www.PavlackLawFirm.com

March 7 2014

by: Colin E. Flora
Associate Civil Litigation Attorney

Indiana Appellate Decision Seems to Signal Major Change in Civil Action Under Ind. Crime Victim's Relief Act

This week we return to not one, but two, blasts from the past. One of the most well read articles on the Hoosier Litigation Blog is *Damages Pt. 7: Indiana Crime Victim's Relief Act*. If you conduct a Google search of "Indiana Crime Victim's Relief Act," you'll see my scowling face right there at the second result. Another topic where you won't have to dig too deep before you start to find my name is the ability to bring a claim for fraud for misrepresentations on an Indiana sales disclosure form. We addressed this in *Actual Knowledge of Inaccuracy in Indiana Real Estate Disclosure Form is Actionable for Fraud* – discussing the Indiana Supreme Court decision in *Johnson v. Wysocki* from this past summer. You can also find further resources from a journal article I co-authored and from a CLE presentation that addressed the sales disclosure form issue listed in the references below.

I do not add the litany of prior discussion on the sales disclosure form issue to toot my own horn. I do it to make clear that I am very knowledgeable on this area of law. I have followed the *Johnson v. Wysocki* case since it began its foray into the Indiana Court of Appeals as an unpublished decision, then made its way up to the

Indiana Supreme Court to finally settle the issue that *caveat emptor* doctrine does not prevent a claim for fraud if a seller of real estate knowingly lies on the (not always mandatory) sales disclosure form. Why do I need to make clear that I'm knowledgeable? I will admit, I generally hate when authors spend a great deal of time trying to explain why they should be listened to – e.g. Jean-Jacques Rousseau's The Social Contract: Or Principles of Political Right. But the reason I do so here is because I am flabbergasted by the Indiana Court of Appeals' decision this week in the second appeal of the *Johnson v. Wysocki* case – this time captioned in reverse as *Wysocki v. Johnson* – and I want to make it clear that my shock should mean something.

Before I delve into the case, I want to reiterate a point I have made before: I find myself amazed time and time again by the high quality of judges we have in this state – especially on the court of appeals and the supreme court – and the tremendous wisdom from which we benefit as a result. That said, I think the court of appeals got this one wrong.

The original appeal in *Johnson v. Wysocki* arose out of the alleged failure to disclose defects that the sellers knew to exist. The buyers filed a case claiming: (I) fraud arising from the sellers' failure to disclose the defects; (II) breach of contract; and (III) compensatory damages pursuant to the Indiana Crime Victim's Relief Act (the "CVRA"). The trial court granted summary judgment to the seller on the breach of contract claim, but let the fraud claim go to trial. At trial, the court found the sellers – the Johnsons – were liable for $13,805.95 in damages but that the buyers – the Wysockis – could not recover under the CVRA.

The Johnsons appealed, trying to vacate the finding of fraud. The Wysockis cross-appealed seeking to recover under the CVRA. The case worked its way up to the Indiana Supreme Court and resulted in a decision finding that such a misrepresentation was actionable for fraud if it was within the actual knowledge of the Johnsons. The court did not rule on the Wysockis' cross-appeal. The case returned to the trial court, wherein the trial judge found that the defects were within the actual knowledge of the seller and awarded judgment on a claim for common law fraud. However, the court denied the buyer's request for attorney fees and expert fees under the Indiana Crime Victim's Relief Act (the "CVRA"). It is the denial of recovery under the CVRA that sparked this appeal.

As we've discussed before, the CVRA allows for the recovery of costs and attorneys fees in bringing the case as well as an additional recovery of two times the actual damages. This is called treble damages and effectively triples the recovery. For the grammarians in the audience, I acknowledge that treble and triple are, in this context, synonyms. The CVRA allows for civil recovery for criminal offenses. If

you refer back to our previous article on the CVRA, you'll see that I list one of the benefits being that "it is not essential for the defendant to have even been charged with a crime for a plaintiff to bring and succeed on a claim under the Act." I also note that the burden of proof – unlike in criminal matters, wherein the burden is beyond a reasonable doubt – is a preponderance of evidence.

I want to reassure our readers, this was not a declaration I made by shooting from the hip. It was a well-researched statement. Specifically, in *Larson v. Karagan* the Indiana Court of Appeals recognized – and, mind you, not for the first time – that "[a] conviction . . . is not a condition precedent to recovery in a civil action brought under the crime victim's relief act, but the claimant must prove all the elements of the criminal act." Further, as stated by the Indiana Supreme Court in *Conwell v. Gray Loon Outdoor Marketing Group, Inc.*, "[A] claimant [under the CVRA] must show the elements of [the criminal act] by a preponderance of the evidence." Consequently, I view these two propositions as well-settled issues of Indiana law.

This brings us to the decision in *Wysocki v. Johnson*. The court was faced, in part, with a novel proposition. In short, the Wysockis argued that a finding of fraud in the sales disclosure form context necessarily met the requirement of criminal fraud under the CVRA and therefore they should have been awarded the costs and fees that they sought. This is a novel issue, but seems like one with a very plausible basis. I will not delve into the merits of that proposition – I know startling since this supposed to be the primary issue in the case I'm discussing. The court examined this issue as one of statutory interpretation and viewed the Wysockis' argument as an invitation to "equate the common-law tort of fraud with the criminal offense of fraud." This is, perhaps, a very reasonable conclusion by the court, but its basis for this conclusion is, in my opinion, weak and contrary to both *Larson* and *Conwell* that I discussed above.

The court looked at the elements of common law fraud, requiring:

> 1) a false statement of past or existing material fact; 2) made with knowledge that it was false or made recklessly without knowledge of its truth or falsity; 3) made for the purpose of inducing the other party to act upon the statement; 4) upon which the other party justifiably relied and acted; 5) proximately resulting in injury to the other party. In order to obtain a recovery under this theory, a plaintiff must prove the allegation by a preponderance of the evidence.

The court then looked at what the state must prove in a criminal case for criminal fraud:

> In order to obtain a conviction under this provision, the State would have been required to prove that the Johnsons (1) knowingly or intentionally (2) made false or misleading written statements (3) with the intent to obtain property. Of course, as with all crimes, the State would have had to prove its case beyond a reasonable doubt.

Based upon the analysis of the different requirements to prove each cause of action and the different standards required between the civil case and the criminal case, the court concluded:

> Thus, it cannot be said that authorization of attorney fees in the CVRA for victims of criminal offenses that can be categorized as fraud extends to the common-law tort of fraud. Simply put, in its current form, the CVRA authorizes certain fees only for victims of certain, specific criminal offenses . . . . The Wysockis were not victims of the criminal offense of fraud because the Johnsons were not charged with that crime in relation to the sale of the house, much less convicted of it in a court of law. In the absence of such a conviction, the CVRA does not apply. Accordingly, the trial court did not err in denying the Wysockis' request for attorney fees under its provisions.

The key to the decision, aside from recognizing that the elements are different – which is a reasonable basis, though it seems to fail to analyze whether in meeting the elements of common law fraud one meets the requirements of criminal fraud – is that the burden of proof is different and that there was no criminal conviction. This seems to clearly contradict the two cases I listed above along with numerous other cases that can be cited for the same proposition. While a panel of the court of appeals can certainly, in the right circumstances, overrule a prior court of appeals panel, and, in theory, even determine that the Indiana Supreme Court's binding precedent might be something that if the Supreme Court were to look at again might be abandoned, the fact the court of appeals did not cite to or explain any of the prior decisions is astonishing. It seems that the court examined this case as though it were an issue of first impression. As I noted before, to an extent it certainly was, but not on these two issues.

I usually suspect in cases like this that there was a deficiency in the briefing of the appeal that deprived the court from having its attention brought to applicable precedent. However, I am familiar with the firm that represents the Wysockis in this case and just cannot imagine them not including the relevant precedent. I simply cannot wrap my mind around this decision. I fully expect the Wysockis to seek a second trip to the Supreme Court. I sincerely hope the Supreme Court grants transfer on this case, even if the Supreme Court comes to the same conclusion, to

simply expand upon what seems like a meaningful change of direction in Indiana law.

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

Sources

- *Johnson v. Wysocki*, 971 N.E.2d 1273 (table), No. 45A04-1111-CT-610, 2012 WL 3067898 (Ind. Ct. App. July 30, 2012), *trans. granted opinion vacated*, 990 N.E.2d 456 (Ind. 2013).

- *Wysocki v. Johnson*, --- N.E.3d ---, No. 45A03-1309-CT-385, 2014 WL 840257 (Ind. Ct. App. Mar. 3, 2014).

- *Larson v. Karagan*, 979 N.E.2d 655, 661 (Ind. Ct. App. 2012).

- *Conwell v. Gray Loon Outdoor Mktg. Grp., Inc.*, 906 N.E.2d 805, 814 (Ind. 2009).

- Colin E. Flora, *Damages Pt. 7: Indiana Crime Victim's Relief Act*, HOOSIER LITIGATION BLOG (May 25, 2012).

- Colin E. Flora, *Actual Knowledge of Inaccuracy in Indiana Real Estate Disclosure Form is Actionable for Fraud*, HOOSIER LITIGATION BLOG (June 28, 2013).

- Charles B. Daugherty & Colin E. Flora, *Survey of Recent Developments in Real Property Law*, 45 IND. L. REV. 1305 (2012).

- Charles B. Daugherty & Colin E. Flora, *Indiana Real Property Law Update*, INDYBAR BROWNBAG CLE (Indianapolis, IN July 15, 2013), written materials available at http://www.indybar.org/_files/Indiana%20Real%20Property%20Law%20Update%20-%20Written%20Materials.pdf.

***Disclaimer**: The author is licensed to practice in the state of Indiana. The information contained above is provided for informational purposes **only** and should not be construed as legal advice on any subject matter. Laws vary by state and region. Furthermore, the law is constantly changing. Thus, the information above may no longer be accurate at this time. No reader of this

content, clients or otherwise, should act or refrain from acting on the basis of any content included herein without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue.