# Seventh Circuit Case-Law Update

The Honorable Jon E. DeGuilio
United States District Court for the Northern District of Indiana
St. Joseph County Bar Association Local Practice Seminar
November 12, 2015

## Topics:

- Summary Judgment
- Recruitment of Counsel for *pro se* plaintiffs
- Causation and Expert Witnesses
- EAJA Attorney Fees
- Class Actions
- Supervised Release
- Custodial Police Encounters
- Rule 404(b) Evidence

## Summary Judgment

- ***Packer v. Trs. of Ind. Univ. Sch. of Med.*, 800 F.3d 843 (7th Cir. 2015)**
- In responding to summary judgment, Plaintiff failed to support claims with specific citations to admissible evidence, so the court granted the motion
  - Rule 56 demands that the nonmovant "cit[e] to particular parts of materials in the record" in order to show that there is a genuine dispute of fact
  - Plaintiff failed to weave the identified evidence into a cogent argument, grounded in the legal elements of the claims
- Plaintiff was not permitted to rectify the omissions on appeal
  - "It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal *or factual*, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal."

## Summary Judgment

- ***Spierer v. Rossman*, 798 F.3d 502 (7th Cir. 2015)**
- The defendants moved for summary judgment relying solely on the facts alleged in the complaint
- The district court granted summary judgment and the decision was affirmed
- The Seventh Circuit held that the district court did not abuse its discretion by refusing to give plaintiffs additional time for discovery because they failed to identify any actual evidence needed to respond to the motion, and they did not serve the request as a motion under Rule 56(d)
- The defendants were not required to produce evidence to succeed on their summary judgment motion because, consistent with *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the only burden of production recognized in Rule 56 falls upon the nonmoving party once a basis for summary judgment has been established

## Summary Judgment

- ***Widmar v. Sun Chemical Corp.*, 772 F.3d 457 (7th Cir. 2014)**
- Employee alleged he was terminated because of his age, and the district court's granting of the employer's summary judgment motion was affirmed
- Evidence supporting/opposing summary judgment must be admissible at trial (or equate to live testimony)
- Previous law indicated that a plaintiff may not rely on "self-serving" evidence to defeat summary judgment
- *Widmar* reiterates that a self-serving affidavit is an acceptable method for a nonmoving party to present evidence of disputed material facts
- But, affidavits must be based on personal knowledge and set forth specific facts showing that there is a genuine issue for trial, and cannot speculate as to the defendants' state of mind

## Summary Judgment

- ***Dirig v. Wilson*, 609 F.App'x 857 (7th Cir. 2015)**
- The district court converted the defendant's motion to dismiss into one for summary judgment, then granted the motion
- The Seventh Circuit reversed, holding that the *pro se* plaintiff did not receive adequate notice of the need to submit evidence to defeat summary judgment
  - A *pro se* litigant must be given the text of the rule and be advised in "ordinary English" that *evidence* is essential to combat a motion for summary judgment
  - If defendant does not supply the required notice, then the court must
  - The Seventh Circuit questioned whether Appendix C of our local rules adequately included the "ordinary English" portion of the requirement

## Recruitment of Counsel

- ***Perez v. Fenoglio*, 792 F.3d 768 (7th Cir. 2015)**
- ***Childress v. Walker*, 787 F.3d 433 (7th Cir. 2015)**
- ***Dewitt v. Corizon, Inc.*, 760 F.3d 654 (7th Cir. 2014)**
- ***Henderson v. Ghosh*, 755 F.3d 559 (7th Cir. 2014)**
- In these cases, the Seventh Circuit has emphasized the need for the recruitment of counsel to represent civil litigants (including prisoners) unable to afford an attorney, especially in cases involving serious medical conditions and those proceeding into the advanced-stages of litigation

## Recruitment of Counsel

- Consistent with *Pruitt v. Mote*, 503 F.3d 647 (7th Cir. 2007), the district court should recruit counsel to represent an indigent litigant if:
  - the litigant makes a reasonable attempt to secure counsel, and
  - the difficulty of the case exceeds the particular plaintiff's capacity to present it
- FACTORS to be considered in making a "practical" determination:
  - plaintiff's literacy, communication skills, educational level, and litigation experience in relationship to the difficulties of the particular case
  - plaintiff's ability to gather information from an institution (where plaintiff may no longer be housed)
  - the severity of any alleged medical condition and need for expert medical evidence
  - the complexities of advanced-stage litigation

## Recruitment of Counsel

- The Seventh Circuit has indicated that courts should strive to implement programs to help locate pro bono assistance for indigent litigants
- Our local rules state that "[e]very bar member should be available to represent, or assist in representing, indigent parties whenever reasonably possible." N.D. Ind. L.R. 83-7
- Amended Rule 6.7 of the Rules of Professional Conduct will require as of January 1 that Indiana lawyers report the number of pro bono service hours provided

## Causation and Expert Witnesses

- ***Brown v. Burlington N. Santa Fe Ry. Co.*, 765 F.3d 765 (7th Cir. 2014)**
- A railroad employee claimed that he suffered cumulative trauma injuries to his wrists, elbow, and shoulder through his employment
- To prove causation, the plaintiff's expert used ***differential etiology***, a method by which an expert ***rules in*** potential causes of an injury and then ***rules out*** alternative potential causes
- The district court excluded the expert's opinion under Rule 702, finding that he had not reliably employed his methodology (not factual deficiencies)
- The expert's methodology required him to perform a job-site analysis in order to *rule in* an individual's work as a potential cause, but he never did
- The expert was also unaware of plaintiff's out-of-work activities, such as motorcycle riding and volunteer firefighting, so couldn't *rule out* that cause

## Causation and Expert Witnesses

- The Seventh Circuit affirmed: "an expert must do more than just state that she is applying a respected methodology; she must follow through with it"
- For differential etiology to pass muster under Rule 702, an expert must *reliably*:
  - ***Rule in*** the ultimate cause
    - Establish that the ultimate cause *can* cause the injury in question
  - ***Rule out*** potential alternative causes
    - Account for all "obvious alternative explanations"
- Both of those factors require an expert to have detailed information about the potential causes
  - E.g., the *severity* of forces to which the individual was exposed, and the *duration* and *frequency* of the individual's exposure

## Causation and Expert Witnesses

- ***Higgins v. Koch Dev. Corp.*, 794 F.3d 697 (7th Cir. 2015)**
- Plaintiff was exposed to chlorine gas while visiting a water park, after which he developed asthma and reactive airways dysfunction syndrome
- He filed a negligence claim under Indiana law
- The district court excluded the retained causation expert (which the plaintiff did not contest on appeal), so the plaintiff argued:
  - First, that he did not need expert testimony to prove causation
  - Second, that his treating physician could offer causation testimony
- The district court rejected both arguments and granted summary judgment for lack of evidence on causation; the Seventh Circuit affirmed

## Causation and Expert Witnesses

- First, the court held that Indiana law requires a plaintiff to prove both:
  - ***General causation*** – the alleged cause *can* cause the sort of injury in question
  - ***Specific causation*** – the alleged cause *did* cause this particular injury
- Where a typical layperson would not possess the requisite knowledge to draw a causative line between the alleged cause and the resulting injury, *expert testimony* is required to establish those elements
- That is a fact-intensive inquiry, and may depend on:
  - The nature of the alleged cause of the injury
  - The type of injury
  - The immediacy of the onset of the injury
  - The number of potential alternative causes
- Second, the treating physician's causation opinion was properly excluded under Rule 702: expertise in diagnosing and treating a condition does not entitle a physician to opine on its cause

## Causation and Expert Witnesses

- ***C.W. v. Textron, Inc.*, No. 14-3448, 2015 WL 5023926 (7th Cir. Aug. 26, 2015)**
- The plaintiffs discovered that their well water had been contaminated with vinyl chloride, so they asserted claims under Indiana law against the defendant, a nearby manufacturing plant that had used the chemical
- The district court excluded all three causation experts under Rule 702
- The experts relied on studies that involved much higher levels of exposure over longer periods of time than the plaintiffs experienced, without adequately connecting the dots between those studies and their applicability to the plaintiffs' exposure
- Without a reliable basis to rule in the exposure as a potential cause of the plaintiffs' conditions to show general causation, the experts could not offer a specific causation opinion, either

## Causation and Expert Witnesses

- The Seventh Circuit affirmed
- Applying the Supreme Court's decision in *Joiner*, the court held that when there is simply too great an analytical gap between the data and the opinion proffered, such that the opinion amounts to nothing more than the *ipse dixit* of the expert, it is not an abuse of discretion to exclude the testimony
- Experts who rely on studies to rule in potential causes must be able to connect the dots from the findings of the studies to the facts of the case
  - This can be very difficult in cases involving toxic exposures to humans
  - The court noted that computer-based models may be able to bridge that gap
- The court also held that it is at least possible for a sufficiently rigorous differential etiology to establish *general causation*

## EAJA Attorney Fees

- ***Sprinkle v. Colvin*, 777 F.3d 421 (7th Cir. 2015)**
- Attorneys' fees under the Equal Access to Justice Act can be awarded at an hourly rate of up to $125, unless inflation or the unavailability of counsel justify a higher rate
- In 2011, the Seventh Circuit created a demanding evidentiary burden on parties seeking inflation adjustments to the hourly rate, in *Mathews-Sheets v. Astrue*
- *Sprinkle* expressly overrules *Mathews-Sheets*, and holds that parties should generally receive the inflation-adjusted rate
- To do so, parties will need to produce two items:
  - (1) a calculation of the inflation-adjusted hourly rate based on the Consumer Price Index; and
  - (2) an affidavit attesting to the prevailing rate in the community for similar services by lawyers of comparable skill and experience

## Class Actions

- ***Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015)**
- Prior to *Chapman*, the law of the Seventh Circuit was that an offer of judgment under Rule 68 for a plaintiff's entire demand mooted the plaintiff's claim, even where the plaintiff let the offer of judgment expire and did not accept it (*Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011))
- In the class-action context, unless the plaintiff had already moved for class certification, the suit would have to be dismissed as moot
- Defense counsel used this as a tactic to defeat class certification, and plaintiffs' counsel responded by moving for class certification at the same time they filed the complaint
- In a dissent in *Symczyk*, 133 S. Ct. 1523 (2013), Justice Kagan harshly criticized the logic underlying *Damasco*

## Class Actions

- In *Chapman*, the Seventh Circuit overruled *Damasco*, holding that an unaccepted offer of judgment does not moot a case
- The court has since applied *Chapman* to offers outside the Rule 68 context
- *However*, the court held that an offer of full compensation could still be used as an equitable affirmative defense, particularly in single-plaintiff cases
- Though the court suggested that that rationale might not apply to class actions, cautious class counsel have continued filing immediate motions for class certification, so *Chapman's* practical effect has been limited
- Further, the Supreme Court granted certiorari and has heard argument on this question in *Campbell-Ewald Co. v. Gomez*, 135 S. Ct. 2311 (2015), and it may further modify or clarify this area of law

## Class Actions

- ***Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014)**
- A single nationwide settlement of class action lawsuits involving consumers who alleged that manufacturers of glucosamine made false claims
- The Seventh Circuit held that it was an abuse of discretion to approve the settlement—"a selfish deal between class counsel and the defendant[s]":
  - notice and attorney's fees are to be considered costs, not benefits to the class
  - the notice and claims forms discouraged the filing of claims
  - *expected* payout for the class did not reflect reasonableness of attorney's fees
  - in consumer class actions the attorney's fees should not exceed a third or at most a half of the total amount of the sum awarded to the class and its lawyers
  - "reversion" or "kicker" clauses should have a strong presumption of invalidity
  - a cy pres award is valid only after demonstrating that it was infeasible to provide that compensation to the victims

## Supervised Release

- ***United States v. Siegel*, 753 F.3d 705 (7th Cir. 2014)**
- ***United States v. Thompson*, 777 F.3d 368 (7th Cir. 2015)**
- ***United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015)**
- In these cases and a number of others, the Seventh Circuit has closely scrutinized the imposition of terms of supervised release and the conditions of supervision

## Supervised Release

- The process for imposing supervised release should include the following:

<u>First</u>:

- Providing ***advance notice*** of the conditions the court is considering and the reasons for those conditions

<u>Second</u>:

- Imposing a ***term*** of supervised release
  - (a) An express finding that a term of supervised release is necessary
  - (b) An explanation of why the length of supervision being imposed is appropriate based on the statutory factors

## Supervised Release

Third:

- Imposing ***conditions*** of supervision.
  - (a) The conditions should be tailored to the circumstances of each defendant, and involve no greater deprivation of liberty than necessary to achieve the goals of deterrence, incapacitation, and rehabilitation
  - (b) The conditions should be properly constructed:
    - Easily understandable
    - Not vague
    - Include mens rea
  - (c) The court should explain why each condition is warranted for that defendant

Fourth:

- ***Pronouncing*** the sentence
  - The court must pronounce the term of supervision and the conditions at the sentencing hearing—the written judgment can only clarify, not supplement, the oral pronouncement

## Supervised Release

Other considerations:

- Courts have the authority to modify the length and conditions of supervision
  - Can militate in favor of imposing shorter terms initially, as they can be extended later if need be
  - Courts can defer imposition of discretionary conditions
    - Particularly appropriate if the defendant is facing a lengthy term of imprisonment, making it difficult to predict which conditions will be appropriate upon their release
  - *Siegel* suggests that a best practice would be to hold a hearing shortly prior to the defendant's release to reconsider the appropriateness of any conditions at that time, and to remind the defendant of those conditions, though that poses practical difficulties

## Custodial Police Encounters

- ***United States v. Smith*, 794 F.3d 681 (7th Cir. 2015)** (holding that the officers' encounter with defendant in an alley at night was a seizure in violation of defendant's Fourth Amendment rights).
- ***United States v. Borostowski*, 775 F.3d 851 (7th Cir. 2014)** (holding that even though the officers told defendant that he was not under arrest and the questioning never became hostile, defendant was "in custody").
- These recent cases reiterate that the test for determining if there has been a seizure is objective and considers whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. *See Howes v. Fields*, —U.S. —, 132 S.Ct. 1181, 1189 (2012); *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

## Custodial Police Encounters

- *Non-exhaustive* list of factors for determining whether a seizure occurred:
- the threatening presence of several officers & any display of their weapons;
- physical touching of the private citizen (or communicating an attempt to capture or intrude on a person's freedom of movement);
- the presence or absence of physical restraints during the questioning;
- use of forceful language or tone of voice & the duration of the encounter;
- the location in which the encounter takes place;
- the release of the interviewee at the end of questioning;
- race; and
- the subjective beliefs and intent of the officers to the extent they have been conveyed to the person confronted

## Rule 404(b) Evidence

- ***United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014) (en banc)**
- *Gomez* abrogates the four-part test that the Seventh Circuit previously used to evaluate Rule 404(b) evidence, and instead relies on the text of the rules

Rule 404(b):

- (1) Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

## Rule 404(b) Evidence

*Gomez's* analytical framework:

- *First*, the proponent should articulate a chain of reasoning that makes the evidence relevant *and that does not rely on any propensity inference*
- *Second*, the Court must apply Rule 403
  - Weighing the probative value of only the non-propensity aspect of the evidence
  - Against the prejudicial value of the evidence, including the possibility that the jury will use it for its propensity purpose
- *Third, if requested by the defendant*, the court should instruct the jury on the purposes for which the evidence can be considered

Questions?