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IN THE NEWS: Survey of Legal Secretaries Produces Interesting Results

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IN THE NEWS: Survey of Legal Secretaries Produces Interesting Results

From: ABAJournal.com, Oct. 24, 2011

When Chicago-Kent law professor Felice Batlan surveyed 142 legal secretaries at larger law firms in 2009, not one expressed a preference for working with a female partner. Asked whether they preferred to work for male or female partners or associates, 35 percent preferred working for male partners, 15 percent preferred working for male associates, 3 percent preferred working for female associates, none preferred working for female partners, and 47 percent had no opinion.

Asked if attorneys respected them, 67 percent of the secretaries said they were respected, and 29 percent said "it depends." Asked about the traits that make a good legal secretary, many indicated that it was important to control their emotions. One secretary listed the traits this way: "Gets to work on time, does the assigned work, hasn't murdered a lawyer by the end of her day."

1. Model Instruction on "Responsible Cause" Properly States Indiana Law; *Fratte v. Rice*, 954 N.E.2d 497 (Ind. Ct. App. 9/19/2011) (Baker)

The Indiana Court of Appeals confirmed that the new Model Jury Instructions do not misstate Indiana law on proximate cause when instructing on "responsible cause." The final instruction stated: "A person's conduct is legally responsible for causing death if: (1) the death would not have occurred without the conduct, and (2) the death was a natural, probable, and foreseeable result of the conduct. This is called a 'responsible cause.'"

The plaintiff argued that the instruction was insufficient because it speaks of "conduct," rather than "act or omission." The Court disagreed, confirming that the instruction "closely tracks our Supreme Court's definition of proximate cause."

The Court found that the Indiana Supreme Court "tacitly approved" the "plain English" instruction on responsible cause in *Green v. Ford Motor Co.*, 942 N.E.2d 791, 795 n. 1 (Ind. 2011).

1. Responsible cause appears to be replacing "proximate cause" as the terminology for assessing causation.
2. The plain English instructions are likely to survive challenge on appeal.

2. Expert's Testimony Admissible Despite the Fact that it Doesn't Meet Daubert Standards; *Turner v. State*, 853 N.E.2d 1039 (Ind. 9/28/2011) (Rucker)

This was a criminal case in which the defendant was charged with murder, felony murder, criminal confinement, robbery, and burglary and found guilty of all charges. At trial, the State presented the testimony of a firearms and tool mark examiner, who testified that a mark on an unfired cartridge found where the defendant slept the night after the crime matched the marks on four discharged cartridges found the scene of the crime and

that these marks were all caused by the same weapon. Turner challenged this testimony, because it did not meet the standards for scientific reliability set forth in *Daubert*. The trial court admitted this testimony and the defendant appealed.

On appeal, the Court restated that Indiana's courts are not bound by *Daubert* and that Indiana Evid. R. 702 does not "interpose an unnecessarily burdensome procedure or methodology [on] trial courts." Thus, whether the expert's testimony satisfied *Daubert* was not dispositive.

[I]t is not dispositive for our purposes whether Putzek's theory or technique can be and has been tested, whether the theory has been subjected to peer review and publication, whether there is a known or potential error rate, and whether the theory has been generally accepted within the relevant field of study. ... The uncertainty of Putzek's opinion, as well as the lack of formal testing and his inability to pinpoint other research, all inform the fact finder's judgment on weighing this evidence, but does not render the evidence inadmissible.

... Here, the conceptual basis for linking tool marks without a "known tool" is the same as that for linking tool marks with a known tool, and the trial court could reasonably have concluded that the concepts of the field could be applied to reach the conclusion given. The linkage demonstrated is simply weaker where no weapon is available for comparison purposes. This goes to the weight, not the admissibility, of the evidence.

This opinion strongly favors the admissibility of expert testimony, allowing the factfinder, rather than the trial court, to sort things out. All of the defendant's challenges to the reliability of the expert's testimony went to the weight, not the admissibility, of that testimony. This is a case that every attorney who is relying on the testimony of an expert should be prepared to cite in defense of the admissibility of that expert's opinion.

Lessons:

1. Scientific evidence should not be excluded in Indiana's state courts simply because it does not meet the standards for admissibility described in *Daubert*. *Daubert* may be helpful, but it is not controlling.
 2. The Indiana Supreme Court favors allowing the factfinder to sort through the weight to be given to expert testimony.
 3. When the factfinder is a judge, rather than a jury, the appellate courts are more lenient: "What might very well constitute prejudicial error in the form of testimony given before a jury does not necessarily constitute prejudicial error in a trial to the court."
- 3. Bank Cannot Contract Itself Out of UCC; *Sapp v. Flagstar Bank, FSB*, 2011 WL 3715281 (Ind. Ct. App. 8/24/20.11) (Bailey)**

In August 2005, Sapp presented a \$125,000.00 check to Flagstar to deposit into a

business account and Flagstar gave the account a provisional settlement. Flagstar then lost the check. In October 2005, Flagstar notified Sapp of the loss and sought his assistance in identifying the source of the check. However, he was not helpful.

The bank thought that the check had come from a trust account for Sapp's mother. Sapp had control over those funds and there were reasons for the bank to reach this conclusion. After Flagstar had notified Sapp of the loss and had threatened set-off against the trust account, Sapp continued to write checks from that trust account. Eventually, the bank charged-back the check to the business account, resulting in a negative balance of over \$123,000. Flagstar then sued Sapp for breach of contract, theft, and other claims.

The parties filed cross-motions for summary judgment and the trial court granted Flagstar's motion. It then awarded Flagstar both damages and attorney's fees. Sapp appealed.

The UCC describes when a bank may charge-back against an account. On appeal, Flagstar argued that the UCC did not apply, arguing, in essence, the following:

that the UCC time limitations must be explicitly adopted in a contract and, in the absence of such a provision, a depositor (under freedom of contract principles) may agree to indefinitely indemnify the bank, even for the bank's own negligence. In Flagstar's view, all risk of loss is on the depositor until final collection of an item.

But as the Court succinctly put it, "This position is contrary to law." The contract between Sapp and Flagstar "cannot operate to indemnify Flagstar for its own failure to exercise ordinary care." Thus, the trial court erred when granting summary judgment on this claim.

The Court then turned to the question of whether the trial court properly granted summary judgment on the theft claim. It held that the trial court erred by not granting summary judgment to Sapp on this claim because there was no evidence that his control over the funds in the trust account was unauthorized.

Sapp admits that he negotiated trust fund checks amounting to \$183,000, after having knowledge that Flagstar desired a set-off against accounts upon which Sapp was a signatory. Admittedly, the withdrawal of funds prevented Flagstar from attempting an offset from those funds. However, Flagstar has designated no materials that indicate Sapp removed funds from an account of which he was a primary owner as opposed to a trustee or minority shareholder. Moreover, it was undisputed that Sapp had a right to negotiate checks or withdraw funds.

Nonetheless, an element of the theft statute was negated in that Sapp did not exert "unauthorized" control over the funds. Again, these were funds available for withdrawal, and Sapp accessed them through honored

negotiable instruments. Flagstar honored each of the Trust checks that it claims were the vehicle whereby Sapp allegedly accomplished "theft." Flagstar did not come forward with sufficient designated materials to show that Sapp's control was without authorization such that he could have been found by a preponderance of the evidence to have criminally stolen the funds.

Thus, after all of this, the question for the jury was whether the bank's loss of the check and two-month acquiescence was a failure to exercise ordinary care. The opinion does not indicate whether there are facts that weigh in the bank's favor on this issue, but that may be a tall order.

Flagstar was aggressive in this lawsuit. It was aggressive in trying to get the funds back from Sapp and argued an aggressive position in support of that attempt. However, that same aggression may have ultimately hurt Flagstar when it argued that the UCC didn't matter. It is difficult to stretch the law in your favor when you don't have the cleanest hands in the world.

Lessons:

1. Banks have a limited, but reasonable amount of time to challenge the validity of a non-cash deposit.
2. A bank cannot disclaim liability for its own negligence.

4. An Employer Can Be Insured for Crimes Committed by Employees; *Holiday Hospitality Franchising, Inc. v. AMCO Ins. Co.*, 955 N.E.2d 827 (Ind. Ct. App. 10/13/11) (Robb)

The employer in this case owned a Holiday Inn in New Castle and one of its employees molested a 15-year-old guest staying at the hotel. The hotel was insured by a policy that covered damages caused by an "occurrence," which was defined as an accident, and contained an intentional acts exclusion. It also provided that each insured under the policy was separately entitled to the policy's protections. The child filed a complaint for negligent hiring, retention, and/or supervision and the hotel made a claim under the policy. The hotel made a claim under the policy and the insurer filed a declaratory action, seeking a determination that the policy did not cover the child's claims. The trial court granted the insurer's motion for summary judgment and the hotel appealed.

On appeal, the insurer argued that there was no coverage because the hiring and supervision of an employee cannot be an accident. The Court disagreed.

First, that a separation of insureds provision allows the finding of an "occurrence" regarding Holiday Hospitality's action even if Forshey's actions do not amount to an accident. Second, without further specificity in the language of the policy, ambiguity exists depending on how we characterize the event that may or may not have been an accident, and ambiguities in insurance policies are strictly construed against the insurance company

pursuant to Indiana law. Third, one such phrasing could reasonably be whether an employer's negligent hiring, supervision, and/or retention of an employee who later commits sexual misconduct is an accident. Without evidence that the employer intended or expected the sexual misconduct to result, this cannot reasonably be deemed intentional, but rather, it is accidental. In light of our policy construing ambiguous insurance policies against insurance companies, we conclude that in these circumstances an "occurrence" has taken place triggering AMCO's coverage of Holiday Hospitality.

The Court concluded that there was an "occurrence" under the terms of the policy and reversed the trial court's decision.

The Court's decision in this case will allow more employers to obtain coverage for the intentional torts of their employees. However, it should be noted that an important provision in the policy that led to this result was the provision providing separate coverage to the various insureds. If this provision was not present, then it is unlikely that the Court would have reached the same result.

Lessons:

1. If an insurance policy provides for a separation of insureds, then one insured's intentional act may not be a basis for denying coverage to another insured.
2. Negligent hiring and supervision is an "occurrence" under the terms of an insurance policy.

5. Trial Court Erred by confusing Duty with Breach, *Estate of Lee v. Colussi*, 954 N.E.2d 1042 (Ind. Ct. App. 9/23/2011) (Mathias)

In this case, an attorney represented an estate in which the will named two people as co-personal representatives. The attorney advised them that either of them could conduct business for the estate and instructed one of them to open an estate account. The estate was liquidated and placed into that account. In the meantime, the co-personal representative who opened the account began writing checks on the Estate account for her personal use, the use of her family and in-laws, and the use of the three other beneficiaries of the will. The account was depleted and overdrawn.

After it was learned that the co-personal representative had misused estate funds, the estate filed a complaint against the attorney, alleging that he had committed legal malpractice by failing "to inform himself as to the status of Estate assets or monitor their use." The attorney moved for summary judgment and the trial court granted that motion, holding that the attorney had no duty to inform himself as to the status of estate assets or monitor their use. The estate appealed.

On appeal, the Court found that the trial court impermissibly conflated the issues of duty and breach.

It is undisputed that Colussi was employed as an attorney for the Estate. Thus, there is no question that Colussi owed a general duty to the Estate to exercise ordinary skill and knowledge as an attorney. ... Whether Colussi's failure to monitor or control the Estate bank account amounted to a violation of his duty to the Estate is a question of breach.

In this case, the estate presented the testimony of an expert who testified that the applicable standard of care requires an attorney for an estate to retain the estate's checkbook, thereby requiring the personal representative to come to the attorney's office to obtain checks. This testimony was sufficient to establish a genuine issue of material fact. The estate did not need to prove that the practice advocated by its expert was "a uniform and accepted practice by attorneys."

Although this decision came in the context of a legal malpractice claim, the Court's analysis should apply more broadly. In negligence actions, many times there are issues about what duty the alleged tortfeasor owes to an alleged victim. This case shows that the duty should be a generally applicable duty, which is not necessarily tied to the particular circumstances regarding the alleged negligence.

Lesson: An attorney has a duty to exercise ordinary skill and knowledge. What this means in a particular set of circumstances is a question of breach, not of duty.

6. Sheriff Had No Duty to Warn of Dangerous Roadway Condition; *Putnam County Sheriff v. Price*, 954 N.E.2d 451 (Ind. 10/6/2011) (Rucker)

This case arose out of a traffic accident caused when a car encountered icy road conditions caused by a waterline that froze and broke. The Sheriff was notified that the line had broken, notified the Highway Department, but did not stay to warn motorists of the danger. The plaintiff sued the Sheriff for negligence and the Sheriff moved to dismiss, alleging that he owed no duty to alleviate or warn motorists of the condition of the road and that he was immune from suit. The trial court denied the motion, the Sheriff appealed, and the Court of Appeals affirmed.

On transfer, the Court concluded that the Sheriff owed no duty to warn motorists of the potential hazard. While the Court recognized that it had previously held that a governmental body could have the duty to warn of hazardous road conditions, this duty "is grounded in the concept of premises liability and presupposes ownership, maintenance, or control of the roadway."

In this case Price's complaint does not allege that Sheriff owned, operated, maintained, or controlled any portion of County Road 375 West in Putnam County, Indiana. And neither could the complaint reasonably do so. The legislature has specifically charged the county supervisor with the supervision over the maintenance and repair of highways within the county. See I.C. § 8-17-3-1 ("The county executive shall appoint a person as a supervisor of county highways. The county highway supervisor has general

charge of the repair and maintenance of the county highways."'). Absent ownership, maintenance, or control of the county roadway, Sheriff had no duty to warn of a hazardous condition. Instead that obligation rested elsewhere. Because there was no duty, Sheriff was not negligent as a matter of law. *See, e.g., Peters v. Forster*, 804 N.E.2d 736, 738 (Ind. 2004) ("Absent a duty, there can be no breach of duty and thus no negligence or liability based upon the breach.>"). Accordingly there were no facts alleged in Price's complaint under which Price would be entitled to relief as against Sheriff. The trial court thus erred in denying Sheriff's motion to dismiss under Indiana Trial Rule 12(B)(6).

Parties should be warned about construing this opinion too broadly. Justices David and Dickson expressly warned against this in a concurring opinion. However, this decision will make it much harder for motorists to sue a Sheriff's Department for failing to warn of dangerous conditions in a roadway.

Lessons:

1. The duty to warn of dangerous road conditions arises out of premises liability.
2. A Sheriff's Department does not have ownership, maintenance, or control of a county roadway, so it generally will not have a duty to warn motorists of dangerous conditions in the roadway.

7. Courts Have a Duty to State the Claims for Which They Are Awarding Attorney's Fees; *City of Jeffersonville v. Env'tl. Mgmt. Corp.*, 954 N.E.2d 1000 (Ind. Ct. App. 9/15/11) (Riley)

In this case, the plaintiff brought a multiple-count complaint against the City. Some of the claims included a statutory claim for attorney's fees, but others did not. After a bench trial, the trial court found for the plaintiff and awarded attorney's fees. The City appealed.

On appeal, the Court dealt with the City's substantive arguments before addressing the award of attorney's fees. The City argued the trial court erred when awarding attorney's fees because the trial court did not distinguish between attorney's fees incurred in the prosecution of claims that allowed an award of attorney's fees and those that did not. The Court agreed, and placed a specific burden on a trial court when making an award in such a situation.

Based on these standards, we conclude that the trial court abused its discretion in calculating EMC's award of attorney's fees. The trial court only provided a legal basis to award EMC for fees incurred as a result of the City's Open Door violation and contempt claim, not EMC's breach of contract claim; nor has EMC provided such a basis. Because an award of attorney's fees is a derogation of the common law and must be strictly construed, we find that the trial court should have specifically verified that its award did not include compensation for fees incurred as a result of EMC's breach of contract claim.

Therefore, the trial court abused its discretion in awarding blanket compensation for every fee incurred after EMC's first Open Door claim, since there is evidence that EMC's attorneys worked on the contract claim after that point.

This decision adds a specific burden on the trial court to make sufficient findings for an appellate court to see whether the award of attorney's fees is proper. Lawyers should pay particular attention to the obligation placed on the trial court and provide the court with proposed findings that meet this requirement.

Lesson: If a trial court is awarding attorney's fees on some, but not all, claims, then it must specifically verify that its award did not include compensation for fees incurred as a result of the claims that don't support an award of attorney's fees.

8. Indiana Supreme Court Identifies Several Serious Deficiencies in CHINS Proceeding; *In re termination of parental rights of Z.G.*, 954 N.E.2d 910 (Ind. 10/11/11)

A mother traveled to Utah to visit family and left her 7-year old child with a family friend, so the child would not miss additional school days. Eventually, the child began complaining that she "hurt in her privates." She was taken to the hospital and diagnosed with genital herpes and had scarring around the anus and perineum. Upon the child's release from the hospital, she was taken into the custody of the DCS and placed into a foster home.

A family case manager (FCM) was assigned to the case and tried to find the mother. The mother had been arrested in Utah, but was not incarcerated in a Utah or Indiana jail or prison, so the FCM couldn't locate her. The DCS then filed a CHINS proceeding.

A second FCM then tried locating the mother. This second FCM took the same steps as the first, but did not speak with any family acquaintances. Despite this, the second FCM swore in an Affidavit of Diligent Inquiry (ADI) that he had spoken to family acquaintances regarding the whereabouts of the mother. Based upon the ADI, the mother was served by publication in the CHINS case.

Just over 2 months after the child was adjudicated a CHINS, the mother wrote to the DCS, informed it that she was incarcerated in federal prison in Kentucky, and asked that an investigation be brought against the family friend. The letter also inquired if the child was in DCS custody and if she could have a family member pick up the child. DCS responded, telling the mother that the child was in a foster home, asked when she would be released from jail, and informed her that there were "legal procedures that go along with this case which can lead to termination of parental rights." The mother wrote back, saying that she would be out of jail in 4 months and asked again to have a family member retrieve the child. The DCS never responded to this letter. The mother had a friend call the DCS on her behalf, but the DCS refused to give the friend any information. The mother then sent a third letter to the DCS. Again, the DCS did not respond.

The month before the mother would be released from jail, the DCS filed a petition to terminate her parental rights. The mother was allowed to participate telephonically, but her rights were terminated. While the appeal was pending, the child was adopted by her foster parents.

On appeal, the mother challenged the termination of her parental rights on many due process grounds. The Court was highly disturbed by the fact that the second FCM signed an affidavit that affirmed that he had asked "family acquaintances regarding the parent's whereabouts" without doing so, which allowed the mother to be served by publication, rather than personally.

We find it extremely troubling that a representative from DCS would make a misrepresentation on such an important document. FCM 2 offered the excuse that the Affidavit "populated" automatically and could not be deleted. If this is accurate, DCS should correct its internal system to ensure that these "populations" cease immediately so that only accurate information exists on its forms. Yet, in the present scenario, we observe that there were no known family acquaintances for FCM 2 to contact about mother's whereabouts. The error would be significantly more egregious if there were family acquaintances with whom FCM 2 knew to inquire about mother's whereabouts. We also note that Mother was able to cross-examine FCM 2 on this issue during the termination proceeding, which allowed the court to assess FCM 2's credibility in determining what impact this had on Mother's due process rights as well as on FCM 2's credibility as a witness. We hold that the misrepresentation on the affidavit, in this limited instance, did not violate Mother's due process rights.

The Court also took issue with the DCS's interactions (or lack thereof) with the mother after she first contacted it herself.

The delay in advising mother of her rights and informing her of the CHINS action is disturbing and inappropriate. There was no reason for this delay. Upon obtaining Mother's letter dated October 14, 2008, DCS should have contacted Mother immediately. The initial response should have included the advisement of rights form and the CHINS petition form. Doing so would have allowed Mother representation in the CHINS proceedings at an earlier stage. However, in this case, we cannot conclude that the dilatory action resulted in fundamental error or deprived Mother of due process. Mother was incarcerated at that time and awaiting a possible ten-year sentence. Although it may have been advisable for DCS to have put the brakes on the termination petition upon locating Mother, or at least temporarily slowed down the proceedings, she was nevertheless in federal custody for transporting drugs. Furthermore, the termination proceeding did not conclude until January 2009. We find the error would have been much more egregious if the court had conducted an expedited termination hearing, sometime shortly after the

termination petition being filed. However, the delays in the termination proceeding and the continuances granted provided further opportunity for Mother and her counsel to attempt to prove Mother's fitness to parent and also to prepare for trial. Finally, we note that Mother was fully and diligently represented in the termination proceeding. Counsel was able to question FCM 2 about the lack of communication with Mother, and Mother was able to present her argument to the trial court judge about any due process violations from the lack of contact. The delay from DCS in advising Mother of her rights and serving her with the CHINS petition upon locating Mother is a very poor practice model in the field of child protection. But a reversal is not warranted in this case.

The Court refused to address the effects of reversing a termination order when a child has already been adopted, because it ultimately affirmed the trial court. However, the Court did issue the following advice to trial courts dealing with this situation.

It might be advisable for prospective adoptive parents and the courts to wait until the expiration of any appeal before going forward with an adoption. Alternatively, if a court proceeds with an adoption while TPR proceedings are still on appeal, the court should advise all parties, especially the prospective adoptive parents, of the possibility of reversal.

Finally, the mother also argued that she should have been transported to appear at the hearing, rather than being forced to participate by telephone. The trial court had a blanket order prohibiting the transportation of a prisoner to a termination hearing, but it appears that this prohibition was not universally enforced.

The Court had not previously addressed a parent's right to be present at a termination proceeding and adopted a non-exhaustive 11-prong test to be applied to this situation. It then criticized the trial court's blanket order.

A blanket order prohibiting transporting a prisoner to a termination hearing is fraught with danger. If the trial courts were allowed to hide behind such a blanket order, on review our appellate courts would be left with little to no information, forcing them to surmise why the trial court issued the order. This is not good policy. However, in the case at bar, the trial court would have arrived at the conclusion to not transport the mother, as we have previously discussed.

The Court ultimately affirmed the termination of parental rights in this case, but made it clear that it was expressing its displeasure with the Department of Child Services.

Lessons:

1. In order to demonstrate a due process violation in a termination of parental rights proceeding, a person must demonstrate that the alleged violation substantially increased the risk of error leading to the termination.

2. Courts should be hesitant to allow an adoption while a termination of parental rights is being appealed.
3. Courts must apply a multi-pronged test to determine whether an incarcerated parent is permitted to attend a termination of parental rights hearing.

9. Date of Mailing≠Postmark Date; *Johnson v. Sullivan*, 952 N.E.2d 787 (Ind. Ct. App. 7/27/2011) (Bradford)

Johnson received medical treatment at a hospital on December 22, 2006, and died the next day. Two years later, a proposed complaint was filed on her behalf with the IDOI. That proposed complaint was postmarked December 23, 2008, and the IDOI file-stamped it that date.

The defendants moved for summary judgment, arguing that the case was not brought within the applicable statute of limitations. In response, a legal assistant to the plaintiffs' attorney, submitted an affidavit, which averred that she deposited the proposed complaint at the post office on December 22, 2008. The trial court granted the motion.

On appeal, the Court disagreed. It found that the postmark date was not dispositive.

Under the Medical Malpractice Act, the date of delivery or mailing, not the date of postmarking, is the date a proposed complaint is considered filed. ... "A letter, package, or other mailable matter is 'mailed' when it is properly addressed, stamped with the proper postage, and deposited in a proper place for receipt of mail." ... We hold today that evidence of mailing on a particular date, even if it contradicts a postmark, is competent to prove filing on that date for purposes of the Medical Malpractice Act.

Thus, the question of whether the legal assistant deposited the proposed complaint at the post office on December 22, 2006, will be a jury question.

Lesson: The date a proposed complaint is properly addressed, stamped with the proper postage, and deposited in a proper place for receipt of mail is the date that it is "mailed", even if the postmark says differently.

10. Indiana Supreme Court Refines Test of When a Suit is Essentially Equitable; *Lucas v. U.S. Bank, N.A.*, 953 N.E.2ed 457 (Ind. 9/15/2011) (David)

The Lucases entered into a residential mortgage in 2005, but in 2009, the bank moved to foreclose on the loan. The Lucases filed an answer asserting many affirmative defenses and counterclaims, asserting that the bank violated numerous statutes and the common law and that the Lucases were thus entitled to various forms of relief, including money damages. The Lucases requested a jury trial on their affirmative defenses and counterclaims, but the trial court denied that motion. On appeal, the Court of Appeals

reversed, holding that the Lucases had the right to have a jury hear their legal claims. The bank then successfully sought transfer.

The Court relied heavily on its decision in *Songer v. Civitas Bank*, 771 N.E.2d 61 (Ind. 2002), which also addressed the test to be used when deciding whether to have a jury hear issues in a case involving both legal and equitable claims. That test was a fact-based, multi-pronged test.

Ultimately, we believe *Songer* reveals that a trial court must engage in a multi-pronged inquiry to determine whether a suit is essentially equitable. Drawing on the teachings of *Songer*, we formulate that inquiry as follows: If equitable and legal causes of action or defenses are present in the same lawsuit, the court must examine several factors of each joined claim—its substance and character, the rights and interests involved, and the relief requested. After that examination, the trial court must decide whether core questions presented in any of the joined legal claims significantly overlap with the subject matter that invokes the equitable jurisdiction of the court. If so, equity subsumes those particular legal claims to obtain more final and effectual relief for the parties despite the presence of peripheral questions of a legal nature. Conversely, the unrelated legal claims are entitled to a trial by jury.

The Lucases' claims in this case were subsumed into equity because, although they were legal causes of action, when "looking at the cause *as a whole*, we conclude that the core questions underlying the Lucases' legal claims significantly overlap with the foreclosure action that invoked the equitable jurisdiction of the trial court." Because "the essential features of the suit" were equitable, the entire case must be tried to the bench, rather than to a jury.

Lesson: If a case involves both legal and equitable claims, the legal claims will be subsumed into equity if the whole action is essentially equitable. This is a fact-based, multi-pronged test.

11. Seventh Circuit Clarifies Requirements of *Iqbal* and *Twombly*; *McCauley v. City of Chicago*, 2011 WL 4975644 (7th Cir. 10/20/2011) (Sykes)

Following the murder of his daughter by an ex-boyfriend, Brewster McCauley brought suit against the City of Chicago alleging that it failed to have adequate policies in place for the protection of female victims of domestic violence. The trial court dismissed the claim and the Seventh Circuit affirmed, applying the plausibility standard announced in *Twombly* and *Iqbal*. In so holding, the Court recited the basics of a *Twombly/Iqbal* analysis.

In reviewing the sufficiency of a complaint under the plausibility standard announced in *Twombly* and *Iqbal*, we accept the well-pleaded facts in the complaint as true, but legal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of

truth. After excising the allegations not entitled to the presumption, we determine whether the remaining factual allegations “plausibly suggest an entitlement to relief.” The “[f]actual allegations must be enough to raise a right to relief above the speculative level.” That is, the complaint must contain “allegations plausibly suggesting (not merely consistent with)” an entitlement to relief. If the allegations give rise to an “obvious alternative explanation,” then the complaint may “stop[] short of the line between possibility and plausibility of ‘entitle[ment] to relief,’ “. Making the plausibility determination is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”

We have interpreted *Twombly* and *Iqbal* to require the plaintiff to “provid[e] some specific facts” to support the legal claims asserted in the complaint. The degree of specificity required is not easily quantified, but “the plaintiff must give enough details about the subject-matter of the case to present a story that holds together.” The required level of factual specificity rises with the complexity of the claim. “A more complex case ... will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff’s mind at least, the dots should be connected.”

In *Swanson*, we applied *Twombly/Iqbal* and held that the plaintiff’s allegations were sufficient to survive a motion to dismiss on at least some of her claims. Swanson, an African-American loan applicant who was turned down for a loan, claimed that the denial was based on her race in violation of the Fair Housing Act. Her complaint alleged that the defendants intentionally undervalued her home and that they did so because of her race. We held that because Swanson’s claim of housing discrimination was uncomplicated, Swanson’s pleading burden under *Twombly* and *Iqbal* was satisfied. Her complaint contained factual allegations identifying (1) who discriminated against her; (2) the type of discrimination that occurred; and (3) when the discrimination took place. We held that given the straightforward nature of the claim, *Twombly/Iqbal* required nothing more.

Here, McCauley’s equal-protection claim is more complicated and counterintuitive. Yet he has alleged only that the City failed to have particularized safeguards in place for the special protection of domestic-violence victims. In order to state a facially plausible equal-protection claim under *Monell*, the factual allegations in McCauley’s complaint must allow us to draw the reasonable inference that the City established a policy or practice of intentionally discriminating against female victims of domestic violence in the provision of police protection. That is, McCauley needed to allege enough “by way of factual content to ‘nudg[e]’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’

“At most, the factual allegations in the complaint plausibly suggest the uneven allocation of limited police-protection services; they do not plausibly

suggest that the City maintained an intentional policy or practice of omitting police protection from female domestic-violence victims as a class. McCauley's factual allegations are entirely consistent with lawful conduct—here a lawful allocation of limited police resources. For the reasons we have explained, this does not state a *Monell* equal-protection claim against the City. This claim was properly dismissed.

Proposals for some form of “Rule 12(b)(6) discovery” have proliferated in academic circles in the wake of *Twombly* and *Iqbal*. The theory underlying this effort is that the plausibility standard for surviving a motion to dismiss requires new tools to meet the higher bar, especially where the information necessary to survive a motion to dismiss is wholly or largely in the defendant's hands. To determine whether pre-Rule 12(b)(6) discovery should have been available in this case, we need not decide the broader and more provocative question whether it should be available in general, in light of the *Twombly/Iqbal* pleading regime. This is not a proper case for Rule 12(b)(6) discovery in any event.

Hamilton, Dissenting:

As a subordinate federal court, it is our responsibility to do our best to apply the law as stated in *Iqbal*. The problem here is that it also our responsibility to do our best to apply other Supreme Court decisions involving pleading standards, including *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007); and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), as well as the Federal Rules of Civil Procedure as adopted by the Court and approved by Congress, and the form pleadings that are part of the Federal Rules of Civil Procedure and that were also approved by the Court and Congress. *Iqbal* is in serious tension with these other decisions, rules, and forms, and the Court's opinion fails to grapple with or resolve that tension. I do not believe it is an exaggeration to say that these decisions, rules, and forms simply conflict with *Iqbal*.

As a result of this unresolved tension, since *Iqbal* was decided, the lower federal court decisions seeking to apply the new “plausibility” standard are wildly inconsistent with each other, and with the conflicting decisions of the Supreme Court.

Under the standards of *Iqbal*, it would be easy to argue that the plaintiffs in *Brown v. Board of Education* failed to state a plausible claim for relief that could survive dismissal. The Court's shift to “plausibility” pleading, and the assignment of interpretation of that standard to the subjective common-sense of individual judges, has markedly increased the danger of throwing out the proverbial baby with the bathwater.

In the face of all these problems, what are the lower federal courts to do? The first thing we can do is recognize the uncertainty that litigants, their lawyers, and district courts now face. As a result of that uncertainty, the courts of appeals should insist that in all but the most unusual situations, a party whose pleading is dismissed based on the *Iqbal* plausibility standard should be entitled to an opportunity to amend the pleading after the court has made its decision.

Lessons:

1. When arguing a 12(b)(6) motion in the Seventh Circuit, as a plaintiff, try to pigeonhole your claim as a "straightforward, uncomplicated claim," but, as a defendant, argue that its complex, and the Court needs to look hard in assessing plausibility.
2. *Twomley/Iqbal* conflicts with other Supreme Court opinions, the federal rules and the forms attached.
3. If you lose as a plaintiff on an *Iqbal* motion, ask to file an amended complaint.
4. If you want discovery before responding to an *Iqbal* motion, ask for it. You could make some new law.

12. Plaintiff Not Required to Notify Defendant of Physical Inspection; Presuit Offer Qualifies for Prejudgment Interest Purposes; *Alsheik v. Guerrero*, 2011 WL5075131 (Ind. Ct. App. 10/26/2011)(Riley)

In this medical malpractice case, a doctor performed a surgery on a 13-month old boy to treat an undescended testicle. Two days later, the child died. An autopsy was performed by the county coroner, but the coroner did not dissect the surgical site, despite being contacted by the doctor. The coroner listed the cause of death as "vascular collapse undetermined cause."

After the plaintiff filed a proposed complaint with the Indiana Department of Insurance and answered interrogatories, the plaintiff's attorney arranged to have a second autopsy performed. The second autopsy revealed the following:

He found that the left spermatic cord was dislocated at a 90-degree angle, causing an L-shaped "kink" in the cord, and which resulted in a loss of blood supply in I.A.'s left spermatic cord, tip of his penis, left testicle and scrotum leading the surrounding tissue to become necrotic. In light of I.A.'s surgery immediately prior to his death, Dr. Bryant opined that this kink could only have resulted from the placement of a suture by Dr. Alsheik at the time of surgery. He stated that "the left testicle died before [I.A.] actually died."

The defendant vigorously opposed the plaintiff's ability to rely on the results of the second autopsy, complaining that he was not given notice that the second autopsy would take place and that the act of performing the second autopsy destroyed evidence, which prevented the doctor from conducting the same physical examination. When the case

eventually went to trial, the trial court overruled the defendant's objections. A verdict was entered for the plaintiff.

On appeal, the Court held that the trial court did not abuse its discretion by admitting this evidence. It held that the plaintiff was not required to notify the defendant of the second autopsy because there was no discovery request or order that required him to do so.

The evidence reflects that at the moment the second autopsy was performed, discovery by way of interrogatories and depositions was on-going between the parties. Specifically, Dr. Alsheik had "asked in discovery to produce all photographs and records." Guerrero's responses "to all [his] requests" were submitted on March 17, 2003. ... The record is devoid of any evidence reflecting that Dr. Alsheik had requested to be notified of any intent to exhume and autopsy I.A.'s body prior to the second autopsy, nor does Dr. Alsheik present us with a motion for the trial court to issue a protective order pursuant to Ind. Trial Rule 26(C), requiring that a possible second autopsy could only be performed on specified terms and conditions. Because there was no existing defense interrogatory or protective order at the time of the second autopsy, we conclude that Guerrero was not required to provide Dr. Alsheik with notice of the autopsy.

The act of performing the second autopsy did not constitute spoliation because the doctor did not present sufficient evidence to prove spoliation.

We decline to find that Dr. Bryant intentionally destroyed evidence during the autopsy. Alsheik failed to establish that Dr. Bryant's destruction of the sutures was done for any reason other than the standard practice of investigative purposes, i.e., opening up the incision wound during an autopsy to evaluate if anything had gone wrong during surgery. There is no evidence that Dr. Bryant's action was done negligently or intentionally to suppress the truth; rather, the opposite occurred: Dr. Bryant cut through the sutures to exclude any other possible cause of death than the one he opined.

Finally, the Court reaffirmed its recent decision in *Wisner v. Laney*, 953 N.E.2d 100 (Ind. Ct. App. 2011), in which it held that an offer made presuit could qualify under the prejudgment interest statute.

Lessons:

1. If you want to know when the opposing party is conducting a physical examination of evidence that could destroy the evidence, then you should request a protective order.
2. In order to prove spoliation, you need to present evidence that destruction of evidence was done for an invalid reason.
3. Prejudgment interest may be awarded, even if the offer occurs presuit.

13. Indiana Supreme Court Takes Unreasonable Fees Seriously, *In re Powell*, 953 N.E.2d 1060 (Ind. 9/29/11) (Per Curiam)

The client in this case was represented by an Attorney Ross in a personal injury action. The proceeds from that action (\$42,500) were put into a special needs trust, with Ross named as trustee, to preserve the client's eligibility for public assistance and to prevent rapid depletion of the funds. The client soon began demanding the money and was not happy when Ross advised her that this may not be in her best interests.

The client then consulted with Powell, who agreed to represent her for a third of whatever was in the trust. The following day, Powell contacted Ross and told him about the client's dissatisfaction. Ross told Powell that he would be happy to step down as trustee and have Powell take his place. Powell then prepared a short document, which Ross signed. Powell prepared an accounting that paid him \$14,815.55 for this work and distributed the remaining 2/3 of the trust to the client.

The Court acknowledged that Powell was justified in entering into a contingency agreement at the outset, because he could have reasonably believed that Ross may contest his removal as trustee. "But within two or three days, ... he knew the case did not involve any complex issues, prolonged time commitment, risk of no recovery, or even any opposition."

We do not suggest that a contingent fee must be reduced every time a case turns out to be easier or more lucrative than contemplated by the parties at the outset. But collection of a fee under the original agreement is unreasonable when it gives the attorney an unconscionable windfall under the totality of the circumstances. On the evidence before us in this case, we conclude that Respondent violated the Indiana Professional Conduct Rule 1.5(a) by collecting a fee that was clearly excessive and unreasonable under the totality of the circumstances.

When reaching this conclusion, the Court rejected Powell's argument that his conduct was justified because of "red flags" raised by this client. The Court rejected this argument.

Even if "red flags" that a client may be difficult to deal with could justify a higher fee than would be reasonable otherwise, we reject any suggestion that an attorney's concern that he may be committing legal malpractice in representing a client justifies charging the client a higher fee.

The Indiana Supreme Court punished Powell by suspending him for 120 days without automatic reinstatement.

Lesson: An attorney who accepts a contingency fee may be subject to discipline if the fee constitutes an unconscionable windfall under the totality of the circumstances.

14. Watch Those Trees!; *Scheckel v. NLI, Inc.*, 953 N.E.2d 133 (Ind. Ct. App. 8/9/11) (Kirsch)

In this case, Scheckel owned two adjacent lots in Fort Wayne, Indiana. A chain link fence separates the properties and a walkway on one property runs parallel to and within five feet of the fence. A tree was growing near the fence towards the front of the property without the walkway, but did not touch the fence.

Scheckel sold the property with the tree to NLI. Over the course of time, the tree grew into the fence and its roots grew under the walkway, damaging both the fence and the walkway. The gate in the fence was rendered unusable, and the walkway cracked and buckled. Scheckel filed a small claims action against NLI, but the trial court granted judgment to NLI after a bench trial on the grounds that the size and placement of the tree caused the damage to the fence and walkway and that a land owner is not liable for harm caused outside his land by a natural condition of the land. Scheckel appealed.

On appeal, the Court described the natural condition rule, but held that it should not apply to modern urban and residential living.

[P]lacing a duty on the landowner to inspect his or her property and take reasonable precautions against dangerous natural conditions is not an undue burden. Property lots in urban or residential settings are much smaller in size--putting neighboring landowners much closer in proximity--and thus, the burden of time and money to inspect and secure trees on those properties is relatively minor compared to the potential damage that could result from a defective tree. As such, we hold that an urban or residential landowner has a duty to exercise reasonable care to protect neighbors from the risk of personal injury or property damage caused by a tree growing upon the landowner's property.

The fact that the issue was over the placement and size of the tree, rather than its health, did not matter.

To be sure, prior decisions finding an exception to the natural condition rule of the Restatement have involved injuries caused by unhealthy or dead trees falling onto an adjoining property, and the damage in the present case results from a healthy tree growing into an adjoining property; however, we see no meaningful difference between the two situations. Indeed, it may be difficult to determine whether a tree is decayed to such an extent that it poses an unreasonable risk of harm to an adjoining property owner, but a tree upon one's property that is growing into a structure on an adjoining property is readily observable. Similarly, a decayed tree falling into a structure on adjoining property may occur instantaneously and without warning, but a tree growing into such structure occurs over an extended period of time.

Thus, NLI owed Scheckel a duty and breached that duty.

The Court's decision appears to break new ground in Indiana and reminds all in residential or urban areas to check our trees from time to time - and to be careful where you plant them.

Lesson: An urban or residential landowner has a duty to exercise reasonable care to protect neighbors from the risk of personal injury or property damage caused by a tree growing upon the landowner's property.

15. Bluster and Bombast Do Not Establish Prejudice as Required for Laches Defense; *The Nature Conservancy v. Wilder Corp. of Delaware*, 656 F.3d 646 (7th Cir. 9/1/2011) (Rovner)

The opening sentence communicates the message loud and clear.

This case proves the maxim that, in appellate briefing, bluster is inversely proportional to merit.

What was the bluster? Wilder argued a laches defense based on a five-year delay in bringing plaintiffs' claim resulting in alleged prejudice to Wilder.

And this is where the brisk wind of bluster enters the appeal. Wilder's claim of prejudice is wholly conclusory and entirely devoid of support in the record. ... Rather than conceding its own failures in the discovery process, Wilder attempts to blame the Conservancy for any gaps in the evidence. ... These concessions are tantamount to an admission that the defense is frivolous, and the argument on appeal borders on the sanctionable.

...

Instead of establishing any prejudice, Wilder relies on bombast. Bluster and bombast are poor substitutes for evidence.

Advocacy Tips of the Month: When petitioning the U.S. Supreme Court for certiorari:

1. Solicit amicus briefs from interested groups; they really make a difference.
2. Identify one significant question presented.
3. Focus on: Genuine conflicts among lower court decisions; that the decision in your case was wrongly decided; and the importance of the question presented.
4. If you don't have significant U.S. Supreme Court experience, associate with lawyers who do; this is a specialized practice area.

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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).

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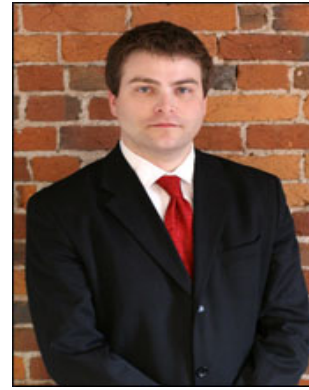
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Brad is a co-editor of The Indiana Law Update (www.indianalawupdate.com), a legal blog focused on important developments in the law that will be of general interest to Indiana litigators.