WHAT CAN BE LEARNED FROM A SECRET APPEAL?

By Mark A. Lienhoop

Two of the ways we learn appellate practice and procedure is by reading the appellate rules and by reading the appellate decisions regarding them. I had been a law clerk at the Indiana Court of Appeals for almost two years and then started practicing with my current firm in 1983. I thought I had seen my share of appellate practice when the events described below took place, but I had never known of a certain type of appeal until I became involved in it. Let me tell you what happened.

There are two reported Indiana Supreme Court opinions regarding the same case, but there were really three separate "appeals." The first is reported at *Jordan v. Deery,* 609 N.E.2d 1104 (Ind. 1993). In that case, the Indiana Supreme Court reversed summary judgments for the five Defendants, represented by three counsel, and remanded the case for a jury trial.

The case alleged injuries to a baby during birth in 1986. The claim was brought on Plaintiff's behalf by her natural mother and father. The Medical Review Panel found 3-0 for the health care providers. By the time of trial in 1998, Plaintiff was 9 years old and had many serious health problems that were obvious to any layperson. However, the child had no testimony to give regarding liability. After a hearing, the trial court granted Defendants' motions to bifurcate the liability and damage phases of the trial, then granted the Defendants' motions to exclude the Plaintiff from the courtroom during the liability phase. At the time, there was Indiana case law precedent for excluding the Plaintiff in such situations. See e.g., *Frito-Lay, Inc. v. Cloud,* 569 N.E.2d 983, 991 (Ind. Ct. App. 1991); *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. Ct. App. 1987).

Plaintiff's biological mother sat at counsel table with Plaintiff's lawyers throughout the liability phase of the trial. If memory serves, Plaintiff's biological father sat in the trial court's gallery. Both had brought the action on behalf of Plaintiff.

The second appeal was taken during the first jury trial, and was regarding the orders granting bifurcation and exclusion of Plaintiff from the courtroom. On the first day of trial, a Tuesday, Plaintiff's counsel moved for the trial court to certify those orders and stay the trial so Plaintiff could seek an interlocutory appeal. The trial court denied the motions to certify the orders and stay the trial.

While the jury trial was proceeding in Starke Circuit Court - located in Knox, Indiana - one of Plaintiff's attorneys went to Indianapolis and filed with the Indiana Court of Appeals a Verified Emergency Petition to Reconsider Denial of Stays. (Docket entry for 75A05-9807-CV-00342) The same day Plaintiff filed the Petition to Reconsider Denial of Stays, and without giving Defendants any opportunity to be heard, the Acting Chief Judge of the Court of Appeals faxed an order to the trial court which stayed the jury trial and directed all counsel to appear in the Court of Appeals' courtroom on the following Friday for a "hearing." So the trial judge sent the jury home, to wait and see if they would have to come back to continue the trial or if the trial judge would have to declare a mistrial.

Meanwhile all counsel switched gears. Defendants prepared responses to Plaintiff's Emergency Petition to Reconsider Denial of Stays. All counsel began preparing for the "hearing" in the Court of Appeals. Counsel also had to cancel and attempt to put all their witnesses, including about nine scheduled expert witnesses, in an indefinite holding pattern. The

trial court and all counsel had to determine if they could re-arrange their schedules to accommodate the trial immediately resuming, depending on if and when the Court of Appeals lifted the stay.

What the Court of Appeals had done seemed so unusual to me that I thought I might be out of my depth. So I hired an attorney in Indianapolis who I considered an Appellate Practice expert. He and another appellate practice attorney from his firm entered their appearances in the Court of Appeals, along with mine. It so happened that Jane Bennett, counsel for one of the co-defendants, practiced with another attorney I consider an Appellate Practice expert, Robert Palmer, and she got him involved in the appeal along with herself.

When we arrived for the "hearing," none of the three judges on the panel was the Acting Chief Judge who had granted the stay and set the "hearing."

It would be interesting if it was noted some place, but by memory it took less than five minutes for one of the panel to return from the robing room after the arguments and tell the attorneys that the panel was dissolving the stay and that we could return to the trial court and continue our jury trial.

The order from the Court of Appeals is less than a page. It does not refer to any rule or case law that gave the Acting Chief Judge jurisdiction to enter the stay and set the "hearing." It only describes what was filed, who was present, and that "... having heard oral argument and being sufficiently advised, now dissolves the Stay previously issued by this Court [3 days earlier] and remands the cause for further hearing in the Starke Circuit Court."

Before the trial resumed the following Monday, Plaintiff filed in the Supreme Court a Verified Emergency Application for Writ of Prohibition and Writ of Mandamus. (Docket entry for 75S00-9807-OR-00391) On the following Monday the Indiana Supreme Court faxed to the

trial court an order signed by then Chief Justice Shepard that provided: "… that relators request constitutes an unquestionably inappropriate remedy under original action rule 2(D). The original action is therefore dismissed." (Docket entry for 75S00-9807-OR-00391) No report of the mid-trial appeal was separately published for the general public or the bar.

Counsel and the litigants completed the trial, and the jury found in favor of Defendants. Plaintiff appealed, arguing that excluding Plaintiff from the courtroom violated the Americans with Disabilities Act. This led to the second reported Indiana Supreme Court opinion, *Jordan v. Deery*, 778 N.E.2d 1264 (Ind. 2002). In that opinion the majority reversed on grounds which neither party had raised nor been asked to brief: that the right to a jury trial found in Article 2, § 20 of the Indiana Constitution includes the ancillary right to be present in the courtroom during the liability and damages phases of trial. *Id*. at 1272. The Court held that absent waiver or special circumstances, a party may not be excluded, and that neither waiver nor exceptional circumstances existed in our case. *Id*. In his dissent, Justice Boehm wrote "But if this case does not present extraordinary circumstances, except for incarcerated litigants it seems that no circumstances could meet this test." *Id*.

The second opinion refers in passing to the mid-trial appellate proceedings, but only as part of the case history and without any comments regarding the reason the stay was entered, then dissolved, or why the Supreme Court dismissed the original action. *Id*. at 1267. The second opinion also does not give the Court of Appeals cause number for those proceedings.

On retrial, with the severely disabled Plaintiff in the courtroom during the liability phase, a different jury again found for the defendants. There were no further appeals.

The usual advice is not to tell war stories at seminars and not to write about them in articles. But how else can we learn about such things if they are not in the Indiana Appellate Rules nor explained by written decisions available to the general public and bar?

Was this type of appeal an isolated aberration or did it happen regularly? Does it continue to happen? What are the criteria? How can it be reconciled with the appellate rules and case law regarding interlocutory appeals? How can one find answers to these questions?

One of the things an attorney wrestling with appellate practice and procedure wants is a rule or case law precedent that sets forth when and how to proceed on appeal. Even not-for-publication memorandum decisions are available to the general public to see why the Indiana Court of Appeals ruled as it did in any particular case.

I have always considered the second appeal, the one during the first trial in Jordan v. Deery, a type of "secret" appeal. It was "secret" because it would have gone completely unreported to the general public and to the bar if the Indiana Supreme Court had not granted transfer and mentioned it in passing in its second opinion. More importantly, it was "secret" because there was never any written explanation by the Court of Appeals of how it had jurisdiction, why the stay was granted, why the stay was granted *ex parte*, or why the stay was dissolved. The bench, bar, and litigants cannot learn the answers to these questions without a publicly available written decision explaining the appellate court's reasoning.

However, one of the things that can be learned from the "secret" appeal supports the old saying of "nothing ventured, nothing gained." While I thought that the mid-trial appeal was not allowed by any rule or case law, I had no reason to believe that the actions of Plaintiff's counsel or the Acting Chief Judge were taken in bad faith or based on an improper motive. As it turned out, Plaintiff eventually got the relief requested when the second Supreme Court opinion

reversed the verdict on this issue, although for different reasons than the parties had raised in the trial court and on appeal.

What I learned from this "secret appeal," was a rule of thumb that I have relied on often throughout my career when deciding whether or not to do something and it is this: if you are no worse off if the answer is no then go ahead and ask, even if there is no rule or case law to support you.

Like all such rules of thumb, there are limits. For instance, you must always follow the Indiana Rules of Professional Conduct. An example is RPC 3.1, entitled "Meritorious Claims and Contentions." It provides that a lawyer shall not bring or defend a proceeding or issue unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for extension, modification, or reversal of existing law.

Comment 2 to that rule broadens it and also relaxes the rule's implied standard of needing legal precedent. It provides that an action is not frivolous if the lawyer is able to make a good faith argument on the merits for the action taken or to support an extension, modification, or reversal of existing law.

Some of the other exceptions are along similar lines. You must always comply with Indiana Trial Rule 11, avoid Ind. Code § 34-52-1-1 (frivolous, unreasonable, groundless claims or defenses), and avoid Indiana Appellate Rule 66.E (frivolous or bad faith filings).

The point is not to be afraid to be the first to try something if you are acting in good faith, you make it clear to the court that you are trying to make or change a legal precedent, and especially if the equities favor your client.

Mark A. Lienhoop is one of the managing partners of Newby, Lewis, Kaminski & Jones, LLP in La Porte, IN.