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ATTORNEYS

2015 YEAR IN REVIEW: 10 INDIANA CASES OF NOTE

Prepared by the DSV Litigation Section

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1. Depositions *Before* the Lawsuit:
Trial Rule 27 Provides Tool for Discovery Before a Lawsuit is Filed

Cleveland Range, LLC v. Lincoln Fort Wayne Associates, LLC, 2015 WL 5172888 (Ind. Ct. App. 2015)
By: David A. Temple

In *Cleveland Range, LLC v. Lincoln Fort Wayne Associates, LLC*, 2015 WL 5172888 (Ind. Ct. App. 2015), a former tenant and landlord enter into a cost allocation agreement for environmental costs after sale of property due to chlorinated solvent contamination of the property. The former tenant missed payments under the allocation agreement and sought to modify the agreement. However, the landlord wanted the tenant to continue paying the agreed upon amount and resisted modifying the agreement.

The landlord could have filed a lawsuit for breach of the allocation agreement by the former tenant in failing to make the payments. However, the landlord was concerned that a lawsuit would adversely affect the parties' working relationship and/or the Indiana Department of Environmental Management's involvement in the matter. The landlord wanted to depose three (3) witnesses whose ages ranged from 67 to 78 and formerly worked for the tenant concerning the tenant's past operations at the property.

Rather than filing a lawsuit for breach of contract, the landlord filed a petition to perpetuate testimony pursuant to Trial Rule 27. Trial Rule 27 is an exception to the general rule that discovery is permitted only after a lawsuit has been commenced. While broadly interpreted, its scope is narrower than Trial Rule 26, the general discovery rule. Trial Rule 27 is to be used to memorialize evidence already known; it is not a pretrial discovery tool. The "impediment requirement" of the Trial Rule 27 prevents "fishing expeditions" to discover grounds for a lawsuit.

In *Cleveland Range*, the landlord satisfied "the impediment" requirement as it could be expected to be a party in a lawsuit in light of the former tenant's failure to make certain payments and the tenant's desire to modify the cost-sharing agreement. Trial Rule 27(A) requires the petitioner to "state facts showing…the facts which [sic] he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it [and] the substance of the testimony which [sic] he expects to elicit from each." The landlord identified three (3) witnesses, 18 specifics matters including the disposal of TCE and PCE, the method by which TCE and PCE entered the soil beneath the building, the location and operation of a UST used to store TCE, how metal trays passed through a degreaser, and the location of a drawing of an AST used to store TCE.

Due to the ages of the three (3) witnesses, the landlord easily satisfied the "failure or delay of justice" requirement. Moreover, the remediation process could take years such that the witnesses' memories might be lost due to poor health or death thereby causing a failure or delay of justice based on the age of the witnesses.

Trial Rule 27 is rarely used discovery tool, but *Cleveland Range* reminds us that options other than filing the traditional lawsuit may exist to accomplish a client's goals in a cost effective and

efficient matter. However, only a court gets to decide the fine line between a fishing expedition and preserving testimony.

2. Jobsite Safety and Personal Injury Claims:
Construction Manager Not Liable for Injury to Prime Contractor's Employee

Lee v. GDH, LLC, 25 N.E.3d 761 (Ind. Ct. App. 2015)
By: Sean T. Devenney

In *Lee v. GDH, LLC*, the Indiana Court of Appeals affirmed and further explained the principles first set out by the Indiana Supreme Court in *Hunt Construction Group v. Garrett*, 964 N.E.2d 222 (Ind. 2012) relating to liability for construction injuries on construction job sites. The Court of Appeals focused on the contracts between the parties and the specific actions of the parties to determine that a construction manager did not owe a duty to an injured employee of a prime contractor working on the project. The Court noted that by contract, the construction manager disavowed responsibility for job site injuries to individual workers on the site.

The Court also noted that the construction manager did agree to certain safety related coordination work for all of the prime contractors on the site. However, the Court noted that the construction manager performed the safety related coordination work for the benefit of the owner per the construction manager's contract, and the injured employee was not an intended beneficiary of that work. Further, the Court noted that since there was no evidence that the construction manager specifically assumed a duty of safety to the injured employee (i.e., Lee), the construction manager was entitled to summary judgment.

3. Personal Injury Claims Occurring After Substantial Completion:
General Contractor Had Legal Duty to Owner's Employee for Accident Occurring After Project Completion

Gwinn v. Harry J. Kloeppel & Associates, 9 N.E.3d 687 (Ind. Ct. App. 2014)
By: William E. Kelley, Jr.

The *Gwinn* case involved a construction project at a high school. After the project was completed, and while the building was in use by the school corporation, a teacher was injured when the projection screen in the classroom fell from a ceiling mount while the teacher was retracting the screen. The teacher filed a lawsuit against the general contractor on the project. However, the general contractor argued that the work at issue had been performed by a subcontractor, and that the general contractor had no legal duty to the teacher since it did not actually install the work at issue. The teacher countered that the general contractor was vicariously liable for the acts of its subcontractors, and therefore was liable to the teacher.

The Court of Appeals held that the general contractor had assumed a non-delegable duty by virtue of its contract agreement with the project owner. Specifically, the general contractor contractually assumed a duty to be "solely responsible for and have control over construction means, methods, techniques, sequences and procedures" of the work. The court concluded that this contractually assumed duty included the duty to supervise the work of its subcontractors and the construction methods employed in a reasonably prudent manner, including any negligent acts and omissions of its subcontractors.

In addition, the Court held that the contractual duty assumed by the general contractor was to the "Owner", which was the school corporation. However, the contractual language not only included the "Owner", but also the "Owner's employees". Since the teacher who was injured was an employee of the "Owner", the Court held that the general contractor had assumed a legal duty to the teacher for the contractual duties outlined in the agreement with the school corporation. The Court sent the case back to the trial court for further proceedings on whether the general contractor breached its legal duty, or whether any of its alleged negligence (or the negligence of its subcontractors) proximately caused the teacher's injuries.

4. Waiver of Subrogation and Insurance Coverage:
Parties to AIA Construction Contract Waived Insurer's Subrogation Claims for Damages Covered by "Any Insurance"

Board of Commissioners of the County of Jefferson v. Teton Corporation, 30 N.E.3d 711 (Ind. 2015)
By: William E. Kelley, Jr.

The Indiana Supreme Court analyzed the waiver of subrogation clause in the American Institute of Architect (AIA) A101 and A201 contract forms, and it formally adopted the "any insurance" approach (over the "work versus non-work" approach). The case involved a fire that occurred during renovations to the Jefferson County (Indiana) courthouse. The Indiana Supreme Court noted that instead of obtaining a builder's risk policy that only covered the renovation project, the owner (Jefferson County) relied on an existing "all risk" property insurance policy that covered not only the existing property at the courthouse, but also the ongoing construction operations.

The damages caused by the fire were all covered and paid by the property insurance company for Jefferson County under the "all risk" insurance policy. Nonetheless, the owner and its insurance company argued that the waiver of subrogation only applied to damages to the contractor's work (and not "non-work" areas in the courthouse), since the construction contract only required the owner to purchase builder's risk insurance for the construction work at issue. However, the Indiana Supreme Court noted that the waiver of subrogation clause was broader than just the potential coverage for the "work" on the project, and specifically applied to all damages paid under any property insurance policy maintained by the owner. Even though the owner had broader insurance coverage than required under the contract, the waiver still applied to all covered damages, since the waiver language specially applied to damages "*to the extent covered by property insurance obtained pursuant to this Paragraph 11.2 or other property insurance applicable to the Work...*"

The Supreme Court also noted that this language clearly only applied to *property insurance* maintained by the owner, and was not so broad to also include damages covered under the *liability insurance* policies that the parties agreed to maintain for the project. The effect is that the owner (or more specifically, its property insurance company that paid all of the damages) could not sue the contractors, as the waiver of subrogation clause effectively waived all claims covered by property insurance.

5. Mechanic's Liens and Attorney Fees:

Mechanic's Lien Claimant Can Recover Attorney Fees Even Where General Contractor Posts Bond and Discharges Lien on Behalf of Owner

Goodrich Quality Theaters, Inc. v. Fostcorp Heating and Cooling, Inc., 2015 WL 5042137 (Ind. 2015).
By: William E. Kelley, Jr.

A group of subcontractors recorded mechanic's liens against a construction project where there was a payment dispute, and then sued the owner and general contractor on the mechanic's lien and the subcontract agreements. The general contractor posted a surety bond pursuant to Indiana Code §32-28-3-11 for the amount of the liens, "including costs and attorney's fees allowed by the court". After the court approved the bond, the court ordered the mechanic's liens to be released from the real estate. The subcontractors proceeded to trial, and the court entered judgments against the general contractor for the amounts owed, which judgments included an award of attorney fees. The general contractor appealed and argued that the award of attorney fees was improper since the judgment was entered against the general contractor and not against the owner of the real estate. The general contractor argued, in part, that the posting of the surety bond and discharge of the mechanic's lien meant that the subcontractors' remedy was against the general contractor and the surety, arguing that the mechanic's lien statute only provided for attorney fees for an award against the owner.

The Indiana Court of Appeals agreed with the general contractor and reversed the award of attorney fees. The Court of Appeals held, in part, that Indiana Code §32-28-3-14 did not permit the subcontractors to recover attorney's fees from a non-property owner (i.e., the general contractor). The subcontractors then sought review by the Indiana Supreme Court, which reversed the Indiana Court of Appeals and found that attorney fees could be awarded against the general contractor.

The Indiana Supreme Court noted that the statute that allowed for the posting of a surety bond in place of a mechanic's lien specifically required the surety to pay fees and costs if the judgment is found to be a lien on the property. Thus, the Court held that the statute obligated the general contractor (who posted the bond) to pay the subcontractor's attorney's fees incurred upon foreclosing their mechanic's liens. The Court held that this obligation was not discharged upon the release of the mechanic's liens, which were only released upon the posting of the property surety bond form and amount. Moreover, the Court held that it would be "unfair" if a general contractor could post a surety bond and avoid paying attorney's fees that it would otherwise have to pay if a subcontractor foreclosed on a lien, leaving the subcontractor in a worse position than if it had foreclosed on the lien while it was still attached to the real estate.

6. Wrongful Death Actions and Attorney Fees:

No Recovery of Attorney Fees for Next of Kin in Wrongful Death Actions

SCI Propane, LLC v. Frederick, 39 N.E.3d 675 (Ind. 2015)
By: Melanie M. Dunajeski

Wrongful Death is a purely statutory cause of action in Indiana. Indiana has three different statutes that control wrongful death suits based on the status of the deceased person. The

original General Wrongful Death Statute (GWDS- Indiana Code 34-23-1-1 et seq.) has been around for fifty years and creates a cause of action for the wrongful death of two categories of decedents. The first category is for all decedents generally. This category allows damages "including, but not limited to" certain enumerated damages on resulting from said wrongful act or omission, and does not expressly include attorneys' fees. The second category is for decedents who are not survived by spouse, dependent children or dependent next of kin. For this category the same statute expresses the recoverable damage differently-and adds as a category of damages "reasonable attorneys' fees" in "prosecuting or compromising the action".

Later enacted statutes have created causes of action for unmarried adults leaving no dependent children or next of kin (Adult Wrongful Death Statute I.C. 34-23-1-2 "AWDS") and for children (Child Wrongful Death Statute I.C. 34-23-2-1 "CWDS"). Both the AWDS and CWDS provide that the decedent be unmarried and without dependents—so in essence together they "perfectly match" the second category of the GWDS. The CWDS provides for recovery of a reasonable attorneys' fee. The AWDS does not expressly provide for recovery of attorneys' fees-providing instead that damages "may include but are not limited to" a list of certain expenses and categories of damages that does not expressly include attorneys' fees. In 2011 the Indiana Supreme Court held that attorneys' fees were recoverable under AWDS, finding the "may include but are not limited to" language of the AWDS as ambiguous, and interpreting the statute so that it was harmonious with the comparable provisions of the two other wrongful death statutes. *McCabe v. Commissioner, Indiana Department of Insurance*, 949 N.E.2d 816 (Ind.2011).

This set the table for the Court in *SCI Propane, LLC v. Frederick*, 39 N.E.3d 675 (Ind.2015). In that case, the decedent Fredericks died in a propane tank explosion leaving a wife and minor child. His estate filed a wrongful death action under the GWDS and specifically sought attorneys' fees, even though that portion of the GWDS did not expressly provide for them. Both the trial court and the Court of Appeals found in favor of the estate—based in large part on the Supreme Court's prior reasoning in *McCabe* construing the AWDS. However, when the Supreme Court granted transfer of *SCI*, it reversed, holding that under the GWDS, no attorneys' fees are recoverable when the decedent is survived by a spouse or dependent.

7. Who Can Bring A Wrongful Death Action?:
Who Is A "Next of Kin" For Purposes of Wrongful Death Action?

Lomax v. Michael, 2015 WL 6447556 (Ind.Ct.App.2015)
By: Melanie M. Dunajeski

Lomax v. Michael, 2015 WL 6447556 (Ind.Ct.App.2015) examines the question of who is "dependent next of kin" under the GWDS. The case arose out of the death of Edward Lomax in a bicycle vs. car accident. Lomax was unmarried and without children, but he was survived by adult nephew Robbie Lomax. Edward was Robbie's last living relative on his father's side. They resided together on and off throughout Robbie's life, and since 2005 or 2006 Eddie resided continuously with Robbie and Robbie's wife. Edward contributed $400 toward monthly rent and utilities, as well as additional contributions for groceries and other expenses when Robbie became unemployed and his business failed. Edward also helped out around the house and

Edward and Robbie spent their leisure time together in a relationship that Robbie described as more like a father and son.

Robbie brought suit under the GWDS against the driver of the car that hit Edward, claiming to be Edward's dependent next of kin under the GWDS. The defendant challenged Robbie's claim to be dependent next of kin under the GWDS in a Motion for Summary Judgment, and the trial court agreed. Robbie appealed. The Court of Appeals examined whether there was any genuine issue of material fact as to whether or not Robbie was a "dependent next of kin", finding that prior precedent has established that the "dependence" needed under the GWDS need not be complete or continuous, and further that Edward's contribution toward the household in which he lived was significant. The Court reversed summary judgment and remanded the case to the trial court for trial including the issue of whether Robbie was a dependent next of kin.

8. Environmental Claims and Insurance Coverage: Court Interprets "Pollutant" in Insurance Policies Using the "Ordinary Policy Holder of Average Intelligence" Test

St. Paul Fire & Marine Ins. Co. v. City of Kokomo, 2015 WL 3907455 (S.D. Ind. 2015)
By: Erik S. Mroz

St. Paul Fire & Marine Ins. Co. v. City of Kokomo is a Southern District of Indiana case concerning three definitions of "pollutant." The Court was called upon to determine whether pollution exclusion language barred coverage for an underlying environmental claim. With regards to the earliest definition (2002-2004), the Court held (consistent with prior Indiana case law) that the term "pollutant" is ambiguous and not a bar to coverage for an environmental claim. On the second definition of "pollutant" (2007-2011), which defined "pollutant" in reference to state and federal environmental protection laws, the Court held that an ordinary policy holder of average intelligence would not be able to understand what specifically was excluded from coverage. Therefore, the Court found that the definition was ambiguous and also not a bar to coverage for an environmental claim.

As to the third definition (2011-2013), which specifically lists categories of chemicals and specifically identifies certain chemicals by name, the Court denied Travelers' motion for summary judgment finding that at least 2 of the 147 chemicals at issue are not specifically listed in the definition. The Court held "[T]he 2011-2013 Endorsement is not sufficiently specific that Travelers has no duty to defend the City as a matter of law…" In so holding, the Court tested the insurance policy language by examining whether "an ordinary policy holder of average intelligence" was on notice that a certain risk (here a specific chemical) excluded coverage under the policy. If so, the exclusion applies. If not, as generally was the case here, the exclusion would not act as a bar to coverage.

9. Environmental Legal Action (ELA) Claims:
Court Interprets "Caused or Contributed to" Language in Environmental Legal Action Statute

5200 Keystone Limited Realty, LLC v. Filmcraft Laboratories, Inc., 30 N.E.3d 5 (Ind. Ct. App. 2015)
By: Erik S. Mroz

5200 Keystone Limited Realty, LLC v. Filmcraft Laboratories, Inc., et al. is an Indiana Court of Appeals case clarifying the "caused or contributed to" language of the Indiana Environmental Legal Action ("ELA") statute. This case has huge implications for parties litigating under the ELA. For years, the courts and parties have grappled with the evidentiary showing needed to prove causation under the ELA. In *5200 Keystone Limited*, the Court of Appeals held:

> For purposes of this litigation, the important dates were those dates for which KLR could establish that Spicklemire was present on the Site, or had knowledge of or bore some responsibility for what was occurring on the Site. KLR adduced such evidence, establishing the date range of Spicklemire's ownership of the Site, the date range of Filmcraft's operations, and the date range of the operations of the subtenants, i.e., the Detailers. It was then up to KLR to present evidence linking Spicklemire to the particular contaminants discovered to be present at the Site via the inspections performed by Keramida in 2002 and Terra in 2013, i.e., chlorinated solvents or petroleum hydrocarbons.

In so holding, the Court of Appeals found that an ELA plaintiff is not required to produce direct evidence that a defendant released a specific contaminant on specific dates, which caused the contamination driving the remediation. Rather, the ELA plaintiff is required to present evidence linking the defendant to particular contaminants in the environment.

10. Environmental Claims and Insurance Coverage:
Court Interprets Insurance Coverage for Abandonment of Foundry Sand on Landlord's Property

FLM, LLC v. The Cincinnati Insurance Company, et al., 24 N.E.3d 444 (Ind. Ct. App. 2014) ("FLM II") and 27 N.E.3d 1141 (Ind. Ct. App. 2015) ("FLM III")
By: Erik S. Mroz

In FLM II, the Indiana Court of Appeals ruled that the environmental consequences of tenant's abandonment of over 100,000 tons of foundry sand on landlord's property was an "occurrence" within the meaning of Commercial General Liability ("CGL") policy. As stated by the Court of Appeals in FLM III "we concluded that the contamination of [landlord's] property by the abandoned foundry sand was an 'accident' and therefore an 'occurrence' under the policy."

In FLM III, Cincinnati Insurance Company requested the Court of Appeals reconsider its coverage determination arguing that the "expected or intended injury" exclusion contained in the CGL policy barred coverage. According to Cincinnati Insurance Company, the tenant "made the intentional business decision to breach its contract… vacate the property and abandon the

thousands of tons of foundry sand being stored on [the] property." The tenant "did so knowing that this act would violate Indiana law and cause the [landlord] to be in non-compliance with IDEM regulations." Therefore, according to Cincinnati Insurance Company, the "injury" here was "expected or intended" and excluded from coverage.

The Court of Appeals in FLM III rejected Cincinnati Insurance Company's contention and relied on the following argument made by the landlord:

> Cincinnati does not, and cannot, claim [that the tenant] had the means to remove the foundry sand … but instead chose not to. [Tenant] did not make a "business decision" and it did not "intentionally" or "deliberately" abandon the foundry sand. [The tenant was forced] out of business – there was no "choice" or intentional act for [the tenant] then. And it was only when the [tenant] was unexpectedly forced out of business … that the injuries occurred.

The Court of Appeals' holding expands the definition of "accident" beyond how that term is usually understood. People do not typically view a business failure as an "accident" – certainly not an insurable accident. The stockpiling of sand was a part of the tenant's business and therefore an intentional act. In arriving at this holding, the Court of Appeals determined that the "injury" was caused by the abandonment of the foundry sand and not the initial placement of the foundry sand. Had the Court viewed the initial placement of the foundry sand as the cause of the "injury," the results of this case may have come out quite differently.