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## IN THE NEWS: More Top Lawyers Break Through \$1,000 Hourly Billing Barrier

1. The death of an affiant will not preclude use of his affidavit on a summary judgment motion unless the record shows no other possible source for the evidence; *Cotton v. Auto-Owners Ins. Co.* – 937 N.E.2d 414 (Ind.Ct.App. 11/18/10)(Najam)
2. A party in a federal arbitration may not rely on T.R. 28(E) to obtain non-party discovery in Indiana; In re: the subpoena issued to Beck’s Superior Hybrids, Inc. – 2011 WL 96481 (Ind.Ct.App. 1/12/11)(Najam)
3. T.R. 54(B)’s magic language is needed for immediate appeal of summary judgment order on less than all claims; *Forman v. Penn* – 938 N.E.2d 287 (Ind.Ct.App. 12/8/10)(Boehm)
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5. A tort claims notice requires only a basic legal theory and the applicable facts; *Simpson v. OP Property Management, LLC* – 2010 WL 5133546 (Ind.Ct.App. 12/17/10)(Crone)
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10. Policy revision may be excluded from evidence as a subsequent remedial measure under Rule 407; *State Farm Mut. Inc. Co. v. Flexdar, Inc.* – 937 N.E.2d 1203 (Ind.Ct.App. 11/22/10)(Vaidik)
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14. Voluntary intoxication is not a complete defense to a Dram Shop Act claim; *Gray v. D&G, Inc. d/b/a/ The Sandstone* – 938 N.E.2d 256 (Ind.Ct.App. 12/3/10)(Mathias)

ADVOCACY TIP OF THE MONTH: Check out the Facebook pages of potential jurors.

*NOTE: The contents of this handout consist mostly of blog entries from IndianaLawUpdate.com prepared primarily by Brad Catlin and words taken directly from appellate court opinions with citations generally omitted. Anyone intending to rely upon any opinion should consult the published decision.*

## **IN THE NEWS: More Top Lawyers Break Through \$1,000 Hourly Billing Barrier**

From abajournal.com Feb. 23, 2011:

Kirkland & Ellis lawyer Kirk Radke has emerged as one of the nation's most expensive lawyers, court filings suggest. Radke, a private equity and corporate lawyer, charged hourly fees of \$1,250 in early 2010. He is one of an increasing number of top lawyers billing more than \$1,000 an hour.

From WSJ.com Feb. 23, 2011: Big Law's \$1,000-Plus an Hour Club:

Nearly 2.9% of partners at a group of 24 large U.S. and British law firms asked for \$1,000 an hour or more in U.S. cases last year up from 1.5% in 2009. The average law-firm partner now asks \$635 an hour and bills \$575, the firm said. But a small group of attorneys in some specialties command significantly more.

"A thousand dollars an hour was a choke point for some clients," said Peter Zeughauser, a consultant to law firms. "I don't think there will be another significant psychological barrier until rates reach \$2,000 an hour, which they will do, probably in five to seven years."

### **1. The death of an affiant will not preclude use of his affidavit on a summary judgment motion unless the record shows no other possible source for the evidence; *Cotton v. Auto-Owners Ins. Co.* – 937 N.E.2d 414 (Ind.Ct.App. 11/18/2010)(Najam)**

A passenger in a single car accident sued the driver, an insurer and the driver's grandfather who had supplied a temporary license plate to the driver. The grandfather provided an affidavit before dying from an illness and prior to any deposition. The passenger and insurer filed cross-motions for summary judgment with the insurer relying on the affidavit. The passenger moved to strike the grandfather's affidavit. The trial court denied the motion to strike and granted the insurer's motion for partial summary judgment. The passenger appealed.

The Court held that the Indiana Supreme Court's decision in *Reeder v. Harper*, 788 N.E.2d 1236, 1241-42 (Ind. 2003), which held that "an affidavit that would be inadmissible at trial may be considered at the summary judgment stage of the proceedings if the substance of the affidavit would be admissible in another form at trial," applies to all affidavits, not just expert affidavits. Thus, in order to strike the affidavit, the passenger needed to describe what statements in the affidavit are inadmissible under *Reeder* because the same evidence would not be admissible at trial from another source. The Court observed that there were other potential sources to prove facts in the affidavit and thus affirmed the denial of the motion to strike.

**Lesson:** An affidavit submitted in support of a motion for summary judgment can only be stricken as containing information that is inadmissible if there is no other form in which that evidence would be admissible at trial.

**2. A party in a federal arbitration may not rely on T.R. 28(E) to obtain non-party discovery in Indiana; *In re: the subpoena issued to Beck's Superior Hybrids, Inc.* – 2011 WL 96481 (Ind.Ct.App. 1/12/11)(Najam)**

In 2002, Monsanto entered into a contract with DuPont and, pursuant to that contract, any disputes between the parties were to be resolved by arbitration in New York City. In May 2009, Monsanto demanded arbitration and the arbitration panel issued a subpoena *duces tecum* to Beck's, ordering Beck's to appear at a preliminary hearing, in Indiana, before one of the panel members and to produce business records relating to Monsanto's arbitration claim. Beck's refused to comply with the subpoena, arguing that the FAA required Monsanto to seek enforcement of its nonparty subpoena in "the United States district court for the district" in which the arbitration panel was sitting, the Southern District of New York. Monsanto then filed a petition to assist in the Hamilton Superior Court, pursuant to Indiana Trial Rule 28(E), to compel Beck's to comply with the subpoena. The trial court agreed with Monsanto and ordered Beck's to comply with the arbitration panel's subpoena.

On appeal, the Court held that Section 7 of the FAA is unambiguous: to enforce an arbitration panel's subpoena against a nonparty, the party seeking enforcement must file its petition "in the United States district court for the district" where the arbitration panel, or a majority of its members, is sitting. Although an arbitration panel has relatively broad power to issue a subpoena, "the authority of an arbitration panel to issue a nonparty subpoena is not equivalent to the authority to enforce that subpoena." Because Section 7 is clear, "the attempt to use an Indiana trial rule when a federal forum is unavailable frustrates Congress' intent to limit these petitions to the federal courts."

The text of the law is the beginning and the end of our analysis. While that language may in some cases, such as this one, create a "gap in enforceability," federal case law persuasively demonstrates that such "gaps" were an intentional policy choice by Congress. Monsanto may not use an Indiana trial rule to circumvent the jurisdictional and territorial limitations intended by Congress. Accordingly, the trial rule must yield to the federal statute.

**Lessons:**

1. For non-party discovery, a party arbitrating a dispute under the Federal Arbitration Act may only rely upon a subpoena issued from the district in which the arbitration is taking place.
2. A party arbitrating a dispute under the Federal Arbitration Act may not use Trial Rule 28(E) to enforce a subpoena.
3. "Be careful about what you wish for" when electing arbitration.

NOTE: Judge Baker dissented, concluding that where there is no federal court jurisdiction, as here, "it obviously makes no sense to direct the arbitrators to a federal court."

**3. T.R. 54(B)'s magic language is needed for immediate appeal of summary judgment order on less than all claims; *Forman v. Penn* – 938 N.E.2d 287 (Ind.Ct.App. 12/8/10)(Boehm)**

Forman, a teen, was staying at a friend's home for the night. The boys were playing video games when the adults retired for the night. The next morning, after the adults had left for some errands before the boys were awake, the friend called them to report that Forman could not be wakened. Ultimately, Forman was hospitalized and contends that he has permanent injuries from ingestion of methadone that had been supplied by his friend from the friend's mother's prescription.

Forman sued his friend and the adults, alleging negligent supervision and control over the methadone and negligence in caring for him after it was discovered that he could not be wakened. Western Reserve, with whom the home was insured, intervened, seeking a declaratory judgment that it had no duty to provide a defense to Forman's complaint. It moved for summary judgment and the trial court granted that motion.

On appeal, the Court *sua sponte* raised the issue of whether the trial court's ruling on Western Reserve's summary judgment motion is an appealable order. It concluded that it was not because the trial court did not include Rule 54(B)'s "magic language" that "there is no just reason for delay and upon an express direction for the entry of judgment."

We recognize that the questions of Western Reserve's obligation to provide a defense and its potential exposure to liability present issues that are at least in part distinct from the issues presented in the underlying lawsuit. In this respect the coverage dispute may be viewed as separate from Forman's claims against the defendants. ... In any event, in *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 385 (Ind. 1998), the Indiana Supreme Court established a "bright line" rule enforcing the requirement of compliance with Trial Rule 54(B) before an appeal may be taken as of right from a trial court ruling that does not dispose of all claims. The Supreme Court specifically rejected the "separate branch" doctrine developed in some cases in this Court that permitted appeals of orders disposing of portions of lawsuits deemed sufficiently independent of the remaining issues to warrant a direct appeal. *Id.* We are bound by that precedent.

The decision regarding whether the order should be immediately appealable was in the hands of the trial court. It did not decide to make the order appealable. Therefore, the appeal had to be dismissed.

As the Court pointed out, the parties were free to ask the trial court to amend its order, but litigants should be aware of this ruling before spending the time and resources on an appeal from a non-appealable order. An order is not appealable merely because it resolves a distinct portion of a case; it is appealable if the trial court provides the language necessary to make that order appealable.

**Lessons:**

1. An order granting summary judgment on a distinct branch of a case is not immediately appealable unless the trial court includes Trial Rule 54(B)'s magic language.
2. The Court of Appeals is paying attention to whether it has jurisdiction, even if those issues are not raised by either party.

Note: Former Supreme Court Justice Ted Boehm is still deciding appellate cases.

**4. Exhibits attached to a complaint should not be considered on 12(B)(6) motion; *Wise v. Hays* 2011 WL 529712 (Ind.Ct.App. 2/15/2011)(Vaidik)**

The plaintiff sued the defendants for fraud and negligence and attached numerous documents to the complaint, including an email and letters relevant to the allegations. The defendants moved to dismiss the plaintiff's claims, citing the exhibits attached to the plaintiff's complaint. After a hearing, the trial court granted the defendants' motion, also citing the exhibits attached to the complaint.

On appeal, the Court was concerned with whether the trial court's order was a decision pursuant to Rule 12(B)(6) or Rule 56 for jurisdictional purposes. It concluded that it had to treat the trial court's order as an order under Rule 56, explaining:

Wise submitted a number of exhibits with her amended complaint. In the memorandum supporting their motion to dismiss, the Hayses cited Wise's complaint as well as the attached exhibits, thus directing the trial court to matters outside the pleading. Further, it is clear from the trial court's citation to these exhibits in its dismissal order that it considered these exhibits. By considering matters outside the pleading, the trial court in effect converted the motion to dismiss into one for summary judgment and essentially ruled in favor of the Hayses on summary judgment.

**Lesson:** If a court considers exhibits attached to a complaint on a 12(b)(6) motion, it may need to convert the motion to one for summary judgment.

**5. A tort claims notice requires only a basic legal theory and the applicable facts; *Simpson v. OP Property Management, LLC* - 2010 WL 5133546 (Ind. Ct. App. 12/17/2010)(Crone)**

One morning, the plaintiff was driving toward the exit of her apartment complex. There was a steep decline near the exit, and as the plaintiff began driving downhill, she saw that there was a car turned the wrong way in her lane. The plaintiff was unable to stop and slid into the other car. Then, a school bus came over the hill and slid into her car. Two more cars came over the hill and collided with the plaintiff's vehicle.

A few months later, the plaintiff sent a notice of tort claim to the local school district. The notice described the accident and alleged that the school district had negligently hired and trained its school bus drivers. The plaintiff later filed suit, alleging that the bus driver had negligently operated the bus and that the school district was vicariously liable. The school district moved for summary judgment and the trial court granted that motion. The plaintiff appealed.

On appeal, the Court first addressed whether the plaintiff's tort claim notice was sufficient. The school district argued that the plaintiff presented a different claim in her complaint than in her tort notice. The Court disagreed.

While Simpson's notice and complaint could have been more clearly drafted, we are not persuaded that Simpson's notice was inadequate. Simpson's claim that the School District negligently hired and trained Matesick by implication indicates that she was claiming that Matesick's conduct was wrongful. We are hard pressed to see how the School District could be negligent by hiring and training a bus driver who had done nothing wrong. Simpson's complaint

clearly states a claim for the School District's vicarious liability, but also alleges that the School District is independently liable, which is easily understood as a reference to her claims in the tort notice that the School District negligently hired and trained Matesick. Simpson, however, alleged negligence, and only negligence, in both her notice and her complaint, and her various theories of liability all stemmed from the same set of facts. In light of our rule that the notice requirements are to be strictly construed against limiting the claimant's right to sue, we conclude that Simpson's notice was adequate.

The Court also held that the school district was not immune from suit, despite the fact that the accident was caused by a temporary weather condition. I.C. § 34-13-3-3(3) provides that a governmental entity or employee acting within the scope of employment is not liable if a loss results from the "temporary condition of a public thoroughfare ... that results from weather." The Court held that this "subsection applies only to a situation where the governmental entity being sued had a responsibility to maintain the roadway; whether someone had the opportunity to clear the incline where [the bus driver] lost control of the bus has no bearing on the propriety of his actions." It, therefore, held that the school district was not immune from suit.

**Lessons:**

1. A tort claims notice is sufficient if it gives a basic legal theory and the applicable facts, even if the plaintiff pursues a different version of that basic legal theory at trial.
2. A governmental entity is only immune from suit due to a temporary weather condition if that entity has some responsibility for alleviating that weather condition.

**6. A judgment has no *res judicata* effect if it is not on the merits: *TacCo Falcon Point, Inc. v. Atlantic Limited Partnership XII* - 937 N.E.2d 1212 (Ind. Ct. App. 11/22/10) (Kirsch)**

In 1999, a foreclosure action was initiated against a set of entities that were obligors on a note secured by the mortgage. Eventually, the obligors entered into a consent judgment in which the obligors agreed to be jointly and severally liable. Before the consent judgment was entered, one of the obligors, ART, discussed purchasing the loan documents from the lender. Eventually, ART designated a new company, TacCo, to purchase the consent judgment and, eventually, TacCo bought the consent judgment.

The lender notified the other obligors that the consent judgment had been assigned to TacCo and then filed a motion for entry of satisfaction of judgment. Before that motion could be heard, TacCo declared bankruptcy. While the bankruptcy was pending, TacCo filed an action in Michigan to enforce and domesticate the consent judgment. The obligors filed affirmative defenses, including a strawman defense, in the Michigan action and sought to have the bankruptcy court determine whether the judgment had been satisfied. The Michigan courts (through appeal) did not address the strawman issue, stating that Michigan did not recognize this defense. The bankruptcy court denied the obligors' motion for a preliminary injunction on the issue of whether the judgment had been satisfied.

Eventually, the case was transferred to Indiana to address the strawman defense issue. The trial court found that the judgment had been satisfied and TacCo appealed.

One of the key issues on appeal was whether either the Michigan or bankruptcy court proceedings precluded the obligors from raising the strawman defense to prove the judgment had been satisfied. The Court held that the bankruptcy court proceedings had no preclusive effect because they only addressed whether the obligors were entitled to a preliminary injunction.

[T]he determination made by the bankruptcy court was merely that, at the time of the evidentiary hearing, insufficient evidence was presented to support the grant of a preliminary injunction. This was not a full determination on the merits of the case or the strawman issue.

The court then refused to give any of the Michigan proceedings preclusive effect because the Michigan courts did not actually apply the law of the strawman defense.

At no time did the Michigan Circuit Court apply the law of the strawman defense to the facts and circumstances of the present case and make a determination that ART did or did not use TacCo as its strawman in the purchase of the Consent Judgment.

[W]e conclude that no Michigan court ever made a determination on the merits of the issue of whether the judgment had been deemed satisfied because ART had used TacCo as its strawman in the purchase of the Consent Judgment from Inland. The courts in Michigan merely found that, although the strawman defense was available in Indiana, it was not recognized in Michigan and that Michigan was not required to recognize the defense in an enforcement proceeding.

The Court then went on to review whether the record supported the trial court's conclusion that TacCo had been merely a strawman for ART and affirmed its decision.

The res judicata issues here are informative because the Court makes clear that the judgment of another court will not have preclusive effect unless that court actually applied the law to the particular legal issues that are allegedly precluded. If it did not, then the decision was not "on the merits" and has no preclusive effect on those issues.

**Lessons:**

1. A judgment has no preclusive effect if it is not on the merits.
2. A judgment is not on the merits if it does not apply the law of a particular claim or defense to the facts and circumstances of the present claim.

**7. Personal jurisdiction may be established against an out-of-state attorney who agrees to represent a plaintiff injured in an Indiana accident; *Foley v. Schwartz* – 2011 WL 288308 (Ind.Ct.App. 1/31/11)(Brown)**

Foley, a resident of Ohio, was riding on an ATV operated by Bastin on property owned by Collins in Switzerland County, Indiana. At one point while operating the ATV, Bastin came upon a hidden culvert pipe and suddenly steered the ATV in an attempt to avoid striking it, causing the ATV to tip-over, severely injuring Foley. The culvert pipe was not functional. It had been replaced and was left on the property by the Switzerland County Highway Dept. Foley hired Schwartz, an Ohio attorney, for representation in connection with the ATV accident.

About a year after the accident, Schwartz spoke with an Indiana attorney, who informed Schwartz about the Indiana Tort Claims Act. Soon thereafter, Foley terminated

Schwartz's employment as her attorney. Foley then filed a complaint against Schwartz for legal malpractice for missing the 180 day deadline for giving notice under the Tort Claims Act. Schwartz moved to dismiss the action for a lack of personal jurisdiction under Rule 12(B)(2). Over Foley's objections, the trial court granted that motion.

On appeal, the Court primarily addressed Foley's argument that Indiana had specific jurisdiction over Schwartz. It held that, for the purposes of making that determination against an attorney in the context of a legal malpractice case, the "continuous representation doctrine" should apply. In other words, the Court would look to all facts up until Foley's termination of Schwartz's representation when deciding whether those contacts provided specific jurisdiction, rather than the facts up until the Tort Claims Notice should have been filed. The Court determined that the facts described above were sufficient minimum contacts with Indiana to confer specific personal jurisdiction.

The pertinent facts include: Schwartz contacted the adjuster for Collin's insurance provider, who was officed in Indianapolis, for an explanation of the type of insurance and policy limits. He also sent letters to multiple Indiana attorneys, asking if they were interested in joining as co-counsel on Foley's behalf and proposing a fee-splitting arrangement. In addition, Schwartz contacted the Switzerland County Highway Department, the County attorney, and a contractor who may have performed work on the culvert.

The Court then turned to determining whether it is reasonable for Schwartz to be haled into an Indiana court. It concluded that it was, dismissing each of Schwartz's arguments to the contrary.

After balancing all the factors, we conclude that Schwartz has failed to persuade us that it would be unfair and unreasonable for an Indiana court to exercise jurisdiction over him. Overall, we conclude that exercising jurisdiction over Schwartz would not offend notions of fairness and reasonableness. Accordingly, the court erred when it granted Schwartz's motion to dismiss for lack of personal jurisdiction.

One of the facts relied upon by the Court in determining whether it is reasonable for Schwartz to be haled into an Indiana court was the fact that he had visited casinos in Vevay (in Switzerland County) twice a year for the last ten years.

**Lessons:**

1. When ruling on a 12(B)(2) motion in a legal malpractice action, a court must look to all of the attorney's contacts through the end of the representation when determining whether Indiana has specific personal jurisdiction over that attorney.
2. Courts will consider a broad range of facts when determining whether the exercise of specific personal jurisdiction over a defendant is reasonable—so, pursue discovery on all potential contacts, not just those related to the case.

**8. Attorney disciplined for requiring non-refundable engagement fee: *In the Matter of Heather McClure O'Farrell* – 1201 WL 7 (Ind. S. Ct. 2/1/11) (Barton)**

In this case the Indiana Supreme Court disciplined a family law attorney for having her clients pay a non-refundable engagement fee as part of the contract of employment.

This fee was "deemed earned upon commencement of Attorney's work on the case" and served as the basis for a public reprimand.

The attorney used a standardized non-refundable engagement fee provision in her family law contracts. Both of the contracts described by the Court stated that the non-refundable fee assigned to that case "shall be deemed earned upon commencement of Attorney's work on the case." The attorney argued that this fee is paid by a client to induce her firm to take a case and thus is earned on receipt. The Court held that it is improper to include this kind of a fee in most cases.

A contract provision for a nonrefundable general retainer, with or without a recitation of supporting circumstances, cannot be inserted as boilerplate language in all of a firm's fee agreements. Routine inclusion of such a provision in all fee agreements regardless of the circumstances would be misleading; and regardless of what the contract says, the basis for charging a nonrefundable general retainer in a particular case must be supported by the actual circumstances of that case.

Special circumstances that would not justify a non-refundable fee did not include "representing these clients precluded the Law Firm from representing the opposing parties and required time that the firm otherwise could have devoted to other representations," because this "would be true any time an attorney is engaged by a client." The Court noted that if an attorney is including a non-refundable fee provision as part of the representation agreement, "a lawyer would be well advised to explicitly include the basis for such non-refundability in the attorney-client agreement."

The Court noted that a flat fee agreement could be non-refundable "except for failure to perform the agreed legal services" and indicated that attorneys should advise their clients of this exception. The contracts in this case did not so advise.

However, rather than advise clients of this exception, the Law Firm's Flat Fee Contracts told clients that the fee was nonrefundable "even if the Client-Attorney relationship terminates prior to the completion of Attorneys' representation." The presence of this contract provision, even if unenforceable, could chill the right of a client to terminate Respondent's services, believing the Law Firm would be entitled to keep the entire flat fee regardless of how much or how little work was done and the client would have to pay another attorney to finish the task.

Finally, the Court offered guidance on how to avoid the problems it highlights here, while still addressing the concern that a client may demand a refund of a fee as unearned, even though the attorney has begun to open the case.

The Court is mindful of the legitimate concern of attorneys that they will go through the initial steps of opening a case and beginning work for a new client, only to have that client discharge them and demand a refund of the entire initial payment as unearned. The solution, however, is not allowing attorneys to charge flat or advance fees upfront that are wholly nonrefundable regardless of the amount of services rendered. As an alternative, a fee agreement could designate a reasonable part of the initial payment that would be deemed earned by the attorney for opening the case and beginning the representation. If a general retainer for availability is justified and additional charges for actual services are contemplated, the contract could include a statement of the amount of the general retainer and the circumstances supporting it along with a provision setting forth how the fees for actual services will be calculated and collected. Even without such contract

provisions, "[i]t is well settled that, where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented, by the client, the attorney may, as a rule, recover on a quantum meruit for the services rendered by him [or her]."

**Lessons:**

1. Non-refundable fees are always refundable for failure to perform the legal services.
2. If entering into a flat fee agreement, it is proper that a reasonable part of the initial payment be deemed earned by the attorney for opening the case and beginning the representation.

**9. The *Daubert* standard does not control the admissibility of expert opinions in state court cases; *Akey v. Parkview Hospital, Inc.* – 2011 WL 218495 (Ind.Ct.App. 1/25/2011)(Sullivan)**

This medical malpractice case arose out of an error in the administration of a thrombolytic drug to an elderly patient in the hospital, shortly after which the patient died. The defendants moved for summary judgment and argued that the opinion of the plaintiff's expert (Michael Mirro, M.D.) opinion was inadmissible. The trial court agreed that the expert's opinion was inadmissible and granted the motion for summary judgment.

On appeal, the plaintiff argued that the trial court erred in excluding his expert's opinion that the error caused the death of plaintiff's decedent. The defendants argued that the expert's opinion on causation was not based on reliable scientific principles pursuant to Rule 702(b). The Court noted the *Daubert* standards for admissibility of expert scientific opinion, but also that the Indiana Supreme Court has not mandated the application of *Daubert* and has chosen alternative approaches in the past. It applied this alternative standard to determine whether the expert's opinion should have been excluded.

Akey attached to his summary judgment filings an affidavit by Mirro, who in addition to being a board certified cardiologist, is also a clinical professor at the Indiana University School of Medicine. Mirro has conducted clinical research projects on a number of medications and participated in a published paper on the hemorrhagic complications of thrombolytic therapy. Mirro testified that he had reviewed a series of trials between 2001 and 2005 regarding the use of thrombolytic therapy in comparison with heart catheterizations that shaped his opinion on the use of thrombolytic therapy to treat elderly patients. We conclude that this evidence ... adequately describes the reasoning and methodologies upon which Mirro's scientific evidence is based. We further conclude that the evidence provides a reasonable amount of confidence that the principles upon which Mirro's opinion is based are reliable.

Although there was a scientific study contradicting the expert's opinion on causation, this went to the weight of that opinion, not its admissibility.

Reasonable expert opinions are not to be summarily excluded on grounds that the opinion has not been subjected to general acceptance by others in the field or proved by

testing and peer review. Such opinions, so long as not based wholly upon speculation and conjecture, are entitled to be given due consideration.

The Court's discussion of the admissibility of scientific expert opinion under Rule 702(b) is explicitly based on the Indiana Supreme Court's failure to expressly adopt *Daubert* in Indiana. Moreover, the manner in which it ruled on the admissibility of this expert's opinion will make it easier for parties to introduce the opinions of experts who may not pass muster under *Daubert*.

**Lessons:**

1. Indiana's courts do not mandate the *Daubert* standard when ruling on the admissibility of scientific expert opinion under Evid. R. 702(b).
2. A scientific expert's opinion will be admitted if the expert adequately describes the reasoning and methodologies upon which the scientific evidence is based and a reasonable amount of confidence can be placed on the reliability of the principles upon which the opinion is based.

**10. Policy revision may be excluded from evidence as a subsequent remedial measure under Rule 407; *State Farm Mut. Inc. Co. v. Flexdar, Inc.* – 937 N.E.2d 1203 (Ind. Ct. App. 11/22/10) (Vaidik)**

Flexdar operates a factory and, in 2003, it was discovered that the industrial solvent trichloroethylene (TCE) had leaked from the premises and contaminated subsoil and groundwater. The contamination was reported to IDEM, which informed Flexdar that it could be liable for the costs of cleanup and remediation. Flexdar notified State Auto and requested defense and indemnification pursuant to its CGL policies. Those policies contained an absolute pollution exclusion. State Auto instituted a dec action seeking a declaration that it owed no coverage to Flexdar. The trial court concluded that the policy was ambiguous and State Auto appealed.

On appeal, Flexdar argued that State Auto's 2004 endorsement form, which specifically listed TCE as a pollutant, demonstrated that its prior absolute pollution exclusion (which did not specifically identify TCE as a pollutant) was ambiguous. The Court considered whether this evidence should be excluded under Rule 407 as a subsequent remedial measure. The Court noted that this Rule is typically associated with personal injury and other negligence cases, but that it is worded broadly and has been applied in many other contexts including intentional tort and contract claims. The Court then followed the 7th Circuit's lead (in *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1045 (7th Cir. 2007)), and held that "Rule 407 may bar evidence of subsequent policy revisions offered to resolve ambiguity in an executed insurance contract."

Quoting *Pastor*, the Court explained that changing the policy language was not an admission that the previous language was ambiguous.

The subsequent version of the clause, in which State Farm made explicit that "day" means 24 hours, and which State Farm describes as a clarification, Pastor deems a confession that her interpretation of the original clause is correct. Obviously it is not a confession. And to use at a trial a revision in a contract to argue the meaning of the original version would violate Rule 407 of the Federal Rules of Evidence, the subsequent-repairs rule, by discouraging efforts to clarify contractual obligations, thus perpetuating any

confusion caused by unclarified language in the contract. ... Pastor wants to use the evidence that State Farm, to avert future liability to persons in the position of the plaintiff, changed the policy, to establish State Farm's "culpable conduct." That is one of the grounds that evidence of subsequent corrective action may not be used to establish.

This decision demonstrates the Court's willingness to apply Rule 407 broadly to contexts which only remotely touch on the opponent of that evidence's "negligence or culpable conduct." Indeed, this decision could be used to preclude any subsequent measure taken after a legal dispute arises.

**Lesson:** Evid. R. 407 precludes evidence of subsequent changes to policy language to demonstrate an ambiguity in a prior version of the policy.

**11. Fault can be apportioned to plaintiff in crashworthiness case; *Green v. Ford Motor Co.* - 2011 WL 400343 (Ind.S.Ct. 2/8/2011)(Dickson)**

The plaintiff was severely injured when his vehicle left the road, struck a guardrail, rolled down an embankment, and came to rest upside down in a ditch. He filed suit against Ford, claiming that his injuries were substantially enhanced because of the alleged defects in the vehicle's restraint system. Green moved *in limine* to exclude any evidence of his alleged contributory negligence on grounds that any conduct by him in causing the vehicle to leave the road and strike the guardrail is not relevant to whether Ford's negligent design of the restraint system caused him to suffer injuries he would not have otherwise suffered. Ford asserted that Green's product liability lawsuit was subject to Indiana's statutory comparative fault principles, which require the jury to consider the fault of Green in causing or contributing to the physical harm he suffered.

The U.S. District Court for the Southern District of Indiana (Judge McKinney) certified the following question to the Indiana Supreme Court: Whether, in a crashworthiness case alleging enhanced injuries under the Indiana Products Liability Act, the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault is a proximate cause of the harm for which damages are being sought.

The Court recognized that the "crashworthiness" doctrine made manufacturers liable "for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design."

As expressed in prior Indiana appellate decisions, claims for enhanced injuries based on alleged uncrashworthiness have been viewed as separate and distinct from the circumstances relating to the initial collision or event. The issue was the "second collision" involving a manufacturer's failure to exercise reasonable care in the design of a product to protect its users in light of the likelihood that the product could be involved in an accident. Thus, a claimant could recover only for the enhanced injuries caused by the lack of reasonable care in designing a crashworthy product. And the fact that the initial collision was not caused by the product's uncrashworthy design did not preclude such a claim for enhanced injuries.

We acknowledge the logical appeal to extend this analysis so as to view any negligence of a claimant in causing the initial collision as therefore irrelevant to determining liability for the "second collision." But two considerations lead to a contrary conclusion.

First, most of the early crashworthiness decisions arose under common law or statutory product liability law that imposed strict liability for which a plaintiff's contributory negligence was not available as a defense, making it irrelevant in those cases to consider a plaintiff's contributory negligence. Second, and more important, product liability claims in Indiana are governed by the Indiana Product Liability Act, which, since 1995, has expressly required liability to be determined in accordance with the principles of comparative fault.

We conclude that, in a crashworthiness case alleging enhanced injuries under the Indiana Product Liability Act, it is the function of the fact-finder to consider and evaluate the conduct of all relevant actors who are alleged to have caused or contributed to cause the harm for which the plaintiff seeks damages. An assertion that a plaintiff is limiting his claim to "enhanced injuries" caused by only the "second collision" does not preclude the fact-finder from considering evidence of all relevant conduct of the plaintiff reasonably alleged to have contributed to cause the injuries. From that evidence, the jury must then, following argument of counsel and proper instructions from the court, determine whether such conduct satisfies the requirement of proximate cause.

The fact-finder may allocate as comparative fault only such fault that it finds to have been a proximate cause of the claimed injuries. And if the fault of more than one actor is found to have been a proximate cause of the claimed injuries, the fact-finder, in its allocation of comparative fault, may consider the relative degree of proximate causation attributable to each of the responsible actors. Thus, while a jury in a crashworthiness case may receive evidence of the plaintiff's conduct alleged to have contributed to cause the claimed injuries, the issue of whether such conduct constitutes proximate cause of the injuries for which damages are sought is a matter for the jury to determine in its evaluation of comparative fault.

**Lessons:**

1. Crashworthiness cases focus on injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.
2. Fault can be apportioned to a plaintiff in a crashworthiness case.

**12. Video surveillance of home exterior is not invasion of privacy by intrusion;  
*Curry v. Whitaker* - 2011 WL 217932 (Ind.Ct.App. 1/25/2011)(Vaidik)**

In this case, the plaintiffs were next door neighbors of the defendants. The defendant-wife filed a police report alleging that the plaintiff-husband sent her threatening emails in her capacity as the Homeowners' Association (HOA) President and that he told people in the neighborhood that he carried a gun. The defendant-wife later filed another

police report that the plaintiff-husband was throwing cigarette butts onto the defendants' property. The defendants then installed two surveillance cameras on their home. One of the cameras was aimed at the common yard between the two homes, part of the plaintiffs' front yard, the plaintiffs' driveway, and the corner of the plaintiffs' garage.

A surveillance camera captured a person who the defendant-husband thought looked like the plaintiff-husband damaging a home security sign that was located on the defendants' property. The defendants showed the video of the incident to a police officer, who could not identify the vandal. Defendants then showed the tape to another police officer, who was an HOA board member, and said that they wanted to pursue charges against the plaintiff-husband. Probable cause for misdemeanor criminal mischief was found, and the plaintiff-husband was arrested and charged with criminal mischief. Following a bench trial, however, he was acquitted.

The plaintiffs filed a complaint against the defendants alleging three counts: (1) invasion of privacy by intrusion; (2) invasion of privacy by false light; and (3) intentional infliction of emotional distress. The defendants moved for summary judgment on those claims and the trial court granted that motion.

On appeal, the Court stated that an invasion of privacy by intrusion only happens when there is some intrusion into the plaintiff's private physical space. The defendants neither entered the plaintiffs' property nor aimed their cameras inside the plaintiffs' home; rather, they simply videotaped "outside areas that can be observed by anyone passing by or living near" the plaintiffs' house. Because the defendants did not enter the plaintiffs' physical space, there was no liability for invasion of privacy by intrusion.

The court then held that the defendants' conduct, as a matter of law, was not "so extreme in degree as to go beyond all possible bounds of decency and should be regarded as atrocious and utterly intolerable in a civilized society" and, therefore, affirmed the grant of summary judgment on the claim for intentional infliction of emotional distress.

The Court affirmed the grant of summary judgment on the plaintiffs' claim for invasion of privacy by false light as well. The tort of invasion of privacy is similar to defamation but reaches different interests. Defamation reaches injury to reputation, while privacy actions involve injuries to emotions and mental suffering. The tort of invasion of privacy by false light is described as publicity that unreasonably places the other in a false light before the public. "Publicity occurs when the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." The rule applies only when the plaintiff would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity.

The Currys do not point to anything in the designated evidence showing that either Andrew or Grace, the defendants, communicated the allegedly false statements to the public. Although there is designated evidence in the record that Grace filed two police reports and both Andrew and Grace sought the assistance of at least two police officers in order to press charges against Jeffrey, these communications cannot be construed as "communicating...to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Because the Currys have failed to establish a genuine issue of material fact on the "publicity" element of invasion of privacy by false light, the trial court properly entered summary judgment in favor of Andrew and Grace on this claim.

**Lessons:**

1. You cannot maintain a claim for invasion of privacy by intrusion if the defendant does not invade your private space.
2. A claim for invasion of privacy by false light requires a false communication to the public that would cause a reasonable person to feel seriously offended and aggrieved.

**13. Pharmacists have a duty to warn of a prescribed medication's side effects; *Kolozsvari v. Doe* – 2011 WL 461626 (Ind.Ct.App. 2/10/11)(Bailey)**

In this case, a woman was prescribed a laxative (OsmoPrep) to prepare her for a colonoscopy. She filled the prescription at her regular CVS pharmacy, which had a complete record of her prescription history. At the time, the woman was also taking an ACE inhibitor that had been associated with a risk of kidney damage when used along with the prescribed laxative. The pharmacist who filled the prescription received two separate warnings from CVS's computers while filling the two prescriptions: one alerting her to the risk of kidney damage as a result of someone Christine's age using OsmoPrep, the other alerting her to the risk of kidney damage as a result of the amount of OsmoPrep Christine had been prescribed and would use in a short period of time. The pharmacist did not convey either of these warnings to the woman.

The night before the colonoscopy, the woman took the laxative per the instructions. By the next day, the woman did not feel that the laxative had completely prepared her for the procedure. She called her doctor to notify him and determine what course of action to take. The colonoscopy was rescheduled for the following day and the woman was informed that another prescription for laxative would be called in to CVS; the woman found this surprising, as she expected to be told to just keep drinking water.

After concluding her phone call with her doctor, the woman returned to CVS to obtain her second round of the laxative. While the same pharmacist filled the prescription, a second computer-generated notification alerted her that the prescribed dose of the laxative would exceed the amount ordinarily considered safe in such a short period of time, increasing the risk to the woman of renal failure. The pharmacist again dismissed the notice and filled the prescription without notifying the woman of the warning's content. During this visit, the woman told a pharmacy technician that she had been experiencing tingling running from her fingers to her elbows, and inquired whether these sensations might be a side-effect of the laxative. The technician consulted with the pharmacist, who said that the laxative did not cause the tingling sensation.

After taking the laxative a second night, the woman woke up with her whole body "buzzing," feeling "like if you push an electric lawnmower ... and ... you let go and your hands are vibrating," and drove herself to the hospital. She was diagnosed with kidney failure due to phosphate nephropathy.

The plaintiffs sued, among others, CVS and the pharmacist, who moved for summary judgment, arguing that they had no duty as a matter of law to warn the woman of the dangers posed by the laxative or to decline to fill the prescription. The trial court granted that motion.

On appeal, the Court noted that I.C. § 25-26-13-16(a) requires that pharmacists exercise their professional judgment in the best interests of the patient's health while

engaging in the practice of pharmacy. This, combined with customers' reliance on their pharmacists, create a duty of care between the pharmacist and the customer.

While the provisions of the Indiana Code and Board of Pharmacy regulations do not give rise to a statutory duty of care, the Indiana Supreme Court has held that specific circumstances may give rise to a pharmacist's duty to warn or withhold and that the Legislature's policy concerns, as expressed in the statutes governing pharmacies and pharmacists, are central to determining when such a duty arises.

Here, Branchfield had information that gave rise to a duty to exercise professional judgment under the statute. In light of this evidence, we hold that CVS and Branchfield had a duty of care to Christine either to warn Christine of the side effects of OsmoPrep or to withhold the medication in accordance with Indiana Code section 25-26-13-16 and Pharmacy Board rule 1-33-2.

**Lesson:** Pharmacists have a duty to warn their customers of the side effects of prescribed medication.

**14. Voluntary intoxication is not a complete defense to a Dram Shop Act claim; *Gray v. D&G, Inc. d/b/a/ The Sandstone* – 938 N.E.2d 256 (Ind.Ct.App. 12/3/10)(Mathias)**

In this case the Indiana Court of Appeals was asked to decide whether a trial court properly granted summary judgment to a bar on a claim under the Dram Shop Act, I.C. § 7.1-5-10-15.5, because the plaintiff was voluntarily intoxicated. The Court reversed.

Gray spent a long day at the Sandstone bar. He ate lunch and drank alcohol throughout the day. Gray continued to consume alcohol until the bar closed at approximately 1:00 a.m. the following morning. The bartender on duty that night was Gray's girlfriend. After leaving the bar, Gray decided to drive his motorcycle. As he went through an intersection, Gray struck a curb and lost control of his motorcycle. Gray wrecked the motorcycle and was injured.

Gray sued Sandstone under the Dram Shop Act and Sandstone moved for summary judgment because Gray was voluntarily intoxicated. The trial court granted that motion, concluding that Gray's voluntary intoxication precluded any recovery. Gray appealed.

On appeal, the Court held that the statute was clear: "[A]n adult consumer who is voluntarily intoxicated may assert a claim of damages for personal injury against the provider who furnished an alcoholic beverage that contributed to the consumer's voluntary intoxication if: (1) the provider had actual knowledge that the consumer was visibly intoxicated at the time the beverage was furnished, and (2) if the consumer's intoxication was a proximate cause of the injury or damage alleged."

Since plaintiff's fault still needed to be allocated under the comparative fault act, the trial court improperly granted summary judgment to the bar.

In this opinion, the Court spoke about the trial court's public policy concerns if the law allowed people who were voluntarily intoxicated to bring claims based on their intoxication. Despite these concerns, the Court held that the statutory language was clear. This decision makes it nearly impossible for a Dram Shop Act defendant to win on summary judgment based on the voluntary intoxication of the plaintiff.

**Lesson:** Voluntary intoxication is not a complete defense to an action under the Dram Shop Act.

## **ADVOCACY TIP OF THE MONTH: Check out the Facebook pages of potential jurors.**

**From Facebook.com:** Facebook now has over 500 million active users worldwide.

### **From Reuters.com Feb. 17: Internet v. Courts: Googling for the perfect juror**

"Jurors are like icebergs -- only 10 percent of them is what you see in court," said Dallas-based jury consultant Jason Bloom. "But you go online and sometimes you can see the rest of the juror iceberg that's below the water line."

Trial consultant Jill Huntley Taylor said that during a product-liability case last year in which her client was representing the defendant, she discovered through online vetting that a juror had posted on Facebook that one of her heroes was Erin Brockovich, the crusading paralegal known for her work for plaintiffs in environmental cases.

Lawyers for food company Conagra used online jury vetting to great effect in a product-liability case last year. The plaintiff, Elaine Khoury, claimed she contracted a rare lung disease from preparing and consuming large amounts of microwave popcorn containing the chemical diacetyl, which is made by Conagra Foods Inc. After the jury was sworn in Circuit Court for Jackson County, Missouri, a ConAgra lawyer discovered that one juror's Facebook page linked to numerous websites that are highly critical of big corporations and to a petition to boycott oil giant BP.

### **From wsj.com, Feb. 22, 2011: Searching for Details Online, Lawyers Facebook the Jury**

Facebook is increasingly being used in courts to decide who is—and who isn't—suitable to serve on a jury, the latest way in which the social-networking site is altering the U.S. court system.

Prosecution and defense lawyers are scouring the site for personal details about members of the jury pool that could signal which side they might sympathize with during a trial. They consider what potential jurors watch on television, their interests and hobbies, and how religious they are.

Some appellate courts have upheld lawyers' rights to research jurors online, including one in New Jersey that ruled last year that a lower-court judge erred by prohibiting a plaintiffs' attorney from using the Internet in the courtroom. The court wrote: The fact that the plaintiffs' lawyer "had the foresight to bring his laptop computer to court and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining a 'level playing field.'"

### **From aba.journal.com, Jan. 18, 2011: Prosecutors in One Texas County Will Use Courtroom iPads to Search Potential Jurors on Facebook**

District Attorney Armando Villalobos of Cameron County, Texas, says he doesn't want defense lawyers to be ahead of prosecutors during jury selection. Toward that end, prosecutors in his county will use iPads to check out the Facebook profiles of potential jurors, the [Brownsville Herald](#) reports. "I would like my attorneys and staff to use every available tool in their arsenal," he told the newspaper.

### **From Forbes.com, Feb. 23, 2011: Make Sure Your Lawyer Knows How to Use Facebook**

If you're going to trial and your lawyer doesn't have an iPad, you may want to seek different legal counsel. That's my takeaway from recent WSJ and Reuters articles on jury selection in the social media age.

## **Accessing The Indiana Law Update Electronically**

For your convenience, a podcast of today's presentation and a PDF version of this document are available online at [www.indianalawupdate.com](http://www.indianalawupdate.com).

- PDF: Simply click on the dated item of interest, and with the proper Adobe Acrobat software installed on your computer you will be able to view, save or print.
- PODCAST: To listen to an audio recording of the February 24, 2011 Indianapolis Law Club simply click on the podcast link. Upon following the link, you will be asked if you want to save or open the file.
- To listen to the podcast, select the "open" button.
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## **IndianaLawUpdate – the Blog**

To keep up with developments in Indiana law between Law Club meetings, check out <http://www.indianalawupdate.com/>

This blog is written by Brad Catlin and Ron Waicukauski of Price Waicukauski & Riley, LLC and focuses on recent decisions of the Indiana appellate courts and the Seventh Circuit as well as statutory and rule changes. It includes the same "lessons" feature used in Ron's Law Club presentations.

The IndianaLawUpdate blog is available as an RSS newsfeed. To subscribe, go to the website at <http://www.indianalawupdate.com/>.

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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).