

HOOSIER LITIGATION BLOG

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Indiana Supreme Court Holds: Trial Court Has Discretion to Not Grant Crime Victims Relief Act Award Even When Predicate Act is Proven

First off, let me start by welcoming you back to the Hoosier Litigation Blog. After over a month away from the blog, it is time to return with a case that I have been waiting for from the Indiana Supreme Court. The break in posts was due in part to the fact that we have relocated the firm from our more than three-year home in Broad Ripple to our fantastic new space in downtown Indianapolis on the third floor of the repurposed firehouse at the intersection of New York and Alabama. Also, I originally drafted this post in the immediate wake of the decision (10/15/2014), but due to technical difficulties was not able to post it to the blog until now. That said; let us turn to the now fourth iteration of *Wysocki v. Johnson* through the appellate process.

Our regular readers will recognize this case as one that we have previously discussed on the HLB. We first covered the case when it was on its first trek through the appellate system. Its first trip reached the Indiana Supreme Court under the moniker *Johnson v. Wysocki*, which resolved a split in the court of appeals as to whether the Indiana Sales Disclosure Statutes supplanted the *caveat emptor* doctrine in real estate transactions. There, for the first time, the state's highest court determined that the seller of land could be held liable for fraudulent

representations on the mandatory sales disclosure form. The case was then remanded to the trial court for a determination of the amount the buyers was entitled to for the sellers' fraud.

The case's now second trip through the appellate system follows from the ultimate decision at the trial court. On the second appeal, the case, due to a change in procedural posture, was re-captioned as *Wysocki v. Johnson*. As I summarized in our discussion of the court of appeals' decision, the issue on the second appeal was:

The court was faced, in part, with a novel proposition. In short, the [buyers] argued that a finding of fraud in the sales disclosure form context necessarily met the requirement of criminal fraud under the [Indiana Crime Victim's Relief Act] and therefore they should have been awarded the costs and fees that they sought.

Thus, the primary issue in this appeal is the breadth and utility of Indiana's Crime Victim's Relief Act (the CVRA). As we have discussed before, the CVRA permits a civil claim stemming from harm suffered by the perpetration of a criminal act. The buyers in this case, argued that the same requirements to prove fraud under in the CVRA context is the same requirements in proving fraud generally for the sale's disclosure form. It is a fascinating and novel argument. Peculiarly, however, it was not the focus of the court of appeals' decision. There, quite startlingly, the court of appeals assumed the stance that no such claim could be proven here because: (1) there was no criminal conviction of sellers and (2) the buyers did not prove fraud beyond a reasonable doubt. In numerous prior cases, both the court of appeals and the Indiana Supreme Court recognized that neither a criminal conviction nor a higher standard than the typical civil standard—by a preponderance of the evidence—apply in civil actions under the CVRA.

The sellers petitioned the Indiana Supreme Court to grant transfer and review the case. To me at least, it seemed an absolute certainty that transfer would be granted here, if for no other reason, than to rectify the peculiar posture of the court of appeals that seemed to treat the matter as a case of first impression. My prognostication came to pass, and now we have a resolution of the primary question in the case from the state's highest court.

The unanimous decision of the court was authored by our recently-elevated Chief Justice Loretta Rush. The court began by recognizing that the buyers' argument sought to establish "a bright-line rule that every knowing misrepresentation on a Sales Disclosure Form constitutes criminal deception, and thus gives rise to CVRA liability. And because an award of costs and reasonable

attorney fees is mandatory when liability is imposed under the CVRA, the [buyers] reason that the trial court lacked discretion to deny their request for those additional damages.” Notably, the trial court’s decision was based solely on a finding of common-law fraud and specifically rejected CVRA relief.

The court began the meat of its analysis by rejecting the court of appeals’ conclusion that criminal deception and fraud in the sales disclosure form context do not include the same elements. The Supreme Court disagreed:

But as our decision last year in this case established, the elements of such a claim when based on a Sales Disclosure Form distill down to (i) a false representation of past or existing facts on the Form, (ii) made with actual knowledge of its falsity, (iii) which proximately caused the complaining party injury. In this context, the elements of criminal deception overlap significantly: “knowingly or intentionally mak[ing] a false or misleading written statement with intent to obtain property.” I.C. § 35-43-5-3(a)(2).

As a result, the court “disagree[d] with the Court of Appeals that the different elements are dispositive, because these findings would have been sufficient to support a CVRA award—if the court’s judgment had actually included such an award.”

Where the Supreme Court drew the line, however, is that the trial court chose to not include a CVRA award, and that it was permitted to make such a choice. Relying on a prior case from the Indiana Supreme Court that recognized “it is highly appropriate for the trial court to weigh any equities before deciding the amount, if any, owed under” the CVRA, the court held that the trial judge was empowered to make findings that would support a CVRA award, but not grant anything beyond the compensatory damages for the harm. The court further reasoned that a decision to not grant a CVRA award “amounts to an ‘implicit[] f[i]nd[ing] that the . . . conduct was not so heinous as to require exemplary damages’—even when the court awards attorney fees as the statute requires.”

The court determined that finding a trial court has a choice to not grant a CVRA award “does not undermine the mandatory nature of awarding costs and attorney fees under the CVRA.” The reasoning here was because the sellers brought claims for more than just the CVRA violation; they brought a claim for common-law fraud as well.

Our conclusion does not undermine the mandatory nature of awarding costs and attorney fees under the CVRA. If the [buyers] had relied exclusively on the CVRA for recovery, refusing to award costs and reasonable attorney fees would have been clearly erroneous—if the trial court had ruled in their favor. But as this case illustrates, a trial court may find compensatory damages to be warranted, yet be reluctant to find a defendant’s conduct “heinous” enough to punish under the CVRA. In such a case, forcing the court to choose between those considerations, without pleading an alternative middle ground as here, might tip the scale towards including fees and costs as part of compensation—or just as readily tip it towards a defense verdict that leaves the claimants empty-handed.

We therefore reject the [buyers]’ invitation to adopt a bright-line rule imposing CVRA liability in all cases involving a knowing misrepresentation on a Sales Disclosure Form—at least where the claimants plead other grounds for liability in the alternative. Plaintiffs are free to choose, by their pleadings, to place all their eggs in the CVRA basket and take their chances on the factfinder’s assessment of criminality in exchange for the assurance of recovering costs and attorney fees if they prevail. But they are also free, as here, to plead other remedies in the alternative to the CVRA to hedge against being shut-out from compensatory damages if the trial court is reluctant to impose quasi-criminal liability. In those circumstances, the trial court has discretion over which remedies to award. Accordingly, the trial court was within its discretion to award compensatory damages for common-law fraudulent misrepresentation, while declining relief under the [buyers]’ alternative CVRA theory.

I question the court’s guidance on whether to go for the gusto and file only a CVRA claim or split the basket and also include a common law fraud claim. It seems unnecessary and, perhaps, unwise. Perhaps the most compelling reason for filing both a common law fraud claim in addition to a CVRA case is just that if the judge wanted to award the CVRA damages, the judge will do so, given the option. However, if the judge does not want to award CVRA damages, the judge will probably not do so any way.

As a matter of housekeeping, the Supreme Court added a paragraph to address the misunderstanding of the law as applied by the court of appeals. The court made it clear that there is no requirement under the CVRA that a defendant have been charged with, let alone convicted of, a crime. Further, the CVRA does not

require a heightened standard above that of preponderance of the evidence. As the court succinctly summarized: “[W]e reiterate that CVRA liability is civil, not criminal, and does not require criminal charges or proof beyond reasonable doubt.”

Join us again next time for further discussion of developments in the law.

Sources

- *Wysocki v. Johnson*, ---N.E.3d---, No. 45S03-1407-CT-459, 2014 WL 5211512 (Ind. Oct. 15, 2014) (Ruch, C.J.).
- *Wysocki v. Johnson*, 4 N.E.3d 1218 (Ind. Ct. App. 2014), *trans. granted*.
- *Johnson v. Wysocki*, 990 N.E.2d 456 (Ind. 2013) (David, J.).
- Indiana Sales Disclosure Statutes – codified at Ind. Code ch. 32-21-5.
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- Colin E. Flora, *Actual Knowledge of Inaccuracy in Indiana Real Estate Disclosure Form is Actionable for Fraud*, HOOSIER LITIG. BLOG (June 28, 2013).
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