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Updates on venue, third-party litigation, and reptile tactics

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Developments in the law never stop. New fact patterns, novel approaches by counsel, and even new participants in the legal marketplace force change in directions and in ways that may not be expected.

Keeping apprised of the trends and working to adapt to them is one of the tasks of competent counsel. Ill. R. Prof'l Conduct (2010) R.1.1 cmt. 8 (eff. Jan. 1, 2016).

Venue

In this space on Nov. 4, comment was made on recent developments in the law regarding personal jurisdiction, venue and forum non conveniens, and that the trend, at least in the last year, had been favorable to defendants in all three areas. Bucking that trend, the 1st District Appellate Court in *Braun v. Aspide Medical*, 2020 IL App (1st) 200131, held that venue was proper over a defendant medical manufacturer in Cook County pursuant to the transactional pathway of venue under 735 ILCS 5/2-101. The plaintiffs, in consolidated product liability claims, filed suit, and the defendants sought transfer of venue to Lake County as they did not do sufficient business in Cook County and maintained no office there.

The court affirmed the circuit court's denial of the motion to transfer finding that because at the time of the alleged injury, the defendants did have an office in Cook County and because the conduct alleged encompassed claims of misrepresentations and omissions in marketing and promotion of the product a portion of the transaction that occurred in Cook County, venue was proper. This expansion of the definition of "transaction" for tort cases, which the court analogized to cases involving fraud, could see venue protection substantially eroded for defendants.

Third-party litigation funding

As discussed here on Sept. 23, third-party litigation funding has an increasing impact on all aspects of the litigation, from large commercial disputes in which litigation funding may be on both sides of a dispute to soft tissue tort claims in the form of medical liens on inflated bills. The reduction in the availability of trials, and thus the ability by the parties and the courts to take the usual steps to move matters toward resolution, has caused a cash crunch for some plaintiffs' counsel and into the void new lines of funding have stepped.

Services such as expertpays.com offer to front the costs of experts in the various areas relevant to tort litigation in return for not seeking reimbursement until a recovery is made and not seeking any recovery at all if no recovery is made. Essentially, though not explicitly, making an expert's fee contingent on the outcome of a case, should be disclosed, as should all third-party funding arrangements.

In another case out of Georgia on third-party funding, the magistrate judge in *Spears v. Wal-Mart Stores East, L.P.*, 18-cv-152-LGW-BWC, Doc. 47. (S.D. Ga., Sept. 21, 2020) ordered the production of third-party funding documents from a non-party who had an interest in the medical bills. Over the objection of the third-party funder and in a thorough order discussing the issues and relevant case law, the court found the information discoverable and saved the issue of admissibility for another day.

Reptile tactics

The June 3 edition of this column discussed the reptile tactics used by many plaintiffs' counsel and a recent order from an Indiana district court judge barring certain questioning of the defendant at deposition on such issues.

The Massachusetts Supreme Judicial Court heard argument recently in *Fitzpatrick v. Wendy's Old Fashioned Hamburgers, Inc.*¸ a case in which the plaintiff's attorney used the full panoply of reptile tactics in closing argument that led to a verdict of $150,000 for a broken tooth resulting from an alleged bone in a Wendy's hamburger. A mistrial was declared and upon retrial, in which the tactics were not used, the verdict was $10,000.

The trial court's lengthy memorandum opinion detailed the arguments that sought to put the jury in the position of plaintiff and to be the protector of the community generally and attempted to "stain the corporate character of the Defendants" instead of focusing on the issues and evidence in the case. The appellate court reversed the trial court, finding an abuse of discretion in applying the wrong legal standard for ordering a new trial and remanded the case for further proceedings.

The oral argument before the high court focused principally on the legal issue of the entry of the order of mistrial and whether it was proper to enter that order only after the first verdict was rendered (despite the motion having been made by defense counsel immediately after closing argument). The argument seemed to take for granted the impropriety of plaintiff's counsel's closing argument. A ruling from a state court of final review on the impropriety of reptile tactics would be important for a return to proper legal arguments in trials that focus on the evidence introduced and the application of it to the law.

Like drinking from a firehose, the law does not stop changing. There are evermore and new avenues of argument and tactics being developed by both plaintiffs' counsel and defense counsel, the effectiveness and propriety that has yet to be seen, but which should be monitored.
