By Jon Laramore and D. Lucetta Pope

RECENT DECISIONS 9/08

Appellate civil case law update

In September, the Indiana Supreme Court issued an opinion in one civil matter, summarized below. The Supreme Court also granted transfer in five civil matters, also summarized. The Indiana Court of Appeals issued a total of 24 published opinions in civil matters and 34 unpublished civil opinions. Some of the Court of Appeals published opinions in civil matters are summarized below. Full text of all Indiana appellate court decisions rendered during September, including those issued not-for-publication, are available via Casemaker at *www.inbar.org* on the Indiana Courts Web site, *www.in.gov/judiciary/opinions.*

Supreme Court

Municipality's right to transfer delinquent sewer account balance from tenant to property owner

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A unanimous Indiana Supreme Court affirmed the City of Jeffersonville's right to transfer the unpaid balance on a tenant's sewer services account to the property owner without notice, finding the owner "ultimately responsible for payment of sewer fees" in *Pinnacle Properties Development Group, LLC v. City of Jeffersonville, Ind.*, 893 N.E.2d 726 (Sept. 17) (Boehm, J.).

Property owner Pinnacle Properties Development Group, LLC, brought an action for declaratory relief on the theory that neither the Indiana Code nor any city ordinance – including the ordinance allowing tenant billing – authorized Jeffersonville to transfer to Pinnacle the delinquent sewer account balances of its tenants 60 days after they received the final bill. The Court acknowledged the lack of any specific legislative authority for the transfers. Justice Boehm noted, however, that Indiana Code chapter 36-9-23: 1) authorizes municipalities to operate sewage works; 2) makes sewer fees "payable by the owner" of the property; and 3) allows the municipality to recover outstanding fees by applying the deposit, bringing a civil action or filing a lien against the property. Jeffersonville's authority to bill Pinnacle, according to the Court, thus derives from Pinnacle's ultimate responsibility for payment of sewer fees.

The Court also rejected Pinnacle's reliance on a statutory provision barring utilities from attaching liens to nonowner-occupied property without notifying the owner within a certain period after fees become 60 days overdue. Finding that the provision related solely to the enforcement mechanism for creating liens, the Court concluded it did not limit a municipality's authority to bill a property owner for sewer services. Nor did a provision requiring sewer utilities to forward the user's final bill to a new residence within the municipality change the analysis. Justice Boehm observed that the Court of Appeals had declined to interpret this provision to require transfer of account balances in *Williams v. City of Indianapolis Dep't of Pub. Works*, 558 N.E.2d 884, 888 n.6 (Ind. Ct. App. 1990), and that the legislature had not amended it in response. Pinnacle's reliance on the ordinance itself proved equally futile. The ordinance did not, in the Court's view, shift the responsibility for sewer service from owner to tenant. Rather, it provided that "such billing shall in no way relieve the owner from the liability in the event payment is not made as herein required."

Concluding its *de novo* review, the Court observed that the legislature may yet restrict the transfer of delinquent fees, but has not done so in the general statute authorizing municipalities like Jeffersonville to provide sewer services to residents. It affirmed the judgment of the trial court.

Court of Appeals

No requirement to itemize settlement proceeds under wrongful death statute

Indiana's wrongful death statute does not require parties to itemize a wrongful death settlement so that reasonable *unapportioned* funeral and burial expenses should be reimbursed from settlement proceeds to a deceased's estate. *In re Estate of Inlow*, 893 N.E.2d 734 (Sept. 18) (Vaidik, J.).

After the widow of attorney Lawrence Inlow sought and received reimbursement of $284,034 in funeral and burial expenses from his estate, the estate's personal representative (joined by four of Inlow's five children) sought reimbursement from the settlement proceeds in a wrongful death action against Inlow's employer. The trial court approved the reimbursement. Inlow's widow then filed a motion to correct error and appealed its denial, arguing that Indiana Code §3-23-1-1 does not require reimbursement unless the wrongful death award expressly apportions funeral and burial expenses.

Reviewing the denial of the widow's motion for abuse of discretion, the court began its analysis with the text of Indiana Code §3-23-1-1. The statute states "[t]hat part of the damages which

is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof," while providing that any remaining damages "inure to the exclusive benefit of the widow" and dependent children (to be distributed as the deceased's personal property). Finding the provision ambiguous as to the need for itemization, Judge Vaidik observed that nowhere does the wrongful death statute mention such itemization, nor do statutory provisions addressing compensatory damages for personal injury/death and property damage require itemization. "It would be illogical to impose an itemization requirement for wrongful death awards," reasoned Judge Vaidik, "while no such requirement exists for other personal injury awards." The court thus affirmed the reimbursement ordered by the trial court.

Dissenting, Judge May maintained that while the statute does not require itemization of a wrongful death award, it does require that damages be "categorized" as either "medical, hospital, funeral, and expense-related" or other. Judge May further argued that the $284,034 reimbursement may exceed "reasonable" expenses under the statute, and favored remanding the case to the trial court for measuring and categorizing damages as well as distributing the award.

Spoliation and third-party insurers

A casualty insurer had no duty to preserve evidence relating to the cause of a fatal home fire for the benefit of a renter whose estate would subsequently sue the property owner, its insured. *American Nat'l Property and Cas. Co. v. Wilmoth*, 893 N.E.2d 1068 (Sept. 19) (May, J.).

Following a fatal house fire, a couch removed by fire fighters sat in the yard of the damaged home for six weeks until the property owners discarded it. Experts retained by the estate of a renter who died from fire-related injuries later identified an air conditioning power cord near the couch as the fire's source. Unable to examine the couch, the estate sued the property owner's insurance carrier for spoliation of evidence. The carrier moved for summary judgment, arguing that it owed no duty to preserve the couch. The trial court denied the motion, and a jury awarded damages to the renter's estate.

Reviewing *de novo* the denial of summary judgment, the court explained that spoliation is "the intentional destruction, mutilation, alteration, or concealment of evidence." The court further explained that courts determine whether an insurance carrier owes a duty to refrain from destroying evidence by analyzing: 1) the relationship between the parties, 2) the foreseeability of the particular harm, and 3) public policy. Analyzing these factors, the court found significant that no contractual relationship existed between the deceased renter and the carrier, which had solely contracted with the owners of the property. Further, the court did not find the harm foreseeable – that is, find that the carrier should have anticipated that loss of the couch would harm the renter's ability to support certain claims. Rather, at the time of the alleged spoliation, the fire department had found the fire accidental, no lawsuit had been filed against the property owners, and no expert report suggested any involvement of the couch. The carrier, moreover, never exclusively possessed the couch. Thus, while declining to hold that an insurer can *never* owe a third party the duty

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to preserve evidence it does not exclusively possess, the court equally declined to hold an insurer "obliged to preserve all physical evidence at the scene of any event that might implicate its policy coverage."

As to public policy, the court distinguished the facts from *Thompson ex rel. Thompson v. Owensby*, 704 N.E.2d 134 (Ind. Ct. App. 1998) – a case that derived a preservation duty from the insurer's business practice of collecting evidence and the insurer's better position to understand its significance and the need to maintain it. By contrast, no business practice related to collecting the couch, and its significance was by no means apparent. Concluding that the property owners' insurance carrier owed no duty to preserve evidence of the fire's origin, the court reversed the denial of summary judgment to the carrier.

Duty to provide safe workplace question of fact

Evidence that a property owner supervising construction of a new home was "master" of an independent contractor's work on various projects, present on the job site daily, made safety equipment available, and directed the contractor to roof a particular part of the house barred summary judgment as to whether the owner owed any duty to provide a safe workplace in *Peterson v. Ponda*, 893 N.E.2d 1100 (Sept. 24) (Crone, J.).

Residential property owners, who were supervising the construction of a new home, hired the plaintiff for $10 per hour to work on various projects. The plaintiff fell after the owner had directed him to "sheet" a part of the roof that lacked scaffolding. In a personal injury action against the owners, the trial court ruled that the plaintiff was not an employee within the meaning of the Indiana Worker's Compensation Act. The owners then moved for summary judgment on the grounds that they lacked any duty of care to the plaintiff-independent contractor. The trial court denied that motion, and the owners appealed.

Writing for a unanimous panel, Judge Crone rejected the owners' claim that the trial court had no option but to grant them summary judgment after finding insufficient control to make the plaintiff an employee rather than independent contractor. The court agreed that a property owner generally has no duty to provide an independent contractor with a safe workplace. Nevertheless, it observed that property owners can assume such duties, and Indiana law generally finds their existence and extent to be questions for the trier of fact.

Turning to the record, Judge Crone acknowledged the absence of evidence that the owners explicitly controlled safety – noting they did not appoint a safety director, hold safety meetings, prescribe safety precautions or provide written safety rules. Evidence did suggest, however, that an owner was considered "lord and master" over the plaintiff's work, was present on the job site nearly every day, made safety equipment available for the workers, directed the plaintiff to work on a specific part of the house without scaffolding, and was "adamant about safety." The court concluded that this evidence of control in the context of "active supervision of safety at the job site" raised a fact question as to whether the owners assumed a duty to provide a safe work environment. Similarly, it found the plaintiff's premises liability claim, on which the owners had also sought summary judgment and which "ordinarily depends upon the power to prevent injury," subject to questions of fact. The court thus affirmed the denial of summary judgment by the trial court.

Ordinance banning sex and violent offenders from public parks

An ordinance barring individuals listed on the Indiana sex and violent offender registry from entering Plainfield's parks and recreation areas does not, on its face, violate the Indiana Constitution. *Doe v. Town of Plainfield*, 893 N.E.2d 1124 (Sept. 24) (Robb, J.).

In 2002, Plainfield enacted an ordinance banning registered sex and violent offenders from its parks and recreation areas "to establish reasonable and responsible rules for those individuals who use" those areas and, more specifically, to protect the health and safety of users. John Doe, a resident of Marion County listed on the Registry for 2001 convictions for child exploitation and possession of child pornography, visited Plainfield parks on several occasions in 2004 with his minor son. Barred from further visits, Doe sued for declaratory and injunctive relief, alleging various facial violations of the Indiana Constitution. The trial court granted Plainfield's motion for summary judgment and denied a cross motion filed by Doe, and Doe appealed.

To consider this facial challenge, the court presumed that Plainfield's ordinance was constitutional until clearly "overcome by a contrary showing" and until Doe could demonstrate that no set of circumstances would allow the ordinance to be constitutionally applied. Doe's claim that the ordinance violates Article I, Section 1 – a provision guaranteeing rights to

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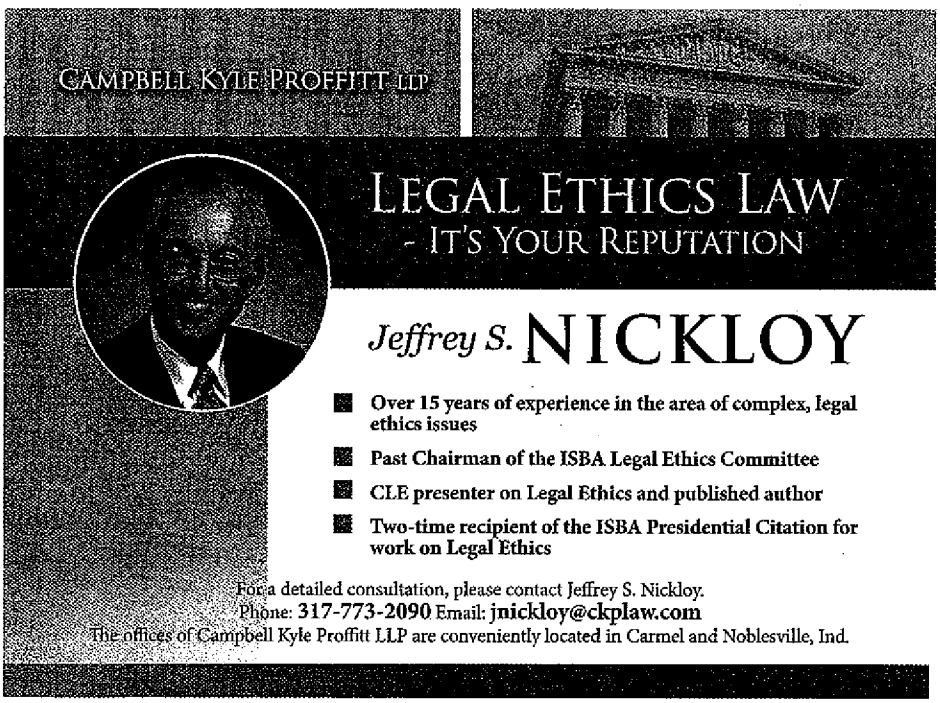
"life, liberty, and the pursuit of happiness" among others – did not, according to the court, meet this standard. Without addressing "the more substantial question of whether Article I, Section 1 creates judicially enforceable rights," the court found it did not recognize the right to enter public parks for legitimate purposes as a core value. Judge Robb reasoned that Section 1 expresses its protection of natural rights in broad language that does not support this interpretation, and found Doe's argument likewise unsupported by historical evidence.

Doe's claim that the ordinance violates Article I, Section 12 – a provision giving every person a remedy "by due course of law" for injuries to person, property or reputation – also fell short of Doe's burden. Section 12, as explained by the court, recognizes that individuals have a right to be free from arbitrary government treatment. Further, Section 12-based challenges trigger a "rational basis" review similar to federal substantive due process analysis. The court concluded that Doe had failed to show that excluding individuals on the Registry was not rationally related to the legitimate goal of protecting the health and safety of park users. Though Doe noted the absence of any procedure for de-listing individuals no longer required to register as sex or violent offenders, the court found this insufficient to foreclose the constitutional application of the ordinance *in all instances* – the operative standard.

Doe's final claim that the ordinance violates Article I, Section 24 – barring *ex post facto* laws or laws impairing "the obligation of contracts" – proved equally futile. The court explained that Section 24 prohibits laws from imposing punishments for acts not punishable when committed (or imposing additional punishments after the fact), and is analyzed under the framework applied to the *ex post facto* clause of the federal constitution. The analysis thus looks to whether the legislature intended proceedings to be civil or criminal, and finds in the latter an intent to violate the *ex post facto* clause. The analysis also finds violations of the *ex post facto* clause where laws are "so punitive either in purpose or effect as to negate" the legislature's nonpunitive intent and transform a civil remedy into a criminal penalty.

Noting that Doe conceded the civil purpose of the ordinance, the court focused on whether Doe had presented the "clearest proof" of its punitive nature. Judge Robb applied four factors elaborated by the Supreme Court to reject Doe's proof, reasoning that: 1) banishment from less than an entire community is not "historically regarded as a punishment"; 2) exclusion from a park is far less of a "disability or restraint" than the "paradigmatic" case of imprisonment; 3) the rational relation of the ordinance to its non-punitive goal of protecting park users outweighs its deterrent effect (which could be considered a traditional aim of punishment); and 4) that rational relationship prevents the ordinance from being "excessive." The court thus affirmed the trial court grant of summary judgment to the City of Plainfield, having rejected each of Doe's facial challenges to the Plainfield ordinance.



Differential diagnosis not mandatory in medical opinion

The Worker's Compensation Board erred when it rejected medical opinion on the cause of the plaintiff's vertigo based on the examining physician's failure to perform a differential diagnosis. *Triplett v. USX Corp.*, 893 N.E.2d 1107 (Sept. 24) (Crone, J.).

The plaintiff, who had a history of preexisting medical conditions, fell from a ladder in 2001 while working as a tractor operator and hit her head. The Board subsequently denied her disability and impairment claim, finding that she failed to prove the accident caused her vertigo. The plaintiff then

appealed the Board's judgment, arguing that the Board erred in rejecting a medical opinion on causation because the examining physician failed to perform a differential diagnosis.

Considering this claim, Judge Crone noted that differential diagnosis is a standard scientific technique for identifying the cause of symptoms by eliminating potential causes and assessing the relative likelihood of remaining possibilities. At the same time, however, he found that the expertise of the opining physician had not been questioned, making her opinion "some evidence" that the accident caused the plaintiff's vertigo. The court also rejected the argument that several appellate decisions imposed a differential diagnosis requirement. It interpreted *Outlaw v. Erbrich Products Co.*, 777 N.E.2d 14 (Ind. Ct. App. 2002), for example, as merely finding a temporal relationship insufficient to establish causation in a chemical exposure case where the opining expert had not analyzed the level and duration of exposure or sufficiently accounted for other potential causes of the alleged harm. Likewise, Judge Crone observed that *Hannan v. Pest Control Services, Inc.*, 743 N.E.2d 1214 (Ind. Ct. App. 2001), another chemical exposure case relied on by the employer, relied on similar inadequacies in ruling expert testimony inadmissible under Rule 702. Judge Crone contrasted these limitations with the lack of dispute over whether head injuries can cause vertigo or whether the plaintiff hit her head, and the employer's failure to challenge the admissibility of the medical opinion at issue. He finally observed that Federal District Court Chief Judge Robert L. Miller Jr., who authored an *Indiana Practice Series* evidence treatise, rejected the claim that a differential diagnosis is always necessary in *James v. Marten Transport, Ltd.*, No. 3:03-CF-244RM, 2006 WL 3755322 (N.D. Ind., Dec. 15, 2006).

Concluding its analysis, the court found the Board's differential diagnosis requirement "clearly erroneous," and its finding that "no showing" linked the plaintiff's vertigo and accident potentially in error. It nevertheless affirmed the Board's decision, determining that it acted within its discretion in rejecting (based on lack of credibility) a medical opinion containing the sole evidence of a resulting impairment. The court also rejected the employer's claim that it should receive credit for two weeks of temporary total disability payments. No evidence suggested the employer had notified the plaintiff in writing of its intent to terminate benefits, and the court did not interpret the statute as creating a *per se* overpayment.

Eligibility for 42 U.S.C. §1988 attorney fees in matters involving both state and federal claims

The Court of Appeals analyzed a claim for attorney fees under 42 U.S.C. §1988, in a case involving both state and federal claims. *Silverman v. Villegas*, 894 N.E.2d 249 (Sept. 30) (Robb, J.). On the merits, the Court of Appeals had invalidated certain rules of the Bureau of Motor Vehicles regarding identification requirements for driver's licenses, concluding that the rules had not been properly promulgated under state law.

On remand, the trial court ordered BMV to pay more than $100,000 in attorney fees to plaintiffs' lawyers under Section 1988, the federal statute that allows a "prevailing party" to collect attorney fees from the losing party in civil rights cases. On appeal, BMV argued that the plaintiffs did not meet the definition of "prevailing party" under federal law.

As a result of the original litigation, BMV went through a full rule promulgation process to formalize the rules that had been found invalid. Once that process was completed, the trial court entered judgment in the plaintiffs' favor, and plaintiffs sought attorney fees. Although plaintiffs succeeded on state, not federal, grounds, they argued they were entitled to fees under Section 1988 because their federal and state claims arose from a common nucleus of operative facts and the federal claims were substantial.

The Court of Appeals affirmed the trial court's award of attorney fees, finding that the prerequisites under Section 1988 were met. The plaintiffs prevailed under the statutory definition because the legal relationship between the parties was changed in a manner benefiting plaintiffs. The trial court did not rule on the constitutional claim, following the principle that cases should be resolved on non-constitutional grounds when possible. The Court of Appeals confirmed that the plaintiffs' constitutional claim was substantial and arose from a nucleus of operative facts that was common to the state claim as well, satisfying the requirements for "prevailing party" fees under Section 1988.

The Court of Appeals also rejected the BMV's argument that plaintiffs should not be entitled to attorney fees because, now that BMV has duly promulgated its rules, the plaintiffs (who are illegal aliens) still cannot obtain driver's licenses or identification cards. The Court of Appeals concluded that because the plaintiffs got the relief they asked for, which was invalidation of the identification procedures then in effect, they qualified as "prevailing parties" under Section 1988.

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Chief Judge Baker dissented. He found no basis for Section 1988 fees because he concluded that the claims on which plaintiffs prevailed were not sufficiently related to their federal constitutional claims. He also concluded that they were not "prevailing parties" because ultimately the very identification requirements they challenged went into effect, albeit after promulgation as a rule.

Contribution claim between shareholders in failed business

Balvich v. Spicer, 894 N.E.2d 235 (Sept. 29) (Baker, C.J.), addressed the law of contribution as it applied to a business failure. The Spicers and Balviches were shareholders in corporations that owned restaurants. After the businesses failed, banks that had loaned money to the corporations foreclosed, then sued to collect the deficiency. The Spicers paid several hundred thousand dollars to obtain releases of their personal guarantees to banks and their state tax liability. The Balviches paid much less to obtain releases.

The Spicers then sued the Balviches for contribution based on the Spicers' much higher payments to the banks and Indiana Department of Revenue. The case was tried, and the trial court found the Balviches liable to the Spicers for contribution as to the funds owed the banks and on a statutory theory for the funds owed the State (one Balvich and one Spicer were corporate officers with statutory personal liability for unpaid taxes). The trial court ordered the Balviches to pay approximately $168,000 to the Spicers.

The Court of Appeals rejected the Balviches' statute of limitations defense. The court concluded that the Spicers properly brought their claim within the catchall 10-year statute of limitations, and the 6-year limit for "accounts and contracts not in writing" asserted by the Balviches did not apply.

The Court of Appeals also affirmed the trial court's decision that the Spicers were entitled to contribution because the Spicers and Balviches were jointly and severally liable. Quoting 19th century cases, the court affirmed the equitable origins of contribution, a doctrine that rests on the principle that where parties stand in equal right, equality of burden becomes equity. Because the Balviches and Spicers all guaranteed the loans, they were equally liable, and that equality could be enforced through an action for contribution. The court rejected the Balviches' argument that the Spicers had no right to recover unless they paid the amounts owed in full.

The Court of Appeals also rejected the Balviches' challenge to the trial court's order that they were liable to the Spicers for the tax debt. The court concluded that this dispute was not over whether the tax was owed, and thus was not in the Tax Court's exclusive jurisdiction. Rather, it was about whether the Balviches could be required to reimburse the Spicers for some of the taxes the Spicers paid on the corporations' behalf. The Court of Appeals concluded that one of the Balviches, an officer of the corporations and therefore personally liable for the taxes, was a fiduciary to the other shareholders; she thus was liable under the doctrine of contribution for a share of the taxes that were paid. The Court of Appeals affirmed the trial court's judgment in all respects.

Mechanic's lien for disposal of biological waste and cleanup

The Court of Appeals held that services for cleaning up biohazardous material resulting from a death in a structure were subject to a mechanic's lien under Indiana law. *Midwest Biohazard Servs., LLC v. Rodgers*, 893 N.E.2d 1074 (Sept. 22) (Riley, J.). Rodgers hired Midwest Biohazard to clean up the home of Rodgers' father. The father had died there, and his body decomposed for several days before it was found. Rodgers did not pay,

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and Midwest filed a notice of intention to hold a mechanic's lien.

The Court of Appeals rejected Rodgers' argument that the services Biohazard provided were not subject to a mechanic's lien. The services included removing carpet and pad, cleaning and disinfecting. The court concluded that Biohazard's services were "repairs" of the sort covered by the mechanic's lien statute. The court noted that Biohazard has the burden to show that its services fall within the scope of the statute. The court adopted a definition of "repair" that includes "to restore to a sound healthy state," and determined that Biohazard's services met that definition.

The Court of Appeals reversed the trial court's dismissal for failure to state a claim and remanded for further proceedings.

Origin of worker's compensation injury

In *Pavese v. Cleaning Solutions*, 894 N.E.2d 570 (Sept. 30) (Vaidik, J.), an employee fell on the job and received medical treatment for head injuries, but her employer would not pay her expenses. The Worker's Compensation Board determined that the employee experienced a personal event on the job that is not covered by the Worker's Compensation Act. The employee argued that she had slipped on a slick floor, but the employer provided medical evidence that she passed out from "personal" causes unrelated to her work and was injured as a result. The medical expert at the Worker's Compensation Board hearing testified that he could not rule out the employee's theory of slipping on a slick floor nor could he medically verify that the employee passed out, but it was his judgment that the latter probably had occurred.

The employee argued that a 2006 amendment to the Worker's Compensation Act violated the Constitution by placing upon her the burden of proving a negative, that her injury was not the result of her own personal health condition. That statutory amendment was designed to reverse *Milledge v. The Oaks*, 784 N.E.2d 926 (Ind. 2003), which placed the burden of proof on the employer for "neutral risks," where the risk is neither distinctly employment-related nor distinctly personal in character. The amendment placed the burden

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on the employee in all cases. The amendment applied in this case, where the cause of the employee's injury was unexplained. As amended, the law required the employee to prove that her injury arose out of her employment even in cases such as this one, where the cause of the accident was unexplained due to the employee's head injury and lack of memory.

The Court of Appeals agreed that the 2006 amendment overruled *Milledge* but found no constitutional problem. The employee alleged that the statute violated the right to due course of law under Article I, §12 of the Indiana Constitution. The court found that the employee had waived this claim by failing to make any cogent argument. The court also found that the 2006 amendment did not violate the Due Course of Law Clause.

The Court of Appeals went on to conclude that the employee failed to meet her burden to show that her injury arose from her employment. The evidence could support that the injury was caused by employment or that it was caused by a personal risk arising from the employee's health conditions. Because the evidence does not show which of the two causes triggered the injury, the employee failed to meet her burden, and her injuries were not compensable under the Worker's Compensation Act.

Transfer grants

The Indiana Supreme Court granted transfer in five civil cases in September. Decisions in these matters will follow at a later date. *Gary Community Schools v. Powell*, 881 N.E.2d 57 (Ind. Ct. App. 2008) (Baker, C.J.) (addressing, as a matter of first impression, whether hours spent performing the jobs of teacher and coach for school corporation should be considered together or separately for purposes of determining full-time status and thus eligibility for coverage under the Family and Medical Leave Act); *Stanley v. Walker*, 888 N.E.2d 222 (Ind. Ct. App. 2008) (Darden, J.) (addressing whether "write-offs" negotiated by medical insurers are benefits directly paid for by insureds and so properly excluded from evidence, consistent with Indiana's collateral source statute, for purposes of calculating pecuniary loss in personal injury actions); *N. Ind. Pub. Serv. Co. v. U.S. Steel*, 881 N.E.2d 1065 (Ind. Ct. App. 2008) (Bailey, J.) (reversing summary judgment entered by Utility Regulatory Commission interpreting rate contract between utility and customer);[1] *Clark v. Clark*, 887 N.E.2d 1021 (Ind. Ct. App. 2008) (addressing child support obligation of father who was incarcerated subsequent to initial establishment of obligation); *Bonner v. Daniels*, 885 N.E.2d 663 (Ind. Ct. App. 2008) (reversing dismissal for failure to state a claim of civil action challenging school funding under state constitutional provision requiring "general and uniform system of Common Schools").

1. One of the authors of this article was counsel in this matter.

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