also concluded that "Gruber's actions were not *the* proximate cause of the Mintzes' loss of insurance coverage."

We make two observations. First, "summary judgment is generally inappropriate in negligence cases because issues of contributory negligence, causation, and reasonable care are more appropriately left for the trier of fact." Whether Gruber's actions proximately caused the Mintzes' injuries is highly fact sensitive and more appropriately left for resolution by a fact-finder than resolved by summary disposition. We conclude therefore that the trial court erred in granting summary judgment in Gruber's favor on the basis of a lack of proximate cause.

The Estate contends the trial court erred in granting summary judgment in Connecticut General's favor because genuine issues of material fact remain as to whether Gruber was an agent of Connecticut General such that it is liable for Gruber's negligence. The term "insurance agent" is often used loosely. Depending on whose interests the "insurance agent" is representing, he or she may be a "broker" or an "agent." A critical distinction exists.

A representative of the insured is known as an "insurance broker." As a general rule, a broker is the agent of the insured, and not the insurer. As such the insurer is not liable for the broker's tortious conduct. A broker represents the insured by acting as an intermediary between the insured and the insurer, soliciting insurance from the public under no employment from any special company, and, upon securing an order, places it with a company selected by the insured, or if the insured has no preference, with a company selected by the broker. In contrast, an

“insurance agent” represents an insurer under an employment agreement by the insurance company. Unlike acts of a broker, “acts of an [insurance] agent are imputable to the insurer.”

But the undisputed facts in this case demonstrate that Gruber was not the agent of Connecticut General. There was simply nothing before the trial court showing that the relationship between Gruber and Connecticut General, their actions, or their usual course of dealing, made Gruber Connecticut General's insurance agent.

The trial court properly granted summary judgment in Connecticut General's favor.

Lessons:

1. An insurance agent is usually an employee of the insurer and his acts are imputed to the insurer.
2. An insurance broker represents the insured and usually deals with several insurers. A broker's negligent acts are not imputed to the insurer.
3. A broker who promises to “take care of everything” may be liable for negligence if he does not.
4. The insurer will not have vicarious liability for such negligence by a broker.
5. “Summary judgment is generally inappropriate in negligence cases,” so sayeth the Indiana Supreme Court and this time, they meant it, reversing the trial court and the Court of Appeals which had found no genuine issue on proximate cause.

10. Insurance agent liability: *Brennan v. Hall*, 2009 WL 1085625 (Ind.Ct.App. April 21, 2009)(Barnes)

Terence Brennan and Burt Insurance Agency (“Burt”) appeal a jury's verdict in favor of Patricia and Harry Hall. The sole restated issue is whether the jury properly found Brennan and Burt liable for negligently failing to procure insurance for the Halls.

The evidence most favorable to the verdict is that in late 2002, Patricia contacted Brennan, an insurance broker working at Burt, and asked him to look into homeowner's insurance policies for the Halls. Patricia told Brennan she had three specific concerns she would want the policy to address: coverage for her dogs, earthquake coverage, and coverage for a wood burning stove. Brennan later informed Patricia that he had found a suitable policy through Buckeye State Mutual Insurance Company (“Buckeye”).

In August 2004, one of the Halls' dogs, a Doberman Pinscher, bit their niece. When the Halls made a claim on the Buckeye policy, Buckeye denied coverage for the claim and additionally declared the policy null and void for “material misrepresentation,” i.e. the application's failure to disclose that the Halls had a Doberman Pinscher.

On December 20, 2006, the Halls filed suit against Brennan and Burt, alleging negligence. On October 21, 2008, a jury found that Brennan and Burt were liable to the Halls based on negligent failure to procure a policy.

The salient issue we will consider is whether Brennan was negligent in procuring insurance for the Halls, where Patricia specifically advised that she wanted coverage for her dogs, Brennan filled out the application and indicated the Halls had no dogs after Patricia specifically stated that they had dogs, but Patricia signed the application, which included a statement that the application was complete and accurate.

The Halls are not seeking any recovery against Buckeye. They are suing only Brennan and Burt for their alleged negligence in the application process, which left the Halls without any homeowner's insurance generally, and without specific coverage for the dog bite. No Indiana

state court case has addressed precisely this question.

We hold that if an agent is negligent in assisting a client complete an insurance application, and such negligence leads to a basis for the insurance company to deny coverage to the applicant and/or revoke the policy, the applicant may seek damages from the agent, even if the applicant signed or ratified the application after having a chance to review it.

There is sufficient evidence from which the jury could have concluded that Brennan's actions amounted to a breach of his duty to procure insurance requested by the Halls. Such breach led to the Halls being damaged because they lack coverage for the dog bite claim. To the extent Patricia herself might share some of the blame for the inaccurate application and subsequent denial of coverage, it would be more appropriate to assess her fault in accordance with the Comparative Fault Act, just as would be the case in another ordinary negligence action; it is not a basis for completely barring the Halls' action.

Lessons:

1. An insurance agent may be held liable for negligently filling out an application form if it leads to denial of coverage.
2. The agent may still be liable even if the insured signs the application, indicating that she read it and the contents were “true, complete and correct.”
3. The fault of the insured will be assessed in accordance with the Comparative Fault Act.

11. Golf outing liability: *Clary v. Dibble*, 903 N.E.2d 1032 (Ind.Ct.App. April 9, 2009) (Darden)

Odetta Clary, individually and as personal representative of the Estate of Kevin Dale Clary, and Kasey Dale Clary, a minor, by his mother and natural guardian, Odetta Clary (collectively, “Clary”), appeal the trial court's entry of summary judgment in favor of K & P Roofing Siding & Home Improvement, Inc. (“K & P”).

In 2006, Patrick H. Dibble worked as a salesperson for K & P pursuant to a Commissioned Salesperson's Agreement. He used his own tools and drove his own vehicle, a Ford pick-up truck. Dibble was considered to be an independent contractor.

On July 16, 2006, Shelter Distribution, Inc., a materials supplier for K & P, sponsored a golf tournament for several companies at the Covered Bridge Golf Club, located in Sellersburg. Since he had been invited to participate in the tournament, Dibble “felt obligated to go play[.]”

Dibble had taken a prescription pain reliever the morning of the golf tournament and had a hangover from drinking the previous night. Dibble played in a foursome along with Ron Cogburn, K & P's owner, James Reynolds, K & P's General Manager, and John Survance, a K & P salesperson. While playing, Dibble “was tired and felt a little bit nauseous, but for the most part tired.” He started falling asleep during the last nine holes and stayed in the golf cart. He had one beer after the 9th hole and drank water throughout the day. He informed the others in his foursome that he was tired.

Dibble left the golf club at approximately 6:30 p.m. and drove west on Perry Crossing Road in Clark County. At some point, he either fell asleep or blacked out, allowing his vehicle to cross the centerline. His vehicle struck a motorcycle on which Kevin and Kasey were riding, resulting in Kevin's death and injuries to Kasey.

Clary filed a complaint for damages against Dibble on September 25, 2006. She alleged

that Dibble had negligently operated his vehicle. In Count II, she alleged that K & P was liable under the theory of respondeat superior.

Clary asserts that the trial court erred in granting K & P's motion for summary judgment. She raises several issues, one of which we find dispositive: whether "K & P owed [Clary] a duty not to allow ... Dibble to leave the golf course impaired."

Whether the defendant must conform his conduct to a certain standard for the plaintiff's benefit is a question of law for the court to decide. Courts will generally find a duty where reasonable persons would recognize and agree that it exists. This analysis involves a balancing of three factors: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.

1. Relationship: Dibble was not an employee of K & P but an independent contractor, and therefore, not under K & P's influence and control. Also, the accident did not involve a vehicle of K & P; did not occur on K & P's property; and did not occur after an event sponsored, hosted, or required by K & P. More importantly, K & P did not in any way contribute to Dibble's impairment, where Dibble had been drinking on his own the night before the tournament and had taken a prescription medication prior to the tournament.

2. Foreseeability: We disagree with Clary that it was foreseeable that a person, who had been feeling ill or tired during the day but was coherent and had not been observed drinking alcohol or taking drugs, would, after resting and proclaiming to feel better, later cause an automobile accident. Accordingly, we do not conclude that there was a high degree of foreseeability that failure to prevent such a person from driving would result in an accident.

3. Public Policy: It would be unreasonable to find it sound public policy to impose a duty on persons to determine the extent of their perceived influence and control over a person; surmise whether that person is too ill or tired to drive; and based on their conjecture, prevent that person from driving. "Ultimately, sound public policy dictates that the responsibility for negligent driving should fall on the driver."

Upon balancing the three factors necessary in determining whether a duty exists, we conclude that K & P did not owe a duty to Clary.

Lesson: There's no duty on a company to prevent an impaired golfer from driving home after a golf outing when (1) the golfer was an independent contractor; (2) the outing was not sponsored by the company; (3) the company didn't contribute to the impairment; and (4) he wasn't driving a company vehicle.

12. Payday loans and usury: *Payday Today v. Defreeuw*, 903 N.E.2d 1057 (Ind.Ct. App. April 9, 2009) (Bartreau)

On June 5, 2004, Defreeuw applied for a \$200.00 loan from Payday. The stated term of the loan was for fourteen days and the finance charge was \$25.00. Defreeuw presented security to Payday in the form of a postdated check in the amount of \$225.00 to cover the principal and the finance charge. Defreeuw did not pay off the loan within fourteen days, and when her check was presented by Payday, it was returned by Defreeuw's bank stamped "closed account."

Payday sued Defreeuw in small claims court for fraud and requested treble damages in the amount of \$675.00, attorney fees in the amount of \$500.00, and a one-time statutory fee in the amount of \$20.00, totaling \$1,195.00 plus court costs in the amount of \$46.00. In the alternative, Payday also requested damages in the amount of \$2,100.00 to represent the 325.89% interest it

believed it was charging over the 84 bi-weekly periods when the loan was unpaid.

The trial court ordered Defreeuw to pay the \$1,195.00 plus court costs because she “provided false information on her loan application when she failed to disclose to [Payday] other outstanding payday loans.” However, the court did not order the payment of the interest accrued at the 325.89% rate. Payday now appeals.

Payday contends that the trial court erred in not awarding the \$2,100.00 that represents the 325.89% interest rate applied to the \$200 loan made to Defreeuw. In responding to this contention, we initially note that the “Small Loans” statute under which Payday asserts its protection from usury laws, conflicts with both statutory law as developed throughout American jurisprudential history and the common law. Accordingly, the statute must be strictly construed.

At the time Payday made a loan to Defreeuw, finance charges on a \$200.00 loan were limited to the \$25.00 charged by Payday. The statute made no reference to continuing to assess this original finance charge every two weeks until the loan is paid. Upon the bank's dishonoring of Defreeuw's check, Payday was allowed to charge a fee not to exceed \$20.00. The Small Loans Act stated that finance charges made on small loans were exempt from both, which limited a loan finance charge for supervised loans to 36%, and Ind.Code § 35-45-7, which stated that a person committed loansharking when he contracted to receive an APR exceeding 72%.

We assume that Payday believes that the Small Loans Act frees it from both the usury and loansharking statutes and is licensed to ignore the historically moral and practical foundations for usury statutes and charge any amount of interest that the so-called payday loan “free market” will bear. In this case, Payday believes that rate to be based upon the transformation of its initial two-week 15% finance charge into an APR of 325.89%. We disagree.

We do not believe our legislature intended to free lenders to assess the *unconscionable* interest rate sought by Payday against Defreeuw. The question then, is how high the APR on a payday loan can rise. The Small Loans Act tells us only that it may exceed 36% and that the charging of greater than 72% will not result in the prosecution of the lender. The Act does not explicitly cap the APR on the loan, but given that it is in derogation of both statutory and common law, we cannot say that it authorizes what can only be described as an *astronomical deviation* from established law.

If Payday wants to collect interest, it must include that interest as part of the agreement between itself and the payday borrower. Because Payday failed to do so, it cannot recover any interest.

Lessons:

1. Payday lenders can collect only for the fees specifically authorized in the Small Loans Act.
2. The Act does not protect continuing interest charges at a rate of 325.89%.
3. When you get a \$1,200.00 judgment on a \$200 loan, don't appeal for more.
 - “Pigs get fat; hogs get slaughtered.”

13. Governmental immunity: *City of Bloomington v. Walter*, 2009 WL 1035091 (Ind. Ct.App. April 15, 2009) (Kirsch)

The City of Bloomington Utilities Department (“CBU”) brings this interlocutory appeal challenging the trial court's denial of its motion for summary judgment. CBU raises the following restated issue: whether the trial court erred in failing to find that CBU is immune from liability under the Indiana Tort Claims Act, Indiana Code chapter 34-13-3 (“ITCA”), for damage

caused by sewage flowing from its sewer pipes into the home of one of its customers.

Here, Homeowners alleged that CBU negligently maintained and controlled the sewer lines by failing to clear severe root invasion from the sewer pipes. As a proximate result of this negligence, the Homeowners' sewer line became blocked, sewage flowed into the home, and the sewage caused damage to the Homeowners' real and personal property. In its motion for summary judgment, CBU argued that its conduct qualified for governmental immunity as a discretionary function under Section 3 of the ITCA. The trial court denied CBU's motion for summary judgment.

“A governmental entity ... is not liable if a loss results from ... [t]he performance of a *discretionary function*....” Ind. Code § 34-13-3-3(7). CBU asserts that, contrary to the trial court's findings, it is entitled to immunity for the discretionary function of enacting and following its Capacity, Management, Operations and Maintenance (“CMOM”) Program—a program that set forth guidelines for CBU to inspect, clean, and repair the City's sewer system.

We note that, in *Peavler v. Monroe County Bd. of Comm'rs*, 528 N.E.2d 40 (Ind.1988), our Supreme Court adopted the “planning/operational” test as the standard for defining discretionary acts under the ITCA. The essential inquiry is whether the challenged act is the type of function that the legislature intended to protect with immunity. Discretionary immunity is provided to governmental units for undertaking a policy-oriented decision-making process.

CBU engaged in policy-oriented decision-making when it determined which part of the system it would maintain (public gravity sewers equal to or greater than eight inches in diameter and public force mains) and that it would not use chemicals for root control. However, much of the CMOM Program merely set forth “things that [CBU has] been doing for years.”

The planning/operational test allows us to “distinguish between decisions involving the formulation of basic policy, entitled to immunity, and decisions regarding only the execution or implementation of that policy, not entitled to immunity.”

While the decisions regarding sewer cleaning required CBU and its employees to exercise professional judgment, these decisions may be evaluated under traditional tort standards of reasonableness. We find no designated evidence in the record here on appeal to convince us that CBU's actions involved the formulation of policy that would entitle it to immunity under Indiana Code section 34-13-3-3(7).

Lessons:

1. A governmental entity is entitled to immunity for the performance of discretionary policy-oriented decisions, but not for decisions regarding the execution or implementation of a policy.
2. The line between the two is often gray.

14. Unjust enrichment; constructive trust; *Zoeller v. East Chicago Second Century, Inc.*, 2009 WL 987170 (Ind. April 13, 2009) (Shepard)

In 1993, Showboat Marina Partnership initiated the process of applying for a riverboat casino license in the City of East Chicago pursuant to Indiana's Riverboat Gambling Act. Showboat entered into a local development agreement with East Chicago. Under the agreement, Showboat agreed to “contribute annually to and for the benefit of economic development, education and community development in the city” an amount of total contribution equal to 3.75% of its adjusted gross receipts.

Showboat proposed that of the total contribution 1% be allocated directly to East

Chicago; 1% to the Twin City Education Foundation, a non-profit corporation; 1% to the East Chicago Community Foundation, another non-profit; and 0.75% to East Chicago Second Century, Inc., a for-profit corporation. The agreement also included promises that Second Century would undertake development activities at sites within East Chicago, that all projects pursued by Second Century would conform to the City's development and master plans, and that all Second Century projects would require approval from the City.

The Commission issued a gaming license to Showboat on January 8, 1996, based in part on these representations, and the Commission incorporated the terms of the agreement as conditions to Showboat's receipt and maintenance of the license. The gaming operation commenced in April 1997. Between this commencement and June 2006, Second Century received about \$16 million from the casino operation.

The Commission subsequently asked the Attorney General to investigate the agreement; the Attorney General found that much of the \$16 million could not be accounted for and could be traced to Second Century's principals.

On April 15, 2005, Second Century sought a declaratory judgment that Resorts would be required to continue the payments to Second Century. In November 2005, the Attorney General intervened, seeking imposition of a constructive trust for public benefit and an accounting over the money paid to Second Century and its principals. Second Century moved to dismiss the Attorney General's claims, and the trial court did so. The Attorney General appealed, and the Court of Appeals affirmed.

Second Century moved to dismiss on grounds that its status as a for-profit corporation took it out from under the provisions in the trust code that describe the Attorney General's supervisory role as respects charitable activity. The people's interest in the rectitude of entities created in the name of public good, such as charities, has long led to regarding the Attorney General as an officer with authority to enforce those interests. The notion was hornbook law even in the time of Blackstone, who wrote:

The king, as *parens patriae*, has the general superintendence of all charities; which he exercises by the keeper of his conscience, the chancellor. And therefore whenever it is necessary, the attorney general, at the relation of some informant, (who is usually called the *relator*) files ex officio an information in the court of chancery to have the charity properly established.

Given the broad common law and statutory authority conferred upon the Attorney General to protect the public interest in charitable and benevolent instrumentalities, we conclude that it was error to dismiss the Attorney General's counterclaim on grounds that Second Century is a for-profit corporation.

Second Century has argued that the unjust enrichment claim is unavailable because the local development agreement specifically addressed the subject matter of the funds that Second Century should receive. There are three general types of contracts—express, implied-in-fact, and constructive contracts. Express and implied-in-fact contracts are traditional contracts, while constructive contracts, “also referred to as quantum meruit, contract implied-in-law, [unjust enrichment], or quasi-contracts[,]” are not contracts at all.

Indiana's Court of Appeals has declared, “The existence of express terms in a valid contract precludes the substitution of and the implication in law of terms regarding the subject matter covered by the express terms of the contract. When the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law.”

There was an express contract in this transaction, but it was not one to which the

Attorney General or the State were parties. Showboat entered into the local development agreement with East Chicago. That transaction is thus not a bar to the Attorney General's claim for unjust enrichment, an equitable remedy. Its terms were intended to control the rights and duties of East Chicago and the casino licensee in relation to each other; they were not intended to control the rights of any non-parties. The Attorney General's claim for unjust enrichment is actionable.

Second Century has argued that the claim for imposition of a constructive trust is defective because the Attorney General has not pleaded any allegations of fraud. The general notion of constructive trust is succinctly outlined in the Restatement (Second) of Trusts:

[A] relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.

“A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.” This type of trust is more in the nature of an equitable remedy rather than an independent cause of action.

While Indiana courts have certainly said on occasion that fraud is a prerequisite, the meaning of this declaration is not confined to fraud as one might define it for purposes of criminal law. Rather, the remedy is available where there is standard fraud (i.e., misrepresentation, reliance, etc.) *or* a breach of duty arising out of a confidential or fiduciary relationship. The Attorney General's allegations against Second Century and its principals on this point are: Upon information and belief, the monies paid to Second Century under the Showboat Agreement have not led to public benefit commensurate with the monies paid out under said agreement, but instead have led mainly to the unjust enrichment of the directors and officers of Second Century. This allegation states a claim for constructive trust.

Lessons:

1. The Attorney General has authority to protect the public interest in charitable and benevolent instrumentalities, including, asserting a claim against a for-profit company if it took money on a promise to perform a public purpose, such as the economic development of East Chicago.
2. Having an express contract will usually preclude a claim for unjust enrichment but not so as to claims by non-parties to the contract.
3. Standard fraud is not required to assert a claim for imposition of a constructive trust; such a claim may arise out of a confidential or fiduciary relationship if the defendant's retention of the property in question is wrongful and he would be unjustly enriched if he were permitted to retain the property.

P.S. Attorney General Greg Zoeller said: “It is our belief that this lawsuit will shine the spotlight of public attention onto the historic problems of corruption that have plagued East Chicago and parts of Lake County. Gambling proceeds from the riverboat were supposed to benefit the citizens of East Chicago; now we have the opportunity to find out how those \$16 million really were spent.”

ADVOCACY TIP OF THE MONTH: Avoid taking extreme positions.

In *Westfield Insurance v. Sheehan Construction* (7th Cir. April 29, 2009), Chief Judge Easterbrook writes:

Sheehan’s insistence that it is entitled to punitive damages because Westfield’s denial of coverage was “in bad faith” is **the sort of argument that calls into question the bona fides of all other contentions**. How can an insurer exhibit “bad faith” by taking a position that not only follows the policy’s language but also is endorsed by a district judge? We can imagine a procedural form of bad faith—refusal to take any stance on the policy’s coverage while leaving the insured to fend for itself in the underlying litigation—but Westfield addressed Sheehan’s claim with dispatch and filed a prompt declaratory-judgment suit to have the dispute resolved. Sheehan’s insistence, even after losing on the merits in the district court, that the insurer acted “in bad faith” implies that its strategy has been to strong-arm a settlement by *in terrorem* claims, rather than to vindicate its legal entitlements. *Lawyers should think carefully about the message that their contentions convey to the court*, as well as the effect they may have on the other litigants.

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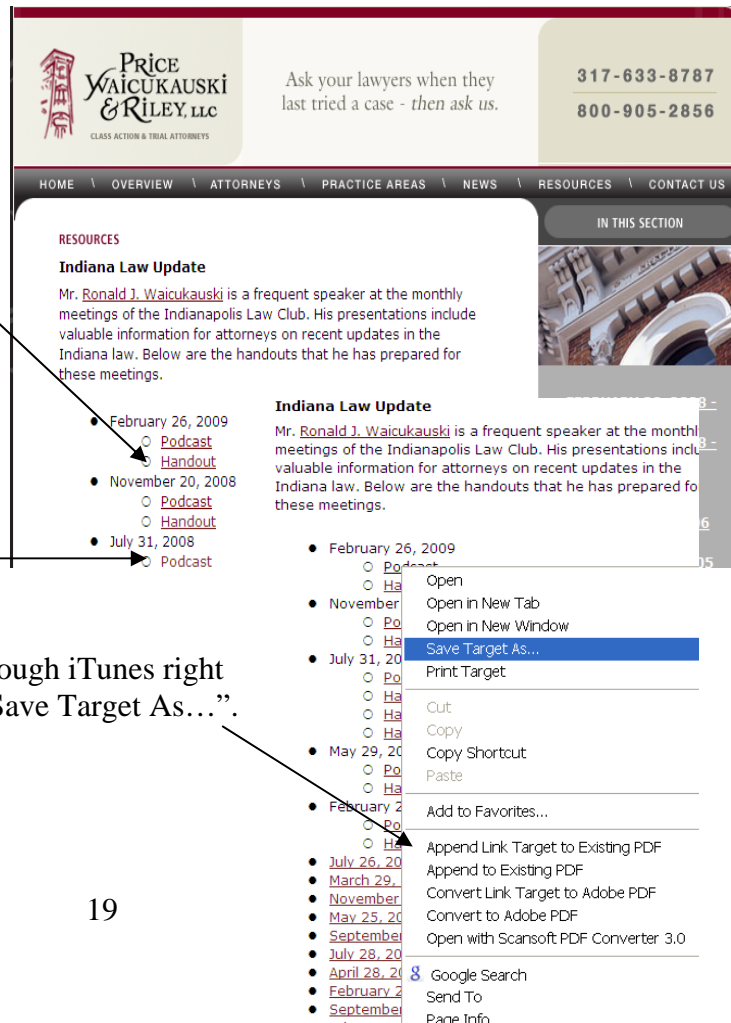
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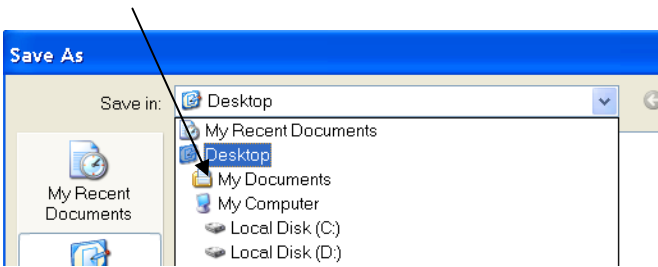
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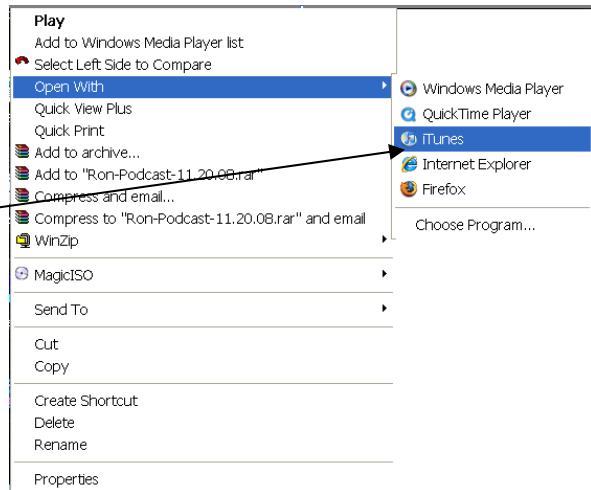
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