3Q Newsletter · 2013

GABLE GOTWALS
COUNSEL

RAISING THE BAR

Recent Awards

- *Firm named in top five Best Places to Work for businesses with 65-200 employees during Employee Choice Awards sponsored by the Tulsa Business Journal.*
- *GableGotwals receives Oklahoma Excellence Award by the Small Business Institute for Excellence in Commerce.*
- *Ten GableGotwals attorneys named 2014 "Lawyer of the Year" by Best Lawyers in America. They are Steven L. Barghols; David L. Bryant; Dennis C. Cameron; Dale E. Cottingham; Jeffrey D. Hassell; Oliver S. Howard; Graydon Dean Luthey, Jr.; Sheppard F. Miers, Jr.; Terry D. Ragsdale; and James M. Sturdivant. This year's honorees join a prestigious list of 15 GableGotwals attorneys who have been honored in the past as Lawyers of the Year. In addition, seven attorneys have been honored with the award in more than one year, which is very unusual.*
- *Forty-two GableGotwals attorneys selected by their peers as Best Lawyers in America 2014.*
- *Three GableGotwals lawyers including Cesar Tavares, Diana Vermeire and Lloyd Landreth selected for the 2013-14 Oklahoma Bar Association's Leadership Academy. Twenty-five attorneys from across the state were invited to participate. GableGotwals was the only organization with more than one applicant in the academy.*

GableGotwals Welcomes Three New Attorneys

Sara E. Barry has returned to the Firm as an Of Counsel Attorney in the Tulsa office. Sara will work in several areas of practice including Corporate and Business Organizations and Commercial Law.

Sara previously worked at GableGotwals from February 2000 through November 2008 before joining McJunkin Redman Corporation, where she served as senior counsel until May 2012. Sara graduated first in her class from Baylor University School of Law in 2000 after earning an honors degree in psychology from Oklahoma State University in 1997. Sara was selected for inclusion in *Super Lawyers – Rising Stars Edition 2008*.

Sara can be reached at (918) 918-595-4829 or sbarry@gablelaw.com.

Adam C. Doverspike has joined the Tulsa office as a new Associate. Adam's primary focus will be Energy Industry Litigation. Prior to coming to GableGotwals, Adam clerked for Chief Judge Gregory K. Frizzell at the United States District Court for the Northern District of Oklahoma and practiced for three years in Sidley Austin, LLP's Washington, DC, Energy Practice Group.

Adam received his J.D. from the Duke University School of Law in 2009. He also has a masters in economics from the University of Chicago and a B.S. in foreign service from Georgetown University.

Adam can be reached at 918-595-4813 or adoverspike@gablelaw.com.

Elizabeth F. Cooper joins GableGotwals as a new Associate in the Oklahoma City office. Elizabeth will concentrate on Litigation Law. She has spent the past year working as a term clerk for the Honorable Judge Joe Heaton in the United States District Court for the Western District of Oklahoma after receiving her J.D. with highest honors from the University of Oklahoma College of Law in May 2012. Elizabeth graduated summa cum laude with a bachelor's degree in French and international relations from the University of Arkansas in 2006, where she was elected to Phi Beta Kappa.

Prior to law school, Elizabeth served as the press secretary for U.S. Senator James M. Inhofe from 2006 to 2009.

Elizabeth can be reached at 405-568-3304 or ecooper@gablelaw.com

The Oklahoman talks with Dean Couch about the economic importance of water rights

Oklahoma is no stranger to drought or battles with other states over water. GableGotwals attorney Dean Couch explains water rights and ownership.

Q: What are water rights and why are they important?

A: Somewhat like a written deed filed with a county clerk that shows legal ownership of property, a water right is usually understood to be legal authorization to use water that is filed with the Oklahoma Water Resources Board (OWRB). The written authorization can be in the form of a permit to use surface water or groundwater, a vested right to use surface water or a prior right to use groundwater. As the demand for water increases, valid water rights are extremely important to determine the authorized use of this valuable resource.

Q: Who owns the water in streams, lakes and ponds in Oklahoma?

A: The answer is no one and everyone. The actual molecules of water in streams, lakes and ponds is said to be part of nature, like deer on the land and birds in the air, and owned by no one or "owned" by the public in general. The U.S. Supreme Court recognized that this principle of non-ownership or public ownership was first established as an ancient Roman law. This is part of the reason that a water right is said to be right of use only, and not a right of actual ownership of the water. The public ownership aspect of water supports the notion that the state government, on behalf of the public, can regulate water use through permit systems such as the water rights system administered by the OWRB.

Q: Does that same principle of non-ownership of water apply to groundwater that is under the surface of the land in Oklahoma?

A: Even before Oklahoma's statehood, the Oklahoma Territory statutes declared that water under the surface of the earth not forming a definite underground stream is owned by the owner of the land, and that law is still on the books today. However, to use more than a minor household amount of the groundwater, the landowner or someone leasing the land from the landowner must obtain a permit from the OWRB for that use. While the statute's declaration of ownership of the groundwater might be described as a water right, a right to use groundwater granted by an OWRB permit may be more important to a landowner or leaseholder.

Q: The Tarrant Regional Water District case highlighted interstate compacts. What are compacts and why are they important?

A: The founding fathers believed that to have a cohesive nation individual states should be limited in the ability to make agreements with each other in a vacuum. The U.S. Constitution provides that no state shall, without the consent of Congress, enter into any agreement or compact with another state. States can make agreements with each other to divide up water in rivers that flow between the states, but Congress must approve those agreements, which are usually called compacts. When approved by Congress, these compacts become federal law that are binding on the states, as well as its citizens, municipalities and industries. It goes without saying that the ability to control the use of water is a fundamental component of life, public health, safety and virtually all activities that contribute to the economic well-being of a state, so the amount of water a state can access is critical. A state's sovereign power is on the line when it enters into a water compact.

Q: What are riparian rights?

A: An unsettled aspect of Oklahoma water law is whether owners of land located next to a stream, lake or pond have a riparian right to use more than a minor amount of water for household purposes without a written authorization from the OWRB. The Oklahoma Supreme Court said yes, but state statutes enacted by the legislature say no. Such riparian rights are subject only to a reasonableness test based on facts and circumstances that would be determined by a court, which can lead to uncertainty in rights because facts and circumstances, like Oklahoma's weather, can change.

Dean Couch is an attorney in the Oklahoma City office of GableGotwals. He is the former general counsel for the Oklahoma Water Resources Board. He can be reached at (405) 235-5596 or dcouch@gablelaw.com.

Tulsa World editorial by Mia Vahlberg and Tammy Barrett regarding recent Supreme Court decisions that could prove favorable for Oklahoma's business climate

Lawsuit reform is a hot topic in Oklahoma. While much of the focus has been on legislative fixes, recent rulings from the nation's highest court have dramatically changed the landscape for an often-misused aspect of our legal system: the class action lawsuit.

The last decade has seen significant numbers of class action lawsuits filed in and certified by Oklahoma courts, in particular against companies who operate oil and gas wells. The plaintiffs in those actions are typically mineral owners, recruited by class action attorneys, asserting claims that the well operator underpaid their royalties. Oklahoma courts have historically been quick to certify these types of cases as class actions.

But, the U.S. Supreme Court's ruling earlier this year in *Comcast Corp. v. Behrend*, coupled with its landmark 2011 ruling in the *Wal-Mart v. Dukes* gender discrimination case, leaves no doubt that a new era in class action litigation has arrived. With these two cases, the Court has emphasized the stringent requirements for establishing a class action.

In *Wal-Mart*, the Court ruled that "commonality," a fundamental prerequisite in class action cases, must focus on whether a common answer to the central questions for all potential plaintiff class members exists. Absent a common answer to a question that drives the litigation certification of a class is improper.

In a class action challenging an energy company's royalty payments for Oklahoma wells, it is now not enough to say that the common question is whether the company is paying royalties properly to all of its mineral owners because the answer to that question could vary between royalty owners under the specific terms of his/her lease. The lack of a common answer should preclude courts from certifying a case as a class action—preventing a court from deciding the claims of a large group of mineral owners based on facts related to only a few.

Comcast, involving a dispute with a cable TV provider, reversed a class certification decision, emphasizing that the difficulty of calculating damages on a class-wide basis can preclude certification. In the past, some courts have decided that difficulties in calculating damages would not prevent certification of a case as a class action.

The rulings have already had an impact. The Tenth Circuit Court of Appeals recently vacated two federal district court decisions, including one in Oklahoma that had certified mineral owner claims. The Tenth Circuit directed that the class action requirements be more carefully analyzed given the recent changes in the law. Several Oklahoma federal courts have likewise denied certification in recent royalty class actions.

The Supreme Court's emphasis on certifying only those cases that truly meet the requirements of a class action will help to spare businesses the threat of coercive class action litigation that, in many cases, has padded the pockets of plaintiffs' attorneys while doing little to provide justice for the plaintiffs. This change should be a plus for Oklahoma's business climate.

Mia Vahlberg and Tammy Barrett regularly defend class action lawsuits as part of their commercial litigation practice with the law firm of GableGotwals, where they are both shareholders. Mia can be reached at (918) 595-4803 or mvahlberg@gablelaw.com and Tammy can be reached at (918) 595-4851or tbarrett@gablelaw.com

Greg Metcalfe discusses electronic records with the Oklahoman

Q: What are electronic records?

A: Electronically-stored information (ESI) is any data that was created and/or stored in an electronic format. ESI can be anything that exists or existed on any electronic medium. A few examples of ESI can include an email on a smartphone or computer hard drive, a voice message stored on a smartphone, a digital photograph on a USB drive, or coordinates stored on an in-car navigation system. Even modern fax and copy machines have sufficient memory to store documents in their cache. With specialized training, those documents can sometimes be retrieved. Any bit of ESI, even a text message, may be discoverable in a legal dispute.

Q: How has technology changed records management?

A: The fundamental principles of records management have not changed. But, the technology of how records are created and stored has created new complexities and challenges for managing records and for preparing for litigation. Years ago, a record was a document on a piece of paper. Today, not only is that paper document a record, but so are the many copies of that document that may exist on a computer hard drive, a network file server and any devices hooked to an email account. Also, the metadata associated with that file, showing the dates of creation and modification and possibly showing the history of changes to the document, is part of the record. Every keystroke showing that document's evolution from first draft to final product can be considered a record subject to review by the opposing party in a lawsuit.

Q: What can a business do to manage its electronic records?

A: The rapid growth of ESI should be of concern to businesses of all sizes. The best solution for most companies is to develop a thoughtful, thorough document and ESI retention policy that addresses what information should be retained and for how long. The period of time a given document must be retained will differ depending on the type of document, laws that may govern records retention (such as tax laws or securities laws) and the needs of the business. But, a given business can usually categorize documents and assign retention schedules to those categories. A good document retention policy will include a document destruction component. This tells a business what may be destroyed and when. The idea is to save certain information for a specific period of time, after which that particular information can be destroyed.

Q: What have the courts said about ESI and document retention when it comes to litigation?

A: The courts have ruled that litigants and potential litigants who reasonably anticipate being a party to a lawsuit have a duty to preserve evidence including ESI. Once a business reasonably anticipates becoming a party to a lawsuit, this duty to preserve evidence requires the business to develop and implement a "litigation hold." We counsel our clients to develop litigation holds that are specific to the facts and needs of the case. The litigation hold encompasses many different concepts, but the fundamental objective is to avoid the inadvertent loss of evidence — referred to in the law as "spoliation."

Q: What are the legal ramifications of the loss of evidence?

A: Spoliation, whether intentional or unintentional, can have serious consequences in litigation, including the loss of a lawsuit. However, companies that implement and follow a thoughtful litigation hold will greatly reduce the chance of unintentional spoliation. Moreover, if evidence is unintentionally lost, having implemented and followed a litigation hold will greatly improve the company's position in the litigation.

Greg Metcalfe is an attorney with GableGotwals and an e-discovery instructor for the National Association of Attorneys General. He can be reached at (405) 235-5578 or gmetcalf@gablelaw.com.

Erin Dailey as Guest Columnist for The Journal Record:

Two little words, one big effect

A recent U.S. Supreme Court ruling has firmly set what once was a moving target, providing clarity to employers and employees regarding retaliation claims in Title VII discrimination lawsuits.

The court's decision in *University of Texas Southwestern Medical Center v. Nassar* has settled an old argument over the standard by which a retaliation claim, when an employee claims that he was fired because he complained about discrimination, must be measured.

For most Title VII claims, a plaintiff must show only that his or her protected status (race, religion, gender, etc.) was a "motivating factor" in the employer's decision to take action against the plaintiff. For example, a plaintiff had to show only that her gender was taken into account in her employer's decision to terminate her employment. In other words, she simply had to show that her gender was a "motivating factor" in her firing.

But the standard for evaluating Title VII retaliation claims has, until now, been unclear. Some courts subscribed to the easier-to-meet "motivating factor" standard, while others applied the traditional "but for" causation standard that is applicable to most tort claims. With its *Nassar* ruling, the Supreme Court cleared up the confusion.

In a 5-4 decision, the court has established that a plaintiff claiming retaliation must prove that an adverse employment action taken by an employer was directed toward the plaintiff as a retaliatory action. Simply put, a plaintiff must now show that he would not have been terminated "but for" his complaint or lawsuit against his employer. Two little words, one big effect.

One of the surprising things about the decision was the extent to which the court openly addressed the practical implications of the decision, noting the steep rise in the number of retaliation claims faced by employers and the ease with which such a cause of action can be fabricated by a plaintiff. The court even offered a hypothetical example of an employee who anticipates termination due to poor performance and so complains about harassment, just so he can file a claim when the inevitable termination occurs.

The *Nassar* ruling serves to underline the necessity for employers to document the legitimate reasons for terminating or otherwise disciplining employees so that it is clear that age, gender or some other protected attribute was not the reason for the employment decision.

Erin Dailey is a shareholder in the Tulsa office of GableGotwals. Her practice includes labor, employment and insurance law as well as employee benefits matters. She can be reached at (918) 595-4863 or edailey@gablelaw.com.

Mind Your Ps, Qs and Commas (Maybe)

A Blog by Paul Rossler

If you've ever wondered what the term, "continuous microtextured skin layer over substantially the entire laminate" means, then you're not alone. The Federal Circuit recently pondered this very thing in deciding a patent infringement case brought by 3M against Tredegar,[1] a supplier of film laminates used in baby diapers, training pants, and adult incontinence products. 3M owned several patents[2] that claimed certain types of laminates used in the waistband or side tabs of baby diapers.

The side tabs are made up of "stretchable films or laminates that allow the [diaper] to expand to fit around the person wearing them[,] with the laminate stabilizing to recover its shape once stretching is complete."[3] Whether Tredegar's film laminates infringed the 3M patents depended in part on the meaning of the term"continuous microtextured skin layer."

3M argued the term meant "the skin layer, not the microtexturing, must be 'continuous' across the laminate because the adjective 'continuous' only modifies the noun 'skin layer.'"[4] Further, "if the inventors had wished to require the microtexturing to be 'continuous,' then they would have used the adverb 'continuously' instead of 'continuous.'"[5] Tredegar argued the term meant "the microtexturing and the skin layer [had to] be 'continuous' across 'substantially the entire surface area of the laminate.'"[6] In other words, the entire laminate had to exhibit microtexturing.

After studying the patent, the Federal Circuit sided with Tredegar. The court found no discussion in the patents which limited the microtexturing to a single skin layer. Instead, the patents referred to "unique continuous microtextured surfaces."[7]

In a concurring opinion, Judge Plager opined "the nuances of comma usage seem to me a tenuous foundation" on which to base the meaning of a claim.[8] He would rather apply a contract drafting doctrine called contra proferentem to patent claim language.[9] "When a term is ambiguous, . . . the ambiguity should be construed against the draftsman."[10] Better yet, he thinks an ambiguous term (and therefore the claim) should be "invalidated as indefinite."[11]

In a dissenting opinion (in part), Judge O'Malley takes the side of "natural reading" or "plain and ordinary meaning" rather than that based on a precise understanding of grammar. Grammatically, Tredegar is right. However, in the judge's view, as a matter of natural reading (whatever that means), 3M is right. If the word "continuous" was intended to describe the microtexturing, then the adverb "continuously" would have been used because, as "any reader" would know, adverbs modify adjectives.[12] I guess I'm not any reader.

This case reminded me of why so many patent attorneys chose a technical degree over an English degree — because they generally don't understand the nuances of commas or know that adverbs modify adjectives, verbs and other adverbs, but not nouns. And sometimes neither does the Federal Circuit. For proof, see my bracketed addition in the court's sentence quoted in paragraph 2 above.

Paul Rossler is an attorney in the Tulsa office of GableGotwals. Paul is a faculty member of the Certified Patent Valuation Analyst and has led national webinars regarding the patent process.
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[1] *3M Innovative Properties v. Tredegar Corporation*, slip op. (Fed. Cir., Aug. 6, 2013). In addition to the above term, the court tackled the meaning of continuous contact 10, preferential activation zone 21, ribbon 30. See *Id.* at 10, 21, & 30. If that's not enough for you, you may want to read the lower court opinion. That court had to construe the meaning of about 30 separate terms. See *Id.*, Plager, J. (concurring) at 1. [2] U.S. Pat. Nos. 5,344,691; 5,501,679; 5,691,034; and 5,468,428. [3] *Tredegar*, slip op. at 3, 5 (reproducing figures from U.S. Pat. No. 5,691,034). [4] *Id.* at 19. [5] *Id.* at 21. [6] *Id.* at 18. [7] *Id.* at 21. [8] *Tredegar,* Plager, J. (concurring) at 3. [9] *Id.* at 4. [10] *Id.* [11] *Id.* [12] *Tredegar*, O'Malley, J. (concurring in part, dissenting in part) at 2.