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**IN THE NEWS:** The Lawyer Surplus

**RECENT CASES:**

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**Advocacy Tip of the Month:** Be wary of dubious alternative grounds.

## IN THE NEWS: The Lawyer Surplus

**From: [economix.blogs.nytimes.com/2011/06/27/](http://economix.blogs.nytimes.com/2011/06/27/); by Catherine Rampell**

The job market for recent law-school graduates is tough partly because of the weak economy, but also partly because the nation's law schools are churning out many more lawyers than the economy needs even in the long run. Now a few researchers have tried to quantify exactly how big that surplus is.

The numbers were crunched by Economic Modeling Specialists Inc. and are based on the number of people who passed the bar exam in each state in 2009, versus an estimate of annual job openings for lawyers in those states. Across the country, there were twice as many people who passed the bar in 2009 (53,508) as there were openings (26,239).

In raw numbers, New York has the greatest legal surplus by far. In 2009, 9,787 people passed the bar exam in the Empire State. The analysts estimated, though, that New York would need only 2,100 new lawyers each year through 2015. That means that if New York keeps minting new lawyers apace, it will continue having an annual surplus of 7,687 lawyers.

The numbers reported for Indiana are 602 who passed the bar exam in 2009 and 339 openings, leaving an annual surplus of 263.

### **1. Attorneys fees are available in adult wrongful death cases; *McCabe v. Commissioner, IN Dept. of Ins., 2011 WL 2567541 (Ind. 6/29/11) (Dickson)***

Last year, the Indiana Court of Appeals issued a series of opinions that disagreed over whether a plaintiff could receive attorney's fees under the Adult Wrongful Death Statute ("AWDS"). On June 29, 2011, the Indiana Supreme Court resolved that dispute in a trilogy of 3-2 decisions, *McCabe v. Commissioner, Indiana Dept. of Ins.*, \_\_ N.E.2d \_\_ (Ind. 2011), *Hematology-Oncology of Indiana, P.C. v. Fruits*, \_\_ N.E.2d \_\_ (Ind. 2011), and *Indiana Patient's Compensation Fund v. Brown*, \_\_ N.E.2d \_\_ (Ind. 2011). In these cases, the Court held that attorney's fees and expenses are recoverable under the AWDS.

In so holding, the Court observed: "In statutory interpretation, paramount consideration must be given to the basic principle that two statutes that apply to the same subject matter must be construed harmoniously if possible. This rule takes precedence over other rules of statutory construction." The Court looked to statutory history and considered the general wrongful death statute ("GWDS") and the AWDS "in *pari material* and warranting harmonious interpretation, we find the phrase 'may include but not limited to' in the AWDS includes the availability of attorney fees and all other elements of damages permitted under GWDS." In light of the juxtaposition of the GWDS as Section 1 of Chapter 1 and the addition of the AWDS as Section 2, the Court believed that "if the legislature had desired the AWDS to exclude elements of damages included in the GWDS," the most likely way to have ensured that objective was by an express exclusion like the statute provided for "punitive damages" and "damages awarded for a person's grief."

The dissent (per Shepard, C.J.) argued that the Court should read the American Rule (that each party pay its own legal fees) into the statute and only determine that attorney's fees are available if the statute specifically says that they are.

**Lessons:**

1. Attorney's fees are available in adult wrongful death cases even though it is not spelled out in the statute.
2. The principle that two statutes must be construed harmoniously if possible "trumps all other rules of statutory construction."

**2. Insurance company can be estopped from denying coverage of a legal malpractice claim; *Ashby v. The Bar Plan Mut. Ins. Co.* 949 N.E.2d 307 (Ind. Ct. App. 6/21/2011) (Dickson)**

This case arose out of an attorney's decision to embark on a multi-state crime spree, rather than represent his clients. The clients filed a legal malpractice action against him and notified his carrier of the action. However, the carrier moved for summary judgment, arguing that it was not obligated to cover the claims because the lawyer failed to provide notice and assist in the investigation of the claims. The trial court granted that motion and the Court of Appeals reversed, holding that the carrier had actual notice of the claim and, therefore, couldn't deny coverage based on its lack of notice and cooperation.

The Indiana Supreme Court disagreed with the Court of Appeals' rationale.

Davidson was not obligated by any statute or rule to purchase insurance coverage to protect his clients. Nor was he compelled to obtain professional liability insurance coverage for his own protection. But he elected to purchase the Bar Plan policy to obtain coverage to protect himself in the event of any professional liability claims against him. ...

Neither Ashby nor O'Brien ever informed Davidson of any professional malpractice claim against him, and Davidson did not provide notification to Bar Plan of any such claim. Davidson purchased the policy to provide himself with protection against professional liability claims. It remained his choice as to whether to activate the available coverage protection.

Nevertheless, the Court held that the trial court erred in granting summary judgment to the carrier because there was a genuine issue regarding whether the carrier was estopped from denying coverage.

In the present case, Bar Plan sent written communications to Ashby and O'Brien implying the existence of coverage by providing conventional treatment of their claims by assigning a claim number, seeking further information from the claimants, and inviting further negotiations to work "to resolve your claim." Conspicuously absent was any caution about possible

non-coverage due to the absence of written notice from Davidson, the insured. From the designated materials, we find genuine issues of fact as to whether Ashby and O'Brien, and their counsel, were misled to believe that Bar Plan provided professional liability coverage for Davidson with respect to their claims.

The clients would have to show detrimental reliance in order to demonstrate that the carrier is estopped from denying coverage.

In order to entitle Ashby or O'Brien to summary judgment in their favor on the issue of detrimental reliance, the designated materials must establish that, if Bar Plan's initial responses had disclosed their coverage defenses, Ashby and O'Brien would have been able to locate Davidson and persuade him to provide written notification to Bar Plan within twenty days of Davidson's first learning of Ashby's and O'Brien's professional liability claims against him. But this fact is neither conclusively established nor disproved by the designated evidence. It remains an issue for resolution at trial, thus precluding summary judgment in favor of any of the parties on the issue of detrimental reliance.

The Supreme Court's main problem with the Court of Appeals' decision appears to be that the Court of Appeals did not require that the clients demonstrate that the clients detrimentally relied on the insurance carrier's actions when deciding whether there was coverage. Despite the fact that summary judgment is still reversed, this case is a win for the defense bar, as the Court of Appeals' decision made it easier for litigants to invoke insurance coverage.

**Lessons:**

1. An insurance company's duty to cover a claim is not triggered if the only notice the insurer has of the claim comes from the third parties, not the insured.
2. In order to demonstrate that an insurer is estopped from denying coverage, the person claiming estoppel must show that he detrimentally relied on the insurance company's conduct that led the person to believe that there was coverage.

**3. Neither judicial nor collateral estoppel support cross-motions for summary judgment; *Price v. Kuchaes*, 2011 WL 2237809 (Ind. Ct. App. 6/8/11) (Robb)**

Mr. and Mrs. Price were clients of Kuchaes, who brought a suit in state court on their behalf, claiming that Mrs. Price had contracted polio from a child who had recently been vaccinated. The defendant informed Kuchaes that he should really be pursuing the claim under the National Childhood Vaccine Injury Act. Kuchaes dismissed the complaint and pursued a claim under that Act.

Eventually, Kuchaes learned that Mr. Price's derivative claim was not compensable under the Vaccine Act and Kuchaes attempted to reinstate the state-court claim. The court

granted summary judgment to the defendants because the two-year statute of limitations had expired during the intervening years between the voluntary dismissal and the reinstatement of the lawsuit.

In May 2006, Mr. Price filed a legal malpractice action against Kuchaes, alleging that he suffered monetary damages as a proximate result of Kuchaes's failure to timely pursue the loss of consortium claim against the vaccine defendants. In April 2007, the Prices filed for bankruptcy, but did not include the malpractice action against Kuchaes as a potential asset. After Mr. Price and Kuchaes filed cross-motions for summary judgment, the Prices amended their bankruptcy schedules to include the malpractice action. A month later, the bankruptcy was dismissed. After this happened, the trial court held a hearing on the cross-motions for summary judgment and granted Kuchaes's fully dispositive motion.

On appeal, the Court noted that equitable judicial estoppel is designed to prevent litigants from playing "fast and loose" with the courts, so it prevents litigants from "gain[ing] an advantage by litigating on one theory and then pursue an incompatible theory in subsequent litigation." The Court held that the doctrine should not apply in these circumstances.

The bankruptcy court in its February 2009 order effectively determined that Price's nondisclosure of the malpractice action was cured by his later disclosure of it, allowing the bankruptcy to proceed with the trustee's knowledge and ownership of the claim. ... In addition, and akin to the facts in *Shewmaker*, the dismissal of Price's bankruptcy in July 2009 had the effect of returning ownership of the malpractice action from the bankruptcy estate to Price. From then onward, Price's initial nondisclosure was a moot point because there was no longer any obligation for the claim to be scheduled for the benefit of creditors. In these circumstances, we cannot perceive how allowing Price's malpractice action to continue would permit him to play fast and loose with the courts, that is, to prevail twice or otherwise gain an unfair advantage in litigating upon inconsistent theories.

Further, "judicial estoppel is an equitable doctrine." We and other courts have recognized that it is not equitable to apply the doctrine in a manner that harms creditors of the plaintiff who would ultimately benefit from the plaintiff's ability to pay them should the plaintiff recover in his or her malpractice or other injury action. .. Here by contrast, because Price's bankruptcy was dismissed, his debts have not been discharged and any recovery Price may obtain in this malpractice action could inure to the benefit of his creditors. Conversely, applying judicial estoppel against Price in this case could have negative consequences for Price's creditors by denying them an opportunity to recoup their losses should Price prevail in this action.

We also point out that Kuchaes neither alleges nor shows he relied upon or was prejudiced by Price's failure to timely disclose the malpractice action in his bankruptcy. Rather, from Kuchaes's perspective, Price's bankruptcy and

the malpractice action were wholly unrelated litigation. As we have observed, judicial estoppel "is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims." And in these circumstances, equitable estoppel is inapplicable.

Thus, the trial court erred when it granted summary judgment to Kuchaes.

The Court then turned to the question of whether the trial court erred when denying Mr. Price's motion for summary judgment. Mr. Price tried arguing that the issue of whether the vaccine defendants manufactured a defective product had been conclusively demonstrated in a Missouri case, *Strong v. Am. Cyanamid Co.*, 261 S.W.3d 493 (Mo. Ct. App. 2007). The *Strong* court affirmed a jury verdict against the same manufacturer by concluding the plaintiff presented sufficient evidence to support a finding, under Missouri law, that the polio vaccine was defective for failure to perform proper testing and such failure proximately caused the plaintiff's vaccine injury. The Court held that it could not give preclusive effect to the *Strong* case.

[T]he *Strong* court applied Missouri's products liability law, not Indiana law. The facts that Price seeks to establish through the *Strong* case involve the complex lineage of the virus strains allegedly used to produce all of the American Cyanamid polio vaccine after a certain date, inclusive of both the vaccine that injured the *Strong* plaintiff and the vaccine that injured Cathy. Price thus appears to contend that the same evidence the *Strong* court accepted as showing the virus strains were not properly tested also establishes a lack of proper testing as to the vaccine that ultimately injured Cathy. However, the form and content of Price's thirty-four-page motion shows that such a contention, if true, can be inferred only by argument and was not expressly adjudicated in *Strong*. Therefore, collateral estoppel does not apply and the trial court erred in granting Price's motion to accept *Strong* as preclusive.

Given the evidence, the Court concluded that there were genuine issues of material fact that precluded summary judgment.

**Lessons:**

1. A court should not apply principles of judicial estoppel to a plaintiff's case if the other case in which the plaintiff was a party has been dismissed.
2. You need to affirmatively demonstrate that a fact or issue was necessarily adjudicated in a prior action in order to apply the doctrine of collateral estoppel.

**4. U.S. Supreme Court limits preclusive effects of prior lawsuits; *Smith v. Bayer Corp.*, 131 S.Ct. 2368 (U.S. 6/16/11)(Kagan)**

Two different plaintiffs brought class actions in state court in West Virginia against Bayer. One was removed to federal court; the other was not because of a lack of diversity. In 2008, the federal court denied the plaintiffs' motion for class certification. Bayer then

asked that court to enjoin the state court proceeding because the claims were identical. The federal court granted that motion, its decision was affirmed on appeal and the Supreme Court granted certiorari.

The Court noted that the Anti-Injunction Act, 28 U. S. C. §2283, generally prohibits federal courts from enjoining state court proceedings. However, that Act has three exceptions, one of which allows an injunction if the state proceeding is litigating a claim or issue that previously was presented to and decided by the federal court. The Court recognized that this was merely an application of the concepts of claim and issue preclusion and therefore, the preclusion standards apply.

The question here is whether the federal court's rejection of *McCollins'* proposed class precluded a later adjudication in state court of Smith's certification motion. For the federal court's determination of the class issue to have this preclusive effect, at least two conditions must be met. First, the issue the federal court decided must be the same as the one presented in the state tribunal. And second, Smith must have been a party to the federal suit, or else must fall within one of a few discrete exceptions to the general rule against binding nonparties.

The Court held that neither of these tests was met in this case. The federal court's decision was based on the federal version of Rule 23 and federal decisions; the state court case would be decided under West Virginia's version of Rule 23 and its precedent interpreting that rule. Since those bodies of law differed (West Virginia said that federal case law was persuasive, but not controlling), the issues were not the same and, therefore, the federal decision did not preclude the state court proceeding. Preclusion was also inappropriate because the state court plaintiff was not a member of the federal class - because the federal class was never certified—and therefore the state court plaintiff was not the same party as the party in the federal case.

**Lessons:**

1. Issue and claim preclusion apply only when the same issue has been litigated against the same party.
2. Procedural issues are not the same if there are differences between the applicable sets of procedural law.
3. An absent member of a class that isn't certified is not a party to the class litigation and not subject to claim preclusion.

**5. Court can award attorney's fees if some, but not all, claims are frivolous; *Fox v. Vice*, 131 S.Ct. 2205 (U.S. 6/6/11) (Kagan)**

This case arose from the election for chief of police in a Louisiana town. The plaintiff and defendant were the candidates for election. The plaintiff argued that the defendant, the incumbent, used an assortment of dirty tricks to try to force the plaintiff out of the race. Nevertheless, the plaintiff won the race.

After winning the race, the plaintiff filed an action against the defendant, asserting both state-law claims and § 1983 claims. After discovery, the defendant moved for summary judgment on the § 1983 claims and the plaintiff conceded that they were not valid. The plaintiff's state law claims remained valid and were remanded to state court.

The defendant asked for an award of attorney's fees under § 1988, arguing that the plaintiff's federal claims were "baseless and without merit." The district court granted that motion and refused to segregate the fees incurred in defense of the federal claims from those incurred in defense of the state-law claims. The Court of Appeals affirmed.

On transfer, the Court noted that a plaintiff could recover attorney's fees under § 1988, even if the plaintiff is not victorious on every claim. The Court held that defendants should be entitled to the same, even if not all the plaintiff's claims were frivolous. "[T]he presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed."

The Court then described how a court should allocate fees in a lawsuit involving a mix of frivolous and non-frivolous claims. It adopted a "but for" test.

Section 1988 allows a defendant to recover reasonable attorney's fees incurred because of, but only because of, a frivolous claim. Or what is the same thing stated as a but-for test: Section 1988 permits the defendant to receive only the portion of his fees that he would not have paid but for the frivolous claim. ... So if a frivolous claim occasioned the attorney's fees at issue, a court may decide that the defendant should not have to pay them. But if the defendant would have incurred those fees anyway, to defend against non-frivolous claims, then a court has no basis for transferring the expense to the plaintiff.

In this case, the district court "failed to take proper account of this overlap between the frivolous and non-frivolous claims," so the Court remanded the case for a calculation of the fees the defendant "expended solely because of the frivolous allegations."

The Court's decision in this case is limited solely to fee shifting in the context of a § 1983 claim. However, its rationale could apply in any case involving frivolous claims. This should give all lawyers an incentive to closely track the time spent on particular claims when there is a reasonable possibility of fee shifting. Remember that the proponent of the fee-shifting must meet the "but for" test in order to be entitled to any fees.

**Lessons:**

1. A plaintiff who brings a frivolous claim under § 1983 is liable for the fees incurred by defendant as a result of the frivolous claim, even if the plaintiff's remaining claims are not frivolous.

2. Be judicious in deciding what claims to assert, recognizing that your strong claims may not save you from having to pay attorney's fees for the defense of frivolous claims.
3. When defending cases with frivolous claims, closely track the time spent on the frivolous claims in order to meet the burden of satisfying the "but for" test.

**6. Default judgment vacated so defendants have "one full opportunity" to litigate personal jurisdiction; *Philos Technologies, Inc. v. Philos & D, Inc.* , 2011 WL 2341025 (7<sup>th</sup> Cir. 6/15/11) (Hamilton)**

The plaintiff sued multiple defendants (a corporation and two individuals) in federal court based on diversity of citizenship. The defendants were successfully served, but never formally appeared in the case. Rather, the two individuals sent an informal *pro se* letter to the district court in which they said that they had no involvement with the plaintiff and asked that the case be dismissed. The defendants took no other action.

Eventually, the plaintiff moved for default judgment, which was granted. The district court then had a hearing on damages and entered a final judgment for the plaintiff.

Nearly a year after the district court entered final judgment, counsel for the defendants appeared and filed a motion to vacate the default judgment under Rule 60(b)(4). The district court denied the defendants' motion without addressing its merits and they appealed.

On appeal, the Court confirmed that it would use an abuse of discretion standard of review in this situation, but that the denial of a Rule 60(b)(4) motion when the district court lacks jurisdiction is *per se* unreasonable.

A court has no discretion to deny a Rule 60(b)(4) motion to vacate a judgment entered against a defendant over whom the court lacks personal jurisdiction, regardless of the specific reason such jurisdiction is lacking.

The Court then turned to the merits of the appeal. It described how a defendant could assert a lack of personal jurisdiction in either the original case or in a collateral attack on a default judgment - and the costs and benefits of each of these choices. Thus, the fact that almost a year passed between entry of the judgment and the Rule 60(b)(4) motion was irrelevant; the true question was whether the defendants had previously appeared in the action, which would have required them to challenge personal jurisdiction at that time.

The Court concluded that the individual defendants' letter did not constitute an appearance. While it did request that the district court dismiss the case, the Court read it generously in favor of the *pro se* litigants.

Although the individual defendants did request the dismissal of the action in their letter, and although "a motion to dismiss is normally considered to constitute an appearance," a more sound reading of the defendants' letter

counsels against construing their letter as such a motion. Such a "motion," after all, would have been denied as plainly deficient on its face. The letter was nothing more than an informal but respectful attempt to explain why Jae-Hee Park and Don-Hee Park would not appear in any judicial proceedings conducted in Illinois. Nothing about that letter indicated the defendants' intent to defend the suit against them or any intent to submit to the district court's jurisdiction.

Therefore, the Court held that the district court erred by denying the defendants' motion without addressing the merits.

**Lessons:**

1. Personal jurisdiction can either be challenged directly or collaterally.
2. There is no time limit on bringing a challenge to a judgment based on personal jurisdiction.
3. The Seventh Circuit will liberally allow defendants one full opportunity to litigate their personal jurisdiction arguments.

**7. Voluntary dismissal as settlement strategy not saved by journey's account statute; *Blinn v. The Law Firm of Johnson, Beaman, Bratch, Beal and White, LLP*, 948 N.E.2d 814 (Ind. Ct. App. 4/29/11) (Barnes)**

Blinn sued an attorney and his law firm for legal malpractice. The attorney and firm were represented by different counsel, but both were insured by the same "wasting" malpractice insurance policy, whereby the proceeds of the policy dwindled as the cost of defending the action increased. Blinn was told that the attorney would agree to a policy-limits settlement, but that the firm would not. Therefore, Blinn's counsel proposed that he dismiss the firm without prejudice, with a conversion of the dismissal to one with prejudice if the settlement was obtained. A stipulation of dismissal was then filed (after the statute of limitations had run).

Settlement negotiations were unsuccessful, so Blinn filed a motion to reinstate the firm as a defendant. The firm opposed that motion and the trial court denied the motion. Blinn then filed a new complaint against the law firm, arguing that the Journey's Account Statute allowed him to do so. The firm moved to dismiss the case and the trial court dismissed that case. Blinn appealed.

Blinn continued to argue that the Journey's Account Statute preserved his claim on appeal. However, the Court did not agree. It specifically noted that Blinn failed to elicit an explicit promise from the firm not to contest reinstatement if settlement negotiations with Beal failed. The firm's failure to tell Blinn that it would raise a statute of limitations defense if he followed his proposed course of action did not change this outcome because the firm owed Blinn no duty to consider whether Blinn would be able to re-file his complaint if mediation was unsuccessful.

Here, Blinn unilaterally sought the voluntary dismissal of the Firm for his own benefit as part of his settlement strategy — to have the Firm removed from the litigation when it was an obstacle to settlement negotiations with Beal and to have the Firm reinstated as a defendant if those settlement negotiations were unsuccessful. That this strategy failed does not warrant an exception to the rule that a voluntarily dismissal precludes the application of the Journey's Account Statute. The trial court properly dismissed Blinn's complaint because it was time-barred and was not saved by the Journey's Account Statute.

Blinn's strategy in this case was not ill-advised, it was merely poorly executed. Counsel who wishes to employ the same type of strategy in a future case should get an express agreement from the defendant who will be dismissed without prejudice that they will not contest reinstatement should settlement (or whatever condition) not occur. This express agreement will offer greater protection than the Journey's Account Statute.

**Lessons:**

1. Do not expect to reinstate a defendant who has been dismissed without prejudice after the statute of limitations has run if you do not have an explicit agreement to do so upon the occurrence of certain conditions.
2. The Court of Appeals will narrowly construe the Journey's Account Statute.

**8. When is it too late to make a fee application?; *R.L. Turner Corp. v. Town of Brownsburg*, 924 N.E.2d 372 (Ind. Ct. App. 5/6/11)(Crone)**

This lawsuit arose out of a dispute regarding a building project that R. L. Turner had contracted to perform for the Brownsburg Municipal Building Corporation. Eventually, R.L. Turner sued the town of Brownsburg for tortious interference with a business relationship. However, R.L. Turner did not send a tort claims notice before filing suit. Brownsburg moved to dismiss and that motion was granted. The trial court's order did not specifically mention attorney's fees. 59 days later, Brownsburg filed a fee petition and the trial court granted that request.

On appeal, the Court held that the fact that the order did not specifically mention attorney's fees was immaterial; Brownsburg had asked for fees in its motion, the order assessed costs against R.L. Turner, and attorney's fees are costs. The Court then turned to the issue of whether the fee petition was filed too late.

While our case law allows for post-judgment requests and awards of attorney's fees to prevailing parties in frivolous litigation, no Indiana case has purported to limit the trial court's authority to consider the attorney's fee issue following the entry of final judgment. Moreover, neither Indiana Code Section 34-52-1-1(b) nor 34-13-2-21 [sic] prescribes a timetable within which the trial court may exercise its authority to award attorney's fees to the prevailing party. ... Accordingly, we offer prospective guidance to practitioners and to trial judges as to when, following the entry of final

judgment, a trial court may consider and rule upon the prevailing party's petition for an award of attorney's fees.

Looking to the Appellate Rules governing the award of fees in appeals, the Court held "that sixty days is a reasonable amount of time within which to permit a prevailing party to file a motion to recover attorney's fees following the entry of final judgment at the trial court level."

**Lessons:**

1. Attorney's fees are costs, not damages.
2. You must file your petition for attorney's fees within sixty days after the trial court enters final judgment.

**9. 7<sup>th</sup> Circuit on subject matter jurisdiction; *Adkins v. VIM Recycling, Inc.*, 2011 SL 1642860 (7<sup>th</sup> Cir. 5/3/11)(Hamilton)**

This case arose out of a series of environmental suits. IDEM found that VIM was violating environmental regulations and filed two suits against VIM. Some private citizens filed their own suit against VIM, making claims under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* Under § 6972(b)(1)(B) of RCRA, a private citizen cannot bring a suit "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order."

According to the Court, both "[t]he parties and the district court treated the statutory bar issue as a question of subject matter jurisdiction." But this was incorrect. The Court said that the RCRA prohibition on bringing a citizen suit was a "claims processing rule" that did not affect the court's adjudicatory authority. The court explained:

In a series of recent cases under many different federal statutes, the Supreme Court has repeatedly reminded the lower courts of the narrow scope of truly jurisdictional rules and the broader category of ordinary "claims processing rules." "Jurisdiction" means nothing more and nothing less than "a court's adjudicatory authority."

The distinction is vital. Treating a rule as jurisdictional "alters the normal operation of our adversarial system" in which courts address the claims and arguments. If a rule is genuinely jurisdictional, a federal court has an obligation to raise and decide the issue itself even if the parties do not. A jurisdictional question may be raised at any time, including for the first time on appeal, causing unfairness to the parties and wasting the efforts spent on the litigation to that point. Congress can specify that a particular claims-processing rule is jurisdictional, but it is clear that the Supreme Court is not expanding the category of jurisdictional rules without explicit indications from Congress that it intended such drastic results.

Subject matter jurisdiction is usually thought of in binary terms. It either exists or it does not.

Ultimately, the Court reversed the district court's dismissal of the claim.

**Lessons:**

1. A court only lacks subject matter jurisdiction over a claim if it does not have adjudicatory authority over that claim.
2. Rules governing subject matter jurisdiction are distinct from claims processing rules.
3. Courts are generally hesitant to say that a rule addresses subject matter jurisdiction if they do not have to do so.

**10. Partial judgment awarding damages is appealable as a matter of right; *Coleman v. Coleman*, 949 N.E.2d 860 (Ind. Ct. App. 5/31/11) (Barnes)**

A family dispute over ownership of a piece of property spilled into court when one family member sued other family members under a variety of legal theories. The matter proceeded to a jury trial, which awarded the plaintiff damages. However, the claim for ejectment and quiet title was not submitted to the jury and no judgment on those claims was entered into the record. The defendants appealed.

On appeal, the Court appears to have *sua sponte* raised the issue of whether it had subject matter jurisdiction over the appeal. In particular, the Court was concerned with the fact that the trial court has not entered a final order or certified its partial judgment as final under Trial Rule 54(B). In *National Gen. Ins. Co. v. Riddell*, 705 N.E.2d 465, 465 n.1 (Ind. Ct. App. 1998), the Court indicated that a partial judgment awarding damages was not an interlocutory order appealable as of right. However, the Court noted that this was merely dicta and expressed disagreement with that conclusion.

It is unclear why the financial and legal consequences of a partial judgment awarding damages would be any less than an interlocutory order for the payment of money. Thus, notwithstanding the footnote in *Riddell*, we conclude that the Colemans are entitled to appeal the interlocutory partial judgment against them as of right.

Attorneys should take the Court's decision to heart, so that they do not accidentally blow the date for filing a notice of appeal because they understood that they needed to wait for a final judgment in order to appeal from a partial judgment awarding damages.

**Lesson:** A partial judgment awarding damages is an immediately appealable order.

**11. Important medical malpractice opinion on experts and the review panel; *K.D. v. Chambers*, 2011 WL 2713526 (Ind. Ct. App. 7/13/11) (Robb)**

In this case, a mother took her 2-year old child to Riley Children's Hospital after he bumped his head. The nurse administered an intravenous dose of Benadryl to the child, but gave the child a dose of 125 milligrams, rather than the medically indicated dose of 12.5 milligrams. The child started shaking as if in a seizure and has continued to suffer from tremors since that incident.

The plaintiffs filed a proposed complaint with the IDOI, which asserted that the nurse breached the standard of care. Plaintiffs' submission to the Review Panel argued that the nurse's conduct was deficient in two ways: (1) by failing to give the proper dosage of Benadryl as it was ordered, and (2) by failing to question or ensure whether the dosage of Benadryl that she gave was an appropriate dosage for a child who weighed 15 kg. The Review Panel found that the nurse failed to meet the standard of care, that this caused the child temporary harm, but had no long-term effects. The plaintiffs then filed their complaint in court.

Prior to a jury trial, the defendants moved to exclude the testimony of one of the plaintiffs' experts, a toxicologist who would testify on causation. Plaintiffs then filed a proposed issue instruction that outlined three claims of breaches of the standard of care: 1) that K.D. was given ten times more than the recommended dose of Benadryl; 2) that the rate at which the Benadryl was pushed was a deviation in the standard of care; and 3) that the giving of additional central nervous system depressants in the face of specific order to the contrary was a deviation in the standard of care. The defendants moved *in limine* to exclude all references to the latter two claimed breaches of the standard of care, arguing these breaches had not been presented to the Review Panel and were not properly before the trial court. The trial court granted both of the defendants' motions. The case was certified for an interlocutory appeal.

On appeal, the Court found that the trial court erred when it excluded the testimony of the toxicologist. While the Court noted that medical malpractice cases typically require the testimony of a physician, "the reasoning for such statements is that physicians are uniquely qualified to diagnose and treat disease." In this case, the toxicologist was not offering testimony that related to diagnosing or treating a disease; his testimony related to the toxic effects of the overdose and whether these include the child's tremor. The toxicologist could offer this testimony, so the Court remanded "with instructions to hold an Evidence Rule 702 hearing at which Plaintiffs may present further evidence of McCoy's qualifications and the scientific basis of his proposed testimony."

The Court then addressed the question of whether a plaintiff can prove breaches of the standard of care at trial that were not presented to the Review Panel. The plaintiffs relied on the Indiana Supreme Court's decision in *Miller v. Mem'l Hosp. of South Bend, Inc.*, 679 N.E.2d 1329, 1332 (Ind. 1997), which had held "that the plaintiffs' action is [not] restricted by the substance of the submissions presented to the medical review panel." However, the Court distinguished that case and held that a plaintiff cannot present a breach of a standard of care in an action, which had not been submitted to the Medical Review Panel.

As the above statutory provisions show, the question of whether defendants breached the standard of care must be presented to the medical review panel and answered based on the evidence submitted to it. It logically follows that a malpractice plaintiff cannot present one breach of the standard of care to the panel and, after receiving an opinion, proceed to trial and raise claims of additional, separate breaches of the standard of care that were not presented to the panel and addressed in its opinion.

Both of the Court's holdings will change the way that medical malpractice cases are tried in Indiana. First, the Court's holding that a non-medical expert could offer causation testimony in a medical malpractice case broadens the scope of the types of experts that parties will be able to bring to bear in medical malpractice cases. Moreover, it more broadly demonstrates the principle that attorneys should be careful to find an appropriate expert for the facts that need to be proven and careful to limit an expert's testimony to areas within that person's expertise.

The full effect of the Court's second holding will likely be felt outside of the courtroom, rather than in it. If plaintiffs are required to submit all possible breaches of any standard of care to the Review Panel in order to preserve them for court, then plaintiffs' lawyers may wish to retain an expert earlier in the process of taking a case than they may otherwise have done - even if the conduct in question is egregious, as it apparently was in this case. It will also be interesting to see whether the Court's holding in this case will be reciprocal, i.e., whether defendants will be prevented from raising arguments regarding the lack of a breach of the standard of care that they did not make during the Review Panel process.

**Lessons:**

1. Only physicians may testify to matters involving the diagnosis and treatment of disease.
2. Medical expertise is not necessarily required for an expert to opine on causation in a medical malpractice case, as long as those causation opinions do not involve the diagnosis or treatment of disease.
3. A plaintiff cannot present a breach of a standard of care in a medical malpractice action if that same breach was not submitted to the Medical Review Panel.

**12. If a person is engaged in ordinary behavior in a sport, then he is not liable for injuries caused by that behavior; *Pfenning v. Lineman*, (Ind. Ct. App. 5/18/11) (Dickson)**

The plaintiff, a 16-year old girl, was attending a golf event. While driving a golf cart on a cart path, she was struck in the mouth by a golf ball and injured. She filed an action against her grandfather (who brought her to the event), the golfer who hit the ball that struck her, the bar that promoted the event, and the operator of the golf course. Each of the defendants moved for summary judgment, the trial court granted those motions, and the Court of Appeals affirmed.

On transfer, the Indiana Supreme Court first addressed the liability of the golfer. The Court recognized that it had not previously addressed the issue of duty and sports injuries and surveyed the decisions of both the Indiana Court of Appeals and other jurisdictions on the topic. The Court found that many of these decisions could not apply to Indiana because of the Comparative Fault Act.

In resolving the issue for Indiana, a foremost consideration must be the Indiana General Assembly's enactment of a comparative fault system and its explicit direction that "fault" includes assumption of risk and incurred risk. These concepts focus on a plaintiff's venturousness and require a subjective determination. As noted above, decisions of this Court have established that such considerations of a plaintiff's incurred risk, even if evaluated by an objective standard, cannot be used to support a finding of no duty in a negligence action. In contrast, the sports injury decisions of the Court of Appeals have employed consideration of the "inherent risks" of a sport to justify development of a no-duty rule. We view the evaluation of such inherent risks to be tantamount to an objective consideration of the risk of harm that a plaintiff undertakes and thus unsatisfactory because it violates the Comparative Fault Act and the precedent of this Court.

Because of this, the Court refused to conclude that the golfer owed no duty to the plaintiff. Instead, the Court focused on the question of whether the golfer breached that duty.

Breach of duty usually involves an evaluation of reasonableness and thus is usually a question to be determined by the finder of fact in negligence cases. But in cases involving sports injuries, and in such cases only, we conclude that a limited new rule should apply acknowledging that reasonableness may be found by the court as a matter of law. As noted above, the sports participant engages in physical activity that is often inexact and imprecise and done in close proximity to others, thus creating an enhanced possibility of injury to others. The general nature of the conduct reasonable and appropriate for a participant in a particular sporting activity is usually commonly understood and subject to ascertainment as a matter of law.

We hold that, in negligence claims against a participant in a sports activity, if the conduct of such participant is within the range of ordinary behavior of participants in the sport, the conduct is reasonable as a matter of law and does not constitute a breach of duty.

The only exception the Court recognized to this rule is if the sports participant acted intentionally or recklessly.

The Court did not extend this rationale to protect the owner of the golf course. Instead, it addressed the issue as a matter of premises liability law. It found the plaintiff was an invitee and that "the risk of a person on a golf course being struck by a golf ball does

not qualify as ‘the unreasonable risk of harm’” required for liability of a possessor of land to an invitee.

The Court's rejection of the defendants' "no duty" argument exposed the sponsor of the event to liability because the Court concluded that there was a genuine issue of fact regarding the existence of a duty by the sponsor. Likewise, summary judgment should not have been granted to the plaintiff's grandfather, who brought her to the event.

**Lessons:**

1. A court cannot premise the lack of a duty on the concepts of inherent risk or assumption of the risk.
2. In cases involving sports injuries, the reasonableness of the conduct of a participant in a sports activity may be found by the court as a matter of law.
3. In negligence claims against a participant in a sports activity, if the conduct of such participant is within the range of ordinary behavior of participants in the sport, the conduct is reasonable as a matter of law and does not constitute a breach of duty, unless the sports participant acts recklessly or intentionally causes an injury.

**13. No right to reasonably resist unlawful entry by police officers into your home; *Barnes v. State*, 946 N.E.2d 572 (Ind. S. Ct. 5/12/11)(David)**

In the midst of a marital conflict, the wife called 911 and reported her husband was throwing things but had not struck her. The 911 dispatch went out as a "domestic violence in progress." Police arrived on the scene and observed that the husband was agitated and yelling. However, no one invited the officers into the couple's apartment. An officer attempted to enter the apartment, and the husband shoved him against the wall. A struggle ensued, the husband was tasered, arrested, and charged with battery on a police officer, resisting law enforcement, and other charges.

At trial, the husband asked for an instruction on the right of a citizen to reasonably resist unlawful entry into the citizen's home. The trial court refused to give the instruction and the husband was convicted. The Court of Appeals found that the trial court's refusal to give the instruction was error.

On transfer, the Indiana Supreme Court held that there is no right to resist a police officer's unlawful entry into your home. While recognizing that there was an English common-law right to resist, that right existed no longer.

We believe, however, that a right to resist an unlawful police entry into a home is against public policy and is incompatible with modern Fourth Amendment jurisprudence. Nowadays, an aggrieved arrestee has means unavailable at common law for redress against unlawful police action. We also find that allowing resistance unnecessarily escalates the level of violence and therefore the risk of injuries to all parties involved without preventing the arrest — as evident by the facts of this instant case. Further, we note that

a warrant is not necessary for every entry into a home. For example, officers may enter the home if they are in "hot pursuit" of the arrestee or if exigent circumstances justified the entry. Even with a warrant, officers may have acted in good faith in entering a home, only to find later that their entry was in error. In these situations, we find it unwise to allow a homeowner to adjudge the legality of police conduct in the heat of the moment.

**Lesson:** Indiana does not recognize the right to reasonably resist an unlawful police entry into a home.

**Note:** Advance Indiana Blog, May 20, 2011: "In the wake of unprecedented nationwide criticism of the decision," Attorney General Greg Zoeller says he will support the defendant's counsel's petition for a rehearing in the case that would "allow for a more narrow ruling that would continue to recognize the individual's right of reasonable resistance to unlawful entry."

**14. Equal Protection Clause does not require equal treatment of installment and lump sum payers of Barrett Law assessments; *City of Indianapolis v. Armour*, 946 N.E.2d 553 (Ind. 5/10/11)(Sullivan)**

In 2004, Indianapolis levied a Barrett Law assessment of \$9,278 against certain properties to fund a sanitary sewer project in an Indianapolis subdivision. Property owners were given the option to pay the assessment up front in its entirety or in monthly installments over a 10-, 20-, or 30-year period. In 2005, Indianapolis adopted a new method to fund sanitary sewer projects and forgave the outstanding assessment balances amounting to 90% or more for all those who elected to pay in installments. However, Indianapolis did not forgive any of the assessments or refund any money to the homeowners who had paid their assessment in full in 2004.

The plaintiffs brought an action seeking a refund, claiming that this disparate treatment violated their federal constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. The trial court granted the plaintiffs' motion for summary judgment and the Court of Appeals affirmed. The Indiana Supreme Court then granted transfer.

In a 3-2 decision, the Court held that the City's disparate treatment satisfied the rational basis standard under the Equal Protection Clause, explaining:

[I]t was reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans. To be sure, there might be some property owners who could have paid up front but elected to pay in installments, despite being required to pay more because of interest. And it is possible that there are some who paid up front that are currently experiencing financial hardship. But, ..., it does not matter under rational basis review what the actual facts would show, as determined in court, so long as the issue was at

least debatable when the governmental decision maker acted.

Furthermore, the decision not to issue refunds to those who had already paid implicates another legitimate interest – preservation of limited resources. The City clearly has a legitimate interest in not emptying its coffers to provide refunds to those who had already paid their assessments. The funds from the particular assessments at issue here were used to fund the Brisbane/Manning Project and had already been spent in constructing those sewers. The plaintiffs each paid for a sewer and received a sewer, along with all the attendant public health benefits associated with sanitary sewers. This was not a case in which the plaintiffs were assessed for a local benefit and did not receive that local benefit. It is true that those whose assessments were discharged also received a sewer and did so at a lower price. But the Equal Protection Clause does not require substantive equality among taxpayers if there is a rational basis for differing treatment, and the Court of Appeals erred in concluding otherwise.

The City's decision to forgive outstanding assessments was rationally related to its legitimate interests in reducing its administrative costs, providing relief for property owners experiencing financial hardship, establishing a clear transition from Barrett Law to STEP, and preserving its limited resources.

**Lessons:**

1. The Indiana Supreme Court's notion of "rational basis" is extraordinarily broad, extending beyond what other state courts have held in similar cases and the U.S. District Court (per Judge Lawrence) has held with respect to the same facts.
2. If the government can treat similar people differently simply because doing so will save the government money, then there are few true limits when the rational basis standard is applied.

**Note:** The *Armour* plaintiffs will be petitioning for certiorari.

**15. Should ambiguities in an insurance contract for a large corporation be construed against the insurer?; *Wellpoint, Inc. v. Natl. Union Fire Ins. Co.*, 2011 WL 2893095 (Ind. Ct. App. 7/20/11) (Vaidik)**

In 1999, a class-action lawsuit was filed against Anthem in Connecticut, claiming that Anthem's subsidiary failed to timely and adequately reimburse for medical services. In 2000, Anthem entered into a claims-made insurance policy with Twin City Fire Insurance Company. Beginning in 2001, Anthem became subject to a series of over ten additional state and federal lawsuits alleging improper denial of reimbursement. Anthem sought coverage for these lawsuits from Twin City, which denied coverage because the post-2000 lawsuits related back to the 1999 lawsuit. Twin City moved for summary judgment and the trial court granted that motion.

On appeal, Twin City argued that two different policy provisions demonstrated that

there was no coverage. The first was a limitation of liability, which the Court held was prospective, rather than retrospective. Therefore, Twin City could not deny a claim during the policy period simply because a similar claim was made prior to the policy period. The second provision that Twin City relied upon to deny coverage was a claim reporting requirement, which the Court again held that this provision was prospective, rather than retrospective. The Court noted that the parties could have drafted the contract to have a retrospective, exclusionary effect, but chose not to do so.

In this case, the Court did not specifically state that it was construing any ambiguity in the insurance policy against the insurer, but it appears to have imported that concept when it stressed that exceptions, limitations, and exclusions to coverage must be plainly expressed.

**Lesson:** In insurance policies between large corporations and their insurers, exceptions, limitations, and exclusions to coverage must be plainly expressed to be effective.

**TIP OF THE MONTH: Be wary of dubious alternative grounds.**

Excerpted from *Inside Looking Out: What Two Years As a Litigator-Turned-Law-Clerk Taught Me* by Edward A. Marshall, Esq., *The Bench*, March/April 2009

The single most important lesson I learned as a law clerk is that you should never lose your credibility before the Court. Credibility is bigger than any one argument or, indeed, even one case. As a clerk, I was amazed at how many facets of prevailing practice unwittingly cleave away at counsel's credibility.

First, euphemism and hyperbole, whether in the statement of facts or description of legal principles, frequently undercut credibility within the first minutes of an oral argument or the first paragraph in a brief. "When you overstate, the reader will be instantly on guard, and everything that has preceded your overstatement as well as everything that follows it will be suspect in his mind, because he has lost confidence in your judgment or your poise." Strunk & White, *The Elements of Style* 72-73 (4<sup>th</sup> Ed. 2000).

Second, credibility requires that even a zealous advocate accept those aspects of his case that are beyond his ability to change. Every case has certain weaknesses. It is far better to appreciate such weaknesses from the outset than to waste energy and credibility before the Court denying what is obvious.

Finally, be wary of dubious alternative grounds for a position. The mediocre, "even assuming" argument (the specious position with little genuine chance of success) carves multiple fissures into an advocate's credibility. Asserting an untenable position leaves the Court to assume that either (i) you perceive it to be imperceptive, or (ii) you fail to appreciate the logical flaw in your approach. Neither impression will endear counsel to the Court.

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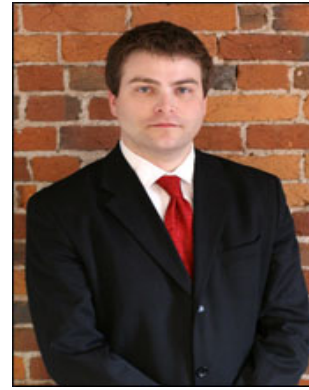
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