

## Appellate civil case law update

In December, the Indiana Supreme Court issued opinions in three civil matters and granted transfer in two civil matters, all summarized below. The Indiana Court of Appeals issued a total of 87 opinions in civil and administrative matters, including 50 unpublished opinions.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 December, including those issued not-for-publication, are available via Casemaker at [www.inbar.org](http://www.inbar.org) or on the Indiana Courts Web site, [www.in.gov/judiciary/opinions](http://www.in.gov/judiciary/opinions).

### SUPREME COURT

#### Indiana adopts federal balancing test to determine discoverability of trade secrets

In a unanimous opinion, the Indiana Supreme Court adopted the three-part balancing test used by federal courts to determine whether and when to protect trade secrets from discovery.

*Bridgestone Americas Holding, Inc. v. Mayberry*, 878 N.E.2d 189 (Dec. 18)\* (Shepard, C.J.).

This matter of first impression arose from a personal injury action in which Violet Mayberry, representing a daughter who died in a car collision, sued several Bridgestone and Firestone companies, attributing the accident to separation of a tire's tread. In discovery, Mayberry sought Bridgestone's formula for the "skim stock,"

which binds the steel belt to the radial tire. Bridgestone responded by asserting that the skim stock formula qualified as a trade secret, and moved for a protective order to prevent its disclosure. After the trial court ordered Bridgestone to produce the formula, and the Court of Appeals affirmed, the Supreme Court accepted transfer to offer guidance on applying T.R. 26(C) to efforts to protect trade secrets and other confidential information — something it had never done.

Chief Justice Shepard began the Court's analysis of Rule 26 protections with a brief history of trade secrets, noting that "the value of a trade secret hinges on its secrecy," and that courts have accepted the value of "trade secret protection to a healthy economy" for many years. More specifically, Justice Shepard observed that federal courts have applied a three-part balancing test to the discovery of trade secrets for over a quarter century, and that states have adopted this approach "with only slight variation." The opinion went on to reason that while Indiana trial courts have enjoyed great discretion in applying the "good cause" standard to protective orders requested under Trial Rule 26(C), Indiana's Uniform Trade Secrets Act (UTSA) — a legal framework that all but five states have adopted — reveals the "legislature's intent to apply trade secret law uniformly with other jurisdictions." Based on this legislative intent, and the historical success of the federal approach, the Court adopted a three-part balancing test under which: 1) "the party seeking a protective order must demonstrate that a trade secret is implicated by a discovery request"; 2) the burden then (and only then) "shifts to the party seeking discovery to show that disclosure is relevant and necessary"; and 3) if both parties satisfy their burdens, "the court must then balance the harm from

disclosure against the need for the information."

Applying the three-part test to the record on review, Justice Shepard found the affidavit of a Bridgestone engineer sufficient to qualify the skim stock formula as a trade secret. That un rebutted affidavit recited the substantial time and effort required to create the formula, efforts to guard its secrecy, and its resistance to reverse engineering. Next, the Court examined whether Mayberry had met her burden to establish relevance and need. Necessity, according to the Court, "is the heart of this three-part analysis" and will generally require some form of disclosure if demonstrated. Thus while Mayberry established the relevance of the formula, the Court relied on evidence that a tire inspection would suffice to conclude she had failed to show need. It reversed the trial court's order directing Bridgestone to disclose its trade secret as an abuse of discretion.

#### Guardianship statute does not authorize dispositions of protected person's entire estate

In a matter of first impression, the Supreme Court found that guardians do not have statutory authority to implement an estate plan that disposes of all of the protected person's assets, including those needed for the protected person's future support. *In the Matter of the Guardianship of E.N.*, 877 N.E.2d 795 (Dec. 12) (Boehm, J.). E.N. had Alzheimer's disease, and a trial court appointed his adult children as co-guardians of E.N. despite objections from E.N.'s brothers whom E.N. had designated as his beneficiaries under a prior will. The trial court determined that E.N.'s brothers had "actively concealed E.N.'s whereabouts and restricted his contacts with family" during a period of time when the



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brothers were caring for E.N. After assuming the guardianship of E.N., E.N.'s children petitioned the guardianship court to implement an estate plan on E.N.'s behalf that placed all of E.N.'s property in the E.N. Revocable Trust and named one of the guardians as trustee ("Revocable Trust Estate Plan"). The Revocable Trust Estate Plan called for income and principal to be applied to E.N.'s support during his life, and allocated any property remaining upon E.N.'s death between two trusts for the benefit of the two guardians and their children. E.N.'s brothers objected to the proposed plan. The guardianship court approved the Revocable Trust Estate Plan, but added a provision that gave E.N.'s brothers 5 percent of E.N.'s net estate at E.N.'s death.

E.N. died in May 2004, and his brothers and children/guardians continued to litigate over the guardians' final accounting as well as the proper will to probate. The Court of Appeals affirmed the guardianship court's approval of the Revocable Trust Estate Plan, holding that the guardianship statute authorized the Revocable Trust Estate Plan because it "applied E.N.'s assets first to his lifetime support." In addition, "[t]he Court of Appeals also found that the statute contained no explicit ban on placing assets in trust or rewriting a protected person's will."

On transfer, the Indiana Supreme Court acknowledged that Ind. Code §29-3-9-4 "specifically authorizes the guardian to take steps directed to estate planning for the protected person." The guardianship statute does not, however, "authorize 'devises[,]'" nor does it "mention the writing, modification or revocation of wills." In addition, "[e]ven if the trust assets remain available to support

the protected person, the creation of a revocable trust is a 'disposition' ... of assets because it places the assets under control of others and frees the assets from supervision of the guardianship court." Moreover, the Supreme Court observed, *inter alia*, that "the principal focus of the statute is minimizing estate and inheritance taxes." However, the "disposition of an entire estate necessarily involves a transfer of

some assets that generates no tax benefit." The Court held that, upon remand, the disposition of E.N.'s estate would remain a matter for the probate court to consider – including the validity of E.N.'s prior wills wherein his brothers were his sole beneficiaries.

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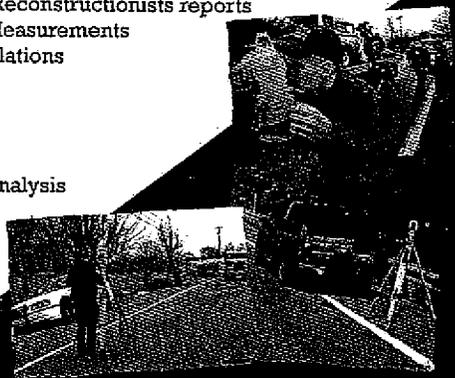


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## RECENT DECISIONS 12/07 *continued from page 31*

### Professional Conduct Rules do not create independent civil liability

The Indiana Supreme Court held that the Professional Conduct Rule prohibiting attorneys from doing business with their clients did not create an independent cause of action for civil liability in *Liggett v. Young*, 877 N.E.2d 178 (Dec. 4) (J. Dickson, in which C.J. Shepard, J. Rucker, J. Sullivan concur; J. Boehm concurring in result with separate opinion). The case reached the Court following a partial summary judgment against third-party plaintiff Ronald Liggett, who had sued his attorney to recover disputed payments under a contract to build the attorney's home. The trial court certified the order for interlocutory appeal, and the Court of Appeals affirmed summary judgment in favor of the attorney and his wife (sued jointly) on all of Liggett's claims.



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On transfer, the Court examined Liggett's argument that the Youngs had failed to show the construction contract - a written agreement that barred the unwritten change orders for which he sought compensation - "was not void by reason of Indiana Professional Conduct Rule 1.8." In 1999 when the parties contracted, Rule 1.8(a) provided that: "A lawyer shall not enter into a business transaction with a client ... unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and the client consents in writing thereto." Ind. Prof. Cond. R. 1.8(a). The Comment to Rule 1.8 clarified that paragraph (a) did not "apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services," because "the lawyer has no advantage" and the restrictions are "unnecessary and impracticable." Ind. Prof. Cond. R. 1.8 cmt. (1999).

Interpreting Rule 1.8, the Court noted that the requirements of paragraph (a) apply even when "the transaction is not closely related to the subject matter of the representation," and applies to lawyers who sell law-related goods and services. It found, however, that regardless of its scope and whether Young's contract fell within the "standard commercial transaction" exception, the rule had only "limited application outside the attorney disciplinary process." Persuaded by

the 1999-2004 Preambles' admonition that a rule violation "should not give rise to a cause of action nor should it create a presumption that any duty had been breached," the Court abrogated two opinions, *Trotter v. Nelson*, 684 N.E.2d 1150, 1153 (Ind. 1997), and *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 342 (Ind. 1991), to the extent they indicated that "violation of the Rules of Professional Conduct may serve as a basis for civil liability."

Having rejected Liggett's Rule 1.8 argument, the Court nevertheless applied analogous common law principles to this contract between client and attorney. Justice Dickson noted that courts have found all but "standard commercial" transactions between attorneys and clients presumptively fraudulent, and required attorneys to prove their honesty and fairness. Turning to the record, the Court observed that attorney Young had both selected the parties' ISBA form contract and revised the modification provision at issue, and further that Young was Liggett's personal attorney at the time they contracted. Finding the record insufficient to establish either the fairness or honesty of the contract, or that it qualified as a standard commercial transaction, Justice Dickson held that the Youngs were not entitled to partial summary judgment on Liggett's claims against them. Consequently, the Court reversed the trial court.

In a separate concurrence, Justice Boehm wrote that the case could be resolved without "regard to whether the written contract was 'void' as 'fraudulent' or not 'fair and honest.'" Rather, Justice Boehm found the contract plainly outside the "standard" contract exception of Rule 1.8 as a unique and lawyer-drafted agreement. And while Justice Boehm agreed that the Rules of Professional Responsibility do not of themselves

create civil liability, he interpreted the 2005 Preamble to clarify their role as setting standards of conduct which may "be evidence of a common law breach." Finally, Justice Boehm determined that the change orders, rather than the written agreement, served as the "transactions" for purposes of Liggett's claims. Finding orders which caused additional cost without adjusting the contractor's compensation anything but fair and reasonable, Justice Boehm deemed the contract provision eliminating compensation unenforceable. He concluded that the Youngs could not overcome the "basic principle that a fiduciary who deals with his beneficiary must look out for the beneficiary's interests above his own."

#### SELECTED CIVIL OPINIONS FROM COURT OF APPEALS

##### Contractual indemnification provision did not bar recovery under Crime Victims Statute

A contractual indemnification provision that contained no specific reference to criminal or fraudulent conduct did not bar damages arising from fraudulent representations under the Crime Victims Statute. Ind. Code § 34-24-3-1, *et seq.* Even exculpatory clauses seeking to indemnify a party against its own negligence must explicitly refer "to the negligence of the party seeking release from liability." Consequently, a contract that did not explicitly exclude liability stemming from a party's own intentional misrepresentations could not preclude damages under the statute. *State Group Indus. (USA) Ltd. v. Murphy & Assocs. Indus. Servs., Inc.*, 878 N.E.2d 475 (Dec. 28) (Robb, J.).

Limitations period from wrongful death statute governs action alleging that negligent health care decisions caused resident's death

The Indiana Wrongful Death Act, Ind. Code §34-23-1-1, supplied the statute of limitations governing allegations that a nursing home negligently caused a resident's death. The Indiana Medical Malpractice Act's statute of limitations did not apply because the record contained no evidence that the nursing home met the requirements of a qualified health care provider under Ind. Code §34-18-3-2. The professional services statute of limitations, Ind. Code §34-11-2-3, potentially applied because there was a health care provider-patient relationship, and because claims challenging a nursing home's health care decisions sounded in medical malpractice, rather than ordinary negligence

(as would control claims based on equipment failures.) However, the more comprehensive nature of the Wrongful Death Act's statute of limitations indicated the legislature's intent that this provision would control over the professional services statute of limitations. *Estate of O'Neal v. Woods Nursing and Rehab. Ctr., LLC*, 878 N.E.2d 303 (Dec. 19) (Robb, J.).

Affidavit reciting party's thwarted intention to conduct certain discovery and retain expert established prejudice

A party who lacked notice of the consolidation of a preliminary injunction hearing and trial on the merits demonstrated prejudice by asserting he would have conducted written and oral discovery and consulted an expert before going to trial. While Ind. T.R. 65(A)(2)

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## RECENT DECISIONS 12/07 *continued from page 33*

permits consolidation of hearing and trial, the trial court's failure to give notice of the consolidation is reversible error when a party can demonstrate prejudice, as opposed to mere surprise. *Roberts, M.D. v. Cmty. Hosps. of Ind., Inc.*, 878 N.E.2d 234 (Dec. 12) (Riley, J.).

### Zoning ordinance restricting location of sexually oriented businesses met Constitutional test for content-based time, place and manner restrictions

A zoning ordinance banning sexually oriented businesses within 1,000 feet of residences passed Constitutional muster under the test for content-based time, place and manner restrictions based on evidence that it intentionally suppressed the "secondary effects" of crime, prostitution and other harms, entitling the county to a permanent injunction against the operation of such a business. The property owner's bare assertion that the county's evidence of "secondary effects" related to urban rather than rural areas did not meet its burden to cast "direct doubt" on the county's rationale. Further, the ordinance was not "substantially broader than necessary to achieve the government's interest" where the county had 34 alternative sites for operating sexually oriented businesses. *Plaza Group Props., LLC v. Spencer County Plan Comm'n*, 877 N.E.2d 877 (Dec. 13) (Baker, C.J.).

### Payment and satisfaction of judgments render appeals from judgment moot

Judgment has been satisfied pursuant to Trial Rule 67 when a prevailing party files, with the relevant court clerk, a release of judgment and obtains a check from the clerk for the full amount entered on the verdict. Such a release and payment satisfy and extinguish the judgment and render moot any

appeal from the judgment. *Carey v. Haddock*, 877 N.E.2d 842 (Dec. 11) (Najam, J.).

### City of East Chicago ordinance could not unilaterally re-direct flow of funds under gaming licensee contract

The city of East Chicago could not, by enacting an ordinance, unilaterally change the terms of its contract with a riverboat gaming licensee to redirect payments to the city; rather, that modification would amount to a "reformation" of the contract. Because the contract created a direct obligation to certain for-profit and not-for-profit entities, they were third-party beneficiaries with standing to sue regardless of whether they acted as mere "conduits" of money for economic development, and regardless of whether "citizens" are the ultimate or intended beneficiaries of the contract. Finally, gambling funds paid directly to private entities did not qualify as "public" funds under the relevant statutory provision, defeating the city's claim that a contract allocating "large amounts of economic development funding without stringent oversight" violates public policy and is void. *City of E. Chicago v. E. Chicago Second Century, Inc.*, 878 N.E.2d 358 (Dec. 21) (May, J.).

### *Lis pendens* notice in circuit court provides subsequent purchaser with constructive notice of claim asserted in reinstated superior court action

The purpose of a *lis pendens* notice is to provide machinery whereby a person with an *in rem* claim to property, which is not otherwise recorded or perfected, may put his or her claim upon the public records so that third persons dealing with a property owner or someone attempting to sell the property will have constructive notice of the claim. Pursuant to

Ind. Code §32-30-11-3(b), claimants must file *lis pendens* notices with the clerk of the circuit court where the real property is located. The facts of this matter support the holding that a valid *lis pendens* notice in a circuit court action provides the subsequent purchaser with constructive notice of a specific performance claim asserted in a reinstated superior court action. *Clarkson v. Neff*, 878 N.E.2d 240 (Dec. 12) (Barnes, J.).

### Party can waive applicability of Dead Man's Statute

An estate challenged the decedent's *inter vivos* transfer of his farm to his caretakers. The caretakers designated portions of one of the caretaker's deposition testimony in support of its motion for summary judgment. The estate moved to strike the designated deposition testimony, arguing that it was barred by the Dead Man's Statute. The estate, however, also designated portions of the same caretaker's deposition testimony in support of its motion for summary and in its opposition to the caretakers' motion for summary judgment. In so doing, the estate "relinquished the benefit bestowed by the [Dead Man's] statute" and "waived the incompetency of the witness." *Carlson v. Warren*, 878 N.E.2d 844 (Dec. 27) (Vaidik, J.).

### Failure to pay child support provides basis for exception to requirement of consent to adoption

A biological father's knowing failure to pay child support comes within the exception to the requirement, under Ind. Code §31-19-9-8(a), that a biological father must consent to the adoption of his child by the biological mother's husband. *In the matter of the Adoption of B.R.*, 877 N.E.2d 217 (Dec. 4) (Bailey, J.).

Failure to file certified copy of complete agency record precludes trial court's exercise of jurisdiction to review agency denial of benefits

The Administrative Orders & Procedures Act ("AOPA") requirement that a petitioner seeking judicial review of an administrative agency determination file an original or certified copy of the agency record is mandatory and a condition precedent to a court acquiring jurisdiction to consider the petition for judicial review. *See* Ind. Code §4-21.5-5-13(a). If a petitioner fails to either file the agency record within 30 days of filing his or her petition, or request and receive an extension of time within the 30-day period, the trial court must dismiss the petition for review because it lacks further jurisdiction to consider it. *Wrogeman v. Roob*, 877 N.E.2d 219 (Dec. 4) (Bradford, J.).

## TRANSFER GRANTS

The Indiana Supreme Court granted transfer in two civil cases in December. Decisions in these matters will follow at a later date.

• *Brenwick Associates, LLC v. Boone County Redevelopment Comm'n*, 870 N.E.2d 474 (Ind. Ct. App. 2007) (Vaidik, J.) (addressing various issues arising from county's creation of an economic development area that included land covered by town's annexation ordinance), *transfer granted* Dec. 6, 2007.

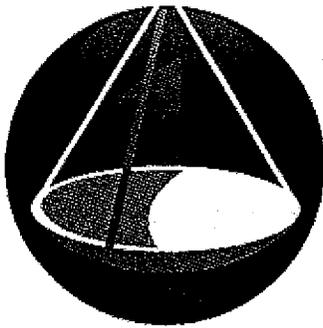
• *Travelers Cas. and Sur. Co. v. U.S. Filter Corp.*, 870 N.E.2d 529 (Ind. Ct. App. 2007) (Kirsch, J.) (addressing whether insureds' rights to assert coverage are transferable to corporate successors), *transfer granted* Dec. 20, 2007. ⚖

\* Asterisked cases indicate those in which one of the authors, or other members of

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