

Appellate civil case law update

In March, the Indiana Supreme Court issued two opinions in civil cases, and the Indiana Court of Appeals issued 33 published opinions in civil cases. The Court of Appeals also issued 49 unpublished opinions. All of the Supreme Court's civil opinions and some of the Court of Appeals' civil opinions are summarized below. Full text of all Indiana appellate decisions, including those not for publication, are available via Casemaker at www.inbar.org or on the Indiana Courts Web site, www.in.gov/judiciary/opinions.

SUPREME COURT

Agreements not to compete between physicians and their medical practice groups are not reasonable when they extend beyond physician's patient contacts

In a split decision, the Indiana Supreme Court held non-competition agreements between physicians and medical practice groups enforceable to the extent reasonable, and it found unreasonable those geographic restrictions that exceed the reach of a physician's patient contacts. *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723 (March 11) (J. Boehm). The case arose from denial of a preliminary injunction against a podiatrist who allegedly breached non-competition restrictions in his employment contract. His former employer, a podiatry clinic, sought the injunction after learning that the

podiatrist had begun practicing with another medical group in one of 43 counties affected by the agreement. The trial court denied the clinic's preliminary injunction request, finding the geographic limits unenforceable, and the Court of Appeals reversed. The Supreme Court accepted transfer, notwithstanding the expiration of the contract, finding the matter significant and capable of repetition.

Writing for the majority, Justice Boehm acknowledged "some force" to the podiatrist's claim that non-competition agreements involving physicians interfere with the physician-patient relationship. The opinion further acknowledged that three states bar such non-competition agreements by statute, an American Medical Association ethics opinion discourages them, and Tennessee's Supreme Court recently held them to be against public policy. At the same time, however, Justice Boehm observed that the AMA opinion predated the Court's decision in *Raymundo v. Hammon Clinic Ass'n*, 449 N.E.2d 276 (Ind. 1983), which adopted a reasonableness standard for physician non-competition agreements and that a substantial majority of other jurisdictions also permit reasonable restrictions. He concluded: "*Raymundo* has been on the books for over 20 years, and our legislature has not seen fit to address the subject. Any decision to ban physician non-competition agreements altogether should be left to the legislature."

Examining the "reasonableness" of the 43-county restriction in the non-competition agreement, the Court concluded that an "employer has invested in creating its physician's patient relationships only where the physician has practiced." Accordingly, it limited the scope of reasonable geographic restrictions to those areas "in which

the physician has had patient contact." The Court went on to "blue-pencil" the agreement, i.e., to excise offending portions where possible without rewriting the agreement, by eliminating references to all but three counties as overbroad (if only because the podiatrist did not have patient contact across the entire county).

Additionally, the Court rejected the podiatrist's argument that the clinic's failure to provide a car allowance made the non-competition agreement unenforceable. While noting that a breach can defeat enforceability, the Court found this one (given its dollar value) immaterial. Consequently, a "no-defense" provision, which asserted that the non-competition agreement would be construed independently of other provisions and survive the contract's termination, preserved the right to enforce it.

After reviewing the evidence on each showing necessary to support a preliminary injunction, the Court affirmed the trial court's denial of the preliminary injunction sought by the clinic *except* as to the three counties that escaped its blue pencil. Chief Justice Shepard dissented, joined by Justice Dickson, noting that the podiatrist had "set up shop" in a bordering county just 10 minutes from his former employer, that the "two areas function as one for commercial purposes," and that he would not "regard [the county line] as grounds for a court voiding a contract by which two relatively sophisticated parties ordered their commercial relationship."

Reviewability of judgments after motions to correct error

The Indiana Supreme Court explored the effect of motions to correct error on appellate deadlines, and it reaffirmed that Trial



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Rule 56(C) means what it says about evidence offered in opposition to summary judgment after the response deadline passes, in *HomeEq Svc. Corp. v. Baker*, 883 N.E.2d 95 (March 26) (J. Dickson). The procedural history of the case was convoluted, creating the problems the Court addressed.

In this action between a lender and borrower, the lender won summary judgment. The borrower then filed a motion to correct error, which was not ruled upon within the time set by Trial Rule 53.3 and therefore was deemed denied. Eight days after the "deemed denied" date, the trial court entered an order purporting to grant the motion to correct error and vacate summary judgment.

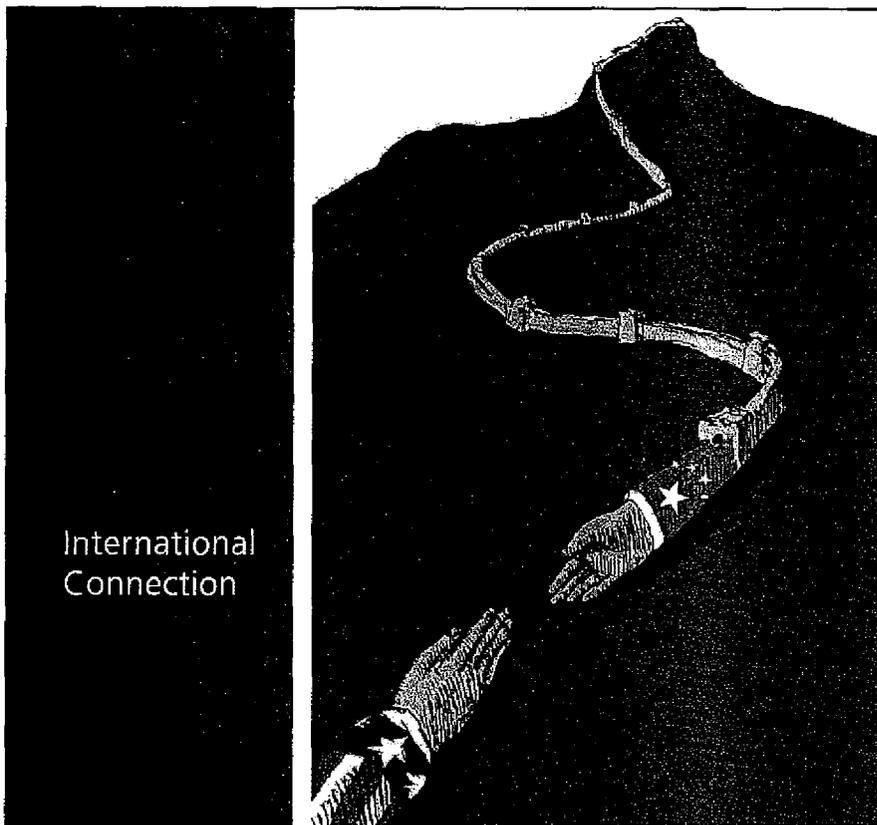
The lender filed a notice of appeal of the order granting summary judgment within 30 days of its entry, and the borrower cross-appealed, asserting that the trial court erred in failing to timely grant his motion to correct error (remember, the trial court granted the motion, but too late). The Supreme Court addressed these issues by applying *Cavinder Elevators, Inc. v. Hall*, 726 N.E.2d 285 (Ind. 2000), which addressed belated trial court action on motions to correct error.

The Court's unanimous opinion by Justice Dickson states that *Cavinder* holds three things. First, if the opponent of a motion to correct errors fails to timely appeal a belated grant of the motion, that party cannot claim on appeal that the trial court violated the time deadlines in Trial Rule 53.3. Second, if the proponent of the motion to correct error fails to timely appeal the deemed denial, that party cannot later raise on cross-appeal the issues presented in its motion to correct error. Third, there is a limited exception to the second point: If the trial court

belatedly grants the motion to correct error before the deadline passes for the proponent of the motion to appeal the deemed denial, the proponent of the motion then may assert as cross-error the issues presented in its "deemed denied" motion to correct error.

The Court stated that this third point in *Cavinder* is based on the probable correctness of a trial court's decision to change its own previous ruling. It allows proponents of belatedly granted motions

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to correct error to delay filing a notice of appeal (from the deemed denial) until the proponent can determine whether the opposing party chooses to acquiesce in the belated ruling. If the opponent chooses to appeal the belatedly granted motion, the proponent of the motion still can raise its merits argument on cross-appeal.

In this case, the borrower (who filed the motion to correct error that was granted belatedly) did not appeal, but the lender timely appealed the belated grant of the motion to correct error. Under *Cavinder*, the borrower still could raise its merits arguments on cross-appeal despite having failed to timely appeal the deemed denial of the motion to correct error.

After addressing the procedural issue, the Court determined that the borrower's argument in its motion to correct error could bring him no relief. The borrower relied on an affidavit filed after the 30-day response deadline in Trial Rule 56, a deadline that had not been extended. The Court ruled that the law is now clear – although it may

have been “somewhat inconsistent” in the past – that when a non-moving party fails to either file affidavits showing an issue of material fact within 30 days or move to extend the deadline, the trial court lacks authority to allow the non-moving party to file affidavits after the deadline. Under this rule, the trial court had properly granted summary judgment to the lender and had erred in granting the borrower's motion to correct error.

The Court therefore reversed the trial court's grant of the motion to correct errors, reinstating summary judgment in favor of the lender.

COURT OF APPEALS

Elected official – compliance with bond requirement

Shetler v. Durham, 881 N.E.2d 720 (March 3) (J. Hoffman), presented questions about whether and when an elected official could take office if the official had difficulty obtaining a statutorily required bond. Durham was elected township trustee in 2006. The law

requires her to post a bond as a condition of holding the office. Although she did not obtain the bond before Jan. 1, 2007, she nevertheless was sworn in to office on that date.

Durham had trouble getting a bond because she was in the midst of a personal bankruptcy. The county clerk informed her that she could not serve as trustee until she obtained a bond. The township board passed a resolution removing Durham and replacing her with the former trustee. She obtained a bond on Feb. 12, 2007.

At that point, however, the township board passed another resolution, indicating that because Durham failed to post a bond before Jan. 1, she could not take office under Ind. Code §5-4-1-9, which states that the bond must be given “before the commencement of [the officer's] term in office.”

The Court of Appeals affirmed the trial court's declaratory judgment that Ind. Code §5-4-1-9 did not preclude Durham from ever taking office just because she did not obtain a bond before commencement of her term. Failure to obtain a bond may delay a duly elected individual from taking office, but once the bond is obtained the person who was elected is qualified and may assume office.

Nomination of candidate who is deceased

In another election case, *Lockard v. Miles*, 882 N.E.2d 288 (March 18) (J. Vaidik), the Court of Appeals addressed a situation where Miles, a candidate who died before the primary election, nevertheless won the primary. Lockard, his opponent in the primary, contested the election, claiming that Miles could not be certified as the winner because he did not meet the statutory requirement to “live” in

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the district – and indeed was not living at all. The trial court denied the contest petition.

The Court of Appeals affirmed, analyzing the statutes governing ballot vacancies. The court concluded that the law governing primaries precludes filling ballot vacancies that occur before the primary, as occurred when Miles died. The statute required his name to remain on the primary ballot despite his death. He was properly certified the winner of the election because he got the most votes, but his death created a ballot vacancy for the general election in the fall that his political party was required to fill by caucus, which it did.

The court concluded that these specific statutes about ballot vacancies trumped the general statutes on candidate residency. The court found legislative intent that a candidate who lost the primary – in this case, Lockard – not be placed on the general election ballot solely by virtue of the winning candidate's death.

Hospital's duty to protect patient being discharged

In *McSwane v. Bloomington Hospital and Healthcare System*, 882 N.E.2d 244 (March 12) (J. May), the Court of Appeals by a 2-1 margin determined that questions of fact existed, sufficient to deny summary judgment, on whether the hospital should have discharged a patient to her husband's custody. On the way home from the hospital, the husband killed his wife and then killed himself.

The husband originally took his wife to the emergency room, and their story was that she had been hurt falling off a horse. Several things occurred during the emergency room stay that caused various hospital staff to doubt the story and suspect that the injuries were the result of spousal abuse. The

wife's mother arrived at the hospital and stated that the injuries occurred when the husband beat his wife with a fireplace poker.

When the wife was being discharged, security personnel accompanied her out of the building, and hospital employees told her that she did not have to leave and did not have to go with her husband. The wife's mother pleaded with her not to go with the husband. The wife indicated that she wanted to leave with her husband.

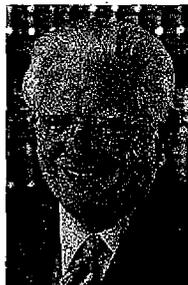
The court analyzed a hospital's duty to its patients, indicating that "whether there is a specific duty not to discharge a patient to the care of a suspected abuser is a question of first impression." The court held that "such a duty might sometimes be included in a hospital's general duty of care toward a patient, or in the alternative might arise by virtue of statutory requirements to report abuse of certain endangered adults." It held that hospitals have a duty to "protect a patient from dangers that might result from external circumstances peculiarly within the hospital's control."

In this case, the court determined that there was enough evidence to create a genuine issue of material fact. The court relied on information that, during her hospitalization, the wife received several drugs that may have impaired her ability to make decisions. At least one drug came with a warning that the patient should make no significant decisions until the drugs were out of her system. The court concluded that either the hospital's general duty of care or the statute requiring hospitals to protect endangered adults could create a duty of care that a reasonable jury might find to have been violated.

The court therefore reversed summary judgment for the hospital. Dissenting, Chief Judge Baker found the duty created by the majority opinion to be "astonishingly broad." He concluded that the wife could not be an "endangered adult" under the statute, and therefore the statute could not subject the hospital to any duty because the undisputed evidence was that the

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wife was coherent and competent at the time of her discharge. He also declined to extend the hospital's duty of care to persons not under the hospital's control and not physically located on the hospital's grounds.

Sanction against governmental party that did not implement mediated settlement

The Court of Appeals looked at whether and when it is appropriate to sanction a local government board for failing to follow through with a mediated settlement in *Lake Cty. Trust Co. v. Advisory Plan Comm'n*, 883 N.E.2d 124 (March 20) (J. Sharpnack). The trust company wanted to develop certain land, the plan commission denied primary approval, and the trust company sought judicial review. The trial court ordered mediation, and the parties signed a settlement agreement under which the trust company would submit a renewed

plan and the plan commission would "approve this agreement" at its next meeting.

But at the next meeting the commission deferred the renewed plan to its next meeting. The trust company went back to the trial court to enforce the settlement and obtain sanctions. The commission's attorneys had said they had full settlement authority, but they also provided evidence that they told the trust company that the plan would have to be approved at a public meeting of the commission.

The trial court found that the commission acted in bad faith, and ordered the commission to approve the plan and to pay the costs of mediation as a sanction. The trial court declined to award attorney fees, finding that such punitive amounts could not be awarded against a governmental entity.

The Court of Appeals affirmed the trial court's conclusion that the

plan commission was immune from punitive sanctions. It held that "specific provisions in court rules for sanctions against a governmental entity may be enforced, but, where there is no such provision ... governmental entities are immune from sanctions." Because sanctions under the Alternative Dispute Resolution Rules are punitive, they could not be awarded against the commission. The Court of Appeals also ruled that the commission did not act in bad faith because "Indiana's Open Door Law requires a settlement agreement to be approved at a public meeting." In other words, the settlement agreement could be at most provisional because it had to be reviewed and approved by the commission at an open meeting. Thus, the commission's decision to defer considering the settlement was not in bad faith and did not violate the terms of the settlement.

The court also noted that it is "better practice" to recite in the settlement agreement that it is contingent upon approval after compliance with the Open Door Law.

Personal jurisdiction over Nevada casinos

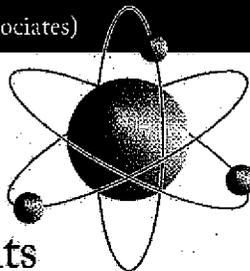
The Court of Appeals found personal jurisdiction over two Nevada casinos in *JPMorgan Chase Bank, N.A. v. Desert Palace, Inc.*, 882 N.E.2d 743 (March 19) (J. Kirsch). The case arose from gambling debts acquired by an Indiana businessman. The casinos made contact with the gambler, his family and his business in Indiana to collect the debts. Eventually, the casinos presented markers to the bank, and the bank paid the markers from the accounts of the gambler's business.

The business notified the bank that the withdrawals were unauthorized. The bank refunded the money and brought suit against

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the casinos, alleging that they had engaged in fraudulent misrepresentation or negligent conversion to obtain the payments. The trial court dismissed for lack of personal jurisdiction.

The Court of Appeals reversed, finding personal jurisdiction. The court found specific personal jurisdiction resulting from the casinos' actions relating to this case and did not reach the question of general personal jurisdiction. The casinos' contacts included advertising and soliciting Indiana citizens, including phone calls, e-mails and letters to the businessman, as well as letters, e-mails and phone calls to the businessman, his family and his attorney to collect the debts. The casinos had brought suit in an Indiana court to collect the debt. The casinos also cashed the markers in Indiana, where the bank accounts were located. These contacts, and the bank's allegation that the casinos knew that cashing the markers was fraudulent because the business itself did not owe the debt, were sufficient to establish personal jurisdiction over the casinos.

Tortious interference with contract

In *Allison v. Union Hospital, Inc.*, 2008 WL 732424 (March 20) (C.J. Baker), evidence that a hospital improperly terminated its contract with independent contractor nurses to purchase nursing services at a lower cost, together with evidence the hospital had been looking for lower cost services even when it contracted with the nurses, precluded summary judgment in the hospital's favor on the nurses' tortious interference with contractual relationship claim. While a contracting party cannot ordinarily "tortiously interfere" with its own contracts, liability can arise when it conspires (unjustifiably) with another party to do so. By contrast,

the provider of lower cost nursing services did not unjustifiably interfere with any contractual relationship where it believed the nurses' contract to be terminable at will. Finally, its independent-contractor relationship with the nurses would not support a constructive fraud claim against the hospital.

Nunc pro tunc order on motion to correct error

The trial court lacked authority to grant a motion to correct error through a *nunc pro tunc* order more than 30 days after its hearing before a magistrate who indicated the motion would be granted. Though the magistrate in civil proceedings can preside over a motion to correct error hearing, the magistrate has insufficient statutory authority to grant or deny the motion. Nor did the record otherwise support a *nunc pro tunc* order, which requires that the unrecorded act occurred

and that a writing form the basis for establishing the error to be corrected. Consequently, a former wife's failure to appeal the court's marriage dissolution decree within 30 days after Rule 53.3 deemed her motion to correct errors denied required reinstatement of that decree. *Johnson v. Johnson*, 882 N.E.2d 223 (March 10) (C.J. Baker).

Riparian right to unobstructed water view

An owner of property abutting water generally possesses compensable riparian rights, such as the right to access navigable water and the right to reasonably use water for boating and similar purposes. But unlike some other states, Indiana does not recognize a riparian right to an unobstructed view of abutting water. *Ctr. Townhouse Corp. v. City*

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of Mishawaka, 882 N.E.2d 762 (March 20) (J. Kirsch).

Bodily injury coverage in uninsured motorist policy

A State Farm automobile insurance policy that limited benefits to damages "for bodily injury" violated Indiana's uninsured motorist statute. The statute operates to make the same protection available to a person injured by an uninsured motorist as would be available if that motorist carried liability insurance. Specifically, it requires coverage where insureds are legally entitled to recover damages from an uninsured motorist "because of" bodily injury, including death. Where the parents/insureds were entitled to recover damages from an uninsured motorist for the loss and companionship, but not for the bodily injury, of a son not covered by their State Farm policy,

its bodily injury requirement was void as violating the uninsured motorist statute. *Bush v. State Farm Mut. Auto. Ins. Co.*, 882 N.E.2d 821 (March 20) (J. Kirsch).

Federal preemption of defective seat belt claim

Vehicle safety standards promulgated under the federal Safety Act preempted the claim that an allegedly defective car seatbelt caused injuries to a child passenger. The court concluded that regulations allowing car makers to choose between lap-only and lap-shoulder belts did not merely set minimum requirements, but imposed a deliberate and comprehensive regulatory scheme. Consequently, they were beyond the scope of the Safety Act's "savings clause," which provides that compliance with a federal standard does not "exempt any person from any liability under the common law." *Roland v. Gen. Motors Corp.*, 881 N.E.2d 722 (March 3) (J. Hoffman).

Zoning board correction of its own error

The Court of Appeals' finding that "the evidence in the record" did not support a zoning board variance, and its reversal of the trial court judgment affirming the board's decision, did not permit the variance to stand; rather, it left the "trial court without authority to take any action except to order the [zoning board] to reverse the grant" of the variance. The zoning board did, however, retain authority to correct a clerical error in its order under general administrative law principles. Consequently, where that correction provided the necessary record evidence to support the variance, its grant would be affirmed. *Burcham v. Metro. Bd. of Zoning Appeals Div. of Marion County*, 2008 WL 835678 (March 31 2008) (J. May).

TRANSFER GRANTS

The Indiana Supreme Court granted transfer in four civil cases in March.

• *Mayes v. Second Injury Fund*, 873 N.E.2d 136 (Ind. Ct. App. 2007) (addressing whether settlement with third party tortfeasor defeats injured worker's claim to compensation from Second Injury Fund).

• *Reuille v. E.E. Brandenberger Constr., Inc.*, 873 N.E.2d 116 (Ind. Ct. App. 2007) (construing "prevailing party" language in contract provision governing award of attorney fees and costs).

• *Young v. Young*, 881 N.E.2d 1 (Ind. Ct. App. 2007) (addressing child support calculation).

• *Barnett v. Clark, Trustee*, 877 N.E.2d 839 (Ind. Ct. App. 2007) (addressing whether and when a public employer is liable for the sexual misconduct of an employee). ☞

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