

# RECENT DEVELOPMENTS IN INDIANA CONTRACT LAW

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## INTRODUCTION

Indiana courts addressed a number of significant contract law issues during the review period, both in the common-law context and in the context of the sale of goods under Article 2 of the Uniform Commercial Code. Several of those decisions addressed questions of first impression in Indiana, while others provided useful reminders of important issues to Indiana attorneys.

### I. THE DISCOVERY RULE AND THE STATUTE OF LIMITATIONS IN CONTRACT ACTIONS

*Meisenhelder v. Zipp Express, Inc.*<sup>1</sup> involved the question of whether the discovery rule applied to the statute of limitations in a contract action. In that case, the plaintiff entered into an employment contract on September 1, 1986, and he did not dispute that any claim he had for breach of contract had to be initiated "within ten years after the cause of action accrued."<sup>2</sup> He disagreed with his employer, however, about when the cause of action accrued and, thus, when the statute of limitations began to run.

The Indiana Court of Appeals began its analysis by carefully reviewing *Habig v. Bruning*.<sup>3</sup> It noted that it was not entirely clear in *Habig* whether the court was treating the claims there (for breach of contract, breach of warranty of habitability, and breach of warranty of workmanship) as contract claims or tort claims.<sup>4</sup> In reaching its conclusion that the discovery rule applied to the statute of limitations governing those claims,<sup>5</sup> the court in *Habig* relied on three cases that involved torts,<sup>6</sup> suggesting that the court viewed the case before it as a tort

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1. 788 N.E.2d 924 (Ind. Ct. App. 2003).

2. *Meisenhelder*, 788 N.E.2d at 927. The relevant statute of limitations provides as follows: "An action upon contracts in writing . . . must be commenced within ten (10) years after the cause of action accrues." IND. CODE § 34-11-2-11 (1998).

3. 613 N.E.2d 61 (Ind. Ct. App. 1993).

4. *Meisenhelder*, 788 N.E.2d at 929.

5. The applicable statute of limitations in *Habig* covered "(1) accounts and contracts not in writing, (2) use, rents, and profits of real property, (3) for injuries to property other than personal property, and (4) relief against frauds." *Id.* (citing former IND. CODE § 34-1-2-1). This code section is now codified at Indiana Code section 34-11-2-7 (1998).

6. See *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840 (Ind. 1992); *Burks v. Rushmore*, 534 N.E.2d 1101 (Ind. 1989); *Barnes v. A.H. Robins Co., Inc.*, 476 N.E.2d 84 (Ind. 1985). The

claim.<sup>7</sup> Arguably then, its holding regarding the applicability of the discovery rule could have been "limited to tort claims for injuries to real property."<sup>8</sup> But the court in *Habig* went on to say that "[i]t would be wholly incongruous to interpret IC 34-1-2-1 as requiring the discovery rule in tort cases but not in other cases covered by the particular statute of limitations."<sup>9</sup>

The court in *Meisenhelder* extended this line of thought to the statute of limitations at issue there.

If it was incongruous to apply the discovery rule only to tort claims under I.C. § 34-1-2-1, now I.C. § 34-11-2-7, it would be just as incongruous to apply the discovery rule to tort claims formerly covered by I.C. § 34-1-2-2(1), but not the other claims . . . covered by . . . the statute of limitations at issue before us today.<sup>10</sup>

The court went on to cite *New Welton Homes v. Eckman*<sup>11</sup> and concluded: "the discovery rule is applicable to actions for breach of a written contract under I.C. § 34-11-2-11, and . . . Meisenhelder's cause of action accrued when he knew, or in the exercise of ordinary diligence, could have discovered, that his employment contract had been breached."<sup>12</sup> The court found, however, that the plaintiff knew about the breach in 1987, and thus his lawsuit was still time barred.<sup>13</sup>

## II. VIOLATION OF CONTRACTED-FOR ARBITRATION CLAUSES: STAY OF PROCEEDINGS OR DISMISSAL

*Indiana CPA Society, Inc. v. GoMembers, Inc.*<sup>14</sup> presented an issue of first

relevant statute of limitations in these cases was the former Indiana Code section 34-1-2-2. *Meisenhelder*, 788 N.E.2d at 928. The limitations periods contained in that section of the code are now codified at Indiana Code sections 34-11-2-4 to -6, -8 to -9, -11 (1998). *Meisenhelder*, 788 N.E.2d at 928 n.4.

7. *Meisenhelder*, 788 N.E.2d at 929.

8. *Id.*

9. *Habig v. Bruning*, 613 N.E.2d 61, 64 (Ind. Ct. App. 1993) (citation omitted).

10. *Meisenhelder*, 788 N.E.2d at 929.

11. 786 N.E.2d 1172 (Ind. Ct. App. 2003), *vacated by* 2003 Ind. LEXIS 742 (Ind. Sept. 4, 2003). The court in *New Welton* stated,

Since we have applied the discovery rule to breach of contract cases where the statute of limitations operates to foreclose untimely claims, then it follows that the discovery rule should also be applied to breach of contract cases where the parties have shortened by contract the time within which suit may be brought and the time of breach is not fixed or readily ascertainable.

*Id.* at 1177. It will be interesting to see whether the Indiana Supreme Court upholds this decision.

12. *Meisenhelder*, 788 N.E.2d at 930. It is not clear whether the lawsuit was filed in 1999 or 2000, but in any case, *Meisenhelder* missed the ten-year deadline. *Id.* at 926, 931.

13. *Id.* at 930-31.

14. 777 N.E.2d 747 (Ind. Ct. App. 2002).

impression in Indiana in the arbitration context: whether, in a situation where parties have contracted to arbitrate their disputes, and despite that agreement, one of the parties initiates a lawsuit, the court should dismiss the case or stay the proceedings pending the outcome of the arbitration. The Indiana CPA Society ("Society") entered into a contract requiring GoMembers to perform some work on Society's web site. The contract contained a clause requiring disputes to be submitted to arbitration,<sup>15</sup> but when a problem arose, Society filed a breach of contract claim in Marion County Superior Court rather than seeking arbitration. GoMembers filed a motion to dismiss, which the trial court granted.

The court of appeals analyzed cases from other jurisdictions to assist it in deciding this issue. For example, in *Shribman v. Miller*<sup>16</sup> the court concluded that if the clause in the contract that required arbitration was phrased as a condition precedent to a lawsuit, then it would be appropriate for a court to dismiss an action brought before the parties had arbitrated the dispute.<sup>17</sup> However, if the contractual language did not make arbitration a condition precedent to a claim in court, then it would be appropriate for the court to stay the proceedings pending the outcome of the arbitration.<sup>18</sup>

Other jurisdictions have held that where a plaintiff ignored the arbitration clause in the contract and proceeded directly to the courts, the defendant could seek summary judgment (on the theory that the plaintiff failed to exhaust his or her administrative remedies), or the defendant could seek to stay the proceedings pending arbitration.<sup>19</sup> One court also suggested that if the premature lawsuit were dismissed without prejudice, the practical effect would be the same as staying the proceedings, and apparently either approach would be acceptable.<sup>20</sup>

The Indiana Court of Appeals recognized that when faced with these factual circumstances, some courts in Indiana have stayed the proceedings, and others have dismissed the lawsuits; however, the courts have not clarified why their chosen actions were appropriate.<sup>21</sup> After considering the numerous alternatives, the court of appeals concluded that the best course of action was to allow the courts to "exercise their discretion to either stay or dismiss litigation based on the nature of the contested issues that should first be submitted to arbitration."<sup>22</sup> It

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15. "Disputes under this Agreement shall be submitted to binding arbitration in accordance with the procedures of the American Arbitration Association." *Id.* at 749 (quoting Appellant's App. at 12).

16. 158 A.2d 432 (N.J. Super. Ct. Ch. Div. 1960).

17. *Ind. CPA Soc'y*, 777 N.E.2d at 751 (citing *Shribman*, 158 A.2d at 438).

18. *Id.* The court in *Shribman* stated that arbitration would be a condition precedent to bringing a lawsuit in court if the clause in the contract stated that "the parties may not resort to the courts for the resolution of [their] disputes, unless and until" the disputes have been submitted to arbitration and a determination has been made. *Id.* (quoting *Shribman*, 158 A.2d at 438).

19. *Id.* (citing *Charles J. Rounds Co. v. Joint Council of Teamsters*, 484 P.2d 1397, 1404 (Cal. 1971)).

20. *Id.* at 752 (citing *Pine Gravel, Inc. v. Cianchette*, 514 A.2d 1282 (N.H. 1986)).

21. *Id.* (citations omitted).

22. *Id.*

added that in reaching their conclusions, courts might consider the following factors: whether the court would need to intervene to compel discovery; whether the court would be asked to enforce the arbitration award; whether the entire dispute would be submitted to arbitration; which state's law would control the parties' disputes; and where the parties and the evidence were located.<sup>23</sup>

Here, it did not appear that the court would have to oversee the arbitration proceeding, and the contractual choice of law provision stated that Illinois law would control disputes between the parties. It was, therefore, not an abuse of discretion for the trial court to dismiss the lawsuit.<sup>24</sup>

### III. A QUESTION OF PRIVACY

*Young v. Tri-Etch, Inc.*<sup>25</sup> involved the question of who was party to a contract and thus was subject to its stipulated statute of limitations. Tri-Etch sold and installed a security alarm system at Muncie Liquors, and Tri-Etch and MLS (the owner of Muncie Liquors) entered a written contract whereby Tri-Etch would monitor that system. Apparently, if the alarm had not been set within a certain length of time following the store's regular closing time, Tri-Etch would call the store, and if nobody answered, Tri-Etch would contact the general manager, as well as the police.<sup>26</sup> The contract included a clause that provided a one-year statute of limitations for bringing a claim.

In August 1997, Michael Young, a store employee, was working the late shift at the store. Shortly before midnight (and before Young set the alarm), a man robbed the store, kidnapped Young, and took him to a park where he beat him and tied him to a tree. Young was found, still alive, at approximately 6:00 a.m., but he later died of his injuries. His "estate presented some evidence that had Young been found earlier, he might have survived."<sup>27</sup> Tri-Etch, however, had not contacted the store or the general manager until approximately 3:15 a.m. regarding the fact that the alarm had not been set. Consequently, Young's estate filed a wrongful death claim against Tri-Etch in August 1999, and Tri-Etch filed a motion for summary judgment, arguing that the one-year statute of limitations contained in the contract barred the action. The trial court granted the motion, finding that the time for bringing the wrongful death claim was governed by the limitation period established in the contract, and the court of appeals affirmed.<sup>28</sup>

Upon transfer, the Indiana Supreme Court reversed the judgment. The supreme court stated that the lower courts had erroneously relied upon *Orkin*

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23. *Id.*

24. *Id.*

25. 790 N.E.2d 456 (Ind. 2003).

26. This service was not included in the written contract, but evidence existed that it was a part of the agreement. The regular closing time was midnight, and generally Tri-Etch contacted the store or, if no one answered, the general manager by 12:30 a.m. if the alarm had not been set. *Id.* at 457.

27. *Id.*

28. *Id.*

*Exterminating Co. v. Walters*,<sup>29</sup> a tort case between two parties who, by entering into the contract giving rise to the suit, had agreed to the contractual provision limiting liability. Unlike *Orkin*, the case at issue was a tort lawsuit between one party to the relevant contract and another person who “never agreed to the terms of the contract.”<sup>30</sup> The court looked to a case from Illinois<sup>31</sup> and a case from Tennessee<sup>32</sup> for guidance, and then reached the following conclusion: “Since Young was not a party to the contract, and thus never consented to the terms of the contract, the contract simply does not impose any obligations or limitations on him.”<sup>33</sup> Thus the one-year statute of limitations established by the contract between Tri-etch and MLS did not bar the wrongful death claim by Young’s estate.

#### IV. COVENANTS NOT TO COMPETE

Several important cases decided during the review period dealt with covenants not to compete. In *Robert’s Hair Designers, Inc. v. Pearson*,<sup>34</sup> hair stylists Pearson and Walsh had signed non-compete agreements which provided, among other things, that upon leaving Robert’s Hair Designers (“Robert’s”), the hair stylists would not perform the same or similar services as they had provided to Robert’s for any competitor within an eight-mile radius for a period of one year. Moreover, the agreement included a provision precluding the hair stylists from soliciting clients from Robert’s.<sup>35</sup>

After becoming dissatisfied with their employment at Robert’s, Pearson and Walsh arranged for new employment as hair stylists at Design Lines Hair Salon (“Design Lines”), which was located approximately one-half mile from Robert’s. Before they left Robert’s, they contacted customers to tell them they would be leaving and that they would be pleased if the customers would follow them to Design Lines.<sup>36</sup> They left Robert’s on July 20, 2002, and began working at Design Lines the following week. Both Pearson and Walsh had customers scheduled for their first day of work at Design Lines, and Walsh stated that most of her customers there had also been her clients at Robert’s.<sup>37</sup> Robert’s sought a preliminary injunction,<sup>38</sup> but the trial court denied that request following a

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29. 466 N.E.2d 55 (Ind. Ct. App. 1984), *abrogated by* Mitchell v. Mitchell, 695 N.E.2d 920, 922 (Ind. 1998).

30. *Young*, 790 N.E.2d at 458.

31. *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 493 N.E.2d 1022 (Ill. 1986).

32. *Lovell v. Sonitrol of Chattanooga, Inc.*, 674 S.W.2d 728 (Tenn. Ct. App. 1983).

33. *Young*, 790 N.E.2d at 459.

34. 780 N.E.2d 858 (Ind. Ct. App. 2002).

35. *Id.* at 861.

36. *Id.* at 862.

37. *Id.*

38. In order to obtain a preliminary injunction, the movant must satisfy each of the following requirements: 1) the movant does not have an adequate remedy at law and thus will suffer irreparable harm; 2) the movant has a reasonable likelihood of succeeding at trial; 3) the potential

hearing.<sup>39</sup>

On appeal, Pearson and Walsh did not dispute the enforceability of the agreement. They did not argue that the covenant not to compete was unreasonable as to time, geography, or the scope of the prohibited activity, and they did not dispute that there was a reasonable likelihood that Robert's would prevail at trial. The focus of the appeal was whether a preliminary injunction was appropriate. Robert's argued that the trial court erred when it concluded that Robert's failed to show irreparable harm when it decided that the potential harm to Pearson and Walsh outweighed the threatened harm to Robert's and when it determined that granting the injunction would do a disservice to the public interest.<sup>40</sup>

The trial court found that Robert's failed "to demonstrate any economic loss or loss of goodwill" as a result of the breaches,<sup>41</sup> and it appears that the primary basis for its conclusion was that Robert's experienced an increase in business revenues in the week following Pearson and Walsh's departure. The court of appeals, however, disagreed with the lower court. Pearson and Walsh's actions were a direct cause of the loss of customers that Robert's experienced. "Simply looking at the Salon's increase in revenues after Pearson and Walsh left is not sufficient. Had Pearson and Walsh not left, . . . and not taken customers that they served, Robert's Salon's increase in revenues would have been even greater."<sup>42</sup> Moreover, the loss of goodwill that Robert's experienced because of the two hair stylists' current and future violations of the agreement justified finding that it would suffer irreparable harm.<sup>43</sup>

In short, "[t]his is exactly the type of breach for which injunctive relief is particularly well suited. Without an injunction, [Robert's] would be forced to amend [its] complaint repeatedly to include every successive violation (possibly every day that [Design Lines] remains open) after filing [its] original complaint."<sup>44</sup> If post-trial damages are not sufficient to satisfy an economic injury, then the party suffering the damages is entitled to receive injunctive relief.<sup>45</sup> The court of appeals consequently reversed the trial court's decision.<sup>46</sup>

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injury to the movant outweighs potential harm to the non-movant that would result from granting the motion; and 4) granting the motion would not disserve the public interest. *Id.* at 863 (citation omitted).

39. *Id.* at 864.

40. *Id.*

41. *Id.* at 863.

42. *Id.* at 865.

43. *Id.*

44. *Id.* at 866 (quoting *Washel v. Bryant*, 770 N.E.2d 902, 907 (Ind. Ct. App. 2002)).

45. *Id.*

46. Regarding the third and fourth requirements that the movant must establish in order to be entitled to injunctive relief (*see supra* note 38), the court of appeals stated that the trial court's findings failed to address how granting the request for an injunction would harm Pearson and Walsh. *Id.* at 868. Moreover, it found no evidence to support the lower court's determination that granting the requested relief would disserve the public interest. *Id.* at 869.

*Pathfinder Communications Corp. v. Macy*<sup>47</sup> also involved a non-compete agreement, this time entered into by Dave Macy, a radio personality, with his employer, Pathfinder Communications (“WOWO”). WOWO hired Macy to bring his “Macy in the Morning” show format, a talk radio program known for its conservative, opinionated commentary, to its morning radio show. The covenant not to compete stated that for twelve months following his termination of employment with WOWO, Macy would “not engage in activities or be employed as an on-air personality, either directly or indirectly” with certain radio stations, including WGL.<sup>48</sup>

Approximately four years later, WOWO decided to change the format of the show, focusing more on news and local events and avoiding discussion of controversial issues. WOWO also changed the name of the show to “Fort Wayne Morning News with Dave Macy.”<sup>49</sup> Subsequently, Macy’s employment with WOWO ended following Macy’s falsification of program logs. Two months after that, Macy joined WGL and brought the former “Macy in the Morning” show format to his new employer.<sup>50</sup> In the ensuing lawsuit, the trial court concluded that WOWO had no protectible interest in the “Macy in the Morning” program or in Dave Macy and that the non-compete agreement was not enforceable because the scope of the prohibited activities was overbroad. Consequently, it denied WOWO’s request for a preliminary injunction.<sup>51</sup>

WOWO argued on appeal that it did have a protectible “interest in Dave Macy, the on-air personality WOWO cultivated . . . regardless of the content of Macy’s radio show . . . .”<sup>52</sup> The court noted that it did not find any case law in Indiana that addressed this issue, so it looked to the law of other jurisdictions for help. Relying on decisions from Virginia, Florida, and Alabama,<sup>53</sup> the court concluded that WOWO did, in fact, maintain a protectible interest in its former on-air personality:

WOWO invested substantial resources in Macy to promote him in the Ft. Wayne market. While on the air at WOWO, Macy acted as WOWO’s representative to its listening audience. Also, Macy obtained employment at WGL, a direct competitor of WOWO with a similar format, and he is hosting the morning drive time slot, the same slot he hosted at WOWO. Although WOWO changed the format of Macy’s show, it did so solely in an attempt to expand Macy’s listening audience, which did not, as Macy argues, have the effect of dissipating the

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47. 795 N.E.2d 1103 (Ind. Ct. App. 2003).

48. *Id.* at 1107.

49. *Id.*

50. *Id.* at 1107-08.

51. *Id.* at 1108.

52. *Id.* at 1110 (quoting Appellant’s Brief 10).

53. See *Cullman Broad. Co. v. Bosley*, 373 So.2d 830 (Ala. 1979); *T.K. Communications, Inc. v. Herman*, 505 So.2d 484 (Fla. Dist. Ct. App. 1987); *New River Media Group, Inc. v. Knighton*, 429 S.E.2d 25 (Va. 1993).

goodwill it had fostered in him.<sup>54</sup>

The court then turned to the scope of the activities proscribed in the agreement. Focusing on the clause “engage in activities,” Macy argued that the prohibition was overbroad and thus prevented him from being employed by any competing radio station in any capacity—even if the work was completely unrelated to the on-air services he had provided to WOWO.<sup>55</sup> The court of appeals looked to *Burk v. Heritage Food Service Equipment, Inc.*,<sup>56</sup> and concluded that Macy was correct. It determined that the scope of the proscribed activities “extend[ed] far beyond WOWO’s legitimate interests in Macy, as an on-air personality,” and therefore, this portion of the agreement was unreasonable.<sup>57</sup>

Finally, the court in *Pathfinder* examined whether the trial court erred in denying the motion for a preliminary injunction. The court relied heavily on its analysis of this issue in *Robert’s Hair Designers, Inc. v. Pearson*.<sup>58</sup> The court distinguished the facts in the case before it from *Robert’s*, noting that WOWO had not demonstrated that a single advertiser had defected to WGL as a consequence of Macy’s move to the competitor and that the record did not indicate whether a significant number of listeners were listening to Macy following his departure from WOWO.<sup>59</sup> It concluded that WOWO failed to show that its remedies at law were inadequate, and therefore, the trial court did not abuse its discretion in denying the motion for a preliminary injunction.<sup>60</sup>

One last case decided during the review period that dealt with an interesting non-compete issue was *Vukovich v. Coleman*.<sup>61</sup> Vukovich was employed by International Magnaproducts, Inc. (“IMI”), which was owned by Coleman and which sold magnets. Vukovich entered into a non-compete agreement with IMI providing that Vukovich would not “directly or indirectly compete with the business of the Company . . . during the period of Employment and for a period of 5 (Five) years following termination of employment . . . .”<sup>62</sup> In cooperation

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54. *Pathfinder*, 795 N.E.2d at 1113.

55. *Id.* at 1114.

56. 737 N.E.2d 803 (Ind. Ct. App. 2000).

57. *Pathfinder*, 795 N.E.2d at 1114. The court noted, however, that because the contract was divisible, it could “blue pencil” the agreement, striking the unreasonable language, and leaving intact the language that was reasonable (i.e., employee will not ~~engage in activities~~ or be employed as an on-air personality).

58. 780 N.E.2d 858 (Ind. Ct. App. 2003); *see supra* notes 34-46 and accompanying text.

59. *Pathfinder*, 795 N.E.2d at 1117.

60. *Id.*

61. 789 N.E.2d 520 (Ind. Ct. App. 2003).

62. *Id.* at 522. It is interesting to note that the term “not compete,” as used in the agreement, was defined as follows: “the Employee shall not own, manage, operate, consult to *or be employed in* a business substantially similar to or competitive with the present business of the Company . . . .” *Id.* (emphasis added). The prohibition against being employed, apparently in any capacity, is arguably comparable to the language that was “blue penciled” by the court in



with IMI, Vukovich formed and began to operate Alliance Motors LLC, a company that was supposed to sell motors. In addition, the parties apparently agreed that Vukovich would start a company called Alliance, LLC. This company was supposed to service certain clients of IMI "as sales representative."<sup>63</sup> Coleman contended, however, that Vukovich violated the non-compete agreement by selling magnets to people other than those that Vukovich and Coleman had agreed Alliance, LLC would service. IMI sued, and the trial court subsequently granted its motion for a temporary injunction.<sup>64</sup>

On appeal, the court noted that in order for a non-compete agreement to be enforceable, the employer must have a legitimate interest that the covenant is designed to protect, and the agreement must be reasonable with regard to the time period covered, the scope of activities proscribed, and the geographic region to which the non-compete applies.<sup>65</sup> The court concluded that this covenant was invalid because it contained no limitation with respect to geography: "A covenant not to compete that contains no geographic limitation is presumptively void."<sup>66</sup> What makes this case interesting is that this issue apparently has not been directly addressed in Indiana for some time because in reaching its conclusion, the court relied primarily on a case decided in 1973.<sup>67</sup> The court concluded that because the covenant "as written 'could apply to the entire world,'"<sup>68</sup> and because nothing in the agreement otherwise limited its geographic scope, it was not valid. The trial court thus should not have granted the temporary injunction.

#### V. "COLLAPSE" IN AN INSURANCE CONTRACT

In the insurance contract context, the court in *Monroe Guaranty Insurance Co. v. Magwerks Corp.*<sup>69</sup> defined the term "collapse" for the first time.<sup>70</sup> Magwerks was a one-story factory with a flat roof that was damaged by accumulated rain and snow. Roof panels fell to the floor, and water damaged the company's machinery, inventory, and other materials. Magwerks filed a claim with its insurer, Monroe Guaranty Insurance Company ("Monroe"), which Monroe ultimately denied because the "damage did not satisfy the definition of a 'collapse.'"<sup>71</sup> Magwerks sued. The trial court concluded as a matter of law that

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*Pathfinder*, 795 N.E.2d at 1114 as overbroad. See *supra* note 57 and accompanying text. The court, however, did not address this issue in *Vukovich*.

63. *Vukovich*, 789 N.E.2d at 523.

64. *Id.*

65. *Id.* at 525.

66. *Id.*

67. *Id.* (quoting *Struever v. Monitor Coach Co.*, 294 N.E.2d 654, 655 (Ind. Ct. App. 1973) ("It has long been the law in Indiana that a covenant not to compete containing no spatial limitations is void and unenforceable.")).

68. *Id.* at 526 (quoting *Struever*, 294 N.E.2d at 656).

69. 796 N.E.2d 326 (Ind. Ct. App. 2003).

70. *Id.* at 332.

71. *Id.* at 329. The insurance contract provided coverage for "collapse" in some instances,

Monroe had breached its contractual obligations “because the damage constituted a ‘collapse’ under the policy.”<sup>72</sup> A jury subsequently awarded Magwerks \$1.1 million in compensatory damages and \$4 million in punitive damages.<sup>73</sup>

On appeal, Monroe argued that “collapse” referred to a situation that “occurs suddenly and results in complete disintegration.”<sup>74</sup> This traditional definition is narrower, the court noted, than the modern definition of the word, which is used by the majority of jurisdictions today. The majority position is that a collapse occurs when “significant damage to the structural integrity is present,”<sup>75</sup> and some courts following this line of thinking do not even require parts of the building to fall. At least fifteen states have chosen to adopt this broader, more modern definition, and a number of those have done so as recently as 1995.<sup>76</sup> Accordingly, the Indiana Court of Appeals chose to join this group of jurisdictions.

Magwerks contended that under this definition, there clearly was a collapse at its factory. The company had to use more than one hundred buckets to catch water that was leaking into the building, it had to place tarps over the equipment, and “numerous ceiling panels . . . crashed through the floor.”<sup>77</sup> However, Monroe countered that the roof was poorly designed and that this was part of the reason for the damage. Moreover, Monroe contended that the fact that its adjuster was able to walk on the roof without the roof falling in was a strong indication that there was no collapse. The court of appeals ultimately concluded that neither party had presented enough evidence for the trial court to determine whether a collapse had occurred under the modern definition of the word, and it remanded the case.<sup>78</sup>

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but the term was not defined in the contract. Instead, the agreement listed scenarios that did not amount to a collapse. *Id.* at 332.

72. *Id.* at 330.

73. *Id.* The jury concluded that Monroe had handled the claim in bad faith—hence the punitive damages award. *Id.*

74. *Id.* at 332 (citing *Dominick v. Statesman Ins. Co.*, 692 A.2d 188, 191-92 (Pa. 1997)). “A partial collapse of a part is entirely outside the contemplation of the parties to the insurance contract.” *Id.* (quoting *Williams v. State Farm Fire & Cas. Co.*, 514 S.W.2d 856, 860 (Mo. Ct. App. 1974)).

75. *Id.* at 333 (citing *Guyther v. Nationwide Mut. Fire Ins. Co.*, 428 S.E.2d 238, 240 (N.C. Ct. App. 1993)).

76. Only nine states use the traditional definition of “collapse,” and no jurisdiction has adopted the traditional definition since 1970. *Id.* (citing *What Constitutes “Collapse” of a Building Within Coverage of Property Insurance Policy*, 71 A.L.R.3d 1072 §§ 3, 4 (1976 & Supp. 2002)).

77. *Id.*

78. *Id.* at 334.

## VI. REMEDIES

*A. Specific Performance for Sellers of Real Property*

Two recent decisions addressed the issue of awarding specific performance to the seller in a transaction for the sale of real property. In *Kesler v. Marshall*,<sup>79</sup> Kesler entered into an agreement to purchase Marshall's property, but Marshall was required, as a condition precedent to Kesler's obligation, to show in writing "that the property could be used in any manner under M-1 zoning."<sup>80</sup> The court of appeals concluded that there was insufficient evidence presented in the trial court to show that Marshall had satisfied this condition, and thus, the lower court erred in granting Marshall specific performance.<sup>81</sup>

The court went on, however, to analyze the general appropriateness of granting specific performance to sellers in real estate transactions, and it focused on whether Marshall would have had an adequate remedy at law.<sup>82</sup> The court noted that Marshall held Kesler's earnest money, which he could have kept upon termination of the agreement, and that he then could have sold the property to someone else. If, upon selling the property, he had not received the full benefit of his original bargain with Kesler, he could have sought the difference in money damages. This would have made him whole.<sup>83</sup> Finally, the court stated that "the traditional rationale underlying the grant of specific performance in real estate transactions, i.e., that each piece of property is unique, does not apply here to the party seeking specific performance, Marshall, because he is not obtaining the property in the transaction, but rather only money."<sup>84</sup> If Marshall had been entitled to a remedy, his remedy at law would have been adequate, and thus he should not have been awarded specific performance.

In *Humphries v. Ables*,<sup>85</sup> the same panel of the court of appeals that decided *Kesler* reached the opposite conclusion with regard to the appropriateness of awarding specific performance to the seller in the real estate transaction at issue there. Max and Betty Ables owned a liquor store that Marc and Kelle Humphries wished to purchase. The parties entered into a contract for sale of the property, but the Humphries ultimately failed to perform their obligations under the agreement. The Ables sued for breach of contract and prevailed, and the trial

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79. 792 N.E.2d 893 (Ind. Ct. App. 2003).

80. *Id.* at 896.

81. "A party seeking specific performance of a real estate contract must prove that he has substantially performed his contract obligations or offered to do so." *Id.*

82. "Our courts generally will not exercise equitable powers when an adequate remedy at law exists." *Id.* at 897 (citations omitted).

83. *Id.*

84. *Id.* The court cited cases from Maine, North Dakota, Illinois, Pennsylvania, and Colorado, primarily for the proposition that specific performance is only appropriate if the party does not have an adequate remedy at law. *Id.*

85. 789 N.E.2d 1025 (Ind. Ct. App. 2003).

court awarded them, as sellers, specific performance of the contract.<sup>86</sup>

The court of appeals stated, "It is a matter of course for the trial court to grant specific performance of a valid contract for the sale of real estate,"<sup>87</sup> and it essentially ignored whether the seller had an adequate remedy at law. Instead, the majority turned to *Migatz v. Stieglitz*<sup>88</sup> where the Indiana Supreme Court awarded specific performance to the seller in a real estate transaction:

The equitable doctrine is that the enforcement of contracts must be mutual, and, the vendee being entitled to specific performance, his vendor must likewise be permitted in equity to compel the acceptance of his deed and the payment of the stipulated consideration. This remedy is available, although the vendor may have an action at law for the purchase money.<sup>89</sup>

The court in *Humphries* noted that it had found no authority that changed "this time honored principle,"<sup>90</sup> and it went on to say that "vendors traditionally have qualified for the remedy of specific performance of a real estate contract after a purchaser's breach."<sup>91</sup>

An important distinction between this case and *Kesler* is that the contract between the Humphries and the Ables explicitly provided the remedies that the sellers could pursue following the buyers' breach. Specifically, the agreement stated that upon breach, the Ables could "declare the entire unpaid balance of this contract immediately due and payable, and in such event, Sellers may pursue whatever remedies, legal or equitable, are available to collect the entire unpaid balance of the purchase price."<sup>92</sup> The court stated that it would not "invalidate a remedy for which the Sellers contracted."<sup>93</sup> The parties agreed, of their own free will, that specific performance was an appropriate remedy, and the courts will enforce contracts that are "entered into freely and voluntarily."<sup>94</sup>

This difference in facts between *Kesler* and *Humphries* and the assertion made by the Indiana Supreme Court in *Migatz* do not seem to be enough, though,

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86. *Id.* at 1029.

87. *Id.* at 1034.

88. 77 N.E. 400 (Ind. 1906).

89. *Id.* at 401. It is interesting to note that Judge Sullivan, in his concurring opinion in *Kesler v. Marshall*, cited this same passage from *Migatz*, but still concluded that Marshall, the seller, was not entitled to specific performance. *Kesler*, 792 N.E.2d at 898 (Sullivan, J., concurring).

90. *Humphries*, 789 N.E.2d at 1035.

91. *Id.* (citing 14 JAMES H. BACKMAN, POWELL ON REAL PROPERTY § 81.04[1][a] (2003)). Aside from the omission of any discussion of whether the sellers' remedy at law was adequate, this assertion is even more curious given that the court also stated that the number of cases in Indiana awarding specific performance of a real estate contract to a seller was "rather small," and that the reasons for doing so are "less compelling than the reasons for awarding specific performance to purchasers following a vendor's breach . . ." *Id.*

92. *Id.* (quoting Appendix at 16-17).

93. *Id.* at 1036.

94. *Id.*

to justify ignoring the requirement that the non-breaching party show an inadequate remedy at law before being granted an equitable remedy. In addition, the court in *Robert's Hair Designers, Inc. v. Pearson*<sup>95</sup> noted that while the non-compete agreement there provided that the hair salon could seek injunctive relief upon breach, "such contract provisions requiring the issuance of an injunction are not binding upon the trial court."<sup>96</sup> Arguably, the same principle would apply in this situation where a party contracted for and later sought another form of equitable relief—specific performance. However, only one judge raised the issue of an adequate legal remedy. Judge Kirsch dissented from the majority's position on specific performance, asserting that typically "the seller's remedy at law . . . for money damages will be sufficient to fully compensate the plaintiff."<sup>97</sup> Judge Kirsch concluded that there were no facts in the case at issue supporting a conclusion that there was no adequate remedy at law available to the sellers, and thus specific performance should not have been granted.<sup>98</sup>

### B. Fraudulent Inducement and Benefit of the Bargain Damages

*Lightning Litho, Inc. v. Danka Industries, Inc.*<sup>99</sup> presented an interesting damages question in a case involving a contract entered into as a result of fraudulent misrepresentations. In that case, Linn, a salesperson for Danka, tried repeatedly to convince Haab, the owner of Lightning Litho ("Litho"), to lease a high-volume copier. Haab continued to reject Linn's overtures until Linn told Haab that he had a client Linn could bring to Haab that would justify Haab's leasing the machine. When Haab asked who the client was, Linn replied that he would not reveal the name until Haab signed the lease. Linn later returned with a manager from Danka who provided further assurances that the client would accompany the copier. Haab signed the lease agreement, and predictably, the client never materialized.<sup>100</sup>

Litho eventually brought a fraudulent inducement claim against Danka,<sup>101</sup> and after a couple of false starts, affirmed the contract<sup>102</sup> and requested both contract and tort damages.<sup>103</sup> Danka argued that Litho did not present evidence supporting its damages request, and the trial court granted Danka's motion for judgment on the evidence. Litho appealed, and the court of appeals reversed.

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95. 780 N.E.2d 858 (Ind. Ct. App. 2003) (citation omitted).

96. *Id.* at 862 n.1.

97. *Humphries*, 789 N.E.2d at 1036-37 (Kirsch, J., dissenting).

98. *Id.* at 1037 (Kirsch, J., dissenting).

99. 776 N.E.2d 1238 (Ind. Ct. App. 2002).

100. *Id.* at 1039-41.

101. *Id.* at 1240. Fraudulent inducement exists when a person enters into a contract as the result of fraudulent misrepresentations. When this occurs, the plaintiff must choose to seek either to rescind the contract (in which case the parties would return to their respective positions prior to entering the agreement) or to affirm the contract and seek damages. *Id.* at 1241 (citations omitted).

102. *Id.*

103. *Id.* at 1240.

The court of appeals cited cases from approximately twenty-four jurisdictions for the proposition that the damages available in a fraudulent inducement case where the plaintiff has affirmed the contract are measured by the benefit of the bargain rule.<sup>104</sup> “Although the benefit of the bargain rule is traditionally used to measure damages in breach of contract cases, it is also used to measure damages in fraudulent inducement cases because fraudulent inducement is a ‘hybrid’ of tort and contract.”<sup>105</sup> While some Indiana cases have held that tort law does not protect a buyer’s interest in “the benefit of his bargain,”<sup>106</sup> those cases are distinguishable because the theory of recovery in those lawsuits was negligence (a tort), not fraudulent inducement (a cross between tort and contract claims).<sup>107</sup> Consequently, the court concluded that Indiana should join other jurisdictions in measuring the damages in fraudulent inducement claims using the benefit of the bargain rule.<sup>108</sup>

### C. Breach of Contract and Tortious Conduct—But Only One Recovery

*INS Investigations Bureau, Inc. v. Lee*<sup>109</sup> involved tort and contract claims, and after concluding that the damages awarded at trial amounted to a double recovery, the court of appeals had to decide whether to vacate the tort award or the damages awarded for the contract claim. The fire caused significant damage to a factory that manufactured modular units for Lees Inns motels. The Home Indemnity Company (“Home Indemnity”), which insured the factory, hired INS Investigations Bureau, Inc. (“INS”) to investigate the origin of the fire. Lester Lee and Bill Lee (“the Lees”), who founded Lees Inns and were the majority stockholders, hired their own investigator, who concluded that airflow to a furnace had been blocked by sawdust and that when parts of the furnace overheated, the sawdust ignited. Home Indemnity disagreed and denied the Lees’ claim, finding that the fire was intentionally set and that the Lees were somehow connected to that act.<sup>110</sup>

The Lees sued Home Indemnity, but eventually the parties settled the dispute. The settlement included not only a \$3.5 million payment to the Lees and a letter of apology from Home Indemnity, but also an assignment from Home Indemnity of “any claims it had against INS to the Lees . . . .”<sup>111</sup> The Lees subsequently sued INS, and it made the following claims:

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104. *Id.* at 1241 n.4. Damages awarded under the benefit of the bargain rule place the parties in the positions they would have been in if the contract had been performed as promised. *Id.* at 1242.

105. *Id.*

106. *See, e.g.,* Choung v. Iemma, 708 N.E.2d 7, 14 (Ind. Ct. App. 1999).

107. *Lightning*, 776 N.E.2d at 1242.

108. *Id.* at 1243.

109. 784 N.E.2d 566 (Ind. Ct. App. 2003).

110. *Id.* at 571-74. The insurance policy allowed for the denial of a claim “if the Lees or someone at their direction committed arson” at the factory. *Id.* at 571.

111. *Id.* at 572.

(1) that INS breached its contract with Home Indemnity by failing to perform its obligations in a skillful, careful, diligent, and workmanlike manner, which caused the denial of the Lees' claim and a subsequent settlement greatly in excess of the policy limits; (2) that INS and its employees owed Home Indemnity a duty of care to perform services in a skillful, careful, diligent, and workmanlike manner, and that INS's breach of that duty was a proximate cause of the erroneous denial of the Lees' claim and the subsequent litigation; and (3) that INS and its employees acted fraudulently, oppressively, maliciously, and outrageously toward Home Indemnity and the Lees and were thus liable for punitive damages.<sup>112</sup>

At the end of the ensuing trial, the jury awarded the Lees more than \$2.3 million in compensatory damages for breach of contract, more than \$2.5 million in compensatory damages for negligence, and \$4.6 million in punitive damages.<sup>113</sup>

On appeal, INS argued that the trial court erred in a number of areas, but the contention relevant here was that the claims for breach of contract and negligence were essentially one in the same and that the damages awarded constituted a double recovery.<sup>114</sup> The court stated that when a party contracts to do work, there exists an implied duty to do so with skill, with care, and in a workmanlike fashion. If one negligently fails to fulfill this duty, the individual has committed a tort and a breach of contract.<sup>115</sup> However, the non-breaching party "may not recover twice for the same wrong,"<sup>116</sup> so the court of appeals had to decide whether to vacate the award for negligence or the award for breach of contract.

Apparently, no Indiana decisions previously addressed this question, and there must also have been little case law available from other jurisdictions because the court turned to a secondary source for guidance in resolving this issue. It stated that as a general rule, "a breach of contract is not a tort,"<sup>117</sup> but the contract can provide the backdrop from which the duty of care in a tort action arises. "In such cases, the contract is mere inducement creating the state of things which furnishes the occasion of the tort. In other words, the contract creates the relation out of which grows the duty to use care."<sup>118</sup> The court concluded that the heart of the Lees' claim was not that INS had breached its contract with Home Indemnity; rather, the Lees claimed that INS owed Home Indemnity a duty to fulfill its contractual obligations skillfully and in the manner generally expected of others in the same line of work.<sup>119</sup> Because this claim sounded more in tort than in contract, the court of appeals vacated the award of \$2,303,601 for breach

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112. *Id.* at 573.

113. *Id.*

114. *Id.* at 576.

115. *Id.* (citing *Homer v. Burman*, 743 N.E.2d 1144, 1147 (Ind. Ct. App. 2001)).

116. *Id.* at 577.

117. *Id.*

118. *Id.* at 578 (quoting 57A AM. JUR. NEGLIGENCE §§ 119-21).

119. *Id.*

of contract, and affirmed the recovery of \$2,546,404 for the tort claim.<sup>120</sup>

VII. A REMINDER TO CLIENTS: THE TERMS OF THE CONTRACT  
WILL BE ENFORCED

Two cases decided during the review period remind practitioners of the importance of stressing to their clients the fact that when people enter into contracts in Indiana, the parties will be bound even if they later conclude that the deal they made was a bad one. In *Zollman v. Geneva Leasing Associates, Inc.*,<sup>121</sup> Wally Zollman ("Wally") and a partnership he controlled borrowed \$3.2 million from Geneva Leasing Associates ("Geneva"), and Wally signed a personal guaranty. When Wally later requested an extension of the payment period, Geneva agreed, but only on the condition that Wally's spouse, Brenda Zollman ("Brenda"), execute a personal guaranty. She agreed to do so, and the guaranty that she signed included a provision that released Geneva "from any and all claims, liabilities, demands, damages and causes of action which any of the releasing parties has asserted . . . or might now or hereafter assert . . ."<sup>122</sup> When the partnership later defaulted and Geneva accelerated the payments due under the note, the partnership and Wally declared bankruptcy, and Geneva sued Brenda.<sup>123</sup> The trial court granted Geneva's summary judgment motion against Wally, *in rem*, and against Brenda, *in personam*, in an amount exceeding \$1.6 million, plus costs and attorney fees.<sup>124</sup> On appeal, the court agreed "with Geneva that Brenda . . . contractually waived" the defense she attempted to raise.<sup>125</sup>

While the court discovered no Indiana case law interpreting a release within a guaranty, it relied on decisions that addressed releases generally. It noted that the release clearly stated that Brenda was waiving her rights and that Brenda did not argue that the release was ambiguous. "Indeed, there is no evidence in the record before us on appeal that the bargaining between the parties was anything other than free and open. Moreover, the facts establish that Brenda was a sophisticated party and was represented by legal counsel during the negotiation of the guaranty agreement."<sup>126</sup> Thus, she could not later raise an affirmative defense.<sup>127</sup>

120. *Id.*

121. 780 N.E.2d 387 (Ind. Ct. App. 2002).

122. *Id.* at 389. The release was printed in capital letters and covered numerous contingencies intended to protect the lender from liability.

123. *Id.* at 390. Geneva also sued Wally, *in rem*, "after the bankruptcy court lifted" the bankruptcy stay for that specific purpose. *Id.*

124. *Id.*

125. *Id.* at 391.

126. *Id.* at 392-93.

127. *Id.* at 393. Chief Judge Brook disagreed. "Simply put, Brenda waived her rights to sue Geneva, file a counterclaim against Geneva, or file a claim against a third party; she did *not* waive her right to interpose affirmative defenses . . ." *Id.* (emphasis in original) (Brook, J., dissenting).



In *Grott v. Jim Barna Log Systems—Midwest, Inc.*,<sup>128</sup> Mark and Barbara Grott (“the Grotts”) entered into a contract to purchase a log home from Jim Barna Log Systems (“Barna”). Peter Rosi (“Rosi”) signed the contract as “owner” of Barna. The contract included a clause providing that disputes would be decided in the Tennessee courts and according to Tennessee law.<sup>129</sup> Approximately nineteen months later, the Grotts sued for breach of contract (among other things) in LaPorte Circuit Court in Indiana. Barna and Rosi asked the court to honor the forum-selection clause and thus to dismiss the lawsuit. The court granted their request, and the Grotts appealed, arguing that the forum-selection provision “was not freely negotiated” and that it was unreasonable.<sup>130</sup>

The court of appeals disagreed with the Grotts. The court pointed out that there was no indication that the Grotts objected to the clause at issue or that they attempted to have it removed from the agreement. There was no suggestion that Mr. Grott “initialed each paragraph and signed the contract unwillingly or was unaware of the forum-selection clause.”<sup>131</sup> Simply put, the Grotts failed to show that they were unable to negotiate the removal of the provision or that they could not have purchased the home from another seller of log homes. “As a general rule, the law allows competent adults the utmost liberty in entering into contracts,” and those contracts will be enforced “when entered into freely and voluntarily . . . .”<sup>132</sup> The Grotts were bound to the terms of their contract.

#### VIII. SALE OF GOODS UNDER ARTICLE 2

The courts addressed the following important issues under Article 2 of the Uniform Commercial Code: the relationship of the entrustment provisions of the code to Indiana’s Certificate of Title Act; the circumstances under which a person with voidable title can transfer good title to a buyer; the point at which title to goods passes to a buyer; what constitutes an admission for purposes of the admission exception to the statute of frauds; and the need for the writing under the statute of frauds to be clearly connected to the sale of the goods.

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128. 794 N.E.2d 1098 (Ind. Ct. App. 2003).

129. *Id.* at 1100-01.

130. *Id.* at 1101.

131. *Id.* at 1103.

132. *Id.* The Grotts also argued that because Rosi signed the contract as a representative of Barna, he was not a party to the contract and thus was not subject to the forum-selection clause. The court turned to a Texas decision which held that forum-selection provisions apply to so-called “transaction participants.” *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. Ct. App. 1996). A transaction participant is “an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum selection clause.” *Id.* The court of appeals in *Grott* followed this line of thinking and concluded that Rosi was a transaction participant and thus was subject to the forum selection provision. If the Grotts wanted to sue him, they had to do it in Tennessee. *Grott*, 794 N.E.2d at 1105.

A. *Entrustment and the Certificate of Title Act*

In *Madrid v. Bloomington Auto Co.*,<sup>133</sup> the court clarified the relationship between Indiana's Certificate of Title Act and Article 2 of the Uniform Commercial Code (UCC),<sup>134</sup> and it also interpreted the UCC's entrustment provisions.<sup>135</sup> The Madrids were interested in buying a Lincoln Navigator and visited Gary Pratt University Motors, Inc. ("Pratt"), a used car dealer located in West Lafayette, Indiana.<sup>136</sup> Pratt discovered that Royal Lincoln Mercury Nissan ("Royal"), a Lincoln dealership located in Bloomington, Indiana, owned "a new 2000-model-year Navigator," and Pratt requested that Royal bring the vehicle to West Lafayette so that the Madrids could see it.<sup>137</sup>

In early June 2001, one of Royal's employees drove the Navigator to West Lafayette, but Royal retained the vehicle's certificate of origin, as well as its owner's manuals, extra keys, and phone.<sup>138</sup> When the Madrids came to inspect the vehicle, Pratt told them that it had bought the Navigator for \$40,000 and that it hoped to sell it to the Madrids for \$43,000. In fact, Pratt had not purchased the vehicle from Royal.<sup>139</sup>

The parties agreed on a purchase price of \$41,500, which the Madrids paid to Pratt, and Pratt promised to deliver the title, paperwork, and other accessories to the buyers. Of course, it could not follow through on this promise because all of those items remained in Royal's possession. In the meantime, Royal continued to call Pratt for updates regarding the prospective sale until finally, in the latter part of June 2001, Royal learned that there was a police seizure of Pratt's automobiles. Royal's general manager drove to West Lafayette to retrieve the dealership's vehicle but discovered that it was not among the vehicles seized because the Madrids possessed it.<sup>140</sup>

The Madrids sued Royal seeking the title to the Navigator, but the trial court

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133. 782 N.E.2d 386 (Ind. Ct. App. 2003).

134. The text of this article may contain references to generic sections of the Uniform Commercial Code (e.g., section 2-201), but all notes will contain specific citations to Indiana's version of the UCC (e.g., IND. CODE ANN. § 26-1-2-201 (West 2003)).

135. IND. CODE ANN. § 26-1-2-403.

136. *Madrid*, 782 N.E.2d at 389. Pratt was not an authorized dealer of Lincoln vehicles and thus was not permitted to sell new Lincoln autos. "It is an unfair practice for a dealer to sell any new motor vehicle having a trade name, trade or service mark, or related characteristics for which the dealer does not have a franchise in effect at the time of the sale." IND. CODE ANN. § 9-23-3-4.

137. *Madrid*, 782 N.E.2d at 389. Pratt and Royal had done this before. If Pratt had a customer interested in buying a new Lincoln, it would request that Royal bring a new auto to West Lafayette for the customer to inspect. If the customer chose to buy the vehicle, the customer would pay Royal directly. Subsequently, Royal would pay a "finder's fee" to Pratt for establishing the contact between Royal and the buyer. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 390.

concluded that Royal was entitled to summary judgment. More specifically, it determined that through its retention of the certificate of origin, Royal retained ownership of the vehicle under Indiana's Certificate of Title Act,<sup>141</sup> and in the alternative, that Royal's actions did not lead to a transfer of ownership under the entrustment provisions of the UCC.<sup>142</sup>

The first issue that the court of appeals considered was whether the sales provisions of the UCC or Indiana's Certificate of Title Act controls in determining who holds legal title to a motor vehicle in Indiana.<sup>143</sup> Royal argued that the Certificate of Title Act controlled, and it relied on an Ohio Supreme Court case interpreting that state's title statute and its relationship to Ohio's version of the Uniform Commercial Code.<sup>144</sup> The court of appeals rejected this argument, however, distinguishing the Ohio statute from Indiana's, and relying on Indiana case law interpreting an earlier version of the Certificate of Title Act.<sup>145</sup> The court agreed with the Madrids' contention that the current version of the Certificate of Title Act results in a "registration" type system rather than an "ownership" type system . . . [and consequently,] legal ownership of vehicles is determined by the sales provisions of the UCC."<sup>146</sup>

The court turned next to the entrustment provisions of the Uniform Commercial Code, which provide that "any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in [the] ordinary course of business."<sup>147</sup> The trial court concluded that Royal retained ownership of the Navigator because it did not entrust the vehicle to Pratt, Pratt was not a merchant who dealt in goods of that kind, and the Madrids "should have known" that Pratt did not own the automobile and was not authorized to sell it to them.<sup>148</sup> The court of appeals disagreed with the lower court on all three points.

The court summarily dismissed the trial court's conclusion that the vehicle was not entrusted to Pratt, noting that entrustment includes "*any* delivery and *any*

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141. An individual "may not purchase or acquire a new motor vehicle without obtaining from the seller of the motor vehicle a valid manufacturer's certificate of origin." IND. CODE ANN. § 9-17-8-2 (West 2003).

142. *Madrid*, 782 N.E.2d at 390; see also IND. CODE ANN. § 26-1-2-403 (West 2003).

143. To this point, "no Indiana court [had] discussed the effect of the current Indiana Certificate of Title Act on the sales provisions of the UCC." *Madrid*, 782 N.E.2d at 390.

144. See *Saturn of Kings Automall, Inc. v. Mike Albert Leasing, Inc.*, 751 N.E.2d 1019 (Ohio 2001).

145. The court stated, "Ohio's Certificate of Motor Vehicle Title Law is substantially different than Indiana's Certificate of Title Act." *Madrid*, 782 N.E.2d at 393. The Ohio statute provides that "[n]o person . . . shall acquire any right, title, claim, or interest in or to the motor vehicle until there is issued to the person a certificate of title . . ." OHIO REV. CODE ANN. § 4505.04(A) (West 2004). The Indiana Title Act, however, "does not expressly limit the passing of legal title until the certificate of title is issued." *Madrid*, 782 N.E.2d at 393.

146. *Madrid*, 782 N.E.2d at 395.

147. IND. CODE ANN. § 26-1-2-403(2).

148. *Madrid*, 782 N.E.2d at 390.

acquiescence" in the entrusted party's retention of the goods.<sup>149</sup> It did not matter that "the vehicle was only brought to University Motors so that the Madrids could inspect the vehicle."<sup>150</sup> Royal then asserted that Pratt was not a merchant dealing in goods of that kind because it did not deal "in new Lincoln cars."<sup>151</sup> The court of appeals determined that Royal's interpretation was too narrow and agreed with the Madrids' position "that it is sufficient that both University Motors and Royal were car dealers" because both dealt in goods that were fundamentally the same.<sup>152</sup>

Finally, the court addressed whether the Madrids were buyers in the ordinary course of business.<sup>153</sup> The trial court stated that the Madrids likely had notice of the identity of the true owner of the Navigator and that they should have known that Pratt was not an authorized Lincoln dealership; consequently, they did not qualify as buyers in the ordinary course of business.<sup>154</sup> The court of appeals reviewed the facts and concluded that the only evidence even raising an inference that the sale might have been outside the ordinary course was Pratt's failure to give the Madrids a certificate of origin when it sold the Navigator to them.<sup>155</sup> However, "the failure of a buyer to demand a certificate of title at the time of the sale [does] not result in the buyer losing its status as a buyer in the ordinary course of business."<sup>156</sup> The court reversed the decision and remanded the case.<sup>157</sup>

### B. Voidable Title and Transfer of Good Title

*Marlow v. Conley*<sup>158</sup> also dealt with section 2-403 of the Uniform Commercial Code. There, Robert Medley purchased a 1932 Ford truck at an Indianapolis car show. The seller was Herchel Ray Conley who told Medley that he operated a

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149. IND. CODE ANN. § 26-1-2-403(3) (emphasis added).

150. *Madrid*, 782 N.E.2d at 396 (quoting Appellant's App. at 75).

151. *Id.*

152. *Id.* (citing *Shacket v. Philco Aviation, Inc.*, 681 F.2d 506 (7th Cir. 1982), *cert. granted in part*, 459 U.S. 1069 (1982), *rev'd on other grounds*, 462 U.S. 406 (1983)). The court in *Shacket* stated, "The term 'goods of that kind' is not limited to the same goods but encompasses goods of the same fundamental nature." *Shacket*, 681 F.2d at 511.

153. The statute defines "buyer in the ordinary course of business" as follows: "[A] person that buys goods in good faith without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person . . . in the business of selling goods of that kind. A person buys in the ordinary course of business if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices." IND. CODE ANN. § 26-1-1-201(9) (West 2003).

154. *Madrid*, 782 N.E.2d at 396.

155. *Id.* at 397.

156. *Id.* (citation omitted).

157. *Id.* at 397-98. This is the proper result, particularly given the intent of the statute to favor the innocent third party and thus to promote commerce. See *Mowan v. Anweiler*, 454 N.E.2d 436, 439 (Ind. Ct. App. 1983).

158. 787 N.E.2d 490 (Ind. Ct. App. 2003).

“buy here, pay here car lot.”<sup>159</sup> Medley noted that the truck had a dealer license plate on it. He purchased it as a gift for his wife Linda, and he paid \$7500. Conley provided Medley with the certificate of title, but Donald Marlow was listed as the owner. Medley inquired about this fact, and Conley told him that “Marlow had signed the title as part of a deal Conley had made with him.”<sup>160</sup> Medley subsequently sought a certificate of title from the Bureau of Motor Vehicles in his wife’s name.

Approximately seven months later, Marlow filed suit against Conley and the Medleys, seeking replevin of the truck. Marlow contended at trial that Conley had asked him to invest in Conley’s business, and that Marlow had given him \$4500. Marlow then stated that Conley stole the truck and its certificate of title and that when Marlow asked Conley to return the truck, Conley told him the truck had caught on fire.<sup>161</sup> Marlow called the police, but the police report told a story that did not comport with Marlow’s testimony at trial. According to the police report, Marlow and Conley apparently had entered into a deal whereby Marlow would provide Conley with \$4500 and the 1932 Ford truck in exchange for a 1994 Ford flatbed dump truck and a 1989 Ford Bronco. Conley gave Marlow several titles of vehicles (thought to be junk), but he never delivered the two Fords to Marlow.<sup>162</sup>

The question on appeal was whether the Medleys obtained good title to the truck that Robert Medley purchased at the auto show in Indianapolis. The statute at issue was Indiana Code section 26-1-2-403(1), which provides as follows: “A person with voidable title has power to transfer a good title to a good faith purchaser for value.”<sup>163</sup> While the UCC does not define “voidable title,” it does state that the person possessing voidable title has the power to transfer good title to a good faith purchaser for value “even though . . . the delivery was procured through fraud.”<sup>164</sup> The “defrauding buyer” thus obtains voidable title, and “when title gets into the hands of a bona fide purchaser for value then he will prevail over the defrauded seller.”<sup>165</sup>

The trial court did not believe Marlow’s story about Conley stealing the truck, and consequently, the court of appeals concluded that Conley defrauded Marlow, that Conley thereby obtained voidable title to the 1932 Ford, and that Conley could transfer good title to a good faith purchaser for value.<sup>166</sup> Clearly, the Medleys were purchasers for value. The question was whether they acted in good faith.<sup>167</sup>

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159. *Id.* at 491.

160. *Id.*

161. *Id.*

162. *Id.* at 491-92.

163. IND. CODE ANN. § 26-1-2-403(1) (West 2003).

164. *Id.* § 26-1-2-403(1)(d).

165. *Marlow*, 787 N.E.2d at 493 (quoting *Mowan v. Anweiler*, 454 N.E.2d 236, 238 (Ind. Ct. App. 1983)).

166. *Id.* at 495.

167. Good faith is defined as “honesty in fact in the conduct or transaction concerned.” IND.

Marlow contended that they did not, and he argued that the sale from Conley to Robert Medley violated Indiana's Certificate of Title Act.<sup>168</sup> The Court of Appeals relied on its analysis in *Madrid v. Bloomington Auto Co.*<sup>169</sup> and concluded that the Medleys' failure to request a title in compliance with the Certificate of Title Act did not affect their status as good faith purchasers. "Although the failure to comply with Ind. Code § 9-17-3-3 may, combined with other suspicious circumstances, raise questions about a purchaser's good faith, we find no such circumstances here."<sup>170</sup> In short, as a holder of voidable title, Conley had the power to pass good title to the Medleys as long as they were good faith purchasers for value. The court concluded that the Medleys did purchase the truck in good faith, and it affirmed the lower court's decision in their favor.<sup>171</sup>

### C. *The Passing of Title to Goods*

*Sam and Mac, Inc. v. Treat*<sup>172</sup> involved a question of whether title to undelivered goods that were paid for in full passed from the seller to the buyer (and if so, when) under Article 2 of the Uniform Commercial Code. Sam and Mac, Inc. ("SMI"), a construction and contracting company, entered into a contract whereby Gruda Enterprises, Inc. would sell to SMI and install in the house that SMI was building a set of kitchen cabinets. Gruda Enterprises ordered the cabinets from the manufacturer, and SMI pre-paid the order in full.<sup>173</sup> At some point following that payment, the cabinets arrived at the seller's warehouse, and a representative of Gruda Enterprises contacted SMI to arrange for the delivery and installation of the goods.<sup>174</sup> However, SMI was not prepared to receive them and requested that the cabinets remain at the warehouse until SMI was ready to have them installed.<sup>175</sup>

Unfortunately for SMI, approximately two months later, Anthony and Sharon

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CODE ANN. § 26-1-1-201(19) (West 2003).

168. *See id.* § 9-17-3-3.

169. *See supra* notes 143-46 and accompanying text.

170. *Marlow*, 787 N.E.2d at 497-98. The only evidence suggesting that the Medleys acted in bad faith was that the title that Conley provided Robert Medley was signed by Marlow. Conley should have transferred the title to his name before selling the truck. *Id.* at 496. However, Robert Medley's testimony regarding the dealer license plate and his inquiry about the signature on the title, among other facts, further supported the Medleys' position that they acted in good faith. Marlow also argued that the Medleys violated Indiana's Certificate of Title Act by providing false information to the Bureau of Motor Vehicles, (i.e., by allegedly listing Marlow, rather than Conley, as the seller of the truck). *Id.* at 498. The court of appeals stated that "although false statements to the Bureau of Motor Vehicles under Ind. Code § 9-17-2-2 could result in prosecution for perjury, such false statements do not affect legal title to the vehicle." *Id.*

171. *Id.* at 499.

172. 783 N.E.2d 760 (Ind. Ct. App. 2003).

173. *Id.* at 762.

174. *Id.* at 766-67.

175. *Id.* at 765.

Gruda, who owned and operated Gruda Enterprises, filed for personal bankruptcy and ceased the company's business operations.<sup>176</sup> The cabinets were never delivered to SMI, so SMI contacted James Treat, the landlord for Gruda Enterprises, and requested that he open the warehouse to allow SMI to remove the cabinets. Treat refused, and SMI sued him for criminal conversion. SMI argued that it held title to the cabinets under Article 2 of the UCC. Following entry of partial summary judgment for SMI and a reversal of that decision on interlocutory appeal, the trial court granted summary judgment in Treat's favor, and SMI appealed.<sup>177</sup>

SMI argued that the transaction between SMI and Gruda Enterprises constituted a "completed sale,"<sup>178</sup> and that SMI consequently held title to the cabinets under section 2-401(3)(b) of the UCC.<sup>179</sup> The court of appeals correctly disagreed with SMI's contention. It was clear that the goods were supposed to be delivered to the house that SMI was building, so the goods obviously had to be moved from the warehouse, rendering section 2-401(3)(b) inapplicable. Instead, section 2-401(2)(b)—which states that "if the contract requires delivery at destination, title passes on tender there"<sup>180</sup>—controlled. "The title to the cabinets did not pass to SMI because the cabinets were not delivered and installed at the agreed upon destination."<sup>181</sup> Therefore, SMI never obtained any possessory interest in the goods, and the court of appeals affirmed the lower court's grant of summary judgment in Treat's favor.<sup>182</sup>

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176. *Id.* at 762.

177. *Id.* at 763.

178. *Id.* at 764.

179. "Unless otherwise explicitly agreed, where delivery is to be made without moving the goods[,] . . . if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting." IND. CODE ANN. § 26-1-2-401(3)(b) (West 2003).

180. *Id.* § 26-1-2-401(2)(b).

181. *Sam and Mac*, 783 N.E.2d at 765. The court also noted that while title to the goods cannot pass to the buyer until the goods are identified to the contract, "identification does not, in and of itself, confer either ownership or possessory rights in the goods." *Id.* (citing IND. CODE ANN. § 26-1-2-401(1) (West 2003) ("Title to goods cannot pass under a contract for sale prior to their identification to the contract . . .").

182. *Id.* at 767. Interestingly, *Howland v. Indiana Department of State Revenue*, 790 N.E.2d 627 (Ind. Tax Ct. 2003) also involved an issue relating to the title to goods. There, the question was "whether Howland's sale and installation of . . . satellite dishes [were] taxable 'retail unitary transactions.'" *Id.* Resolution of the issue turned at least in part on when title passed from the seller to the buyer. The court relied on *Farmers' National Bank of Sheridan v. Coyner*, 88 N.E. 856 (Ind. Ct. App. 1909) to determine when title passed, without considering the title provisions of Article 2. *Howland*, 790 N.E.2d at 630. Arguably, however, even though the sale included both personal property and the provision of services, the transaction constituted a sale of goods covered by Article 2 of the Uniform Commercial Code. In situations that involve both goods and services, Indiana applies the predominant thrust test. Under this test, the court must determine "whether the transaction's 'predominant factor, [its] thrust, [its] purpose . . . is the rendition of service, with

*D. The Admission Exception to the Statute of Frauds*

Section 2-201 of the Uniform Commercial Code provides the circumstances under which a contract for the sale of goods must be in writing under the statute of frauds,<sup>183</sup> and also includes a number of exceptions to the writing requirement, including the admission exception.<sup>184</sup> *Wehry v. Daniels*<sup>185</sup> presented a question that had not been previously addressed by Indiana's courts: namely, what constitutes an admission under section 2-201(3)(b).

In the fall of 2001, Daniels, a seller of Formula One memorabilia, sold an autographed Michael Schumacher helmet to Wehry for \$3500. While Wehry was in the store, he apparently told Daniels that he would like to purchase a scaled-down reproduction of a 1985 Ayrton Senna helmet. Daniels informed Wehry that the helmet was only sold in a set of three and that the price of the set was \$9000. When Wehry responded that he was only interested in the 1985 helmet and that he was willing to pay up to \$3000 for it, Daniels told him that he would check with the distributor to see if the distributor would break up the set.<sup>186</sup>

Subsequently, Daniels contacted Wehry to inform him that he could purchase the helmet he desired separately from the set, and Wehry instructed Daniels to order the helmet, which Daniels did. Following its arrival, Daniels called Wehry on numerous occasions, and Wehry repeatedly told Daniels that he would be in soon to pick up the helmet. Daniels eventually sued seeking \$2887.50 in damages.<sup>187</sup> At the hearing, Wehry was asked whether he had instructed Daniels to order the helmet for him, and he responded as follows: "At Seventeen

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goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved . . . ." *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 612 N.E.2d 550, 554 (Ind. 1993) (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)). The court in *Insul-Mark* adopted the predominant thrust test and rejected the bifurcation approach to handling mixed transactions. *Insul-Mark*, 612 N.E.2d at 554. If the court in *Howland* had applied the predominant thrust test, it might have concluded that the transactions at issue constituted sales of goods covered by Article 2, and if that were the situation, sections 2-401 and 2-501 would have provided the court with additional guidance regarding the title question. See IND. CODE ANN. § 26-1-2-401 and § 26-1-2-501 (West 2003).

183. "Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars (\$500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . ." IND. CODE ANN. § 26-1-2-201.

184. *Id.* § 26-1-2-201(3)(b) (West 2003).

185. 784 N.E.2d 532 (Ind. Ct. App. 2003).

186. *Id.* at 533.

187. *Id.* at 534. Daniels said that he told Wehry before he ordered the helmet that it would cost \$2750. Wehry said that Daniels did not reveal this price to Wehry until the third phone call that Daniels made to Wehry about picking up the helmet. *Id.* Daniels' claim included the price of the helmet, along with sales tax and court costs. *Id.*



(\$1700.00) Eighteen Hundred Dollars (\$1800.00) yes.”<sup>188</sup> The trial court found for Daniels and awarded him \$2926.50.<sup>189</sup>

Wehry argued that because the contract for sale did not satisfy the requirement that there be a writing under the statute of frauds, it was not enforceable. Daniels contended that, although there was no written contract, their agreement was removed from the writing requirement under the admission exception to the statute of frauds:

A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted . . . .<sup>190</sup>

Because this was an issue of first impression in Indiana,<sup>191</sup> the court turned to the case law of other jurisdictions. The court noted that it is not necessary that a party literally say, “I admit that I entered into an oral contract.” Instead, it is enough if the party “testified to facts which . . . establish that a contract was formed.”<sup>192</sup> In addition, it is not necessary that the admission encompass all the terms of the contract; rather, it must establish “that the parties did in fact enter into a contractual relationship.”<sup>193</sup> Consequently, the admission does not have to show that the parties agreed upon the price of the goods to be bought and sold.<sup>194</sup>

188. *Id.* (quoting Hearing Transcript 26).

189. The award included \$2887.50 (the price of the helmet plus sales tax), along with \$39.00 in court costs. *Id.*

190. IND. CODE ANN. § 26-1-2-201(3)(b) (West 2003). The court noted that the purpose underlying this exception is

(1) to provide that a party cannot admit the existence of an oral contract for the sale of goods and simultaneously claim the benefit of the statute of frauds, (2) to prevent the statute of frauds from becoming an aid to fraud, and (3) to expand the exceptions to the nonenforceability of oral contracts under the statute of frauds.

*Wehry*, 784 N.E.2d at 535 (quoting *Quaney v. Tobyne*, 689 P.2d 844, 849 (Kan. 1984) (citations omitted)).

191. “Although we have found no Indiana cases considering what constitutes an admission within the statutory term, courts in other jurisdictions have considered this issue.” *Wehry*, 784 N.E.2d at 535.

192. *Id.* (quoting *Lewis v. Hughes*, 346 A2d. 231 (Md. 1975)).

193. *Id.* at 536 (citing *Jackson v. Meadows*, 264 S.E.2d 503, 505 (Ga. Ct. App. 1980)).

194. *Id.* (citing *Jackson*, 264 S.E.2d at 503). This conclusion comports with other sections of the Uniform Commercial Code. See IND. CODE ANN. § 26-1-2-204(3) (West 2003) (“Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”); see also *id.* § 26-1-2-305(1) (“The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery . . .”).

In *Cargill, Inc., Commodity Marketing Division v. Hale*,<sup>195</sup> during cross examination, the plaintiff asked the defendant whether the defendant had agreed in a phone conversation to sell soybeans to the plaintiff. "The defendant responded, 'Yes, Sir[,]'"<sup>196</sup> and the court there concluded that this response was an admission under 2-201(3)(b).<sup>197</sup> The court in *Wehry* viewed the facts before it as analogous to the facts in *Cargill*, and it reached the same conclusion as the Missouri court. "Here, Wehry also responded affirmatively when asked if he told Daniels to order the helmet for him. This testimony also constitutes an admission within the meaning of the statute, and the contract is therefore enforceable by Daniels."<sup>198</sup> Finally, the court stated that once it is clear that a contract was formed, the only task remaining is to determine the contract's exact terms.<sup>199</sup> Here, the parties' disagreement over the price term raised a factual issue for the trier of fact, and the court determined that it was not unreasonable for the trier of fact to have determined that Wehry agreed to purchase the 1985 helmet for \$2750.<sup>200</sup> The court of appeals affirmed the lower court's decision in Daniels' favor.

#### *E. Connection of the Writing to the Sale*

One other case addressing writing requirements under the UCC reaffirmed the long-ago-established proposition that there must be a clear connection between the writing and the purported sale of goods in order to satisfy the requirements of the statute of frauds. In *Fillmore LLC v. Fillmore Machine & Tool Co.*,<sup>201</sup> the parties entered into a transfer and sale agreement designed to establish Fillmore LLC.<sup>202</sup> The contract provided that "Innotek was to contribute \$24,000 in cash to Fillmore LLC in exchange for 50% of Fillmore LLC's units. Fillmore was to contribute \$24,000 in accounts receivable to Fillmore LLC in exchange for the other 50% of Fillmore LLC's units."<sup>203</sup> The contract did not mention the transfer of any other assets to Fillmore LLC. Despite this fact, Innotek's accountant, Bruce Buchan, who prepared the tax returns for Fillmore and Fillmore LLC, showed on the returns "a transfer of Fillmore's equipment and real property to Fillmore LLC."<sup>204</sup> Moreover, Buchan was the only person who

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195. 537 S.W.2d 667 (Mo. Ct. App. 1976).

196. *Id.* at 669.

197. *Id.*

198. *Wehry*, 784 N.E.2d at 536.

199. *Id.* (citing *Dangerfield v. Markel*, 222 N.W.2d 373, 378 (N.D. 1974)).

200. *Id.*

201. 783 N.E.2d 1169 (Ind. Ct. App. 2003).

202. *Id.* at 1172.

203. *Id.*

204. *Id.* at 1173.

When questioned about the accounting entries and the tax returns showing a transfer of assets other than \$24,000 in accounts receivable from Fillmore to Fillmore LLC, Buchan stated that he prepared the returns and made the entries to reflect his

testified that an agreement for such a transfer was made.<sup>205</sup>

Fillmore subsequently sued Innotek, alleging that Innotek was liable for conversion of \$275,000 worth of Fillmore's machinery and equipment.<sup>206</sup> The trial court concluded, among other determinations, that the Uniform Commercial Code's statute of frauds precluded "any agreement regarding the transfer of the equipment to Fillmore LLC."<sup>207</sup> In response, Innotek contended, among other things, that the signature of one of Fillmore's principals on the tax return "indicated that the equipment had been transferred and that this was enough to have satisfied the statute of frauds."<sup>208</sup> The court, however, disagreed. Relying on a 1926 case, the court of appeals stated, "Long ago, this court determined that the writing must specifically refer to a sale memorandum or other acknowledgment of a sale—oral testimony will not establish a connection between the writing and the parties' acknowledgment of sale."<sup>209</sup> Here, the tax returns did not specifically refer to an agreement for the sale of Fillmore's equipment to Fillmore LLC, and thus, the statute of frauds was not satisfied.<sup>210</sup> The court of appeals affirmed the lower court's decision.

#### CONCLUSION

Finally, in addition to the cases discussed here, the Indiana Court of Appeals decided several other cases that Indiana attorneys will find interesting. However, the Indiana Supreme Court has granted requests for transfer in each of those cases, and as of this writing, it has not delivered those opinions. Consequently, readers will have to wait until next year's survey issue of the *Indiana Law Review* for a discussion of those decisions.

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understanding of the parties' discussions [at a meeting preceding the signing of the contract for sale]. Buchan also acknowledged that before preparing the first tax return for Fillmore and Fillmore LLC, he discovered that the transfer and sale agreement . . . reflected a different scenario—one in which Fillmore's contribution to Fillmore LLC was only \$24,000 in accounts receivable—not any and all assets of the company.

*Id.*

205. *Id.* at 1175.

206. *Id.* at 1174.

207. *Id.* at 1178. See *supra* note 183; IND. CODE ANN. § 26-1-2-201 (West 2003).

208. *Fillmore*, 783 N.E.2d at 1178.

209. *Id.* (citing *Warner Sugar Ref. Co. v. Beyer Bros.*, 151 N.E. 739 (Ind. Ct. App. 1926)).

210. *Id.*

