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IN THE NEWS: King & Spalding Drops DOMA Defense; Clement Resigns in Protest
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ADVOCACY TIP OF THE MONTH: Arouse the Jurors' Sense of Injustice.

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Apparently bowing to political pressure, King & Spalding has dropped its representation of the Republican-led U.S. House of Representatives in defense of a controversial federal law banning recognition of same-sex marriages. In response, partner Paul Clement, a former U.S. Solicitor General, has resigned from the firm in protest. Clement wrote in his resignation letter:

My resignation is, of course, prompted by the firm's decision to withdraw as counsel for the Bipartisan Legal Advisory Group of the United States House of Representatives in defense of Section III of the Defense of Marriage Act. To be clear, I take this step not because of strongly held views about this statute. My thoughts about the merits of DOMA are as irrelevant as my views about the dozens of federal statutes that I defended as Solicitor General.

Instead, I resign out of the firmly-held belief that a representation should not be abandoned because the client's legal position is extremely unpopular in certain quarters. Defending unpopular positions is what lawyers do. The adversary system of justice depends on it, especially in cases where the passions run high. Efforts to delegitimize any representation for one side of a legal controversy are a profound threat to the rule of law. Much has been said about being on the wrong side of history. But being on the right or wrong side of history on the merits is a question for the clients. When it comes to the lawyers, the surest way to be on the wrong side of history is to abandon a client in the face of hostile criticism.

In the letter, Clement cited a former King & Spalding partner, Griffin Bell: "You are not required to take every matter that is presented to you, but having assumed a representation, it becomes your duty to finish the representation. Sometimes you will make a bad bargain, but as a professional, you are still obligated to carry out the representation."

Clement will continue on the DOMA matter at his new firm, Bancroft.

1. NCAA ticket distribution plan is not an illegal lottery; *George v. Natl. Collegiate Athletic Assn.*, 2011 WL 1506231 (Ind. 4/21/11) (Sullivan)

Last year, the Seventh Circuit, after initially holding that the NCAA ticket distribution process was an illegal lottery, vacated its ruling and certified the question to the Indiana Supreme Court. On April 21, 2011, the Indiana Supreme Court issued its decision and held that the Seventh Circuit's initial view was incorrect - the NCAA's ticket-distribution plan does not constitute a lottery under Indiana law.

In its decision, the Court stated that Indiana's statutes did not define the term "lottery" and acknowledged that prior judicial interpretations of that term "have not been

consistent." It then clarified that the definition it will use is the definition it first announced in *Tinder v. Music Operating, Inc.*, 237 Ind. 33, 142 N.E.2d 610, 614 (1957):

[A]s used in Indiana Code section 35-45-5-3, the term "lottery" means a scheme for the distribution of prizes by lot or chance among those who provided or promised to provide consideration.

The issue the Court was asked to decide was whether the NCAA's tickets were a "prize." It concluded that the tickets were not prizes because it was merely speculation that the tickets would have an increased value in a secondary market.

Here, the NCAA created the primary market for the tickets, and the value realized by the NCAA is in fact the face value of the tickets. But for the NCAA issuing tickets to one of its events, there could never be a secondary market. Once the NCAA sells tickets, the tickets will have a resale value in a secondary market, but, for a plethora of reasons, that resale value may be above or below the face value. For example, the event may be undersold. Even if the event is oversold, there may be no excess demand once the competitors are determined. Other factors may affect the secondary market for tickets, such as the general state of the economy, weather predictions, or an injury to a star competitor. The speculative nature of the secondary market makes it an inappropriate consideration in determining the presence of a prize in this case.

[T]he applicants who are successful do not necessarily increase their fortunes; they merely receive a license to attend a collegiate sporting event. The prospect of bettering one's fortunes is entirely speculative at the time applications are submitted, and, to make a profit on the putative secondary market, the successful ticket purchaser must forego the very benefit acquired through the ticket-allocation process – the license to attend the event.

In reaching its decision the Court cited to the definition of "lottery" in Black's Law Dictionary but noted in a footnote: "We generally prefer to consult standard dictionaries when interpreting the undefined terms of a statute." The Court only resorted to a legal dictionary in its discussion because "the term 'lottery' has become a legal term of art, at least with respect to laws prohibiting or authorizing lotteries, given that the term has been the subject of many constitutions, statutes, and judicial opinions."

Lessons:

1. An item is not a prize in a lottery if no market exists for the item before it is offered by the person running the purported lottery.
2. As a general rule, look to standard dictionaries, rather than legal dictionaries, when interpreting a statute.

2. Expert in federal court must provide more than just conclusions; *Bourke v. Conger*, 2011 WL 1466558 (7th Cir. 4/19/11) (Cudahy)

After being convicted of murder, Bourke sued his lawyers for malpractice. The lawyers moved for summary judgment and Bourke submitted an expert report that described why the lawyers did not meet the applicable standard of care and asserted that this caused the jury to find Bourke guilty. The district court granted the motion for summary judgment.

On appeal, the Court affirmed the district court's judgment because the expert's report did not sufficiently describe why the expert believed that the lawyers' conduct caused the jury to find Bourke guilty.

Bourke depended exclusively on Thomas's expert report to establish the causation element of his claim. While expert testimony is one of the types of evidence that a plaintiff like Bourke could normally rely on to ward off summary judgment, it is well established that an expert report that lacks foundation and depth will be given little consideration by courts. In order for "an expert report to create a genuine issue of fact, it must provide not merely ... conclusions, but the basis for the conclusions."

As the district court noted, the Thomas report does not support its conclusion that the Appellees' performance during voir dire caused the jury to find Bourke guilty with analysis, facts or reasoning. While the report discusses various ways in which the Appellees could have better represented Bourke's interests ..., this discussion only goes towards establishing that the Appellees breached their duty to Bourke, not causation.

The Thomas report fails to identify facts that support its conclusion that the Appellees' alleged errors had any role in causing the jury to find Bourke guilty. This shortcoming prevents the Thomas report from creating a genuine, disputed issue of fact concerning causation. Because of this flaw and the fact that Bourke did not present the court with any other evidence relevant to this element of his prima facie case, it was appropriate for the district court to grant summary judgment against Bourke's claim.

Lesson:

Make sure your experts fully describe the rationale for their conclusions in their expert reports.

3. Evidence of acquittal not admissible in a civil action; *Sigo v. Prudential Prop. & Cas. Ins. Co.*, 2011 WL 1543019 (Ind. Ct. App. 4/25/11) (Robb)

Sigo brought an action against Prudential to recover for the fire loss of his home. Concurrent with that civil litigation, he was charged and tried for arson for the same fire

that was the cause of his claim. A jury acquitted him of those charges. Prudential filed a motion in limine seeking to exclude any evidence of Sigo's acquittal and the trial court granted that motion. The trial court then certified the issue for an interlocutory appeal.

On appeal, the Court noted that no Indiana reported case had addressed the extent to which evidence of acquittal was admissible in a civil case. However, it noted that cases from other jurisdictions supported the trial court's decision. Sigo argued that evidence of his criminal trial would show bias, prejudice, or adverse interest of Prudential's witnesses. However, he failed to explain how those witnesses' prior testimony creates a substantial bias or adverse interest.

While Sigo's ability to make these uses of his criminal trial and acquittal is not central to proving his theory of the civil case, the potential prejudice to Prudential from the jury's improper use of his acquittal goes directly to the ultimate issue Prudential must prove to make its case – that Sigo intentionally set the fire. Thus, if evidence of Sigo's criminal trial and acquittal were permitted, it would create a substantial risk to Prudential of unfair prejudice in the form of the jury deciding the case based on improper inferences.

The Court's decision is not surprising. As Prudential argued, an acquittal is not a positive finding of innocence; it is a negative judgment that the State's burden of proof beyond a reasonable doubt was not met. Because the standard of proof in a civil case is much lower, a powerful case can be made that evidence of an acquittal is simply not relevant to the question of civil liability. What is interesting about this case, however, is that the Court did not base its judgment on this rationale, leaving room for litigants to make the fact of acquittal admissible upon a showing that the evidence is sufficiently probative.

Lesson:

Evidence of a prior acquittal can be probative, but its proponent needs to demonstrate that the probative value of this evidence is not substantially outweighed by its prejudicial impact.

4. No claim for negligent infliction of emotional distress for family members who see improperly buried casket exhumed; *York v. Fredrick*, __ N.E.2d __ (Ind. Ct. App. 4/25/11)

A woman died and a funeral service was held. After the family left the cemetery, the woman was interred. However, the casket was too large to fit into the vault. Four people then pushed and applied pressure to the corners of the casket to force it into the vault. Once the casket was in the vault, the vault was bulging, and a seal was difficult to obtain. Boards and straps were used in an attempt to eliminate the bulge and get the vault sealed. Ultimately, the vault was interred without being completely sealed.

A couple of weeks later, one of the family members was notified by an anonymous caller that there had been a problem during the burial. The vault was then exhumed. Some of the family members were present at the exhumation. There was some conflicting testimony regarding whether there was dampness and dirt in the casket, but all witnesses agreed that the remains were not damaged.

The family brought a suit claiming, among other things, negligent infliction of emotional distress. The defendants moved for a dismissal under Trial Rule 12(B)(6) and the trial court granted that motion. The family then appealed.

On appeal, the family compared their case to the situation described in *Blackwell v. Dykes Funeral Homes, Inc.*, 771 N.E.2d 692 (Ind. Ct. App. 2002). In that case, parents lost their son and had him cremated. Eleven years later, it was discovered that an urn containing his remains was not placed into the niche the parents had selected and that his remains had been lost. The Court in that case found that the defendants were not entitled to summary judgment on the parents' claim for negligent infliction of emotional distress.

The Court disagreed, holding that this case was distinguishable from *Blackwell*.

That case involved a truly egregious situation where the funeral home permanently lost the remains of the son of the plaintiffs, who had been directly involved with the funeral arrangements, and which loss was not discovered for over eleven years. Here, none of the Yorks were involved with making the funeral arrangements for Johnson and had little, if any, contact with the Defendants. The upset experienced by the Yorks upon learning that Johnson's casket and vault had been damaged during the burial does not rise to the same level of egregiousness as the situation in *Blackwell*. As all of the Yorks testified, the remains were not lost and there was no damage to Johnson's remains. Further, as previously stated, they were not present during the burial, and they voluntarily exposed themselves to the exhumation by either being present when it occurred or by later viewing pictures and video taken when it occurred. We therefore conclude that the present case is distinguishable from *Blackwell*.

Lesson:

A family cannot make a claim for negligent infliction of emotional distress over irregularities in the burial process if those irregularities happened outside of their presence and did not damage the remains.

5. Settlement agreement too vague to be binding; *Zukerman v. Montgomery*, 2011 WL 1543210 (Ind. Ct. App. 4/25/11) (Brown)

This case involved a complex set of litigation arising from multiple real estate transactions. The parties were business partners and had invested in a number of real estate properties, with different corporate entities owning different properties. Eventually,

there was a falling out and a series of lawsuits and an arbitration proceeding arose over who owed whom money. In November 2008, the principal individuals involved in these disputes mediated the matter and entered into a settlement agreement. Issues then arose over the terms of the settlement agreement and one party moved to enforce that agreement. All of the various lawsuits were consolidated together and, after a hearing, the trial court entered an order enforcing the settlement agreement.

On appeal, the Court found that the settlement agreement was not reasonably certain in the terms and conditions of the promises made, including by whom and to whom. The Court then went on to describe multiple ways in which the settlement agreement could be interpreted.

We will not attempt to determine which, if any, of these interpretations may have been intended by the parties to the Settlement Agreement. As previously stated, we cannot make a contract for the parties and we are not at liberty to supply omitted terms while professing to construe a contract. Further, there is considerable ambiguity with respect to the debts to be paid by the parties, and the Settlement Agreement does not contain any ascertainable formula or standard for determining the extent of each party's obligations to relinquish shares or property interests free and clear of encumbrances. We also observe that a "contract must provide a basis for determining the existence of a breach and for giving an appropriate remedy," and we cannot ascertain with any degree of confidence based upon the language of the Settlement Agreement what actions or omissions by the parties may constitute a breach of the terms of the Settlement Agreement or the remedy a court could order to make the non-breaching party or parties whole in the event of any breach.

Because the settlement agreement lacked this information, it was too vague to be enforceable against the parties.

The Court's discussion does not describe what kind of testimony was presented to the trial court, so we can't know whether the testimony presented would have filled in the blanks missing from the settlement agreement or simply demonstrated a lack of the meeting of the minds. However, counsel should take this case as a warning to be careful when drafting the terms of a settlement agreement. Write the agreement in such a way as to eliminate ambiguity, so that all parties know all of the essential terms of the agreement. If you do not, then you may just be inviting additional, unnecessary litigation.

Lessons:

1. A settlement agreement is unenforceable if you cannot ascertain its essential terms with reasonable certainty.
2. A settlement agreement is unenforceable if a party cannot ascertain what conduct would constitute a breach of that agreement.

6. Insurance agent does not owe duty of good faith and fair dealing; *Meridian Title Corp. v. Gainer Group, LLC*, 2011 WL 1228295 (Ind. Ct. App. 4/4/11) (Sharpnack)

Gainer Group is in the business of buying real estate for the purpose of subdividing and re-selling it. It agreed to purchase some property and the seller agreed to provide title insurance. Meridian, the seller's real estate agent, procured the title insurance. After the sale, the seller alleged that it mistakenly sold more land to Gainer Group than it intended. Meridian attempted to facilitate a resolution of the dispute by holding a meeting at its offices. At the meeting, Meridian's CEO told Gainer Group that it was his opinion that Gainer Group did not have a claim under its policy of title insurance because the seller closed on the property without a completed survey and the policy has an exception for survey issues when the parties closed without a survey.

Subsequently, the seller filed suit against Gainer Group, which hired counsel to defend itself. It then submitted the claim to the title insurance company, which provided a defense. Gainer Group then filed suit against Meridian for the litigation expenses and attorney fees it incurred prior to the title insurance company's acceptance of Gainer Group's claim. The trial court denied summary judgment to Meridian.

On appeal, the Court reaffirmed that an insurance agent's duty does not extend beyond procuring insurance for the insured unless the insured can establish the existence of an intimate, long-term relationship with the agent or some other special circumstance. The facts in this case did not establish an intimate, long-term relationship, but the Court held that they did constitute a special circumstance.

The evidence shows that Meridian advised Gainer Group that the policy contains an exception for survey issues. There is no indication in the designated materials, and Gainer Group does not argue, that this representation is inaccurate. Meridian had an extended duty to advise Gainer Group regarding coverage, and it fulfilled that duty.

The Gainer Group argued that the Indiana Supreme Court's decision in *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515 (Ind. 1993), which imposed a duty of good faith and fair dealing on insurers, should be extended to insurance agents. The Court refused:

Our Supreme Court has yet to extend this duty to an agent; rather, an insurance agent's duty does not extend beyond the general duty to exercise reasonable care, skill and good faith diligence in obtaining a policy of insurance unless the evidence, through certain factors as set forth above, establishes a special relationship. Therefore, we decline Gainer Group's invitation to extend the application of the duty of an insurer as set out by the Supreme Court in *Erie*.

Lessons:

1. An insurance agent who provides advice that there is no coverage does not breach a duty merely because the insurer accepts coverage.
2. An insurance agent does not owe a duty of good faith and fair dealing to an insured.
7. **Non-party requests must designate the items sought with particularity;**
Crawford v. State of Indiana, 2011 WL 1378424 (Ind. Ct. App. 4/12/11) (Riley)

Prior to his trial for murder, Crawford served a non-party request for production of documents on Lucky Shift, Inc., a television production company. Lucky Shift did extensive filming of the murder investigation and interviewed the parties involved. It combined the footage into an episode of a non-fiction police show called The Shift. Crawford's first non-party request simply asked for all recorded footage, both aired and unaired, relating to the investigation by IMPD which resulted in the charges against him. The trial court refused to enforce this request, finding that the request was not sufficiently particular.

Crawford filed an amended request for production to Lucky Strike with 20 requests. After Lucky Strike objected, the trial court granted thirteen of the requests and denied seven, four because Lucky Strike claimed no such footage existed, and three for lack of particularity. After his conviction for murder, Crawford argued on appeal that the trial erred in denying these three requests.

The requests that were denied for lack of sufficient particularity are as follows:

Request #18: Footage of any and all statements of officers, agents, or affiliates of [the Indianapolis Metropolitan Police Department] or any reenactment thereof.

Request #19: Footage of anyone interviewed or questioned, or any reenactment thereof, in connection with the investigation of the death of Gernell Jackson.

Request # 20: Any and all recorded footage, both aired and unaired, relating to the investigation by the Indianapolis Metropolitan Police Department of a murder that is the subject of Season Two, Episode One, of the Shift, an Investigation Discovery Program, which aired on September 30, 2009.

The Court of Appeals affirmed, agreeing that these requests were not sufficiently particular. In doing so, the Court relied on *In re WTHR-TV*, 693 N.E.2d 1 (Ind. 1998)(*Cline*), where the Court specified that a party making a request must not be "engaged in a fishing expedition with no focused idea of the size, species, or edibility of the fish." Comparing the three requests at issue here with the request that was found insufficiently particular in *Cline* and with similar requests in other cases, the Court of Appeals held that these requests needed to be more specific.

Lessons:

1. To compel non-party discovery, a party must make two showings: (1) sufficient designation of the items sought, or particularity; and (2) materiality.
2. When requesting documents from a media source, although no reporter's privilege is recognized, the courts will vigorously enforce the particularity requirement and so, in drafting your requests, be as specific and narrow as possible.

8. Indiana does not apply same standard for relating back as federal courts; *Guzman v. Gray*, 2011 WL 1085261 (Ind. Ct. App. 3/24/11) and *Joseph v. Elan Motorsports Technologies Corp.*, 2011 WL 855852 (7th Cir. 3/31/11) (Posner)

These two cases offer a contrast between the manner in which federal courts and Indiana courts approach the questions of whether a claim related back under their respective versions of Rule 15.

Guzman was incarcerated in the Hancock County Jail. While in jail, other inmates forced him to do repeated squats. The damage to Guzman's muscles caused a medical condition that caused Guzman to be hospitalized.

Almost two years after he was released from the hospital, Guzman served a tort claim notice on the Hancock County Sheriff and filed a complaint against the Sheriff that alleged negligence. The Sheriff sent a letter to Guzman's counsel alerting him to the failure to file the tort claim notice within 180 days. He later filed and sent a second letter to Guzman's counsel, repeating the first and threatening to seek sanctions if Guzman continued to pursue the litigation.

The Sheriff moved for summary judgment on the basis that Guzman did not timely serve his tort claim notice. Guzman responded and moved to amend his complaint. Guzman's proposed amended complaint changed the theory of recovery from a state tort claim to a theory of recovery under 42 U.S.C. § 1983 for an alleged violation of Guzman's constitutional right. The trial court denied Guzman's motion to amend and granted the Sheriff's motion for summary judgment.

On appeal, the Court affirmed the trial court's decision. In so doing, it focused almost exclusively on Guzman's conduct.

Guzman decided to file a tort claim as a placeholder, a claim he knew to be fatally flawed by the lack of a prior tort claim notice. Moreover, Guzman failed to amend his complaint early on, which forced Gray to incur increased costs in defending against the complaint.

In contrast, in *Joseph* the 7th Circuit reversed a district court's decision because it improperly focused on what the plaintiff knew or should have known when he originally filed his complaint.

The only two inquiries that the district court is now permitted to make in deciding whether an amended complaint relates back to the date of the original one are, first, whether the defendant who is sought to be added by the amendment knew or should have known that the plaintiff, had it not been for a mistake, would have sued him instead or in addition to suing the named defendant; and second, whether, even if so, the delay in the plaintiff's discovering his mistake impaired the new defendant's ability to defend himself.

The fact that the plaintiff was careless in failing to discover his mistake is relevant to a defendant's claim of prejudice; the longer the delay in amending the complaint was, the likelier the new defendant is to have been placed at a disadvantage in the litigation. But carelessness is no longer a ground independent of prejudice for refusing to allow relation back.

Under this approach, it is fair to say that the 7th Circuit would have approached *Guzman* differently than the Indiana Court of Appeals did. It will be interesting to see if litigants are able to convince Indiana's appellate courts to apply the new federal test to the question of whether an amendment will relate back or whether Indiana's courts will continue to focus on the conduct of the plaintiff when making this decision.

Lessons:

1. In federal court, an amended complaint relates back if 1) the defendant who is sought to be added by the amendment knew or should have known that the plaintiff, had it not been for a mistake, would have sued him instead or in addition to suing the named defendant; and 2) the delay in the plaintiff's discovering his mistake prejudiced the new defendant's ability to defend himself.
2. Indiana does not apply the same test as the federal courts when determining whether an amendment to a complaint relates back.

9. Amount in jurisdiction is the most that the plaintiff can possibly recover; *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 2011 WL 120681 (7th Cir. 4/1/11) (Easterbrook)

Back Doctors filed a class action suit against an insurer under the Illinois Consumer Fraud and Deceptive Business Practices Act. The insurer removed the litigation to federal court under the Class Action Fairness Act of 2005, which allows the removal of class actions in which the stakes exceed \$5 million, provided that at least minimal diversity of citizenship exists. Back Doctors argued that the stakes were only \$2.9 million. The insurer argued that punitive damages made up the balance. Back Doctors argued that it did not either expressly request punitive damages or allege that the insurer acted wantonly or maliciously in its complaint, so the district court should remand. The district court remanded, finding that the insurer did not establish a "reasonable probability" that the amount in controversy exceeded \$5 million.

On appeal, the Court made it crystal clear that it is improper to use a "reasonable probability" standard when determining whether the amount in controversy exceeds the jurisdictional minimum - "unless recovery of an amount exceeding the jurisdictional minimum is legally impossible, the case belongs in federal court."

The fact that Back Doctors did not expressly request punitive damages did not prohibit it from requesting punitive damages in the future within this litigation.

When a plaintiff does not tie its own hands, the defendant is entitled to present a good-faith estimate of the stakes. If that estimate exceeds the jurisdictional minimum, it controls and allows removal unless recovery exceeding the jurisdictional minimum would be legally impossible.

Lesson:

If the defendant's estimates that the amount in controversy exceeds the jurisdictional minimum, then the federal court will have jurisdiction if it is possible for the plaintiff to recover that amount.

10. Court of Appeals provides lesson in how to ensure a case stays dismissed under T.R. 41(E); *Indiana Department of Natural Resources v. Ritz*, 2011 WL 1204715 (Ind. Ct. App. 3/31/11) (Crone)

This case involves a property dispute between DNR and the Ritzes. Each claimed possession of a deed conveying ownership of a tract of real estate along the former Whitewater Canal in Franklin County. In 1991, DNR sought to develop a hiking and biking trail that would include the disputed real estate and placed boundary markers on the property to survey it. The Ritzes operated a canoe business on property adjacent to the disputed real estate. The Ritzes' employees removed the markers and denied DNR employees access to the property.

In September 1991, DNR filed a complaint against the Ritzes for ejectment, trespass, preliminary and permanent injunctions, and damages. In April 1992, the trial court *sua sponte* issued an order to show cause why the case should not be dismissed pursuant to Rule 41(E) for failure to prosecute, but the case was not dismissed. Three years later, the trial court dismissed the case for failure to prosecute pursuant to Rule 41(E), but (a couple of months later) ordered that the case remain active and not be dismissed. Finally, in December 1998, the trial court again issued an order to show cause why the case should not be dismissed pursuant to Rule 41(E) for failure to prosecute and the case was dismissed in April 1999.

Over ten years later, in October 2009, DNR filed a complaint against the Ritzes for trespass, injunction, damages, and to quiet title pertaining to essentially the same real estate that was the subject of the earlier case. The Ritzes filed a motion to dismiss, asserting (1) that the case was originally filed in 1991 and was dismissed with prejudice and (2) that the statute of limitations for quiet title actions had run. DNR then moved to reinstate the

original action, contending that Trial Rule 41(E) required a hearing prior to dismissal, such a hearing was not held, and therefore the 1999 dismissal had been improper.

The parties then engaged in motion practice that resulted in the dismissal of the 2009 action and a hearing on the 1998 show cause order in the original action. The trial court dismissed that original action because DNR had failed to take any action for almost eleven years and could not offer a good excuse for the delay.

On appeal, the Court held that the trial court abused its discretion when it dismissed the original case in 2010. It held that this claim, a dispute over whether the land was public land, was particularly desirable to resolve on the merits because public land cannot be alienated and the right of the public to use public lands is not barred by the statute of limitations. Thus, "DNR's prior recorded deed ... will cast a perpetual shadow over the Ritzes' ownership rights." Moreover, while the length of the delay was "substantial," "the desirability of deciding this case on the merits is exceptionally important because of the alleged public interest in the disputed land."

The Ritzes argued that they would be prejudiced if the case were not dismissed. The Court stated that the Ritzes did not introduce sufficient evidence of prejudice.

The Ritzes have not asserted prejudice from having built on, developed, or improved the property in the belief that it belonged to them. The record before us does not reveal how or if the Ritzes were actually using the property. ... The Ritzes do not assert that they have paid taxes on the property or that the loss of the disputed property would materially affect their canoe business. Any prejudice to the Ritzes caused by the delay seems to be negligible.

In light of the absence of negligence and since "deciding this case on the merits is exceptionally important because of the alleged public interest in the disputed land," the Court reversed the dismissal under Rule 41(E).

Lessons:

1. It is exceptionally important to resolve disputes concerning allegedly public lands on their merits.
2. Be prepared to submit evidence of prejudice in support of a Rule 41(E) dismissal.

11. Trial court's sanctions for discovery violations were too severe; *Whitaker v. Becker*, 2011 WL 1136243 (Ind. Ct. App. 3/29/11) (Darden)

In December 2008, Whitaker filed a complaint for damages against Becker after Becker rear-ended Whitaker's vehicle, injuring him. Before filing suit, Whitaker's counsel had corresponded with Becker's insurance claims representative, informing him that Becker was expected to need surgery to address his injuries. On January 19, 2009, Becker filed his interrogatories and request for production. Whitaker did not respond to these discovery requests. Beginning on April 14, 2009, Becker's counsel wrote to Whitaker's

counsel every two weeks, requesting responses to the discovery. Becker's counsel did not receive any answer from Whitaker's counsel. On May 27, 2009, Becker filed a motion to compel, which the trial court granted. Whitaker's discovery responses were now due on June 16, 2009.

On June 15, 2009, Whitaker served his sworn discovery responses on Becker. Three days later, on June 18th, Whitaker had surgery – a fact not indicated in the discovery he provided. On June 18th, Becker's counsel received a letter dated June 17th stating that Becker was "scheduled to have surgery on June 18, 2009." Becker moved for sanctions, including dismissal and fees, for concealing the plan to have surgery. Whitaker did not file a response, but argued against the motion at a hearing. After the hearing, the trial court found that Whitaker was in violation of the order compelling discovery and, as a sanction, dismissed the action and awarded Becker attorney's fees.

Whitaker filed a motion to correct error, arguing that he had not concealed his need for the surgery and that Becker was not prejudiced so severely that it could only be cured by dismissal. Whitaker's motion was not granted.

On appeal, the Court held that the sanctions imposed by the trial court were too severe:

Our ultimate conclusion is that our decision here should be viewed as akin to one in equity, and that our resolution of this appeal must turn on fairness and Indiana's "marked judicial deference for deciding disputes on their merits and for giving parties their day in court." We find that based upon the facts and circumstances before the trial court, the dismissal of Whitaker's action was an abuse of discretion. Therefore, we reverse the trial court's order of dismissal.

One of the factors the Court considered when determining that the sanction of dismissal was inappropriate was the trial court's failure to warn Whitaker that this was a possibility.

We have stated that "in deciding whether a sanction is just, this court has routinely considered whether or not a trial court expressly warned a party that failure to comply could result in dismissal." There was no such warning or any such indication in this case. Thus, we cannot conclude that Whitaker was "clearly aware that the trial court was considering" the "death knell" sanction of dismissal.

Thus, the Court affirmed the trial court's finding that there were grounds for sanctions, but held that different sanctions were appropriate in this case. Dismissal was inappropriate. An award of attorney's fees in the amount of \$625 was determined to be appropriate. This was somewhat less than the \$3,700 sanction for fees that the trial court had ordered.

Lessons:

1. A trial court should only dismiss a case because of discovery violations in extreme circumstances.
2. Not communicating with opposing counsel concerning discovery matters invites unnecessary motion practice.

12. Appellant waives jury instruction issues because Court adopted improper procedure; *Johnson v. Wait*, 2011 WL 1378484 (Ind. Ct. App. 4/12/11) (Kirsch)

This case was a medical malpractice case that arose from injuries a woman allegedly sustained while she was in a hospital for the cesarean birth of her fourth child. While she was in the hospital, she was uncooperative when she complained of pain and didn't allow her doctor to perform a complete physical examination. This led to doctors missing the fact that she had bilateral shoulder dislocations and an avulsion fracture. These conditions were not diagnosed until a couple of weeks after she was released from the hospital.

The woman filed a complaint and the case was eventually tried to a jury. The jury entered a total defense verdict. The woman then appealed.

On appeal, the Court criticized the procedure that the trial court employed for hearing objections to the court's jury instructions. Rather than hearing those objections before giving them, the trial court heard objections after it had instructed the jury and the jury had retired to deliberate. The Court noted that this was contrary to the procedure set forth in Trial Rule 51(C), which states that an objection to a jury instruction must be made "before the jury retires to consider its verdict." However, this was not reversible error in this case because the parties acquiesced to this procedure.

This was a problem for the plaintiff because the jury instructions were legally incorrect. When instructing the jury on the issue of contributory negligence, the trial court did not inform the jury that the defendants had the burden of proving all of the elements of contributory negligence. However, the Court determined that the plaintiff had waived this issue.

The plaintiff also argued that the trial court should have instructed the jury on the doctrine of *res ipsa loquitur*. However, the plaintiff was procedurally barred from making this argument, as well. Trial Rule 51(D) only allows parties to tender 10 jury instructions, unless the trial court allows the parties to tender more. The trial court did not grant that permission in this case and the plaintiff tendered 37 jury instructions. The *res ipsa loquitur* instruction was the 21st of those 37 instructions. Because the plaintiff did not demonstrate good cause for needing this 21st instruction, she was barred from challenging the trial court's refusal to give that instruction.

Lessons:

1. A litigant waives any objection to jury instructions if she either doesn't make those objections before the jury retires or fails to object to the trial court's refusal to allow her to make those objections in a timely manner.
2. You need to demonstrate good cause if you tender more than 10 jury instructions. If you tender more than 10 instructions, always put the instructions you think are most likely to be controversial in the first ten.

13. Court of Appeals defines standard of review of an administrative agency's ruling on a motion to dismiss; *Harris v. United Water Services, Inc.*, 2011 WL 977493 (Ind. Ct. App. 3/21/11) (Crone)

United Water operates a waste water treatment plant. Harris was hired to work as an operator at United Water's plant. His job included monitoring equipment, taking samples, and clearing waste water and "sludge" on occasions when equipment clogged or malfunctioned. Harris was provided with overalls, safety glasses, and a helmet, but other protective gear, such as gloves, goggles, and face shields were not always available when needed.

On December 15, 2005, Harris was splashed in the face with waste water, and he believed that he ingested some of the waste. Harris noted immediate symptoms, including pain in his mouth. Harris went to the emergency room, where it was determined that he had a dental cavity and a sebaceous cyst on his chin.

In February 2006, Harris began suffering from acid reflux. His symptoms worsened over time until, in August 2007, Harris was taken to the emergency room because he had severe abdominal pain and was having difficulty breathing. He was diagnosed with a perforated ulcer, and he underwent surgery.

On May 2, 2008, Harris filed an application for adjustment of claim with the Board, which indicated that he was pursuing a worker's compensation claim and an occupational disease claim. United Water moved to dismiss for lack of subject matter jurisdiction, claiming that all of Harris's medical conditions stemmed solely from the December 15, 2005, incident when he was splashed in the face with waste. According to United Water, the statute of limitation had run because Harris did not file his claim until more than two years later. Harris argued that his claim was for an occupational disease and, therefore, the statute of limitations had not run. The Board granted the motion to dismiss.

On appeal, the Court noted that it had "not consistently applied a single standard of review" to an appeal from an administrative agency's ruling on a motion to dismiss. It decided that it should apply the same standard of review in this situation that the Indiana Supreme Court applied to an appeal to an administrative agency's grant of summary judgment in *Northern Indiana Public Service Co. v. United States Steel Corp.*, 907 N.E.2d 1012 (Ind. 2009), rather than a *de novo* standard of review.

[Pursuant to] the statutory standard of review, "basic facts are reviewed for substantial evidence, legal propositions are reviewed for their correctness."

Ultimate facts or "mixed questions" are evaluated for reasonableness, with the amount of deference depending on whether the issue falls within the Commission's expertise.

Even though it was applying a more deferential standard of review, the Court found that the Board had erred in dismissing the case, because of the particular facts of the case. In doing so it noted that its confidence in the Board's decision was "undermined" because the Board had adopted United Water's findings in that order.

Substantial portions of the Board's order were copied, with insignificant changes, from United Water's reply brief in support of its motion to dismiss. Although this may not be grounds for reversal per se, it undermines our confidence in the Board's decision, especially when the copied portions include erroneous statements of the law.

In particular, the Court was troubled by language in the Board's decision that indicated that it placed the burden of proof on Harris to show that his claim should not be dismissed.

Furthermore, several statements from the Board's order suggest that the Board confused the issues and applied the wrong burden of proof. See Appellant's App. at 9 (finding number 7 states, "Plaintiff has failed to come forward with any evidence linking his condition of *Helicobacter pylori* infection and/or stomach cancer to his employment."); id. (issue number 1 states, "Whether Plaintiff sustained his burden of proving by credible evidence that the stomach cancer he contracted arose out of and in the course of his employment."); id. at 11 (in the discussion section, the Board states, "Plaintiff did not present any evidence or even allege that he had contracted stomach cancer in a manner consistent with the definition of occupational disease in Indiana Code § 22-3-7-10"); id. (conclusion number 1 states, "Plaintiff has failed to come forward with or indicate his ability to come forward with any medical evidence that his stomach cancer arose out of and in the course of his employment by Defendant.").

In this case, the statute of limitations issue is closely related to the issue of causation. If the case proceeds to a hearing on the merits, Harris will of course bear the burden of proof on the elements of his claim. To have the case dismissed without reaching the merits of his claim, United Water has to prove its alleged grounds for dismissal. Instead, it appears that the Board expected Harris to come forward with proof of causation in order to survive United Water's motion to dismiss.

The court reversed and remanded for the Board to reconsider the motion to dismiss applying the correct burden of proof.

It appears clear from the Court's decision that courts will not be using a *de novo* standard of review in appeals from administrative agencies. This appears to have directly led to the ultimate outcome in this case, a reversal with a remand to reconsider, rather than an outright reversal. People who do not engage in much appellate practice must remember that standards of review make a difference.

Lessons:

1. A court will not use a *de novo* standard of review in appeals from an administrative agency's ruling on a motion to dismiss.
2. A defendant has the burden of proving that a case should be dismissed.
3. An administrative agency's wholesale adoption of one party's facts makes it more likely that the agency's decision will be reversed on appeal.

14. An attorney is entitled to adequate security for attorney's lien before releasing file to client; *Grimes v. Crockrom*, 2011 WL 1403181 (Ind. Ct. App. 4/13/11) (Najam)

Crockrom hired Grimes to represent her in a medical malpractice action on an hourly basis. After he filed a proposed complaint for damages with the Indiana Department of Insurance, Grimes withdrew as Crockrom's counsel. Crockrom's new counsel was unable to obtain certain medical records that were in Grimes's file. Grimes said that he would release those records if Crockrom paid the attorney's fees owed him or provided adequate security that those fees would be paid. Crockrom refused to provide adequate security and issued a subpoena *duces tecum* to Grimes demanding that he produce the medical records. Grimes moved to quash the subpoena and the trial court denied that motion.

On appeal, the Court recognized an attorney's common law "right to retain possession of a client's documents or other property which comes into the hands of the attorney professionally, until a general balance due the attorney for professional services has been paid." The trial court could only order that Grimes provide those documents if it provided for adequate security for the payment of the outstanding fees. In a footnote, the Court noted that attaching the lien to the settlement or favorable judgment in the pending action was inadequate security.

Crockrom argued that Grimes was not entitled to adequate security for his lien because he did not provide any documentation of the amount she owed. The Court held that Grimes's failure to include this documentation did not invalidate the lien. "[T]he reasonableness of a fee, as reflected by an attorney's lien, is irrelevant to the determination of whether the lien has been established."

Crockrom then argued that the contract between her and Grimes provided her with the right to those medical records. However, the Court found that Crockrom's access to the file and Grimes's retaining lien are not mutually exclusive.

Finally, the Court held that "[t]he amount of security should correspond with the amount of fees owed" and that the trial court should hold a hearing on the attorney's fees

claimed by Grimes to determine what amount constitutes adequate security.

Lessons:

1. An attorney is entitled to adequate security for the payment of outstanding attorney's fees if a court orders the attorney to produce portions of a former client's file.
2. Attaching an attorney's lien to a settlement or favorable outcome of the client's case is inadequate security for the payment of fees.
3. An attorney seeking adequate security for the payment of an attorney's lien should present evidence of the amount and reasonableness of the fee.

ADVOCACY TIP OF THE MONTH: Arouse the Jurors' Sense of Injustice.

Excerpted from *McElhaney on Litigation*, ABA Journal, April 2011, pp. 22-23 and from *McElhaney's Trial Notebook* (ABA 2005), Ch. 5, The Sense of Injustice, and from Edmund N. Cahn, *The Sense of Injustice* (New York University Press, 1949)

The job of the persuasive lawyer is to present her case so that what the opponent did will arouse the sense of injustice. It is not, "What is the ideal solution to this problem?" but rather, "See how unfair this is," that impels a jury to take sides. An appeal to justice is abstract. It is more likely to invoke contemplation than action. Everyone has suffered injustice. It offends a sense common to us all and we react strongly to it.

The most powerful thing you can do in your opening statement is to tell the story of the case so that it arouses the judge and jury's sense of injustice. When you are for the plaintiff, it sends the message that 'Here is a wrong that you need to set right.' And when you represent the defendant, it says, 'It would be terribly unfair to make this woman pay for something she didn't do.'

The sense of injustice is not just a guide for opening statements. It underlies what makes a memorable direct examination. It is part of what gives a good cross-examination its bite. And in final argument is the chance to right a wrong that moves a jury to action. Wielded with a tasteful touch, the sense of injustice is not just another argument, it is a means of genuine persuasion.

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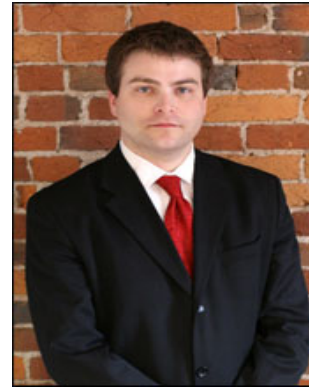
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