Survey of Recent Developments in the Indiana Law of Evidence

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I. Introduction

If the appellate judiciary has been described, facetiously, as students of the law possessing the freedom to grade their own paper, the restraints upon those of us who subsequently review their work are even less. Our views as commentators are essentially made without the benefit, or restraint, of any records of the proceedings at the trial courts which, of course, are the factual essence upon which rest the appellate opinions. We simply do not know what facts, altogether, served to persuade the courts to reach their conclusions, and each reported opinion of the court does not necessarily set forth all of those facts, or necessarily even all of the salient ones, which were persuasive to the courts in ending up with the conclusions and reasoning ultimately expressed in the opinions themselves. We simply have to accept, and work with, the facts as reported in the opinions themselves. We are neither limited by any need to reach a consensus of thinking in reaching the results that we do, nor benefitted by the collective, persuasive thinking of others on the court who share the responsibility of reaching correct and reasoned conclusions. Moreover, we have not had the benefit of the legal authorities and argument which were presented in the appellate process and which influenced the courts' conclusions. In short, the views we offer are essentially our own and, with certain limitations, are not shared by the courts themselves. It is within those limitations, and the potential for error which they represent, that the following is offered as an overview of those cases which are noteworthy involving evidentiary issues under Indiana law during the survey period. The author hopes to assist the judiciary and bar in their understanding and ultimate application of these cases.

II. Hearsay

Hearsay evidence received a good deal of appellate consideration during the survey period, not always consistent. Most of that consid-

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eration focused on the business records exception to the general rule prohibiting introduction of evidence which is otherwise hearsay.

Hearsay evidence was again defined during the survey period, as either testimony in court, or written evidence of a statement or entry made out of court, which is being offered to show the truth of the matters which are asserted therein, and is thus resting for its value upon the credibility of the out-of-court asserter.[1] The general rule, of course, is that such hearsay evidence is inadmissible, because its attempted use, when offered for the truth of the matter, deprives the party against whose interests it is offered the opportunity to challenge its accuracy and therefore its truthfulness. It thereby becomes unreliable, and thus inadmissible, unless falling within one of the recognized exceptions to the hearsay rule, that is, hearsay evidence which is nevertheless admissible because of an established judicial recognition that the hearsay evidence has been sufficiently cleansed by the satisfaction of a particular set of foundational requirements, so that the benefits attendant to the admission of the evidence override the potential for its untrustworthiness.

For the business records exception to override the exclusionary rule prohibiting the admission of hearsay evidence, Indiana law has long recognized that the witness, through whose testimony the hearsay evidence is offered, must satisfy four foundational requirements: (1) the records must be identified *either* by their entrant *or* by one under whose supervision they are kept; (2) the records must be shown to be either an original, or a first permanent entry or a duplicate thereof, made in the regular or routine course of business; (3) the records must be shown to have been made at or near the time of the recorded event or transaction; and (4) the recording must be shown to have been performed or made by a person who had both a duty to record the event or transaction as well as personal knowledge of the event or transaction represented by the entry or the recording.[2] As such, traditional Indiana common law requirements comport with the Federal Rules of Evidence,[3] as well as with the views of authoritative commentators.[4]

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1. Payne v. State, 515 N.E.2d 1141 (Ind. Ct. App. 1987). *Accord* Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975); Choate v. State, 462 N.E.2d 1037 (Ind. Ct. App. 1984).

2. Jones v. State, 267 Ind. 205, 209, 369 N.E.2d 418, 420 (1977); Myers v. State, 422 N.E.2d 745, 752 (Ind. Ct. App. 1981); Burger Man, Inc. v. Jordan Paper Prods., 170 Ind. App. 295, 308, 352 N.E.2d 821, 830 (1976); American United Life Ins. Co. v. Peffley, 158 Ind. App. 29, 36, 301 N.E.2d 651, 656 (1973) (case states that it sets forth "[a] synthesis of the Indiana cases treating what modern authorities call the 'business record' exception to the hearsay rule").

3. Fed. R. Evid. 803(6).

4. M. Seidman, The Law of Evidence in Indiana 135 (1977); E. Imwinkelried, Evidentiary Foundations 171 (1980).

However, in *Wiseman v. State*,[5] decided during the survey period, the Indiana Supreme Court either resurrected or created a fifth requirement which arguably must now be satisfied before the business records exception to the exclusion is satisfied: the witness who had knowledge of the facts contained in the records must be unavailable to testify, or unable to recall the facts so as to testify from memory.[6] Except for a single prior case decided seventeen years earlier, upon which the *Wiseman* court relied in making this additional foundational requirement,[7] the business records exception to the hearsay rule in Indiana simply had not included a requirement similar to *Wiseman* that the witness who had knowledge of the facts contained in the records must be unavailable to testify, or be unable to recall the facts themselves. In fact, the requirements of the business records exception to the hearsay rule were addressed on at least two other occasions by the Indiana Court of Appeals during the survey period.[8] In neither of those contemporaneous cases did either court expressly or impliedly add the *Wiseman* or *Wells* requirement of an "absent or forgetful witness" in order to satisfy the foundational requirements of the business records exception to hearsay.

Nor does the purported additional requirement in *Wiseman* add anything meaningful to enhance the trustworthiness of the evidence which is permitted by the business records exception. It is that enhancement of the trustworthiness of the testimony which is, and should be, the sole justification for establishing the exception in the first instance. The purpose of the exception is to establish a series of adequate foundational requirements which are purposefully created to remove, or minimize, the untrustworthiness of evidence which otherwise is unreliable hearsay, and thereby permit its reasonable use by the trier of fact. The exception has never sought to require the introduction of the best evidence, or the most reliable evidence, or only that evidence which cannot be otherwise established by a witness because that witness is unavailable or unable to recall the facts or assertions contained in out-of-court records or statements. However, it is these evidentiary purposes which the "absent or forgetful witness" requirement of *Wiseman* seems to address. Those

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5. 521 N.E.2d 942 (Ind. 1988).

6. *Id.* at 944.

7. Wells v. State, 254 Ind. 608, 261 N.E.2d 865 (1970) (*Wells* was authored by Justice DeBruler, who also authored Wiseman v. State, 521 N.E.2d 942 (Ind. 1988)). While *Wells* in fact contains the requirements cited subsequently in *Wiseman* pertaining to the foundational requirements of the business records exception to the hearsay rule, the same misstatement in *Wiseman* was initiated in *Wells*. There should be no requirement that the witness who had knowledge of the facts be unavailable to testify, nor be unable to recall the facts so as to testify from memory.

8. Payne v. State, 515 N.E.2d 1141 (Ind. Ct. App. 1987); Brant Constr. Co. v. Lumen Constr., Inc., 515 N.E.2d 868 (Ind. Ct. App. 1987).

purposes have simply never been part of the justification, nor need to be part of the justification, for any exception to the hearsay rule, including the business records exception, and should not be made part of the justification now.

Neither *Payne v. State*[9] nor *Brant Construction Co. v. Lumen Construction, Inc.*,[10] also decided during the survey periods, deviated from the traditional foundational requirements which prior Indiana law held must be satisfied in order to admit business records into evidence which are otherwise hearsay. Both of those decisions followed the traditional requirements, consistent with the foundational requirements earlier established in *Burger Man, Inc. v. Jordan Paper Products, Inc.*,[11] *American United Life Insurance Co. v. Peffley*,[12] *Jones v. State*,[13] *Myers v. State*,[14] and the additional authority cited therein.[15] *Wiseman*, therefore, stands alone during the survey period as authority which purports to either graft a new and additional foundational requirement, or to resurrect the earlier requirement of *Wells v. State*.[16] To require an "absent or forgetful witness" who had knowledge of the facts and the records, in order to permit the introduction of the facts contained in those records through another witness who can otherwise satisfy the traditional foundational requirements, is a requirement which, if in fact intended by the *Wiseman* court, is both unnecessary and improper when considered either from the standpoint of traditional Indiana case law or from the standpoint of the purpose for the existence of the foundational requirements themselves.

If *Wiseman* adds confusion to the status of the business records exception to the hearsay rule, however, *Willis v. State*,[17] clarifies the specificity required in the objection which must be made to the business records when they are offered. In *Willis*, the state offered evidence in its rebuttal case. The defendant "objected to the introduction of the exhibit *on hearsay grounds*."[18] The state's reply to the objection was that the evidence, though hearsay, was nevertheless admissible under the business records exception to the hearsay rule. The supreme court held that the defendant's objection, "on hearsay grounds," was an insufficient

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9. 515 N.E.2d at 1143-44.
10. 515 N.E.2d at 872.
11. 170 Ind. App. 295, 308, 352 N.E.2d 821, 830 (1976).
12. 158 Ind. App. 29, 36, 301 N.E.2d 651, 656 (1973).
13. 267 Ind. 205, 209, 369 N.E.2d 418, 420 (1977).
14. 422 N.E.2d 745, 752 (Ind. Ct. App. 1981).
15. *See supra* notes 2, 11-14.
16. 254 Ind. 608, 261 N.E.2d 865 (1970).
17. 510 N.E.2d 1354 (Ind. 1987), *cert. denied*, 108 S. Ct. 721 (1988).
18. *Id.* at 1357 (emphasis added).

objection.[19] Citing the long-established rule that evidentiary objections must be specific, and not general, to preserve error for judicial review on appeal, the court held that the proper and necessary objection would have been to object on the basis of "insufficient foundation," and not merely "on hearsay grounds."[20]

The reasoning of the court is interesting. Had the objection been specific and not general, that is, stated on the grounds of insufficient foundation instead of on the grounds of hearsay, the court explained that the state then would have been furnished with a fair opportunity to correct the deficiency in the offered evidence by satisfying the necessary foundational requirements which had not been fulfilled when the evidence was offered and the objection was made.[21] The court seems to say that at least a purpose of the requirement that objections to offered evidence be specific is to permit the party offering that evidence to then proceed to correct that deficiency in order to enable the proffered evidence to ultimately be received. If that is in fact part of the court's reasoning, then the purpose for making the objection is not merely to exclude evidence, but simultaneously to instruct the party proffering that evidence as to the exact deficiencies in the evidentiary offer itself in order that the deficiencies can then be corrected and the previously excluded evidence be successfully reoffered. The objection, under *Willis*, must not merely be specifically adversarial, but instructive, as well.[22] Moreover, the reason that the evidence in *Willis* was inadmissible was because that evidence truly was hearsay. Although a sufficient foundation in fact may not have been established to satisfy the appropriate exception to the rule prohibiting the introduction of the hearsay evidence, the evidence itself remained hearsay and it was the nature of that evidence, as hearsay, which explained why it should not have been received and considered by the trier of fact. The insufficient foundation was a failure to cleanse the untrustworthy, hearsay character of the evidence; the uncleansed evidence itself, therefore, remained hearsay, and thus inadmissible, and objecting to its admissibility on the basis that the evidence was hearsay should have been sufficient. The *Willis* court held that it was not, however, and the lesson from the case, therefore, is that an objection to hearsay evidence, when offered, must be based not only "upon hearsay grounds," but also upon a failure to establish a proper foundation to satisfy the applicable exception to the hearsay rule itself.[23] Any objection short of that is insufficient under the ruling in *Willis*.

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19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

In *Payne v. State*,[24] the court again addressed the business records exception. In this case, statements had been made *by the patient* in hospital records concerning the alleged causes of her injuries. Although noting that medical records themselves are generally admissible under the business records exception to the hearsay rule, citing *Fendley v. Ford*,[25] the court noted that "any facts within a medical history *given by the patient* are not admissible as substantive evidence."[26] The court concluded that statements contained in the medical records which are made by the patient, and which concern the alleged cause of her injuries were not within the exception to the hearsay rule and could not have been admitted as substantive evidence.[27]

A different aspect of hearsay was addressed by the court of appeals in *Senff v. Estate of Levi*.[28] In *Senff*, a paternity action was brought against the estate of the putative father. During trial, the child's mother attempted to testify concerning her relationship with the putative father during his lifetime, in order to establish paternity. The estate objected to that testimony on the basis of the Indiana Dead Man's Statute, which renders a witness incompetent when the following requirements are met:

(a) The action must be one in which an administrator or executor is a party, or one of the parties is acting in the capacity of an administrator or executor;
(b) The action must involve matters which occurred within and during the lifetime of the decedent;
(c) The action must be a case in which a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator;

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24. 515 N.E.2d 1141 (Ind. Ct. App. 1987).
25. 458 N.E.2d 1167 (Ind. Ct. App. 1984).
26. *Payne*, 515 N.E.2d at 1144. In *Fendley*, 458 N.E.2d at 1170-72, Judge Shields has provided an excellent discussion of whether the results of certain medical tests, including blood-alcohol tests, which are described or memorialized in hospital records may be admissible under the business records exception to the hearsay rule. As discussed therein, other jurisdictions permit certain test results to be admitted into evidence through the hospital records, without testimony from the witnesses who performed the tests, on the basis that the tests themselves are sufficiently routine that the results may be considered as "fact" and not opinion. At least with respect to the results of blood-alcohol tests, Indiana has not adopted that rule, and the results of blood-alcohol tests are not admissible into evidence, as "mere facts," even if included in the hospital records which are otherwise offered into evidence upon the satisfaction of the foundational requirements to establish the business records exception to the hearsay rule. See also Hayes v. State, 514 N.E.2d 332 (Ind. Ct. App. 1987), also decided during the survey period, on the degree of testimony required to satisfy the foundational requirements for the admission of the test results.
27. *Payne*, 515 N.E.2d at 1144.
28. 515 N.E.2d 556 (Ind. Ct. App. 1987).

(d) The witness must be a necessary party to the issue and not merely a party to the record; and
(e) The witness must be adverse to the estate and must testify against the estate.[29]

The court of appeals first held that the trial court had committed error in applying the Dead Man's Statute to prevent the child's mother from testifying concerning her relationship with the putative father during his lifetime.[30] The court reasoned, and properly so, that the child's mother possessed no interest adverse to the estate; the paternity petition was brought by the mother on behalf of the minor child, and it was the child who was the real party in interest and the person intended to be benefited by the establishment of paternity.[31] The mother was only a nominal party, and the mere fact that she brought the action in a representative capacity on behalf of the child, did not rightfully render her a party with an adverse interest against the estate within the meaning of the Dead Man's Statute.[32]

During trial in *Senff*, another witness attempted to testify concerning a conversation which she had had with the putative father shortly before his death. The estate objected on the grounds of hearsay, which was sustained. The argument made in favor of admitting into evidence those statements made by the putative father to that witness, was that the testimony was admissible as an admission, even if it was hearsay.[33] The court of appeals agreed, and held that the decedent's statements were admissible as admissions, and distinguished an admission from a hearsay statement.[34] "An admission," the court held, "is a statement against the interests of a party which is inconsistent with a defense or tends to establish or disprove a material fact."[35] The court then concluded that the subsequent death of a party who has made such an admission does not render that admission inadmissible.[36]

In *Kline v. Business Press, Inc.*,[37] the court of appeals considered the application, and potential extension, of that Indiana hearsay rule

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29. IND. CODE § 34-1-14-6 (1982).
30. *Senff*, 515 N.E.2d at 559.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* Because the child's mother failed to make an offer to prove, however, an axiomatic requirement when an objection is sustained to a question asked on direct examination, the court of appeals concluded the error in excluding the putative father's admission had not been preserved for appeal, and the court therefore did not reverse on that basis.
36. *Id.* (citing Uebelhack Equip., Inc. v. Garrett Bros., Inc., 408 N.E.2d 136 (Ind. Ct. App. 1980); 12 IND. L. ENCYC. *Evidence* § 131 (1959)).
37. 516 N.E.2d 88 (Ind. Ct. App. 1987).

which has become commonly known as "the *Patterson* rule," previously established by the Indiana Supreme Court in *Patterson v. State*.[38] In *Kline*, hearsay statements had been included within affidavits tendered in support of dispositive motions. The affidavits stated that the affiants "had heard" another nonparty witness make certain statements, and those statements were offered in the affidavits for the truth of the matters contained in the statements.[39] A deposition had been taken of the declarants who had allegedly made the statements reported in the affidavits, but not of the affiants themselves. After restating the axioms that facts and matters set forth in affidavits must be admissible in evidence in order to be properly considered by a court when ruling on Summary Judgment Motions, and that courts must ignore those parts of affidavits which are not admissible evidence, the court of appeals in *Kline* concluded that the statements which were contained in the affidavit were in fact hearsay, that they were offered as proof of the truth of the facts contained therein, and that they were therefore inadmissible.[40]

In *Kline*, the party which sought to use the hearsay affidavits argued that, although hearsay, the affidavits nevertheless presented admissible evidence under the exception to the hearsay rule which had been previously enunciated by the Indiana Supreme Court in *Patterson v. State*. In *Patterson*, as reviewed by the *Kline* court, two witnesses had given out-of-court statements prior to trial. Both witnesses were thereafter called to testify as in-court witnesses. Their out-of-court statements were offered and received into evidence, and were consistent with their in-court testimony.[41] The *Patterson* court had then held that the out-of-court statements, although hearsay, were nevertheless admissible as substantive evidence because the declarants themselves were on the stand, under oath, and subject to cross-examination at the time their pre-trial statements were offered into evidence.[42]

The *Kline* court concluded that *Patterson* could not apply so as to render the Summary Judgment Affidavits admissible hearsay.[43] It was true that the persons who allegedly made the statements which had been reported and contained within the affidavits had been deposed; arguably, therefore, the requirement of *Patterson* which compelled the declarant to be available "for cross-examination," by deposition if not necessarily at trial, was satisfied.[44] The *Kline* court, however, correctly observed

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38. 263 Ind. 55, 324 N.E.2d 482 (1975).
39. *Kline*, 516 N.E.2d at 91.
40. *Id.*
41. *Patterson*, 324 N.E.2d at 484-85.
42. *Id.*
43. *Kline*, 516 N.E.2d at 92.
44. *Id.*

that the persons who were transmitting, or relaying, the out-of-court statements, that is, the affiants themselves who furnished the affidavits, had not been deposed and therefore it could not be determined that the statements made by the affiants in their own depositions were consistent with their subsequent statements in the affidavits.[45] *Kline* properly recognized that a comparison could be made between the sworn deposition testimony given by the original declarants, and the subsequent out-of-court statements made by those same declarants whose comments were reported by the affiants in the affidavits. Therefore, the consistency between those two statements could be confirmed in order to satisfy the *Patterson* requirement that the statements made by the declarant/witness on both occasions be consistent. However, the court also properly recognized that there could be no comparable compliance with the same requirement insofar as the statements of the *affiants* were concerned—that is, the relayer of the original declarations.[46] Mindful of the instructions of the Indiana Supreme Court in *Samuels v. State*[47] and in *Stone v. State*[48] not to extend the *Patterson* rule, the *Kline* court concluded that *Patterson* could not apply, that the affidavits were hearsay, and that there was no basis to prevent their being stricken.[49] The summary judgment which the trial court had granted over the stricken affidavits asserted in opposition was therefore upheld.

Finally, on the subject of hearsay, the court of appeals in *Lafary v. Lafary*[50] considered an issue which had not been considered in Indiana in excess of one hundred years: whether specific statements made in a contract, although made out of court and by an out-of-court declarant, are nevertheless admissible. In *Lafary v. Lafary*, an oral contract had been made between the defendant and his deceased father. The defendant attempted to testify at trial concerning the substance of that contract. The trial court sustained "an objection to the testimony as hearsay."[51] The court of appeals reversed, and held that

> "[w]here the *utterances of specific words* is itself *a part of the details of the issue under the substantive law and the pleadings*,

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45. *Id.*
46. *See id.*
47. 267 Ind. 676, 372 N.E.2d 1186 (1978).
48. 268 Ind. 672, 377 N.E.2d 1372 (1978).
49. *Kline*, 516 N.E.2d at 92.
50. 522 N.E.2d 916 (Ind. Ct. App. 1988).
51. *Id.* at 917. Presumably, under Willis v. State, 510 N.E.2d 1354 (Ind. 1987), the objection which was made in *Lafary* to have been properly sustained would have included insufficient foundation as a basis for the objection. Otherwise, *Willis* would have made the objection "on hearsay grounds" insufficient. 510 N.E.2d at 1357. *See supra* text accompanying notes 17-23.

> their utterances may be proved without violation of the hearsay rule, because they are not offered to evidence the truth of the matter that may be asserted therein. . . . The *making of a contract* necessarily involves utterances . . . and these are admissible under the issue.[52]

The court thus stated that the statements made within the contract, and which constituted the contract itself, were thus part of the contract and thereby not hearsay. The oral, contractual statements, therefore, became admissible.[53]

III. Expert Testimony

The suitability, sufficiency, and foundational requirements for expert testimony were also considered several times during the survey period by Indiana courts, with most of that consideration arising in the context of malpractice litigation.[54]

In *Burke v. Capello*,[55] a medical malpractice action, the Indiana Supreme Court was presented with a summary judgment motion which had been granted by the trial court in favor of a physician who had performed hip surgery upon the plaintiff. Several weeks following surgery upon examination precipitated by pain, it was discovered that fragments of cement measuring a total of one inch in diameter, which had been used during surgery to affix a prosthesis, had been left in the wound.[56] The physician, who had been sued on the basis that the cement had been left in the wound, filed a Motion for Summary Judgment and, in support thereof, submitted the written expert opinion of the Medical Review Panel finding in favor of the physician.[57] The opinion of the Panel had concluded that there was no malpractice in accordance with the Medical Malpractice Act.[58] Specifically, the Medical Review Panel had concluded that the evidence did not support the conclusion that the physician had failed to meet the appropriate standard of care, and he thereby had not committed an act of negligence.[59] Additional evidence

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52. 522 N.E.2d at 917 (quoting 6 J. Wigmore, Wigmore on Evidence § 1770 (Chadbourn rev. 1981).

53. 522 N.E.2d at 917.

54. Outside of the area of malpractice litigation, the Indiana Court of Appeals also held during the survey period that obscenity, to be proven, need not have expert testimony and may be based upon the jury's viewing of the materials. VanSant v. State, 523 N.E.2d 229 (Ind. Ct. App. 1988).

55. 520 N.E.2d 439 (Ind. 1988).

56. *Id.* at 440.

57. *Id.* at 441.

58. *See* Ind. Code § 16-9.5-9-7 (1982).

59. *Burke*, 520 N.E.2d at 441.

submitted in support of the Motion for Summary Judgment detailed the care with which the surgical procedure had been performed, including the physician's own assertion therein that "care was taken to remove extraneous cement . . . ."[60] The patient offered no evidence in the summary judgment proceedings to contradict the opinion of the Medical Review Panel or the additional evidence which had been submitted in support of the summary judgment.[61]

The Indiana Supreme Court, with Justice Dickson dissenting in a separate opinion, reversed an unpublished opinion of the court of appeals, and set aside the summary judgment. The supreme court found that although expert testimony is ordinarily necessary in medical malpractice actions because of the general rule requiring expert testimony in matters of a technical and complex nature, the leaving of a foreign object in the body "which should have been removed by an act understandable by the jury without extensive technical input" was the kind of act which in fact needed no expert testimony in order to establish a *prima facie* case of negligence.[62] In reaching its conclusion, the court reasoned that "[t]he properties of liquid cement are common knowledge," a conclusion by the supreme court which presumably was based upon evidence contained somewhere in the record of proceedings or which otherwise would arguably be an invasion by the supreme court into the province of the trier of fact.[63] What is, or is not, common knowledge presumably was

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60. *Id.*

61. *Id.*

62. *Id.* As a threshold consideration, there must always be established a need for the expert testimony before that testimony may be given. The issues to be addressed by the expert testimony must be such that they lie beyond the ordinary knowledge of the trier of fact, whether jury or court, and the trier of fact, therefore, could only indulge in speculation in reaching the findings on those issues if expert testimony were not provided. Such testimony is not appropriate with respect to matters which are within the common experience, observation, or knowledge of the trier of fact. Noblesville Casting Div. of TRW, Inc. v. Prince, 438 N.E.2d 722 (Ind. Ct. App. 1982); Johnson v. Bender, 174 Ind. App. 638, 369 N.E.2d 936 (1977). Expert testimony should be excluded where the trier of fact is as well qualified to form an opinion upon the facts as is the expert witness. Hill v. State, 470 N.E.2d 1332 (Ind. 1984); Reburn v. State, 421 N.E.2d 604 (Ind. 1981); Breese v. State, 449 N.E.2d 1098 (Ind. Ct. App. 1983); Carter v. State, 412 N.E.2d 825 (Ind. Ct. App. 1980). However, in Summers v. State, 495 N.E.2d 799 (Ind. Ct. App. 1986), the court, citing an interpretation of FED. R. EVID. 702 in 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 702(02) (1985), allowed expert testimony upon a finding that the expert's opinions would be helpful to the jury, even though the jury may have been able to make a determination without that testimony. And yet, *Summers*, defined an expert as "one who, by reason of education or special experience, has knowledge concerning a subject matter about which persons who have no particular training are incapable of forming an accurate opinion or making a correct decision." *Summers*, 495 N.E.2d at 802. *See also* Moody v. State, 448 N.E.2d 660 (Ind. 1983).

63. *Burke*, 520 N.E.2d at 441.

established somewhere in the record of proceedings, either by judicial notice or otherwise, however, there is nothing in the reported opinion indicating that judicial notice provided the evidentiary basis for establishment of those facts. In fact, the reported opinion indicates that the patient had presented no evidence whatsoever in opposition to this Motion for Summary Judgment, and presumably the affidavits which had been presented on behalf of the defendant did not set forth any self-incriminating evidence concerning "the properties of liquid cement," or that such properties "are common knowledge" to laymen generally.[64] In short, the basis upon which the supreme court derived this evidence of "common knowledge" is unclear, unless it was established in the record of proceeding. The court then reasoned that a "rational trier of fact could have inferred from the admissible evidence that the cement would have been in at least a hardening state and thus perceptible by sight or touch to a careful observer engaged in the process of cleansing the wound . . . ."[65] Therefore, the court concluded, "[t]he inference of breach of duty confronts medical opinion of no breach of duty," and a genuine issue of material fact was thereby created which would render summary judgment inappropriate.[66] The trial court's granting of the summary judgment was thus reversed.

During the survey period, the court of appeals also considered the question of what degree of certitude an expert's opinion must express in order to be admissible, as well as the related question of what degree of exactness tests and experiments must have in order to be reliable as a basis for expert testimony. In *Yang v. Stafford*,[67] a medical malpractice action, opinions of an expert witness were contained in a sworn affidavit which was considered as part of a summary judgment proceeding. The affidavit failed to include any explanation as to the degree of certitude with which the opinions contained therein were being expressed, and specifically failed to explain that the opinions which were being made were based upon a reasonable degree of medical certainty.[68] The parties against whose interests the affidavits were submitted then challenged their use on that basis.[69] The court of appeals disagreed with the challengers, and properly distinguished what are matters of evidentiary foundation, on the one hand, from others, which are matters of the degree of weight which should be placed upon that testimony once it is admitted. "[T]he admissibility of a physician's testimony should not be determined

64. *Id.*
65. *Id.*
66. *Id.* at 442.
67. 515 N.E.2d 1157 (Ind. Ct. App. 1987).
68. *Id.* at 1162.
69. *Id.*

by examining the level of certainty in his opinions," the court reasoned, "since the court would be invading the province of the jury."[70] The court continued:

> Therefore, the admissibility of a physician's testimony should not be determined by examining the level of certainty in his opinions since the court would be invading the province of the jury. Rather, the expert's opinion is admissible if 'a proper foundation establishes the need for expert testimony and the expert's credentials establish an expertise in the area and the methods employed. . . .' Once these factors are established, the evidence is admissible and the jury is left to perform its function of assessing the reliability of the evidence.[71]

Yang thereby becomes part of the growing progeny of *Noblesville Casting Division of TRW, Inc. v. Prince*.[72] Prior to *Noblesville Casting*, Indiana law had permitted medical expert testimony only if the conclusions and opinions expressed by such experts were given in testimony couched in terms of reasonable medical certainty; expert testimony that a certain proposition would merely be possible, as opposed to reasonably certain, was inadmissible.[73] In *Noblesville Casting*, however, the requirement of the previous law was expressly reversed. The *Noblesville Casting* court held that expert testimony, to be admissible, need not be expressed in any particular degree of certitude, because such a requirement improperly emphasizes semantics of the testimony rather than the trustworthiness of its substance and thus its reasonable use by the trier of fact.[74] What must be "reasonably certain," under *Noblesville Casting*, is not what words are chosen for the expression of the opinion, but

> that the witness is in fact an expert and that the analytical and scientific methods employed are generally accepted in the particular community of expertise; in other words, "reasonable certainty" is primarily a formulation designed to guarantee the trustworthiness or reliability of the opinion offered, rather than the fact to be proved.[75]

In *Yang*, as earlier in *Noblesville Casting*, the rule then becomes that the issue of admissibility is not determined by the language which is employed in the expression of the opinion; rather, the admissibility is

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70. *Id.*
71. *Id.* (quoting Kaminski v. Cooper, 508 N.E.2d 29, 30 (Ind. Ct. App. 1987)).
72. 438 N.E.2d 722 (Ind. 1982).
73. Palace Bar, Inc. v. Fearnot, 269 Ind. 405, 381 N.E.2d 858 (1978).
74. *Noblesville Casting*, 438 N.E.2d at 728.
75. *Id.* at 729.

determined by whether the expert witness is shown to have sufficient credentials to enable him to provide opinions on the issues on which he is expected to testify, and whether the methods, tests, and other assistance he has utilized in reaching his opinions are established as reasonably reliable.[76] If those foundational requirements are satisfied, then the degree of certitude with which those opinions are expressed, whether "possibility," "probability," "certainty," or some other comparative expression, become subject to an ultimate determination by the trier of fact after consideration of all of the evidence presented on the subject.[77]

Similarly, in *Hayes v. State*,[78] the court held that test results which are considered by an expert witness in giving expert testimony must be reasonably reliable, although not necessarily fail-safe. In *Hayes v. State*, the technical accuracy of a blood-alcohol test was challenged; arguably, a certain amount of ethanol may have developed in the blood sample, which in turn may have affected the reliability of the test results.[79] The court held, and properly so, that the results of the test were nevertheless admissible, even though arguably tainted by technical imperfections. The court reasoned that "[t]he persuasiveness of such evidence is in large measure dependent upon the expertise of the witness who conducted it; in the final analysis, this is to be determined by the jury after an opportunity for cross-examination."[80] The foundational requirements, therefore, are: whether the test is of a kind ordinarily performed to provide the purported analysis; whether the test is generally reliable; and whether the credentials of the expert witness who will be interpreting the results of the test have been adequately established.

Hayes also addressed the foundational prerequisites for admitting fungible evidence, including blood samples, and the interpretation of the results thereof.[81] The *Hayes* court reviewed applicable authority as follows:

> The admissibility of fungible evidence such as blood samples depends upon a foundation which establishes, inter alia, a continuous chain of custody. The purpose of the rule requiring the State to show a continuous chain of custody of fungible evidence is to demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence. Thus the

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76. *Yang*, 515 N.E.2d at 1161.
77. *Id.* at 1162.
78. 514 N.E.2d 332 (Ind. Ct. App. 1987).
79. *Id.*
80. *Id.* at 338.
81. *Id.* at 337.

> foundation is required to connect the exhibit with the defendant and show the continuous whereabouts of the exhibit from the time it comes into the possession of the police until it is laboratory tested.[82]

Although the requisite chain of custody was established, the defendant objected to the introduction of the test results because of the absence of any testimony that the containers into which the blood samples had been placed were clean; the defendant argued if they were not, a possibility existed that the test sample was contaminated and the test results thereby unreliable.[83] The court rejected that argument. The mere possibility that evidence might have been tampered with or contaminated will not by itself render that evidence inadmissible.[84] In *Hayes*, there was no evidence that contamination had in fact occurred; the objection was only that the lack of contamination, that is, the negative, had occurred, and under *Conrad v. State*[85] and *Zimmerman v. State*[86] there need be no conclusive proof of the negative.[87]

In *Hayes*, there apparently had been no testimony by a physician, or someone in authority who was present at the time of the taking of the specimen, to establish the condition of the equipment utilized for the sampling and the procedures which were followed.[88] Citing *Orr v. State*,[89] the defendant asserted "that the State must elicit testimony *from* a doctor or someone in authority who was present at the time of the taking of the blood as to the procedure used in that taking."[90] The court disagreed, and, citing *King v. State*,[91] held that the foundational requirement to admit the test results does in fact require testimony to be elicited *about* a physician or someone in authority, to establish *who* was present at the time of taking and *what* was done, but that the foundational testimony need not come *from* the physician or the other person who either took the sample or was present at the time.[92] The foundational testimony, therefore, is sufficient if it comes from any witness who was present when the sample was taken and who is otherwise

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82. *Id.* (citations omitted).
83. *Id.* at 336.
84. *Id.* at 337 (citing Zimmerman v. State, 469 N.E.2d 11 (Ind. 1984)); Conrad v. State, 262 Ind. 446, 317 N.E.2d (1974).
85. 262 Ind. 446, 317 N.E.2d 789 (1974).
86. 469 N.E.2d 11 (Ind. 1984).
87. *Hayes*, 514 N.E.2d at 337.
88. *Id.* at 336.
89. 472 N.E.2d 627 (Ind. Ct. App. 1984).
90. *Hayes*, 514 N.E.2d at 337.
91. 397 N.E.2d 1260 (Ind. Ct. App. 1979).
92. *Hayes*, 514 N.E.2d at 337.

competent to testify as to what a physician or other qualified person did, and did not do, with respect to the sampling and identification procedures.

In another medical malpractice action, *Wilson v. Sligar*,[93] the court of appeals again addressed the general Indiana rule which prevents an expert witness from testifying as to the applicable standard of care unless it is first established that the expert is in fact familiar with the standard of care in the same or similar locality as the one in which the alleged act or acts of negligence occurred. The standard of care thereby is measured with reference to the same or similar locality as that in which the complained-of acts were performed.

The court in *Wilson* reviewed the historical justification for the "same or similar locality" rule, noting that the "rule was intended to prevent the inequity that would result from holding rural doctors to the same standard of care as urban doctors."[94] And, the court explained the purpose of Indiana's adherence to the rule, as ensuring that "the physician's professional conduct will be judged in light of the conditions and facilities with which he must work."[95] In a possible portent for future consideration of the "same or similar locality" rule, however, the court, in a footnote, observed that the "same or similar locality" rule is currently being challenged with respect to those physicians, and presumably other professionals who are sued for malpractice, who have become nationally board certified specialists. The court observed:

> We note that today even the less stringent "same or similar locality" rule is under attack with regard to nationally board certified specialists. A national standard of care appears to be justified for specialists who are nationally certified, who have equal access to new theories and modern facilities, and who are equally able to refine their procedures. However, regardless of the merit of changing the standard for specialists to a national standard of care, as an intermediate appellate tribunal this Court is not at liberty to depart from the standard of care embodied in our supreme court's precedent. Therefore, this court will apply the "same or similar locality" rule to the specialist in the present case.[96]

It will be up to the supreme court to accept the invitation of *Wilson v. Sligar* to give future consideration to the foundational requirement

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93. 516 N.E.2d 1099 (Ind. Ct. App. 1988).
94. *Id.* at 1101.
95. *Id.*
96. *Id.* (citations omitted).

of whether expert testimony in medical malpractice litigation, may be given only if the witness is first shown to be familiar with the prevailing standards applicable to the same or similar locality as that in which the defendant committed the acts complained of, in those instances in which the defendant is nationally certified or has otherwise complied with national standards of competence.

IV. Impeachment and Evidence of Other Crimes and Charges

The Indiana courts also considered several cases during the survey period concerning impeachment, evidence of other crimes, and the application in a civil proceeding of evidence of criminal misconduct or the lack thereof.

Generally, evidence of one crime is not admissible to prove that another crime was committed.[97] However, evidence of the earlier crime having been committed may be admissible to prove commission of a subsequent crime by the same perpetrator, if a foundation of substantial similarity between the two crimes can be established.[98] To satisfy that foundation, the facts of the two crimes must be shown to be so similar, unusual, or distinctive as to create a probability that both crimes were committed by a common perpetrator.[99] The application of the foregoing rule was considered during the survey period in *Henley v. State*.[100] In *Henley*, the defendant was convicted of multiple offenses, including rape. During trial, the state introduced evidence that eight days prior to the alleged rape, the defendant had seriously assaulted another witness.[101] The defendant objected, arguing that the two attacks were not so distinctive or unique as to make them a "signature," and that the similarities, if any, were merely common to most rapes and therefore would not suggest a common plan or identity.[102] The court of appeals disagreed, and held that the evidentiary foundation had been established by a showing that there were sufficient similarities between the two crimes that a trier of fact could properly conclude that it *was likely* that the defendant had in fact committed both crimes.[103]

In *Hatcher v. State*,[104] the Indiana Court of Appeals again addressed the issue of whether evidence of prior offenses by an accused is admissible,

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97. Hobbs v. State, 466 N.E.2d 729 (Ind. 1984); Kimmel v. State, 275 Ind. 575, 418 N.E.2d 1152, *cert. denied*, 454 U.S. 932 (1981).
98. *Hobbs*, 466 N.E.2d at 733; *Kimmel*, 275 Ind. at 518, 418 N.E.2d at 1154.
99. *Hobbs*, 466 N.E.2d at 733.
100. 522 N.E.2d 376 (Ind. 1988).
101. *Id.* at 379.
102. *Id.*
103. *Id.* at 379-80.
104. 510 N.E.2d 184 (Ind. Ct. App. 1987).

if it is relevant, to show the likelihood of the commission of the subsequent crime. Specifically, the court was faced with the depraved sexual instinct exception previously addressed by the Indiana Supreme Court in *Kuchel v. State*[105] and *Kerlin v. State*.[106] Those cases held that evidence of prior offenses by the accused are not admissible if they are produced merely to show the defendant's bad character or to show that the defendant has a tendency to commit certain types of crimes, *unless* the alleged crime involves a depraved sexual instinct.[107] If the crime alleged in fact does involve a depraved sexual instinct, then under *Kuchel*, evidence of the prior offenses which involved that same instinct become admissible.[108] In *Hatcher v. State*,[109] the court affirmed the depraved sexual instinct exception to the general rule which otherwise excludes evidence of prior offenses of an accused.

Although evidence of prior crimes committed by a defendant generally are inadmissible to prove the commission of a subsequent crime, evidence of previous criminal conduct generally is admissible for impeachment purposes. The convictions, however, must be one or more of those infamous crimes set forth in *Ashton v. Anderson*,[110] or other crimes involving dishonesty or false statement. Drug convictions had previously been held to be inadmissible for impeachment purposes, because they generally fell beyond the enumerated crimes under the *Ashton* rule.[111] However, in *Wilson v. State*,[112] decided during the survey period, the court held that evidence of a prior drug conviction could be used for impeachment purposes, because on direct examination the defendant had denied any prior convictions "of several types of crimes including the crime he was charged with."[113] The supreme court held that the defendant had thus "opened the door" with his direct testimony concerning what crimes he had *not* been convicted of, thus effectively placing his character into issue as he was attempting to present himself as a person of good character and thereby a person unlikely to have committed the charged crime.[114] Accordingly, the court reasoned, his prior convictions of any

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105. 501 N.E.2d 1032 (Ind. 1986).

106. 255 Ind. 420, 265 N.E.2d 22 (1970).

107. *Kuchel*, 501 N.E.2d at 1033; *Kerlin*, 255 Ind. at 424, 265 N.E.2d at 25.

108. *Kuchel*, 501 N.E.2d at 1033.

109. 510 N.E.2d 184 (Ind. Ct. App. 1987).

110. 258 Ind. 51, 279 N.E.2d 210 (1972) (the crimes were identified as: treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, and willfull and corrupt perjury).

111. Hatchett v. State, 503 N.E.2d 398 (Ind. 1987); Jones v. State, 512 N.E.2d 211, 214 n.3 (Ind. Ct. App. 1987).

112. 521 N.E.2d 363 (Ind. Ct. App. 1988).

113. *Id.* at 367.

114. *Id.* at 368.

of the other crimes enumerated in *Ashton* could be used for impeachment purposes, as well as his prior conviction on drug-related charges.[115]

The final case included within this review is *Schneider v. Wilson*,[116] a legal malpractice action. In *Schneider*, the plaintiff had been operating a truck, which was struck at a railroad crossing by a train engine. The plaintiff then brought suit against the railroad. A blood sample obtained from the plaintiff shortly after the accident, however, revealed a blood alcohol level of .16%, a violation of Indiana Code section 9-11-1-7 which provides that evidence of .10% or more, by weight of alcohol in blood, constitutes *prima facie* evidence of intoxication.[117] Because of various alleged acts of legal malpractice, the plaintiff's claim in the underlying case was involuntarily dismissed, and a malpractice action subsequently was brought which rested upon the involuntary dismissal of the underlying case.[118] In the legal malpractice action, the trial court granted summary judgment in favor of the defendant on the basis that the plaintiff had been operating his vehicle while intoxicated in the underlying case and that he was, therefore, contributorily negligent as a matter of law.[119] The malpractice defendant had successfully argued that because of his contributory negligence, the plaintiff could not have recovered in the underlying action, even had it been properly prosecuted, and the subsequent malpractice action therefore could not be successfully maintained.[120]

The court of appeals reversed the trial court's summary judgment in the malpractice action, and held that although there was no dispute that the plaintiff had been operating his vehicle with a blood alcohol level of .16%, that fact constituted only *prima facie* evidence of intoxication while driving his truck, and "this presumption may be rebutted by the fact that Schneider was never charged with driving while intoxicated and his statement that he was not drunk. The lack of such charge, after investigation by the police, creates an inference that Schneider may not have violated that Statute."[121] Without question, Schneider should have been able to rebut the clinical evidence of his intoxication by his own testimony that he was not drunk by his own testimony or that of others that he was not impaired at that time and place, or by similar testimony

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115. *Id.*

116. 521 N.E.2d 1342 (Ind. Ct. App. 1988).

117. *Id.* IND. CODE § 9-11-1-7 (1988) provides: "Prima facie evidence of intoxication' includes evidence that at the time of an alleged violation there was ten hundredths percent (.10%), or more, by weight of alcohol in the person's blood."

118. *Schreider*, 521 N.E.2d at 1343.

119. *Id.*

120. *Id.*

121. *Id.* at 1344.

that he was capable of safely and properly operating his vehicle at the time of the accident.

However, it is submitted that there is not persuasive legal precedent for the court to have suggested that evidence that Schneider had never been charged with driving while intoxicated would be admissible at trial and, in fact, prevailing Indiana law should exclude that very kind of evidence. Criminal conduct which does not result in a conviction is generally inadmissible.[122] Moreover, the mere fact that a criminal charge has been made against a witness, which is not followed by a conviction on that charge, is not relevant.[123] Likewise, conviction of a crime in a criminal case upon facts which serve as the basis for bringing a civil action as well is inadmissible to establish any element of the civil action.[124] Even a guilty plea to the criminal action which was based upon facts giving rise to the civil suit is only some evidence of culpability in the civil action as an admission, but is not necessarily conclusive of fault in the civil litigation.[125] The common thread through these cases is that a mere charge, without conviction, is evidence of nothing and that a conviction in a criminal case is not evidence of wrongdoing in a civil action brought on the same facts.

Schneider is factually distinguishable to the extent that the evidence of a criminal "no-charge" was to be used to establish a civil "no-fault" rather than evidence of a criminal conviction being used to establish civil fault.[126] Nevertheless, *Schneider* contradicts the principles which derive from this series of cases and does so unjustifiably. *Schneider* would let a mere accusation by the state, or lack thereof, become evidentiary in nature in the civil proceeding. There may have been any number of reasons why the state elected not to charge Schneider with the criminal offense of driving while intoxicated, having little if anything to do with the results of the blood-alcohol testing, and a trier of fact would be compelled to speculate as to the reasons for which that charge was not brought. What the state chooses to do with evidence, that is, whether the state elects to proceed with prosecution or instead chooses to forebear from that course, should not be relevant either on the issue of whether the evidence exists or on the issue of the proper interpretation to be placed upon that evidence when it is considered within the context of civil litigation. Notwithstanding the contrary rule expressed in *Schneider*, the fact that a civil litigant has *not* been criminally *charged*, when

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122. Robinson v. State, 525 N.E.2d 605 (Ind. 1988); Jarvis v. State, 441 N.E.2d 1 (Ind. 1982).

123. Jones v. State, 512 N.E.2d 211, 214 n.3 (Ind. Ct. App. 1987).

124. Cromer v. Sefton, 471 N.E.2d 700 (Ind. Ct. App. 1984).

125. Shearer v. Cantrell, 145 Ind. App. 693, 252 N.E.2d 514 (1969).

126. Schneider v. Wilson, 521 N.E.2d 1341 (Ind. Ct. App. 1988).

the same facts serve as the basis for the civil offense as well as the criminal offense, should not be admissible as substantive evidence in the civil proceeding.