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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: Student Brought to Court in Chains for Shirking Jury Duty

Houston Chronicle, April 27, 2010

A 19-year-old college freshman missed class Tuesday when a federal judge decided to teach her a civics lesson by ordering federal marshals to haul her in chains from school to court to explain why she shirked jury duty. Kelsey Gloston stood in ankle and wrist restraints in court Tuesday afternoon wearing flip flops, a tight white T-shirt, short-shorts and sporting green streaks in her hair. Though she rolled her eyes and looked impatient while waiting for the judge, once U.S. District Judge David Hittner took the bench her tears flowed.

The judge was incensed that the teen had hung up on jury clerks calling to get her to the courthouse. "You in effect went right at the jury folks and said you'd have nothing to do with it," Hittner said sternly. "I'm going to hear exactly what your problem is with jury duty and what your problem is with how our country operates." Darrell Gloston, the woman's father, said Tuesday night: "Don't treat her like she murdered 25 people along the freeway," he said. "She's 19, she's ignorant, she's a kid. They don't take anything seriously."

The judge released Gloston to return with a lawyer for a hearing Thursday on whether he should find her in contempt and possibly detain her.

Kelley Drye Pressured to Eliminate Mandatory Retirement Policy

By Elenore Cotter Klingler, Litigation News – April 15, 2010

Kelley, Drye & Warren, LLP, the law firm facing suit by the EEOC for its partner de-equitization policy, is back in the news. The firm has announced that it is eliminating its mandatory retirement policy altogether. In its complaint, the EEOC alleges that Kelley Drye partner Eugene D'Ablemont was forced to give up his equity in the firm after he turned 70 and forced to accept instead an annual bonus set by the firm's management committee. Kelley Drye asserts that partners such as D'Ablemont are employers, and thus not subject to the Age Discrimination in Employment Act.

According to a 2005 Altman & Weil survey, 37 percent of law firms nationally and 57 percent of law firms of more than 100 lawyers have mandatory retirement policies. The issue of retirement is "a quandary for law firms," says P. Arley Harrel, Seattle. Under current law, full partners who qualify as "employers" can be terminated without involving the Age Discrimination in Employment Act, but when firms try to slowly transition older partners to retirement, partners "can start looking like employees," Harrel says.

The ABA House of Delegates formally adopted a policy opposing mandatory retirement in 2007. The resolution recommended that firms end age-based mandatory retirement programs. Instead, the report endorsed programs that would individually evaluate partners using performance-based measures.

1. Hearsay exception for medical treatment; lay opinion on medical causation; reasonable and necessary medical expenses – *Sibbing v. Cave*, 922 N.E.2d 594 (Ind. 3/4/10) (Dickson)

This case arises from an Indianapolis motor vehicle collision in which the defendant drove his automobile into the rear of the vehicle occupied by the plaintiff and her eleven-year-old daughter. The defendant did not contest liability at trial. The trial court entered judgment upon the jury's verdict awarding the plaintiff \$71,675 and her daughter \$325.

The defendant first challenges the trial court's decision in allowing the plaintiff, over defendant's objection, "to recite hearsay testimony at trial about what Dr. Saquib told her about her injuries." Indiana Evidence Rule 803(4) operates as an exception to the general rule that hearsay is inadmissible evidence at trial. The rule states:

"Statements for Purpose of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

The plaintiff points to *Coffey v. Coffey*, 649 N.E.2d 1074 (Ind.Ct.App.1995), *trans. not sought*, as authority for allowing statements made by a health care provider to a patient to be admitted under the 803(4) hearsay exception. We disagree with and disapprove of this holding in *Coffey*. While Rule 803(4) does not expressly identify which declarants' medical statements are intended to be treated as a hearsay rule exception, we hold that the Rule is intended and should apply only to statements made by persons who are seeking medical diagnosis or treatment. For this reason, the plaintiff's testimony reporting Dr. Saquib's statements about the results of diagnostic tests and the cause of her pain does not qualify as an exception to the hearsay rule under Rule 803(4).

The defendant also contends that the trial court erred in permitting the plaintiff to give her own opinion as to the cause of her pain. When asked on direct examination what she believed was causing her pain, the plaintiff replied: "Well I knew that the pain in my lower back was because of the bulging disc, the rest of it was just terrible muscle pain I felt like I had been rolled down stairs repeatedly." On appeal, the defendant alternatively contends that the plaintiff should not have been permitted to repeat the opinion of Dr. Saquib "under the guise of Rule 803(4)" or that, if the plaintiff had arrived at these opinions on her own, she was not qualified to give medical opinion testimony under Indiana Evidence Rule 702 absent a proper foundation.

In giving the challenged testimony, the plaintiff was not testifying as an expert. The question eliciting the plaintiff's response did not ask for her medical expertise regarding the causation of her pain; it merely asked, "What did you believe was causing your pain?" Her resulting answer, merely stating her own personal belief about the source of her pain, was permissible as testimony by a lay witness pursuant to Indiana Evidence Rule 701.

The defendant contends that the trial court erred in striking portions of the videotape deposition of the defendant's medical expert, Paul Kern, M.D. Urging that he should have been permitted to present this evidence challenging the medical necessity of Dr. Saquib's nerve conduction studies at Priority 1 Medical and "passive care" treatment provided more than four weeks after the collision, first from Priority 1 Medical and later from Dr. Sheppard at Castleton Chiropractic, the defendant argues that he was thereby

precluded from rebutting the plaintiff's claim.

The defendant emphasizes that a party seeking to recover damages for medical expenses must prove that the expenses were both reasonable and necessary. The plaintiff asserts that the testimony was properly excluded because it was contrary to *Whitaker v. Kruse*, 495 N.E.2d 223 (Ind.Ct.App.1986), *trans. not sought*, which she contends prevents a defendant tortfeasor from seeking to reduce his liability by questioning the judgment of a plaintiff's health care providers. It is apparent that the shorthand phrase "reasonable and necessary" embodies two aspects. First, the claimed amount of medical expenses must be reasonable. Second, the nature and extent of the claimed medical treatment must be necessary.

In *Whitaker*, the Court of Appeals concluded:

"We hold that an injured party may recover for injuries caused by the original tort-feasor's negligent conduct and for any aggravation of those injuries caused by a physician's improper diagnosis and unnecessary treatment or proper diagnosis and negligent treatment. In order to recover under this rule, the plaintiff need only show he exercised reasonable care in choosing the physician."

The rationale expressed in *Whitaker* was that "the tort-feasor created the necessity for medical care in the first instance. So long as the individual seeking medical care makes a reasonable choice of physicians, he is entitled to recover for all damages resulting from any aggravation of his original injury caused by a physician's misdiagnosis or mistreatment."

We do not read *Whitaker* to allow an injured plaintiff to recover for medical treatment wholly unrelated to a defendant's wrongful conduct. *Whitaker* does not eliminate the causation element. "'Proximate cause' has two components: causation-in-fact and scope of liability." "The scope of liability doctrine asks whether the injury was a natural and probable consequence of the defendant's conduct, which in the light of the circumstances should have been foreseen or anticipated." While *Whitaker* restricts a defendant's evidence as to the "scope of liability" component of proximate cause, it does not preclude challenge to the "causation-in-fact" component. A future defendant may thus present evidence to counter a plaintiff's claim that but for the defendant's alleged negligence, the disputed medical treatment would not have occurred. A defendant may properly challenge whether a plaintiff's medical treatment was not at all necessitated by the alleged tortious conduct but by a non-aggravated, pre-existing condition.

In summary, we hold that the phrase "reasonable and necessary," as a qualification for the damages recoverable by an injured party, means (1) that the amount of medical expense claimed must be reasonable, (2) that the nature and extent of the treatment claimed must be necessary in the sense that it proximately resulted from the wrongful conduct of another, and (3) the rule in *Whitaker* is a correct application of the "scope of liability" component of proximate cause.

In the present case, the defendant challenges the exclusion of evidence from his medical expert challenging the medical necessity of Dr. Saquib's nerve conduction studies at Priority 1 Medical and the "passive care" treatment provided more than four weeks after the collision, first from Priority 1 Medical and later under Dr. Sheppard at Castleton Chiropractic. The defendant does not assert that such treatment lacks causation in fact, that is, that plaintiff failed to establish that, but for the collision, the challenged treatment would not have occurred. Instead, the defendant disputes the medical judgment of the plaintiff's

medical providers in choosing to administer the questioned studies and treatment. This he may not do.

Shepard, concurring in result: The breadth of today's ruling will lead future judges and juries to work injustices at the very moment when judgment is most needed to hold to account providers at the edge of reasonably necessary treatment, or beyond it. Today's "*Sibbing* rule" insulates sharp practices from scrutiny, which is why I decline to join in.

Lessons:

1. Statements made by a *physician* to a patient do *not* qualify for the Rule 803(4) hearsay exception; only the *patient's* "statements for purposes of medical diagnosis or treatment" qualify.
2. A plaintiff may give a lay opinion as to the cause of her pain.
3. Under the *Sibbing* rule, a defendant may not challenge the necessity of medical expenses except on causation-in-fact grounds.

2. Medical malpractice; expert testimony by nurse on medical causation – *Clarian Health Partners, Inc. v. Wagler*, 2010 WL 1233514 (Ind.Ct.App. 3/31/10) (Brown)

Clarian Health Partners, Inc. f/k/a Methodist Hospital ("Clarian") appeals the trial court's denial of its motion for summary judgment. Natalie Wagler was admitted to Clarian to undergo open heart surgery to repair a valve in her heart. A complication arose during the surgery and Wagler's femoral artery was compromised. A medical review panel found: "that the evidence supports the conclusion that [Clarian] failed to comply with the appropriate standard of care, but that it cannot be determined from the evidence whether its conduct was a factor of any resulting damage. Dr. Cefali is of the opinion that the evidence does not support the conclusion that [Clarian] failed to meet the applicable standard of care, and that its conduct was not a factor of the resultant damages."

Clarian filed a motion for summary judgment. Wagler designated the opinion of the medical review panel and the affidavit of Tina Little, a licensed nurse in Illinois and Missouri. Little's affidavit indicated that Clarian's nursing staff breached the standard of care and that this breach was a substantial factor in causing injury and damage to Wagler.

Clarian filed a Motion to Strike Plaintiff's Nurse's Testimony Regarding Causation. After a hearing, the trial court denied Clarian's motion for summary judgment. The trial court's order stated in part: "The Court also finds Indiana law to be contradictory and inconclusive regarding expert testimony from nurses. Therefore, the policy and purpose of summary judgment also precludes summary judgment on this ground."

Upon Clarian's request, the trial court certified the order for interlocutory appeal. Clarian argues that Nurse Little's affidavit is inadmissible. The trial court found:

"On one hand, *Long v. Methodist Hosp. of Indiana, Inc.*, 699 N.E.2d 1164 (Ind.Ct.App.1998), finds that nurses are not qualified to offer expert testimony as to the medical cause of injuries." On the other hand, *Harlett v. St. Vincent Hospitals and Health Services*, 748 N.E.2d 921 (Ind.Ct.App.2001), finds that nurses must be allowed to serve on medical review panels, and therefore would be able to offer expert opinions as to causation, and

presumably required to testify at trial under I.C. § 34-18-10-23 above. So, apparently a nurse can offer expert opinion on a panel (and must testify at trial if requested) but cannot offer expert opinion in opposition to a motion for summary judgment. This conflict is simply irreconcilable, and provides no functional common law rule about nurse testimony on causation. There is currently no clearly applicable Indiana law showing if, how, or when, nurses can testify as experts.”

We cannot say that *Harlett* is in conflict with *Long*. Rather, the court in *Harlett* held that *Long* could not be *expanded* to the issue of whether a nurse could be a member of a medical review panel. Based upon *Long*, we conclude that Nurse Little's affidavit was inadmissible for the purpose of creating an issue of fact regarding whether Clarian's actions were the proximate cause of Wagler's injuries.

The opinion of the majority of the medical review panel and Nurse Little's affidavit was not evidence which tends to support Wagler's allegation that there was a causative nexus between Clarian's conduct and Wagler's injuries. Accordingly, we conclude that the trial court erred by denying Clarian's motion for summary judgment.

Lessons:

1. Nurses may not testify as to medical causation.
2. But nurses may serve on medical review panels, make decisions on medical causation, and by statute, be required to testify to opinions pursuant to IC § 34-18-10-23.

3. Settlement with third party as bar to worker's compensation – *Smith v. Champion Trucking Company, Inc.*, 2010 WL 1507057 (Ind. 4/15/10)(Boehm)

Jimmie Smith, a truck driver employed by Champion Trucking Co., was injured in an Ohio accident with a third-party motorist. Smith's initial medical expenses in the amount of \$4,342.42 were paid by Champion's worker's compensation coverage. Smith retained counsel to explore the possibility of recovering from Jeremy Bittner, the third party motorist. Smith settled with Bittner for \$10,342. According to Smith, he accepted the settlement because, although Bittner was 95% at fault for the accident, he had only \$12,000 in liability insurance. The settlement agreement released Bittner from liability for the accident. Smith's attorney paid 75% of the medical lien amount (\$3,256.74) to Champion and retained 25% as the attorneys' fee authorized by the worker's compensation statute. In August 2005, less than one month after the settlement, a neurosurgeon evaluated Smith as having suffered a 19% potential permanent impairment, which would warrant approximately \$26,500 in additional worker's compensation benefits.

The Worker's Compensation Board ruled in July 2008 that Smith's settlement with Bittner terminated Champion's liability pursuant to an “absolute bar” provision of the statute described below. The Court of Appeals reversed, holding that the provision in question did not apply to Smith's claim because his worker's compensation case had not yet been resolved. We granted transfer.

Section 13 of Indiana's Worker's Compensation Act (WCA), titled “Claims Against Third Persons; Subrogation; Procedures,” contains a number of potentially relevant provisions. Paragraph 1, provides that if an injured employee has received worker's compensation and later settles a claim against a responsible third party, “then from the

amount received by the employee," the employer is to be reimbursed for its expenditures, "and the liability of the employer or the employer's compensation insurance carrier to pay further compensation or other expenses shall thereupon terminate." Paragraph 2 has a similar provision applicable to settlements made before any worker's compensation has been paid. We conclude that precedent and the statute itself dictate that the "absolute bar" language of the statute is unambiguous and that it protects Champion from further worker's compensation liability.

A long line of Indiana decisions supports the proposition that an employer's worker's compensation liability terminates when the injured employee settles with a third-party tortfeasor without first obtaining the employer's consent. We think the language of both Paragraph 1 and Paragraph 2 of Section 13 of the WCA unequivocally impose a bright line rule that settlement with a third party without the employer's consent bars a worker's compensation claim.

The Court of Appeals has long held that once an employee releases the third party from liability related to the injury-causing accident, the employer may not continue to pursue the third party. Given this longstanding precedent on an issue of statutory interpretation, we believe it is up to the legislature to implement any change.

Lessons:

1. Settlement with a third party without the employer's consent bars a worker's comp claim.
2. Obtain the employer's consent before settling with a third party whenever worker's comp benefits are available.

4. Service of process; duty to protect against falling tree – *Marshall v. Erie Insurance Exchange*, 923 N.E.2d. 18 (Ind.Ct.App. 3/10/10) (Robb)

John and Marjorie Marshall appeal the trial court's denial of their motion to correct error following its judgment in favor of Erie Insurance Exchange ("Erie") on Erie's claims for damages resulting from the Marshalls' negligent maintenance of a tree located on their property, which fell and damaged the home of Cindy Cain. Marjorie owned a vacant lot located next to Cain's home in Elkhart. A tree stood near the boundary of the two lots on Marjorie's property. From the time she purchased the home Cain had concerns about the health of the tree and the danger it posed to her home.

On December 31, 2006, the tree fell onto Cain's house knocking over the chimney and causing damage to the roof and structure of the house. Cain filed an insurance claim with Erie, which held her homeowner's insurance policy. Erie reimbursed Cain for the necessary repairs to her home minus Cain's deductible. Thereafter, Erie, acting as a subrogee for Cain, brought suit against the Marshalls for damages stemming from the Marshalls' negligent maintenance of the tree.

The trial court conducted a bench trial after which it allowed the parties to file written closing arguments. On March 11, 2009, the trial court entered its judgment in favor of Erie. However, the Marshalls argue Marjorie never personally received service of process and John was not authorized to receive service as her agent. Under Indiana law, service by mail is effective even if someone other than the intended recipient ultimately signs the return receipt. The return receipt indicating the service of process was received at the proper post office box number was signed by an unidentified party. Therefore, Erie

achieved effective service of process upon Marjorie, and the trial court obtained personal jurisdiction over Marjorie thereby.

This case presents an issue of first impression regarding whether an urban or residential landowner owes a duty to protect neighbors from damage caused by a tree which falls from the landowner's property. In *Valinet v. Eskew*, our supreme court adopted the Restatement (Second) of Torts section 363 (the "Restatement rule"), which states:

"(1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.

(2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway."

The Restatement rule developed when land was mostly unsettled and uncultivated. Several of our sister states have retreated from a strict application of the Restatement rule when an urban or residential landowner has actual or constructive knowledge of a dangerous condition. We agree and hold an urban or residential landowner does have a duty to exercise reasonable care to prevent an unreasonable risk of harm to neighboring landowners, arising from the condition of trees on his or her property.

Whether the land in question is of sufficient population density to invoke the rule is a factual question for the fact finder. In addition, in determining whether the landowner exercised the requisite reasonable care, the fact finder must weigh the seriousness of the danger against the ease with which it may have been prevented. In some circumstances, fulfilling this duty may require a landowner to conduct periodic inspections of his or her property.

Lessons:

1. Service is proper if mailed to the right address; it doesn't matter who signs the return receipt.
2. An *urban* landowner has a duty to protect neighbors from damage caused by a falling tree; a rural landowner does not.

5. Implied amendment of pleadings – *Menard, Inc. v. Comstock*, 922 N.E.2d 647 (Ind.Ct.App. 2/25/10) (Crone)

Sixty-year-old C.J. Comstock and his wife, Mary, were walking toward the building materials entrance of a Menards store in Hammond when C.J. slipped and fell on snow and/or ice on the sidewalk. Upon learning of the incident, Menards store manager Marlon Gary went to the Comstocks' car to assess C.J.'s condition. Gary offered to call an ambulance, and C.J. replied that he had a headache but did not want to go to the hospital. Mary drove him home, where C.J. continued to complain of a headache.

The next day, he said that it had developed into the "worse [sic] headache he'd ever had." He was nauseated and had trouble concentrating, but he refused Mary's offer to take him to the hospital. Two days after the fall, C.J. slid off the edge of the bed onto the floor. Mary called the fire department. They took him to the hospital, where he was diagnosed with a cerebral contusion and hemorrhage. He later died from his injuries.

Mary filed her complaint for wrongful death against Menard. At trial, neurologist Dr. Larry Salberg testified that if C.J. had gone to the hospital on December 13 or 14, 2003, doctors likely would have identified and treated the brain bleed, and C.J. would have survived. The jury returned a gross verdict of \$24,638.97 in favor of Mary. The jury also allocated fault among the parties, with 35% attributed to C.J., 35% attributed to Mary, and 30% to Menard. After application of Menard's fault allocation, the jury awarded 30% of the total verdict, or \$8,212.99, to Mary. The trial court granted Mary's motion to correct error and amended the damages award to \$149,240.71.

In her motion to correct error, Mary argued that the jury found Menard 30% at fault for C.J.'s death and that because she presented evidence of "undisputed economic losses" totaling \$507,469.03, the verdict should have been \$152,240.71. Menard argues that the jury assigned fault to Menard for C.J.'s fall but not his death and that therefore, the jury's damages award was supported by the evidence.

While the case was pled as a wrongful death claim, the jury also heard evidence and arguments for a survival claim. Indiana Trial Rule 15(B) permits the amendment of pleadings to include the issues tried and states in pertinent part:

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

Clearly, the theory that Menard might have been negligent in causing C.J.'s fall, but not his death, was before the jury in this case. According to Rule 15(B), the pleadings' contents do not override the fact that an issue has been tried by express or implied consent of the parties. In this case, a survival claim was tried, and the fact that the pleadings were not amended to include that claim does not nullify it.

The gist of Mary's motion to correct error was that the jury had only two options in this case: (1) to assign Menard zero fault for C.J.'s death and thus to award Mary zero damages, or (2) to assign Menard a percentage of fault for C.J.'s death and to award Mary that percentage of *at least* \$507,469.03, which is the total amount of monetary damages she claimed to have suffered.

In our view, the jury chose a third viable option, which was to find Menard's partially liable for C.J.'s fall, but not for his death. Therefore, we reverse the trial court's order granting Mary's motion to correct error and remand for reinstatement of the jury's verdict awarding damages to Mary in the net amount of \$8,212.99.

Lessons:

1. A survival claim may be tried within a wrongful death case even when not asserted in any pleading and without any instruction thereon.
2. Failure to amend a complaint to include a claim that was tried does not affect the result of the trial or of the appeal.

6. Failure to exhaust administrative remedies; procedural error as non-jurisdictional – *Kennedy v. Town of Gaston*, 923 N.E.2d 988 (Ind.Ct.App. 3/22/10) (Riley)

In the Complaint, the Town alleged that Gregory L. Kennedy had ownership and control of a property in Gaston, Indiana, which was in violation of the Town's weed ordinance, constituted a public nuisance, and was in violation of the Unsafe Building Act. In a motion to correct error, Kennedy challenged for the first time the trial court's subject matter jurisdiction on the ground that the Town had failed to exhaust administrative remedies pursuant to the Town's Ordinance 93 and I.C. § 36-7-9-1.

Clarifying the concept of subject matter jurisdiction, our supreme court stated in *K.S. v. State*, 849 N.E.2d 538, 540-542 (Ind.2006) that:

“Like the rest of the nation's courts, Indiana trial courts possess two kinds of ‘jurisdiction.’ Subject matter jurisdiction is the power to hear and determine cases of the general class of cases to which any particular proceeding belongs. Personal jurisdiction requires that appropriate process be effected over the parties.

Other phrases recently common to Indiana practice, like “jurisdiction over a particular case,” confuse actual jurisdiction with legal error, and we will be better off ceasing such characterizations. Attorneys and judges alike frequently characterize a claim of procedural error as one of jurisdictional dimension. The fact that a trial court may have erred along the course of adjudicating a dispute does not mean that it lacked jurisdiction.”

Here, there is no question that the Delaware Circuit Court possessed jurisdiction over the subject matter of this case. The Town's claim falls within the general authority or subject matter of the Delaware Circuit Court. Kennedy's argument that the Town had failed to exhaust the administrative remedies as contemplated in the Town's Ordinance 93 and the Unsafe Building Act, is thus more properly characterized as to whether the trial court had jurisdiction over this particular case. As we stated unequivocally in *Packard v. Shoopman*, 852 N.E.2d 927, 930 (Ind.2006), “[j]urisdiction over the particular case is something of a misnomer and refers to failure to meet procedural requirements[.]” Therefore, because Kennedy raised an untimely procedural error, he waived his claim for our review.

Lessons:

1. Failure to exhaust administrative remedies does *not* deprive a court of subject matter jurisdiction.
2. A motion for failure to exhaust administrative remedies must be timely asserted.
3. It's hard for courts to break old habits in using the term “jurisdiction.”

7. Statute of limitations; the discovery rule; relation back rule – *Rieth-Riley Construction Co., Inc. v. Gibson*, 923 N.E.2d 472 (Ind.Ct.App. 3/25/10)(Bartreau)

On September 27, 2006, Defendant Edward Schroeder and Plaintiff Michael Gibson were involved in an automobile accident. On July 15, 2008, Gibson filed his complaint against Schroeder with regard to the accident. Through subsequent discovery, Gibson learned that, at the time of the accident, Schroeder was employed by Rieth-Riley. On March

18, 2009, Gibson filed a second amended complaint with the trial court naming Rieth-Riley as an additional defendant in this action. Rieth-Riley then filed a motion to dismiss the complaint, asserting that the complaint was time-barred because it had been filed after the statute of limitation had passed.

Rieth-Riley maintains that the statute of limitation began running on September 27, 2006, the day of the accident. Gibson claims that the statute of limitation for his cause of action against Rieth-Riley did not begin to run, based upon application of the discovery rule, until March 2009, when he “discovered” that Schroeder was employed by Rieth-Riley at the time the accident occurred.

Gibson was aware of both his injury and the cause of his injury in September 2006, but he argues that the discovery rule should apply to his case to toll the statute of limitation because he did not know, and could not know in the exercise of ordinary diligence, that Rieth-Riley was also potentially liable as Schroeder's employer.

The discovery rule is not intended to toll the limitation period until optimal litigation conditions can be established. Rather, the purpose of the discovery rule is to limit the injustice that would arise by requiring a plaintiff to bring his or her claim within the limitation period during which, even with due diligence, he or she could not be aware a cause of action exists. Therefore, we decline to extend the discovery rule to apply to cases like this one where the indeterminate fact is not the existence of an injury, but rather the identity of a tortfeasor.

Rieth-Riley also asserts that Indiana Trial Rule 15(C) does not apply in this case in order to save Gibson's amended complaint from being time-barred. Indiana Trial Rule 15(C) provides:

“An amendment changing the party against whom a claim is asserted relates back within one hundred and twenty (120) days of commencement of the action, the party to be brought in by amendment: (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (2) knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.”

Further, the party seeking relation back bears the burden of proving that the conditions of Trial Rule 15(C) are met. The second requirement of Trial Rule 15(C) deals with the new defendant having notice of the action within 120 days of its commencement.

Gibson argues that Rieth-Riley received constructive notice of the action when Schroeder received service of the complaint in July 2008. This assertion is based upon the employment relationship between the two at the time of the accident in 2006. The designated evidence provides nothing to substantiate Gibson's assertion that Rieth-Riley and Schroeder maintained an employment relationship within 120 days of the commencement of the action to satisfy the identity of interest prong of the constructive notice doctrine. Mere evidence of an employment relationship at the time of the accident does not equate to imputed notice to the employer two years later when an action is commenced. Thus, the second requirement of Trial Rule 15(C) has not been met.

Based upon the foregoing discussion and authorities, we conclude that the trial court erred when it applied the discovery rule to this action to toll the statute of limitation for Gibson's filing of an amended complaint against Rieth-Riley. Thus, the trial court erred when it denied Rieth-Riley's motion for summary judgment on that basis. Further, Gibson's amended complaint cannot relate back pursuant to Trial Rule 15(C).

Lessons:

1. The discovery rule will not toll the limitation period when the unknown fact is the identity of a tortfeasor (but will when the plaintiff could not be aware that a cause of action exists).
2. The party seeking relation back bears the burden of proving that the new defendant had notice of the claim within 120 days of filing; an employment relation at the time of the accident will *not* satisfy this burden.

8. Special master; dissenter's rights; the business judgment rule; prejudgment interest and delay – *Lees Inns of America, Inc. v. Lee*, 924 N.E.2d 143 (Ind.Ct.App. 3/15/10) (Baker)

At the time this dispute arose, the shares of Lees Inns of America, Inc. were owned by Lester Lee (516 shares; 51.6%) and a Trust in the name of his brother, William Lee with his sons, Donald and Robert, being co-trustees (484 shares; 48.4%). Lester decided that Lees Inn would merge with LLL Acquisition Corporation in a transaction in which the Trust was bought out. Goelzer Investment Banking was employed to value the Trust's shares and after Goelzer determined that value to be \$1,945 per share, payment was made in the amount of \$941,380 to the Trust for its shares.

The Trust dissented to the merger, exercising its minority shareholder rights pursuant to the Dissenter's Rights Statute, Ind. Code § 23-1-44 et seq.. The Trust also asserted a claim against Lester for breach of fiduciary duty. The Trust obtained a valuation from Deloitte who determined that the value of the minority shares was \$5.9 million. At the request of Lees Inns, a third valuation was performed by Empire Valuation Consultants which reached a value similar to Goelzer's.

The trial court found in favor of the Trust, valuing the Trust's 48.4% interest on the valuation date at \$5,900,000, and determined that the value in excess of the \$941,380 payment is \$4,959,620. Although the trial court found that interest of 8% per year on the additional value amount was also due, it also noted that the "case took over eight (8) years to bring to an end [that] the Court believes it could have concluded in substantially less time." As a result, the trial court found that a reasonable and equitable amount of interest to be \$1,673,160.09. The trial court awarded the Trust \$614,405.97 in attorney's fees and expenses, yielding a total judgment of \$7,522,879.73, plus interest at 8% per annum until satisfied.

On appeal, Lees Inns contends that the trial court abused its discretion in denying its motion to appoint a special master or expert to assist in addressing the valuation issues of the business. Indiana Trial Rule 53 permits a trial court to appoint a special master in certain instances, but "a reference to a master shall be the exception and not the rule." T.R. 53(B). Additionally, Indiana Code section 23-1-44-19(d) provides that "the court *may* appoint one (1) or more persons as appraisers to receive evidence and recommend decision on the question of fair value."

In support of its claim that a master or appraiser should have been appointed, Lees Inns asserts that the valuation issue was central to the case, the issue was fraught with technical disagreements, and "those differences made millions of dollars of difference in the bottom line valuation." Notwithstanding this contention, we note that our trial courts

are frequently called upon to consider business valuations. Interestingly, Lees Inns has failed to explain why a small chain of midwestern hotels presents issues at the difficult end of the spectrum of such valuations. In short, Lees Inns makes no compelling argument for the necessity of such an additional expert.

Lees Inns argues secondly that the trial court erred in adopting the Deloitte appraisal as the basis for valuing the business. More particularly, Lees Inns argues the appraisal was based on speculation. Under the Dissenter's Rights Statute, all elements of a corporation's fair value must be considered on the valuation date, and elements of future value that are not attributable to the merger itself are properly considered in the calculation of fair value.

The trial court properly considered the future prospects of Lees Inns including the nature of the enterprise, its business plans, and earning prospects in arriving at the stock's fair value. The trial court considered the various valuation models and demonstrated that its ultimate valuation determination fit within the ranges that were established by the parties. In short, the "fair value" of \$5.9 million that the trial court assigned to the Trust's shares fell within the range of values that were developed through the analysis of the reports and testimony of the various witnesses.

Thirdly, Lees Inns argues that the trial court's finding that Lester breached his fiduciary duty to the company was not supported by the evidence and the law. Specifically, Lees Inn claims that the Trust failed to establish willful or reckless conduct sufficient to overcome Indiana's "management-friendly business judgment rule." Indiana's business judgment rule is management-friendly, designed to protect corporate managers and directors from undue judicial interference.

In this case, the various breaches of duty found by the trial court include: (1) Lester's options to acquire certain Lees Inns properties at below-market prices without "objective corporate due diligence"; (2) Lester's increase in compensation "without establishing reasonable, independent and objective fairness"; (3) Lees Inns' payment of increased rents to Lester for certain space leased from Lester without "reasonable due diligence"; and (4) Lester's borrowing of more than \$1 million from Lees Inns at low interest rates.

We note that the evidence at trial established that the relationship among the parties deteriorated rapidly after Donald, Robert, and William resisted Lester's efforts to merge Lees Inns with Maxim (another company owned by Lester). At a meeting in 1998, Lester informed Donald and Robert that he would "nail [their a**es] to the wall, ... screw [them] at every opportunity ... [and] do everything [he] could to make sure [they] never receive one dime from this company."

The evidence established that Lester abused his position of trust by profiting from corporate opportunities, devaluing the company through entering the Compensation Agreement, and failing to keep the directors and shareholders properly informed of the financial situation of the company.

On cross appeal, the Trust claims that the trial court abused its discretion in not Awarding the full amount of prejudgment interest that it requested. The Trust maintains that the trial court is not permitted to exercise discretion regarding any aspect of a prejudgment interest award.... Because the trial court found that the Trust contributed to the lengthy delay in bringing this case to trial--and the record supports that finding--the Trust should not be permitted to benefit from its own delay by receiving eight years' worth

of interest. As a result, we conclude that the trial court did not abuse its discretion in limiting the amount of prejudgment interest that it awarded to the Trust.

Lessons:

1. The appointment of a special master or appraiser is discretionary in determining the value of minority shares under Indiana's Dissenter's Rights Statute.
2. All elements are to be considered in determining a corporation's fair value.
3. There are limits to Indiana's management friendly business judgment rule.
4. In some circumstances, the trial court may limit prejudgment interest due to delay attributable to claimant. *But see next case.*

9. Prejudgment interest – *Fackler v. Powell*, 923 N.E.2d 973 (Ind.Ct.App. 3/17/10) (Najam)

Pamela Fackler filed a petition for dissolution of her marriage with Melvin Powell which was resolved by an Agreement that was made part of the final decree in the dissolution court. Fackler later sued to enforce the Agreement in another court. The Indiana Supreme Court determined that Fackler's claim should have been filed in the dissolution court and the matter was relitigated there. Fackler won a judgment in the amount of \$32,162.20, including prejudgment interest.

In this appeal, Powell maintains that the "award of statutory interest during the time period of February 6, 2003, to December 20, 2005, was clearly improper because that period represents a period of delay that is wholly attributable to Fackler."

It is well-settled that an award of prejudgment interest in a breach of contract action is warranted if the amount of the claim rests upon a simple calculation and the terms of the contract make such a claim ascertainable. Here, in essence, Powell asserts that the trial court should have exercised its discretion to determine that Fackler was not entitled to prejudgment interest for the period of time during which she pursued her action in the wrong court. But such discretion is generally prohibited. Prejudgment interest is awarded to fully compensate an injured party for the lost use of money. Powell breached the parties' Agreement, thus depriving Fackler of the use of the money during the entire legal proceedings. It goes without saying that Powell could have avoided responsibility for all prejudgment interest had he not breached the parties' Agreement in the first instance. The period of delay of which Powell complains, then, was not "wholly" attributable to Fackler.

In *Olcott International v. Micro Data Base Systems*, 793 N.E.2d 1063 Ind.Ct.App.2003), *trans. denied*, the trial court denied prejudgment interest to the appellee for the period of "many years" it had delayed in attempting to collect on the appellant's debt. On appeal, we held that the trial court "lacked discretion to deprive" the appellee of that prejudgment interest. Here, it follows that the trial court did not have discretion to deny Fackler prejudgment interest during the period of time she pursued her claim in the wrong court.

Lesson: Although the *Fackler* Court holds that the right to full prejudgment interest is unaffected by delay for which plaintiff may be responsible, in light of the *Lees Inn* case above, the state of the law on this issue is unclear,

10. Agency; ratification – *Maxitrol Company v. Lupke*, 924 N.E.2d 179 (Ind.Ct.App. 3/26/10)(Sharpnack)

Maxitrol is a Michigan corporation that manufactures gas pressure regulators. Lupke Rice is an Indiana insurance agency, and Stanley Rice (Rice) is one of its agents. Rice procured Maxitrol's workers' compensation insurance from EBI Companies until early 2002. Thereafter, Maxitrol's workers' compensation insurance was procured from RSA.

Lupke Rice and Maxitrol agreed to an agency billing relationship. Lupke Rice paid the premiums and in turn invoiced and recovered payment from Maxitrol. For the workers' compensation insurance, Maxitrol paid an estimated premium at the start of each twelve-month policy period. As is the industry standard, the full policy premium was not determined until the end of each policy period when Maxitrol's full exposure was capable of determination. Accordingly, at the expiration of each policy period, the insurer audited Maxitrol and either credited Maxitrol with an overpayment or billed for an adjustment.

In 2000, EBI audited Maxitrol at the expiration of the June 30, 1999, to June 30, 2000, policy period. EBI determined that Maxitrol had improperly classified some of its employees and owed an additional premium of \$11,062. Lupke Rice paid the premium and then told Maxitrol about the audit report. Chris Kelly, Maxitrol's Vice President of Finance, immediately contacted Rice to challenge the adjustment to the premium. Rice told Kelly not to pay the adjustment and that he (Rice) would "take care of it." Per Rice's instructions, Maxitrol paid the regular premium, but not the adjustment. Maxitrol was not aware that Lupke Rice had paid the premium adjustment. Similar events occurred with RSA following audits at the end of the 2002, 2003 and 2004 policy years, with Lupke Rice paying an adjusted premium although Maxitrol objected to the adjustments.

During this time, Lupke Rice sent Kelly invoices and statements. The invoices were a request for payment. The statements, on the other hand, were a report of credits and balances over a series of years. Maxitrol never received an invoice for the audit adjustments. The adjustment amounts did, however, appear on the statements. Kelly contacted Rice several times to inquire as to why the adjusted amounts were still on the statements. Rice told Kelly the statements were an internal accounting document and "not to worry about it. He would take care of it." Kelly was not aware that Lupke Rice had paid the adjusted premiums.

In May 2005, Rice contacted Kelly and for the first time told him that Lupke Rice had paid the adjusted premiums and that Maxitrol needed to pay Lupke Rice. Lupke Rice filed a complaint seeking recovery of insurance premiums it had paid on behalf of Maxitrol.

Following a January 2009 bench trial, the trial court entered a judgment in favor of Lupke Rice. Specifically, the court found in relevant part that Maxitrol was bound by Lupke Rice's acts, even though Lupke Rice violated Maxitrol's private instructions, and that Maxitrol ratified Lupke Rice's payment of the adjusted premiums to RSA.

The Indiana Supreme Court has explained that a "principal is bound by the acts of a general agent if the agent acted within the usual and ordinary scope of the business in which it was employed, even if the agent may have violated the private instructions the principal may have given it." *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1304 (Ind.1998). This rule is intended to hold a principal liable to a third party. The reason for this rule is that if one of two innocent parties-either the principal or the third party-must suffer due to a betrayal of the agent's trust, the loss should fall on the party who is most at fault. Because the principal puts the agent in a position of trust, the principal should bear the loss.

The rule was not intended to protect a disobedient agent. The trial court therefore

erred in concluding that Maxitrol was bound by Lupke Rice's acts even though Lupke Rice violated Maxitrol's private instructions not to pay RSA the adjusted premiums. The rationale behind the rule simply does not apply in this case.

Ratification is the adoption of that which was done for and in the name of another without authority. It is in the nature of a cure for a lack of authorization. When ratification takes place, the transaction stands as an authorized one, and the transaction is good from the beginning. Ratification is a question of fact, and may be inferred from the conduct of the parties. The acts, words, silence, dealings, and knowledge of the principal, as well as many other facts and circumstances, may be shown as evidence warranting the inference of finding of the ultimate fact of ratification.

Whenever a principal is sought to be held liable on the ground of ratification, either express or implied, it must be shown that the principal ratified upon full knowledge of all material facts, or that he was willfully ignorant, or purposely refrained from seeking information. Here, however, Maxitrol did not have full knowledge of all material facts. Specifically, Maxitrol did not know that Lupke Rice was paying RSA the annual premium adjustments. Under these circumstances, the trial court erred in concluding that Maxitrol ratified Lupke Rice's payment to RSA.

Lessons:

1. In a dispute between principal and agent, the disobedient agent may not rely on the rule that a principal is bound by the acts of a general agent when the agent acts within the usual and ordinary scope of the business in which it was employed even if the agent violated the principal's private instructions; that rule only applies to third party claims against the principal.
2. Ratification is a cure for lack of authorization and may be inferred from acts, words or silence as well as other facts.

11. Defamation; tortious interference – *Melton v. Ousley*, 2010 WL 1507596 (Ind.Ct.App. 4/15/10)(Najam)

Brett Melton is a professional golfer, a golf instructor, a member of the PGA of America and a member of the Indiana Section of the PGA. The PGA classifies its professional members according to types of professional golf employment. There are twenty-four levels of "Class A" membership in the PGA. The PGA and the Indiana Section run separate tournaments. Participation in certain tournaments is limited by PGA classification. In 2006, Melton and his family moved back to Indiana. Melton applied to change his PGA classification from an A-6 teaching professional in the Illinois Section to the same classification in the Indiana Section. The PGA approved that change.

James Ousley is the head golf professional at the Tippecanoe Country Club in Monticello. Ousley told some other Indiana Section members that Melton was a "cheat," a "cheater," and was "cheating the system."

In August Ousley contacted the Indiana Section, expressing concern about whether Melton's main employment qualified him to be classified as a teaching professional. The Indiana Section launched an investigation to verify Melton's qualification to be classified as a teaching professional. After reviewing that documentation, Tom Brawley, PGA Membership Director, sent a letter to Melton stating that Melton's "employment is considered ineligible." Melton appealed that determination to the Board of Control. The

Board of Control denied Melton's request. The National Board of Directors upheld the decision of the Board of Control.

Melton contends that the trial court erred when it granted summary judgment in favor of Ousley on the defamation claim. Specifically, he contends that the trial court erroneously determined that Ousley's statements are not susceptible to a defamatory meaning because the statements at issue were true. We conclude that Ousley's statements were true, thus establishing a complete defense. Truth is a complete defense in civil actions of defamation.

While Melton acknowledges that truth is a defense to a defamation claim, he suggests that, "[t]o bar a defamation action, the 'truth' 'must extend to the innuendo, the [defamatory] implications and insinuations, as well as to the direct accusations of the statement.'" *Cochran v. Indianapolis Newspapers*, 175 Ind.App. 548, 372 N.E.2d 1211, 1217 (1978)).

The court noted that a "false implication or impression may be created by the positioning of true statements and headlines and the defense of truth must extend to the innuendo, the libelous implications and insinuations, as well as to the direct accusations in the statement." Whether a statement in its entirety is susceptible to a defamatory meaning is a question of law for a court to decide. Melton has not shown that a true statement has been presented in a false light as was done in *Cochran*.

Melton's complaint does not specify whether he is asserting a claim of tortious interference with a business relationship or tortious interference with a contractual relationship. The elements of the two claims are the same with the following exceptions: (1) the first does not require a showing of the existence of a valid contract; and (2) the second does not require a showing of illegality. One element of both claims is the absence of justification.

In determining whether an intentional interference is justified, the Restatement suggests that several factors be considered but the overriding question is whether the defendant's conduct has been fair and reasonable under the circumstances. This element is established only if the interferer acted intentionally, without a legitimate business purpose, and the breach is malicious and exclusively directed to the injury and damage of another. The existence of a legitimate reason for the defendant's actions provides the necessary justification to avoid liability.

Ousley has demonstrated evidence showing a justification for his complaints to the Indiana Section, regarding Melton, namely, that there is a procedure in place for an Indiana Section member to request the organization to investigate whether another member is qualified for the PGA classification he holds. In other words, Ousley has shown by undisputed evidence that his communications to the Indiana Section regarding Melton had a legitimate business purpose. And Melton has not demonstrated a genuine issue of material fact regarding that justification.

Lessons:

1. A true statement presented in a false light may be actionable for defamation.
2. A legitimate reason will provide the justification sufficient to defeat a tortious interference claim.

12. Attorney-client privilege; collateral appeal of privilege ruling; mandamus to address privilege ruling – *In re: Whirlpool* 597 F.3d 858 (7th Cir. 3/3/10)

LG Electronics, U.S.A., sued Whirlpool Corporation for infringing its trademark in a dryer that uses steam to reduce wrinkles. When it asked Whirlpool to produce communications between its attorneys and its outside advertising agencies relating to the purportedly infringing dryer, Whirlpool objected that the communications were protected by the attorney-client privilege. Whirlpool argued that the advertising agents were not third parties, to whom the privilege typically does not apply, but *de facto* employees of the company. Whirlpool alternatively contended that the communications should be kept confidential on the ground that the advertising agencies shared with it a common legal interest in producing lawful advertisements. In a lengthy and thoughtful decision, the district court rejected both arguments and ordered Whirlpool to disclose the communications.

Whirlpool immediately sought relief in this court. At the time there was uncertainty about whether rulings on the attorney-client privilege could be appealed as collateral orders, because *Mohawk Indus., Inc. v. Carpenter*, U.S., 130 S.Ct. 599, L.Ed.2d (2009), which addressed this very issue, was pending before the Supreme Court. The Supreme Court held in *Mohawk* that rulings that allegedly infringe upon the attorney-client privilege are not appealable as collateral orders. Consequently, as the parties acknowledge, Whirlpool's appeal must be dismissed for lack of jurisdiction.

In its petition for a writ of mandamus, to which LG Electronics has responded, Whirlpool submits that the unavailability of collateral appeal requires us to relax our standards for issuing writs of mandamus. We reject this argument. Mandamus is reserved for "extraordinary circumstances--*i.e.*, when a disclosure order 'amounts to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice."

The cases Whirlpool cites, fail to establish that the district court's rejection of Whirlpool's position was patently erroneous or usurpative in character--in other words, a serious error. Without that, mandamus is inappropriate, regardless of whether Whirlpool has any other opportunities for appellate review, such as refusing to turn over the documents and then using the ensuing sanctions under FED.R.CIV.P. 37(b)(2) as the basis of an appeal.

Lessons:

1. Counsel's communications with a client's advertising agency are probably not privileged
2. A privilege ruling adverse to a party may not be challenged by interlocutory appeal in federal court.
3. A privilege ruling may not be challenged by seeking a writ of mandamus unless there is a clear abuse of discretion.
4. The option of refusing to produce the documents, submitting to sanctions and appealing the sanctions may still be available but has obvious disadvantages.

Note: In *Sandra T.E. v. South Berwyn School District 100 and Sidley Austin LLP*, (7th Cir. 3/3/10), the Seventh Circuit allowed a collateral appeal to go forward when sought by a non-party, noting that while a party may appeal the privilege issue at the end of the case, a non-party may not have that opportunity.

13. Fair Debt Collection Practices Act; good faith defense; legislative history – *Jerman v. Carlisle*, 2010 WL 1558977 (U.S. 4/21/10) (Sotomayor)

The Fair Debt Collection Practices Act (FDCPA or Act) imposes civil liability on “debt collector[s]” for certain prohibited debt collection practices. Section 813(c) of the Act, 15 U.S.C. § 1692k(c), provides that a debt collector is not liable in an action brought under the Act if she can show “the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” This case presents the question whether the “bona fide error” defense in § 1692k(c) applies to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. We conclude it does not.

Congress enacted the FDCPA in 1977, to eliminate abusive debt collection practices, to ensure that debt collectors who abstain from such practices are not competitively disadvantaged, and to promote consistent state action to protect consumers. Among other things, the Act prohibits debt collectors from making false representations as to a debt's character, amount, or legal status; communicating with consumers at an “unusual time or place” likely to be inconvenient to the consumer; or using obscene or profane language or violence or the threat thereof. The FDCPA also provides that “any debt collector who fails to comply with any provision of th[e] [Act] with respect to any person is liable to such person.”

Successful plaintiffs are entitled to “actual damage [s],” plus costs and “a reasonable attorney's fee as determined by the court.” A court may also award “additional damages,” subject to a statutory cap of \$1,000 for individual actions, or, for class actions, “the lesser of \$500,000 or 1 per centum of the net worth of the debt collector.”

The Act contains two exceptions. Section 1692k(c), at issue here, provides that: “[a] debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”

Respondents in this case are a law firm, Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., and one of its attorneys, Adrienne S. Foster (collectively Carlisle). In April 2006, Carlisle filed a complaint in Ohio state court on behalf of a client, Countrywide Home Loans, Inc. Carlisle sought foreclosure of a mortgage held by Countrywide in real property owned by petitioner Karen L. Jerman. The complaint included a “Notice,” later served on Jerman, stating that the mortgage debt would be assumed to be valid unless Jerman disputed it in writing. Jerman's lawyer sent a letter disputing the debt, and Carlisle sought verification from Countrywide. When Countrywide acknowledged that Jerman had, in fact, already paid the debt in full, Carlisle withdrew the foreclosure lawsuit.

Jerman then filed her own lawsuit seeking class certification and damages under the FDCPA, contending that Carlisle violated § 1692g by stating that her debt would be assumed valid unless she disputed it in writing. While acknowledging a division of authority on the question, the District Court held that Carlisle had violated § 1692g by requiring Jerman to dispute the debt in writing. The court ultimately granted summary judgment to Carlisle, however, concluding that § 1692k(c) shielded it from liability because the violation was not intentional, resulted from a bona fide error, and occurred despite the maintenance of procedures reasonably adapted to avoid any such error.

The Court of Appeals for the Sixth Circuit affirmed. Acknowledging that the Courts of Appeals are divided regarding the scope of the bona fide error defense, and that the “majority view is that the defense is available for clerical and factual errors only,” the Sixth Circuit nonetheless held that § 1692k(c) extends to “mistakes of law.”

Carlisle urges us to read § 1692k(c) to encompass “all types of error,” including mistakes of law. We decline to adopt the expansive reading of § 1692k(c) that Carlisle proposes. We have long recognized the “common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.” When Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here.

Carlisle, its *amici*, and the dissent raise the concern that our reading will have unworkable practical consequences for debt collecting lawyers. Carlisle claims the FDCPA's private enforcement provisions have fostered a “cottage industry” of professional plaintiffs who sue debt collectors for trivial violations of the Act. If debt collecting attorneys can be held personally liable for their reasonable misinterpretations of the requirements of the Act, Carlisle and its *amici* foresee a flood of lawsuits against creditors' lawyers by plaintiffs (and their attorneys) seeking damages and attorney's fees. The threat of such liability, in the dissent's view, creates an irreconcilable conflict between an attorney's personal financial interest and her ethical obligation of zealous advocacy on behalf of a client.

An attorney uncertain about what the FDCPA requires must choose between, on the one hand, exposing herself to liability and, on the other, resolving the legal ambiguity against her client's interest or advising the client to settle—even where there is substantial legal authority for a position favoring the client. We do not believe our holding today portends such grave consequences. For one, the FDCPA contains several provisions that expressly guard against abusive lawsuits, thereby mitigating the financial risk to creditors' attorneys. When an alleged violation is trivial, the “actual damage[s]” sustained, will likely be *de minimis* or even zero.

One *amicus* suggests that attorney's fees may shape financial incentives even where actual and statutory damages are modest. But courts have discretion in calculating reasonable attorney's fees under this statute, and § 1692k(a)(3) authorizes courts to award attorney's fees to the defendant if a plaintiff's suit “was brought in bad faith and for the purpose of harassment.”

We therefore hold that the bona fide error defense in § 1692k(c) does not apply to a violation of the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of that statute.

Scalia, Concurring: I join the Court's opinion except for its reliance upon two legal fictions. A portion of the Court's reasoning consists of this: The language in the Fair Debt Collection Practices Act (FDCPA or Act) tracks language in the Truth in Lending Act (TILA); and in the nine years between the enactment of TILA and the enactment of the FDCPA, three Courts of Appeals had “interpreted TILA's bona fide error defense as referring to clerical errors.” The Court concludes that these three Court of Appeals cases “suppor[t] an inference that Congress understood the statutory formula it chose for the FDCPA consistent with Federal Court of Appeals interpretations of TILA.”

Can one really believe that a majority in both Houses of Congress knew of those three cases, and accepted them as correct (even when, as was the case here, some District Court opinions and a State Supreme Court opinion had concluded, to the contrary, that the

defense covered legal errors)? This is a legal fiction, which has nothing to be said for it except that it can sometimes make our job easier.

The Court's opinion also makes fulsome use of that other legal fiction, legislative history. When the Court addresses such far-afield legislative history merely "for the sake of completeness," it encourages and indeed prescribes wasteful over-lawyering. (Legislative history, after all, almost always has something for everyone!). I think it more reasonable to give zero weight to the other snippets of legislative history that the Court relies upon, for the reason that the Senate Committee Report on the very bill that became the FDCPA flatly contradicts them.

It is almost invariably the case that our opinions benefit not at all from the make-weight use of legislative history. But today's opinion probably suffers from it. Better to spare us the results of legislative-history research, however painfully and exhaustively conducted it might have been.

Kennedy , Dissenting: Today's holding gives new impetus to this already troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit. The Court's ruling, however, endorses and drives forward this dynamic, for today's holding leaves attorneys and their clients vulnerable to civil liability for adopting good-faith legal positions later determined to be mistaken, even if reasonable efforts were made to avoid mistakes.

In referring to "abusive debt collection practices," surely Congress did not contemplate attorneys who act based on reasonable, albeit ultimately mistaken, legal interpretations. Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the attorneys themselves incur personal financial risk.

Lessons:

1. A creditors' lawyer may be held liable under the FDCPA for a mistake of law; the bona fide error defense applies only to clerical and factual errors.
2. Interpreting congressional intent based on assumed knowledge of Court of Appeals opinions or based on legislative history are usually legal fictions (at least in Justice Scalia's opinion).

Note: 8,287 federal lawsuits were filed citing violations of the FDCPA in 2009, a 60 percent rise over the previous year, according to WebRecon, a site that tracks collection-related litigation and the most litigious consumers and lawyers on behalf of debt collectors.

ADVOCACY TIP OF THE MONTH: Woodshedding Has Its Limits.

By: Teresa Rider Bult, Litigation News, November 4, 2009

In *Ibarra v. Baker*, No. 08-20220 (July 28, 2009), the Fifth Circuit considered the question of how far is too far when it comes to overly coaching or "woodshedding" witnesses. The district court found that attorneys for Harris County, Texas and several of its law enforcement officers had improperly coached defense witnesses by essentially planting two new terms of art into the litigation via their preparation of an expert witness and law enforcement officers. In sustaining monetary sanctions against the attorneys, the

Fifth Circuit held: "An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way."

Here there were terms of art, specifically "retaliation" and "high crime area," that were introduced by counsel and the expert that were "additive of prior testimony, reflecting a conspiracy ... to manufacture a record favorable to the defense. The appearance of these terms in the litigation would not be noteworthy if they merely repackaged the witnesses' prior testimony, neither adding nor subtracting anything substantive."

The advice provided by one court more than a century ago may still be the best advice provided to date: "the lawyer's 'duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not teach him what he ought to know.'"

Mark Davidson, Seattle advises: "Every attorney should begin the witness preparation session by clearly saying, 'When testifying under oath, you must tell the truth. Nothing I say in this preparation session is intended to instruct you to the contrary.'"

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Ron Waicukauski is a trial lawyer whose practice focuses on plaintiffs' complex litigation including matters involving business disputes, property rights, professional malpractice, and class actions. He has tried more than sixty jury cases to verdict as lead counsel in both state and federal courts. Ron has been recognized in Best Lawyers in America (2006-2010) and Indiana Super Lawyers (2004-2010) and with an AV Rating from Martindale-Hubbell.

Ron received his bachelor degree with Distinction from Northwestern University, his J.D. degree from Harvard University where he was named Best Oralist in the Ames Moot Court Competition, and an LL.M. degree, with Highest Honors, from George Washington University. Ron has taught trial and appellate advocacy at the Indiana University Schools of Law in Bloomington and Indianapolis, and has served on the faculties of the National Institute of Trial Advocacy and the Defense Counsel Trial Academy.

Ron has also served as President of the Indianapolis American Inn of Court, as Chair of the Continuing Legal Education Board of the International Association of Defense Counsel, and as Co-chair of the Training the Advocate Committee, Litigation Section, American Bar Association. He formerly was a JAG and Captain in the U.S. Marine Corps and served as the elected Prosecuting Attorney in Monroe County, Indiana.

Ron co-authored *The Twelve Secrets of Persuasive Argument* (2009 ABA), *The Winning Argument* (2001 ABA), *Classical Rhetoric and the Modern Trial Lawyer*, Litigation (Winter 2010); and *Ethos and the Art of Argument*, Litigation (Fall 1999). Ron also wrote *Learning the Craft*, Litigation (Spring 1998) and was the editor and a contributing author of *Law and Amateur Sports* (Ind. Univ. Press 1982).