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"Unfolding The Human Drama – Presenting The Plaintiff's Case-In-Chief"

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INTRODUCTION

Direct examination is the most challenging task for the trial lawyer in an employment case. Georgia Judge M. Gino Brogdon, Jr. aptly calls direct exam the "second most under-rated and neglected part of the trial process, voir dire being the undisputed first."[1]

This paper and presentation substantially reprises a presentation I first made, along with NELA stalwart Ellen Simon, in October, 2002 in Chicago.[2] Our Chicago seminar was entitled, "Constructing Plaintiff's Direct Examination." The construction metaphor precisely describes the workmanlike method by which we must approach this hardest of all trial tasks. **No doubt about it — it's hard labor**. The edifice we must build is the plaintiff's story, with each witness contributing brick and mortar to our story's impregnable structure. How do we build it?

First, no "one size fits all" — but some tips will help you build a winning case-in-chief. Second, preparing your plaintiff starts before trial, but constructing direct means skillfully installing the pieces into a cohesive whole **during trial**.

My paper and presentation will focus on carrying through your preparation **at trial**. We will examine style, content and effective delivery at **trial**. Note: the hints and techniques provided herein apply equally to all direct examination during your case-in-chief.

For Chicago, our esteemed moderator (NELA's President Fred Gittes) insisted that we show by example. Thus, at the end of this paper, you will find excerpts — with my editorial comments in the margins — from my direct examination of plaintiff Bill Faust, in a whistle-blower case against Ryder Truck, tried in Jackson County, Missouri in November, 1995. Bill was a great witness, so his direct no doubt helped achieve the verdict of **$530,250** actual damages and **$4 million** punitives.

PURPOSE OF DIRECT EXAMINATION

To Make Your Case Legally . . . And Persuasively

Your overall purpose is to establish essential facts favorable to the story of your plaintiff. Direct testimony is the foundation for admission of important documents and testimony that will meet legal requirements so as to make your case submissible for liability, actuals, punitives . . . all while being interesting and persuasive. That's a lot to do.

To get there, you and your plaintiff had better know the facts and documents better than the opponent. Review together the themes that are consistent with your positive facts, and themes which minimize adverse facts. Isolate your pieces of evidence that are consistent with common knowledge and experience — meaning the jury will more likely believe these facts. Hit these facts (and thereby underline your themes) in direct. Identify what I call "the heartbeat of the case."

The **heartbeat of the case** is that central issue of damage to one human being from the wrongful conduct of another. The "heartbeat" is what caused you to take on this case, because there was a crisis and an injustice. Answer for the jury — early and often — the first question on their minds: "Why are we here?" From start to finish, you want the jury to feel passionately that your client has been needlessly abused by the conduct of defendant. You want to stir indignation and outrage, if possible, and you need to do it at every step of the trial. Opening Statement is the starting place; direct examination follows suit.

The "heartbeat" of ***Faust v. Ryder*** is stated in the first few sentences of Opening Statement:

> Meet Bill Faust, who you will learn was an employee who built a solid 21-year career at Ryder Truck Rental. It was a career he loved and wanted to work in until he retired. But it was a career that you will find out from the evidence has been shut off from him forever — because he dared to speak out and take a stand against what he saw as management stealing of company property and services from their employer.

To Be A Persuasive Teaching Team

What is your specific objective with your plaintiff? One of my heroes, James McElhaney,[3] says the "real role" of a lawyer and client is "to be a teaching team." That is, your job is to present your evidence so effectively that your "students" — the judge and jury — will genuinely learn your case: "hear, understand, accept and remember your facts and want you to win."[4] McElhaney preaches that you don't want direct testimony to sound too studied, as if it were scripted, and I agree. Let the defendants win the academy awards for acting and following their "script." McElhaney (and all who understand this subject) suggests we concentrate on the story, presenting your case-in-chief witnesses using story language: "The words and ideas that

speak to real people, whom you want to use your story to decide the case." That simple shift in mind set from thinking "law" to thinking "story" gets rid of those "unbearable legalisms most lawyers use" in their questioning vocabulary.[5] Some key things to think about as you tell this story:

- **The winning case is a story of an injustice** — the wrong done by the other side. (Injustice is easier for most people to know and understand than the more elusive, abstract idea of "justice.").

- **Put the focus of judgment on your opponent**. Put your opponent and its conduct on trial. Your focus is not so much on how good plaintiff is — but on what "dastardly deed" the corporation did.

- **Address your problem spots before your opponent**. But be smart about context — meaning start and end strong, putting explanations in the middle, in the best context.

- **Cut out the clutter, emphasize what counts**. That said, some seemingly trivial subjects often constitute essential legal elements of your case. For example, a jury might think you belabor the obvious in asking the plaintiff in a sexual harassment case if the offensive conduct "was offensive to you." But that predictable "yes" covers one of the elements in a typical hostile environment jury instruction.

PLAN YOUR ORDER OF PROOF; YOUR ORDER OF DIRECT

Order of Proof: Start With Strong "Tale Tellers"

I want to take much of the credibility burden off of the plaintiff, so "constructing plaintiff's direct" means spending much planning on the order and presentation of witnesses. We (the trial team and client) brainstorm this a lot — and it's a fun part of getting ready. I rarely put plaintiff on first — but I have done so when my case left no alternative. Most often I start with what I call "tale tellers": solid, hard-to-impeach witnesses with no financial incentive . . . no deposition taken by defendant is even better. Start strong, presenting witnesses who, one-by-one, provide key building blocks of the story, in a context constructed so one witness's testimony is supported by another's.

Co-worker testimony is very effective, particularly current employees. Former supervisors, of course, are the best. Where co-workers or former supervisors can tell significant parts of your client's story, or where supervisors (friendly or unfriendly) must admit plaintiff's superior performance record, they should be put on before the plaintiff. By the time your plaintiff takes the stand, the hostile environment described by fellow minority workers or females makes plaintiff's complaint appear both subjectively **and objectively** credible. Plaintiff is not shouldering the burden of showing "pervasiveness," or that management failed to respond adequately to complaints. By the time your plaintiff takes the stand, he or she has been crowned

with the "positive halo" of accolades from co-workers, supervisors, past-performance evaluations, etc.

Similarly, lay witnesses — particularly co-workers witnessing plaintiff's discrimination or experiencing it on their own — can begin laying the groundwork for non-pecuniary compensatory damages. Again, the credibility/persuasion burden is lessened for your plaintiff.

Organizing the Direct: Using Audible Headlines and Paragraphs

Who goes where depends on (1) what part of the story each witness has to tell, (2) how you judge witness strengths/weaknesses, (3) who best carries the most of your themes, and (4) the flow and context you desire. Now, with each witness, try first announcing through questions who they are and what they know of the story. Quickly give the jury a "headline" that answers their question, "Why is this witness here?"

Newspapers have headlines; newscasts have leads. Advocates must repeat the heartbeat of the case by telling the jury, this is why we are here; this is why this witness is here:

Q. Mr. Witness, did I subpoena you and ask you to come here to tell the jury about the racial climate at X company?
A. Yes.
Q. Let's briefly talk about your background with the company . . . .

Particularly, you must headline the purpose of an expert witness:

Q. Mr. Economist (or Doctor X), are you here to provide [your analysis of the financial losses of plaintiff] or [your record of treatment of plaintiff and your opinion as to the cause for such treatment]?

After headlining the witness's purpose and grabbing the jury's attention, then break down each topic or subject matter into some audible organizational packages (call them paragraphs), and tell the witness (and jury) where you are going.

Q. Doctor, do you understand that in order to give your opinion, it is necessary for me to ask some background questions on your experience and qualifications?

Now the jury knows who this witness is, and why you are going through this process. Be logical, easy to follow, presenting "paragraphs" or packages of information on essential facts without needless detail. When you announce your topics, it becomes easier to ask the non-leading, open-ended "who," "what," "when," "where," "how" and "why" questions that are the bread and butter of direct. Whether you present by topics or chronological is <u>your</u> choice. But deliver an organized structure.

STYLE AND TECHNIQUE AT TRIAL

Show and Tell This Human Story

Because the plaintiff has more ground to cover, often the chronological or time-line order of proof is most useful in employment cases. Again, the jury needs some sense of organization in order to follow your story. If subject matter is easiest, then by all means cover subject matter — announcing clearly ahead of time each subject that is being covered.

You want to both **show** and **tell** this human story — through oral testimony and displaying all important documentary evidence. "Direct" examination does not mean "dry" presentation. Break up the examination by looking for "action opportunities" that move along your witness's story. Write on a flip chart. Show and discuss documents on an overhead transparency. Remember that unfolding the human drama throughout the trial keeps the jury interested because anticipation turns pages. You want to make it easy for the jurors to know exactly where you are headed, and why, so they concentrate on the substance, in general, and the heartbeat of your case, in particular.

Your Witness Is The Star: Unfolding the Human Drama

On direct examination (unlike cross) , your client is the star of the show. You fade into the background. To physically carry this out, I check with the court to make sure I can stand behind the jury box, so the plaintiff (or other witness) is facing the jury, making eye contact, while having a dialogue with me. Relaxed, confident, using a "stage voice" just above conversational, the lawyer guides the witness through his/her story. The witness does most of the talking, and in the best of direct exams, "blooms" before the jury's eyes. The jury should feel and experience the witness's personality, evaluate his or her humanness. Your goal is for the jury to like and genuinely care for the plaintiff as a person, and therefore believe everything he/she says. The jury evaluates **everything** about the witness's personality, humanness, appearance, sense of humor, candidness, ability to communicate.

You have carefully prepared plaintiff on the facts; you have gone over the subjects plaintiff will cover that have been left uncovered and unexplained, and those which need further amplification. But in final analysis, you must **trust your witness**. No witness will be perfect, but you have your notebook with its outline of the subjects you want the witness to cover. And it is your job to remind and "prompt" when (not if) your client forgets. Your questions must be clear enough that your client trusts you to be the "good shepherd" guiding the story along. If your witness is prepared and ready to tell the story, educated by seeing how other witnesses have done on direct and cross, usually you can obtain the desired testimony without much leading. What gentle leading you do is allowed under the rules of evidence if the witness forgets something. Also it is simple to rephrase a leading question to an open-ended question once the witness's recollection has been prompted.

Your Pace Should Show Relentless Progress But Vary In Speed And Tone

Pace is vitally important with the plaintiff. Because my plaintiff comes on with 70% (or more) of the basic story already told, his/her testimony can (and must) be keenly focused. In the Western District of Missouri, the courts impose time limits on direct examination (1 hour for most witnesses except parties). So we have learned to be brisk and to-the-point, while still striving for the jury to "get to know" your witness. Judges normally will relax the time limit for the plaintiff — but to keep some judges from getting cranky, you must show the judge by your purposeful pace and audible announcement of where you are going that you are relentlessly forging ahead.

The pace I seek to project is that of a person on a mission, relentlessly marching forward through the remaining facts. I like to be the one to set the jury free for lunch or breaks by saying, "Judge, I'm at a convenient breaking point for lunch . . . or I can forge ahead." Since I'm not dragging things out, the judges usually will go with me and break at my suggested times. But you must be truly ready to forge ahead to build credibility.

That said, your pace and tone must vary. With plaintiff's testimony, your pace will quicken over certain background facts — but deliberately must slow (and tone) down during the most dramatic moments where credibility and persuasion are vital. Some hints:

- **Make a connection**. As you make your witness a storyteller, have him/her talk to you and the jury. At appropriate points that demand particular emphasis, signal to your witness to look directly at the jury and make eye contact with all jurors, by saying, "Please tell the court and jury what happened that day in your supervisor's office behind closed doors . . . ."

- **Listen**. Hang on your witness's words as if you are hearing them for the first time. Carry on a conversation with transitional and follow-up questions.

- **Use exhibits to move the story along**. People tend to believe what they see in writing. Using exhibits is easy in most employment cases, where there were memos going back and forth, discussions concerning job standards, performance evaluations, probation records, policies, etc. Have your exhibits ready to go, and show them to the jury on overheads while you ask the questions pertaining to those documents. Don't waste time, be ready . . . . relentless in your march. The jury will love your professionalism.

- **Use an easel pad to highlight key evidence**, key themes, particularly if the jury is allowed to take notes. Things are going well, and your story at least is being heard, if your notes on the easel become their note-taking cues:

  Q. Mr. Human Resources Manager, do you agree with this statement that I've written here on the pad: 'Any employee has a right to complain of discrimination without the fear of reprisal and retaliation?'

Q. Mr. H. R. Manager, do you also agree with this statement (written on the easel pad): 'Retaliation is against the law?'

Survey The Terrain Before Trial To Relax Your Plaintiff

Some attorneys write out all questions and answers and go over them with the plaintiff beforehand. I personally do not. My personal style works better as a **seemingly** extemporaneous conversation. Besides, my plaintiffs testify after lots of ground work. So I'm more aware of filling gaps, covering what's not been said, meeting unmet legal elements. So **subject areas** — not the precise questions — are my focus. Don't misunderstand — I use detailed outlines of chronology, dates, names, even stage directions for me to "go over Exs. 5, 6, 7 . . . ." But my outline contains only the story — the expected answers — not the questions. Occasionally, if a particular question must be phrased "just right" to avoid an objection, or to signal to the judge why the question is proper, I will write that question in the margin to the left-hand side of my subject matter notes I'm about to cover. An example would be eliciting the plaintiff's "state of mind," but anticipating a hearsay objection. An easy way to signal to the court this exception to the hearsay rule is to simply ask, "What was your state of mind when your supervisor said this to you?" Or, "What was your thinking . . . . What was your thought process?"

Part of preparation of my plaintiff is to have her sit in the witness chair before trial, or during a break. I show where I will be standing, and give her some practice looking at the jury and making eye contact while talking with me. I tell her you must "connect" with the jury to stir them to take action for you. During breaks, but while direct exam is ongoing, I am always asking my plaintiff, "Are you making a connection?. . . ." "Are you getting any feedback?" (nods, smiles, kind eyes . . . .); or negative feedback (folded arms, yawns, refusing to look at you, shaking their head in disbelief . . . .). I want to know so we can deal with what's happening — good or bad. I also ask the trial team, "How's the pace?"

Covering Your Weak Points; Preparing Your Client for Cross Examination

Preparing for direct also means preparing for cross examination. Your direct examination will cover any weak points in your case — but always in the proper context. For example, if your female plaintiff in a sexual harassment case claims she feared retaliation and thus did not file a written complaint, for proper context and for believability you present previous witnesses telling the jury that harassment occurs in front of management without repercussion, or that written complaints go unremedied and trigger retaliation. This provides context and lays the groundwork for the jury's greater willingness to accept your plaintiff's explanation. Jurors want to know **why** human beings acted, or failed to act — so knowing good facts about your plaintiff (positive halos) and bad facts about the defendants and their witnesses (negative halos) aids acceptance of your story . . . rejection of theirs.

My experience is that the inevitable summary judgment motion allows us to prepare for cross examination with very few surprises. Defense lawyers by and large are married to plaintiff's deposition and documents as the "script" for cross. So beat your client over the head

with the necessity of knowing the deposition, knowing all documents, knowing the answers to interrogatories. If there are medical records, your client must be able to explain why she did or did not receive treatment. Plaintiff's demeanor and tone are crucial, so prepare your plaintiff to respond as candidly — and politely — to the defense lawyer, as she has for you. Tell them, "Don't let the defense lawyer put words in your mouth, but answer the question truthfully and succinctly, even if that particular answer hurts." If your client needs to explain, teach them to offer to explain, so you will know to come back to the issue on redirect.

With every witness, remember the rules of primacy, recency, and repetition. **Primacy** teaches that people tend to believe what they hear first; **recency** means people remember what they heard last; **repetition** is self-explanatory. Try to start on important points in the morning, after recesses, and end on strong points at the end of a day, at the weekend break. Repeat and reinforce your themes without appearing repetitive. The rule of three ("triads") is useful for aiding the jury's recollection.

Redirect

Plaintiff's counsel has a tough but important job when reading your client's deposition. Invariably, defense counsel will obtain an admission on page 30, when the true context or a more complete answer and explanation is given by the plaintiff later in the deposition, or upon your questions at the end of the deposition. So your job in preparing for your client's direct and cross examination also involves knowing where the defendant has misled the jury by fake impeachment. If it happens and you catch it and reveal it, the effect is dramatic, with almost visible reaction from the jury. Such redirect examination goes something like this:

Q. Miss Witness, remember the question by defense counsel on [this topic] in which he quoted your deposition at page 30?
A. Yes.
Q. Do you recall offering further explanation on that same subject later in your deposition to this same defense lawyer?
A. I don't recall. I think I did.

Whether she says "yes" or "I don't recall," you can get right to the rehabilitative deposition questioning:

Q. Let me ask you to turn to page 230. Do you recall these questions being asked by Mr. Defense Counsel and these answers being given by you at page 230?

Pace on redirect is even more purposeful and relentless than direct. Go right at only those few areas where defense counsel might have scored some points or obscured some things — but where you can quickly re-shine the light of truth and knock down (again) what defendant tried to put in your way: boom . . . boom . . . boom. If defense counsel has failed to let the witness explain something important, then you do; if defense counsel has misrepresented or

shown only part of a document or the deposition testimony, your reveal the rest.

Sometimes the jury can be jolted back to **your client's reality** after a meandering or boring cross with a single (yes, possibly argumentative) question such as:

> Q. After all of defense counsel's questions, do you change what you told the jury about whether you experienced sexual harassment?

Be pointed or don't do any redirect. You will be pleased with the effect.

A 10-Point Checklist

This checklist is a slightly modified version from a fellow trial lawyer who suggests taking some pretrial quiet time (without interruption) to first focus on the sentence or paragraph which defines the "heartbeat of your case," and to have before you a list of your witnesses and exhibits, the packages of information each must convey, and the preliminary order of proof.[6] Then address whether you have done the best you can to prepare to persuade by the following methods:

1. **SHOW AND TELL THIS HUMAN STORY, AND WHAT IT WAS LIKE FOR YOUR CLIENT**. Use exhibits and charts as action opportunities and teaching tools.

2. **UNFOLD THIS HUMAN DRAMA THROUGHOUT THE TRIAL** (Remembering that anticipation turns pages).

3. **LET THIS JURY IDENTIFY WITH AND CARE FOR THE PERSON OR PERSONS INVOLVED**. With each witness, try to bring home a point which might make a juror think: "This could happen to me or someone I love." Jurors want to know why humans acted in certain ways, and will be searching for motives and explanations whether you present them or not.

4. **MAKE IT EASY FOR THE JURORS TO KNOW EXACTLY WHERE YOU ARE HEADED, AND WHY, SO THEY CAN CONCENTRATE ON YOUR SUBSTANCE IN GENERAL AND YOUR "HEARTBEAT" IN PARTICULAR**. Use "headlines" for each new subject, with "packages of information" or "paragraphs" within the subject. Example: "Now I want to talk about all the instances in which you raise the issue of discrimination with management . . . ."

5. **USE PROPER CONTEXT**. Place each significant item of proof in its most favorable context for receptiveness by the jurors. Plan your order of proof; plan your order of subjects within each witness's testimony.

6. **MAKE IT EASY FOR THE JURORS TO REMEMBER YOUR HEARTBEAT OF THE CASE, THROUGH SELECTIVE USE OF A KEY PHRASE OR KEY QUESTIONS**. If possible, elicit vivid images/mental

pictures: "Getting fired was like a dagger to heart." Repeat and write down on your pad key phrases: "A worker has a right to complain of discrimination without reprisal or retaliation."

7. **COVER ADVERSE FACTS**. Thoroughly address your own problem list. That is, always address and explain adverse facts, and think of ways to minimize their effect.
8. **BE CERTAIN YOUR PROOF IS CREDIBLE**. Touch the heart, but leave the conscience clear.

9. **GIVE FACTS AND EMOTION**. Try the case to the jurors' heads and hearts, since jurors decide the case using both.

10. **PUT DEFENDANT ON TRIAL**. The winning case is the story of an injustice that stirs the jury to action.

CONCLUSION

Having a plan, and signaling to your witnesses — and the jury — where you're going by showing audible organization will enhance credibility and persuasion immensely. We have said the plaintiff (and each case-in-chief witness) is the star on direct, and that's true. But by using audible organization, your are being more than just helpful to the witness, jury and judge. You are proving to the jury that you really know the case and can be trusted to bring out all the important facts. Your credibility is vital, and if the judge and jury feel they can't trust you, they aren't going to trust your witnesses, your arguments, or your exhibits. As McElhaney concludes in his recent article: "Being simple, direct and well organized are important ways to earn . . . trust."

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ENDNOTES

1. Judge M. Gino Brogdon, Jr., Fulton State Court, Witness Examination, *The Missouri Trial Attorney*, Summer 2002.
2. Sorry for the repetition, but I guess I've presented this material twice before today: See "Evidentiary Issues for the Plaintiff Employment Lawyer," National Employment Lawyers Association, the W. Hotel, Chicago, Ill., October 18-19, 2002; "Effectively Representing Employees," The Dallas/Fort Worth NELA Annual Seminar, February 14, 2003.
3. Senior Editor of the ABA's *Litigation* magazine and Professor of Law, Case Western Reserve University School of Law.
4. *Litigation* Magazine, Vol. 3, No. 3, Spring 2002, McElhaney "Trial Notebook" entitled: "Simple Direct."
5. Id.
6. Fred Wilkins, *Persuasive Jury Communication*, Shephard's/McGraw-Hill, Inc. 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

GREATER KANSAS CITY LABORERS PENSION FUND, A TRUST FUND, ET AL.	)	
	)	Case No: 4:14-cv-00229-BCW
Plaintiffs,	)	
v.	)	
AL MUEHLBERGER CONCRETE COMPANY, LLC,	)	
Defendant.	)	

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW Defendant, by and through counsel and hereby presents the following proposed findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. The Parties stipulate that jurisdiction and venue in this matter are proper before this Court (Joint Stip. No. 1).

2. Only Al Muehlberger Concrete Construction, Inc. (hereinafter "Inc.") was party to the collective bargaining agreement between the Builders Association and Laborers Locals Nos. 264 and 1290, until the cessation of business by Inc. (See Michael Bell testimony, Tr. 7-19; Exs. 1-4; (Joint Stip. No. 3).

3. Muehlberger, LLC was never a signatory or party to collective bargaining agreements embodied in Ex. 1. Muehlberger, LLC was not shown under all the evidence to ever have been a "contractor" or "employer" subject to those agreements, to which the long-defunct Inc. was at one time a party. (Ex. 5, Remittance Reports; Tr. 30).

4. Plaintiffs' main witness, Michael Bell, admitted the foregoing (Tr. 30):

> "Q: [W]ould it be true that the only employer that ever was a signatory on this Laborer Agreement would have been Al Muehlberger Concrete Construction Company, Inc.?
>
> A: Yes.
>
> Q: By contrast, Al Muehlberger...Concrete Construction, LLC has never been a signatory in the sense of being named an employer?
>
> A: That's correct."

Plaintiffs' counsel, Mr. Sollars, then conclusively established this point. (Tr. 47):

> "Q: I just have a brief redirect Mr. Bell. It's not in dispute here that LLC didn't sign the Joint Agreement; is that correct?
>
> A: No, that's not the dispute, no.
>
> Q: So LLC never signed the Joint Agreement?
>
> A: No."

5. Mr. Bell described the long-defunct Muehlberger, Inc. thusly: "Pretty big company." (Tr. 24). Bell never knew of LLC until "when it was discussed in collection" in 2013. (Tr. 24;34)

6. Pension fund witness Bell admitted on cross (Tr. 38), that by 2009 Al Muehlberger Concrete Construction, Inc. was essentially out of business; that Inc.'s cash flow had shrunk to nothing; that they were in the steps of a bankruptcy in 2009? A: "Yes, I did know that."

A. The History of Al Muehlberger Concrete Construction, Inc.

7. Dan Muehlberger testified, "I've been in [the concrete industry] my whole life." (Tr. 152). He started with John Rohrer Contracting when he graduated in 1972 from Southwest

High School, and got married at 17. (Id.) When Dan was working for John Rohrer (when he was 17), he was a laborer and a union member. (Tr. 153).

8. Dan Muehlberger started working for his dad Al Muehlberger, Sr., when he was in his later 20's; Dan did not have any ownership interest. He did "grunt labor" when he started with Muehlberger, Inc. (Tr. 154). Al Muehlberger, Sr. carried a union card for 65 years. (Tr. 197). Dan also was a union member in his 4-5 years with Rohrer Construction. (Tr. 198).

9. Dan Muehlberger is now approximately 62 years of age. (Tr. 196). His dad started Al Muehlberger Concrete Construction, Inc. around 1961, when his dad was about 51; Dan was only 7 years old. (Tr. 196).

10. Dan's brother Al Muehlberger, Jr. is the oldest sibling in the family and is now about 74 years of age. After Dan's father, Al Sr., decided to phase out of the company "in the 80's," Dan and Al Jr. gradually assumed control of the company. (Tr. 154-155).

11. Dan's brother Al maintained the title of President "for a long time" during his active years with Muehlberger, Inc. (Tr. 198). Dan held the title of Vice-President. (Tr. 199). That remained true until Al "wanted out" and surrendered his stock to Dan. (Tr. 199, 155).

12. Al always worked the office; Dan worked the field: "I'm a field person only." (Tr. 163). During that time, Al Muehlberger Jr. ─ not Dan Muehlberger ─ signed off on, and handled, all details of union contracts. (Tr. 199). Al met with all unions for the negotiation of contracts. (Tr. 158). After Al left Dan signed union agreements, but testified, "To be real honest with you, my secretary/treasurer would give me this stuff, put it in front of me, and I would sign it." (Tr. 158).

13. Dan Muehlberger did not know about the concept of "withdrawal liability" until he received Ex. 7, the March 4, 2013 letter from the pension-funds lawyers. (Tr. 171-72, 200).

The Court believes Muehlberger knew nothing substantive about "withdrawal liability" when Inc. was losing money in 2009 (Tr. 200); nor did he acquire any such knowledge before the March 4, 2013 letter.

14. While Inc. was going strong, and in its heyday, it grossed $15 Million annually, "at least 15-plus," according to Dan Muehlberger. (Tr. 207). Inc. worked primarily on large projects such as improvements to the racetrack in Kansas City, Kansas; both stadiums at the Truman Sports Complex; the Plaza, and many others. (Tr. 208).

15. Inc.'s jobs consisted of almost exclusively commercial concrete flatwork (Eric Kibbe, Tr. 57).

16. Again, during Inc.'s strong years (into the early to mid 2000's), the company employed as many as 150 employees. (Tr. 161-162, 231) These included trade union employees: about 85 laborers; about 10 operators; 60 union finishers; plus extra union help as needed from the union hall. (Tr. 208-209). LLC today has 1 Operator (Inc. had 10); zero Union Finishers (Inc. had 60); 6-10 Laborers (Inc. had 85) (Eric Kibbe, Tr. 98-99).

17. Throughout Inc.'s existence, Inc. had in place a letter of credit that amounted to about $1.2 Million. (Tr. 209). By contrast, the current operation at LLC is strictly cash on delivery (C.O.D.)along with a $75,000 letter of credit that is fully used up. (Tr. 191-92). In stark contrast to Muehlberger, Inc., no one is providing LLC goods and materials on credit as it did with Al Muehlberger Concrete Construction, Inc.; LLC is "COD on all my gravel, on C.O.D. with most of the concrete companies in town." (Dan Muehlberger Tr. 209).

B. Timeline Leading to the Bankruptcy of Muehlberger, Inc.

18. Inc. filed for reorganization in bankruptcy court in 2004. (Tr. 158). "We tried to reorganize to get monies coming in to pay the debt off." (Tr. 159). By then Muehlberger, Inc.

was experiencing severe cash flow issues. (Tr. 158-159). Inc. was struggling with payroll, payroll taxes, union fringe benefit payments, just about everything. By 2009, Inc. "virtually went out of business." (Tr. 159; 38). By the date of the 12/18/09 bankruptcy filing represented by Ex. 14, Muehlberger, Inc. was essentially done. (Tr. 202). Dan Muehlberger testified the 2009 filing "was the second part of the first one....I don't remember two bankruptcies." (Tr. 159).

19. Inc. had "outstanding IRS debt," (Tr. 160), and substantial other debt. (Tr. 160). Inc. hired Evans & Mullinix to handle the process to complete their bankruptcy. (Tr. Dan Muehlberger Tr. 161). By the close-out of bankruptcy, everything had been "cashed in" and "disbursed" to creditors, (Tr. 172), except for the IRS. (Tr. 225-26).

20. As part of the bankruptcy proceedings, all of Inc.'s equipment was repossessed by the Bank of Blue Valley as collateral for the $1.2 million line of credit. (Tr. Dan Muehlberger 229).

21. Interestingly, plaintiffs' counsel asked Dan Muehlberger if Muehlberger, Inc. "ever attempted to terminate your union contract in bankruptcy?" (Tr. 163) Muehlberger said he never tried to cancel union contracts.

22. The latest remittance of any contributions to pension benefits occurred February 20, 2009; March 20, 2009; July 20, 2009. (Tr. 37-38). There is no evidence in the record of any later remittance reports in the possession of the union plaintiffs. (Tr. 38) The Court finds payments ceased no later than 2009.

23. Israel Abundis was terminated by Inc. in April 2009. (Tr. 111). He was brought back to wrap up the bankruptcy. (Tr. 112) Inc. was "completely defunct." As of 2010, there had been "complete cessation" of contributions to the Union pension fund. (Israel Abundis Tr. 112-113).

24. According to the Pension Plan, failure to make contributions constituted a complete withdrawal from the Pension Plan, and triggered the withdrawal liability that should have been imposed on Inc. at that time. (Exhibit 3, § 10.1, 10.2; Michael Bell Tr. 16).

25. However, Dan Muehlberger was not given "notice" of, and had no knowledge of any kind of alleged withdrawal liability until March 4, 2013 when he received the Pension Fund's letter on March 4, 2013; that letter asserts that LLC owed withdrawal liability funds for a "disguised attempt" at avoiding liability. (Exhibit 7; Dan Muehlberger, Tr. 170-171). As explained below, the Court finds no evidence or inference to support a "disguised" or undisguised attempt by LLC to avoid union pension fund liability.

26. In August of 2010, Inc. was administratively dissolved by the Missouri Secretary of State. (D's Ex. 4; Tr. 206-07).

27. The United States Bankruptcy Court for the District of Kansas ordered the dissolution of Inc. on July 20, 2011. (Exhibit 15).

C. Allcrete Purchases All of Inc.'s Assets; Defendant LLC Does Not Exist

28. Completely independent of any influence from Dan Muehlberger, Mark Brandmeyer, Dan's son-in-law, decided to open up his own concrete company trying to build on his remodeling experience. (Dan Muehlberger Tr, 203, 224-25). The Court learned when questioning Dan Muehlberger that Brandmeyer had already been in the construction industry (residential remodeling), such that "concrete wasn't a far fetch for him." (Tr. 223-24).

29. Brandmeyer named his company Allcrete, and bought all of Inc.'s equipment that the Bank of Blue Valley had repossessed in order to start his company. (Dan Muehlberger Tr. 181, 229).

30. Allcrete was never a signatory to the Union seeking recovery in this action. (Ed Freeman Tr. 247).

31. Although Allcrete purchased all of Inc.'s equipment from the bank, Allcrete was never pursued by the collections committee or plaintiffs as a "successor" of Inc. (Michael Bell Tr. 40). Plaintiffs' counsel candidly concedes that "the intervening factor with Allcrete...that's an issue." (Tr. 256): "We concede there was no direct transfer of assets. Allcrete was involved. There's no way around it." Id.

32. Plaintiffs first witness Bell, upon redirect from Mr. Sollars, was asked if an employer went out of business in 2011 and formed a new company, "Would you have any reason to investigate a new company called Allcrete?" (Tr. 50). Significantly, the witness answered, "Yes. We try to ─ we try to keep tabs on all contractors...." (Tr. 50). The Court expressly finds that the formation of Allcrete was in no manner a "disguised attempt" to avoid union pension fund liability by Allcrete, by Muehlberger LLC or by Dan Muehlberger.

33. Eric Kibbe worked for Inc.; after going out to do his own thing he went to work for Allcrete; after Allcrete went out of business ─ after 2 years of operations ─ he went to work for LLC. The Court accepts as true his testimony that he never at any time heard anything "that suggested to you that Dan Muehlberger, when he formed the LLC, was trying to secretly disguise or avoid liability for any type of union obligation of Inc." (Tr. 88). Kibbe was the first witness to confirm what became undisputed in the record ─ that LLC did not acquire any assets of Inc. (Tr. 88-89)

34. The Court questioned Israel Abundis (Tr. 117 - 120), and accepts as true his responsive testimony concerning the involved chain of custody from disposition of Inc's assets through Allcrete's purchase, through LLC's purchases. All equipment was pledged as collateral

to the bank; the bank was a creditor in the bankruptcy and the bankruptcy judge gave the equipment back to the Bank of Blue Valley (Tr. 118). The Bank of Blue Valley sold it to the highest bidder, in a commercially reasonable manner. Id. Muehlberger Inc. "had no control over what Bank of Blue Valley did with the equipment once Inc. surrendered it." Id. at 118.

35. The Court also accepts as true Mr. Abundis' testimony that Mark Brandmeyer shut Allcrete down merely because "he was tired of losing money is what he told me." (Tr. 119). At Allcrete, no checks were ever written to the pension fund and significantly the Court finds true Mr. Abundis' answers to these questions:

> "The Court: Anything about Allcrete shutting down relate to Inc.?
>
> The Witness: No.
>
> The Court: Anything about Allcrete shutting down relate to avoiding union payments by Inc.?
>
> The Witness: No.
>
> "The Court: Anything about Allcrete shutting down relate in any way to LLC opening up?
>
> The Witness: No, no. Mark Brandmeyer pretty much ran the business. I mean he was...into making ─ having companies that made money, and this one was not making money for him."

(Tr. 119-120).

36. The Court believes the testimony of James Rosberg, who currently is the only union employee at Muehlberger, LLC. The Court probed further whether "somebody, the Muehlbergers, did something inappropriate to avoid paying union benefits here." Rosberg was

indeed "the only union guy we have in front of us." (Tr. 149). The Court finds entirely believable Rosberg's answers to the Court's questioning:

"The Court: [D]o you feel like somebody's done something to avoid paying union benefits when they shut down Inc. and went to create and then opened up LLC?

The Witness: That's a hard question to answer, your Honor. I don't think anyone did anything deliberately to me personally to avoid paying any benefits.

The Court: And you didn't see anybody saying "Let's shut down a union shop. Let's open up a cheaper, nonunion shop"?

The Witness: No.

The Court: You never got that feeling?

The Witness: No.

The Court: And I'm sure you talked to Inc. employees when it was shutting down, because losing a job is a big thing? Nobody suggested that?

The Witness: No."

(Tr. 149-50).

37. When Mr. Sollars asked Dan Muehlberger whether when Inc. dissolved there was any distribution of assets back to him he answered: "No, none back to me." (Tr. 232)

38. Dan Muehlberger went to work for Allcrete for about two years (2009 - 2011) as a field supervisor. (D's Ex. 3, 2010-2011 W-2's; Tr. 204-05) He was strictly a salaried employee and never had any ownership interest in Allcrete. (Israel Abunis, Tr. 122; Dan Muehlberger Tr. 174).

39. Allcrete did employ some of the same employees that had been at Inc., including supervisory personnel, and bought Inc.'s same machinery in completing concrete work.

40. Throughout its several years existence, Allcrete acquired other assets and equipment that had never been owned by Inc. at any time. (Israel Abundis, Tr. 123; Dan Muehlberger Tr. 230). According to Abundis, "tons of it" eventually was bought not by LLC but by others. Id.

41. Allcrete did primarily commercial flatwork along with some minor foundation projects and some tear up, remove/replace work. (Eric Kibbe Tr. 68).

42. As part of shutting down Allcrete, Brandmeyer sold all of his equipment through independent auction houses such as the on-line Purple Wave and Ritchie Brothers. (Dan Muehlberger Tr. 182). That means what had been Inc.'s plus "tons" more Allcrete had acquired elsewhere.

D. Defendant Muehlberger, LLC Is Formed October, 2011

43. Dan Muehlberger did not start up operation of Al Muehlberger Concrete Company, LLC until (at earliest) after his Operating Agreement dated October 1, 2011. (Exhibit 17).

44. The idea of forming the LLC did not come to Dan Muehlberger until late 2011 ─ after Mark Brandmeyer had decided to shut down Allcrete. (Eric Kibbe, Tr. 70, 81). Dan Muehlberger told James Rosberg "[t]hat Mr. Brandmeyer was going to close his doors and that in a short period of time, maybe six to eight months, he [Dan] was trying to start his own business again." (James Rosberg Tr. 132). Rosberg started with LLC in March, 2012 (Tr. 126() Plaintiffs' counsel asked Muehlberger if there was "any intent on Mr. Brandmeyer's part to close up shop so you could start doing business as the LLC," to which Muehlberger testified: "Not at all." (Tr. 189).

45. In forming LLC, Dan named the company in honor of his father because "my dad was in this business for 65 years. He was a card carrier with the unions, and out of true respect to him I owe it to him to try to make something work, even if it's on a smaller scale. That's my goal." (Tr. 183) Dan's decision to name it Al Muehlberger Concrete Construction LLC was not for a "business purpose," but "has to do strictly about my dad." (Dan Muehlberger Tr. 184). The Court finds this testimony credible.

46. Due to a mix up, Dan's ex-wife, was able to get the Al Muehlberger name on-line. (Dan Muehlberger Tr. 184). "So I ran with it to my attorneys. Nobody checked the federal ID number at all until six months later we found out it was the same federal tax ID number. (Dan Muehlberger Tr. 184). The IRS pursued a claim against LLC for liabilities left behind by Inc. (Tr. 206). Notably, after an explanation and proof that there was misidentification, that LLC was a completely separate entity from Inc., the IRS determined LLC was not responsible for any tax liabilities of Inc. and said, "Ok. We're dropping it." (Dan Muehlberger Tr. 206).

47. LLC never purchased any assets from Al Muehlberger Concrete Construction, Inc. (Tr. 211-212) After Allcrete closed its operation, Dan Muehlberger bought from auction houses roughly **15%** of assets that had once been owned by Allcrete. (Dan Muehlberger Tr. 211). "Tons of" Allcrete's other assets were sold to entities other than LLC. (Israel Abundis, Tr. 123).

48. The Court finds the purchase of Allcrete's assets was through an independent third party (as was the original sale from Bank of Blue Valley to Allcrete), and was done in a commercially reasonable manner with no "discount given" to Dan Muehlberger or LLC. (Abundis answers to Court questions Tr. 123).

49. Neither Inc. nor LLC has ever had a plant or a factory where items are produced. (Tr. 169). Still the Court finds it undisputed that LLC has never had an office or headquarters at the same location as any office or headquarters of Inc.. (Dan Muehlberger Tr. 218-19).

50. LLC has employed a maximum of 20-25 employees, in stark contrast to the over 100-150 employed over time by Inc. (Dan Muehlberger Tr. 233).

51. Only a small portion of employees that had been employed by Inc. were later employed by LLC after each employee had found intervening employment elsewhere in the years between the cessation of Inc. and the creation of LLC. (Dan Muehlberger Tr. 168).

52. "The business is completely different" when comparing LLC to Inc., despite both companies doing concrete work. (Eric Kibbe, Tr. 83-85, 88-95; James Rosberg Tr. 147-148).

53. Among many differences between Inc. and LLC, where Inc. workers had very specific job duties, LLC employees must serve as finishers, laborers, and operators; at LLC "they all perform all services." (Dan Muehlberger Tr. 233). Now everyone must "multifunction big time to make things work." (Dan Muehlberger Tr. 234).

54. The clients that LLC works with are neither substantially similar to, nor a "continuation of" those that did business with Inc.. Despite being used by some of the same general contractors as Inc., LLC deals with a substantially new (and smaller) client base. "I know that Inc. had large clients that I haven't seen in a good many years." (James Rosberg Tr. 147). Kibbe: "We don't do projects on anywhere near the same scale as we used to." (Tr. 83).

55. The Court finds there was a substantial and legally significant time break in between the existence of Inc. and the creation of LLC. It was a "distinct break," with "years of interruption" in the chain of business. (Eric Kibbe Tr. 89-90).

56. LLC employs a much smaller workforce than that of Inc.

E. Pension Fund Plaintiffs Pursuit of LLC For Withdrawal Liability

57. Plaintiffs question to it s first witness (Michael Bell) captures why this lawsuit was brought. (Tr. 54):

> "Q: When you saw the name Muehlberger on that photograph...you assumed that was a continuation of the prior company; is that correct?
>
> A: Yes."

58. Based solely on a photograph, on March 4, 2013 plaintiffs mailed Dan Muehlberger a notice demanding that his new and separate entity, LLC, should pay withdrawal liability for the long-defunct separate entity of Inc., under a successorship liability theory. The base liability claimed is $932,499.00. (Exhibit 7)

59. Inc., the signatory company potentially liable for the withdrawal liability, had been defunct since 2009. Because the separate and distinct LLC business had not incurred any withdrawal liability, Dan Muehlberger did not pay nor respond to the notice (Tr. 217). The Court finds Muehlberger had no legal obligation to respond. The Court accepts as true Muehlberger's testimony that LLC could not satisfy that obligation and still remain in business. (Tr. 215)

60. The Court accepts as true Muehlberger's testimony, that when starting LLC in 2011, he did not have any knowledge regarding the assertions in the March 4, 2013 letter that withdrawal liability could attach to LLC. (Tr. 213)

61. The photograph that spawned this lawsuit (Ex. 18), was of a van owned by then LLC employee Ron Penner (Tr. 194-95). Importantly, it shows LLC's company name. Only that photograph, plus Ed Freeman reporting he had "seen them" on other jobs, was presented to the collections committee. (Ed Freeman Tr. 251).

62. Michael Bell, a trustee of the Pension Fund for 14 years, testified that he never discussed any attempt to pursue Allcrete as a successor for any of the withdrawal liability incurred by Inc.. (Michael Bell Tr. 11, 40) Significantly, former trustee Freeman admitted the following material fact (Tr. 253:)

> "Q: If Allcrete bought all assets of Inc. and employed, let's call it the same or substantially same employees who had worked at Inc., a viable fair target under your knowledge of the withdrawal liability would be to go after Allcrete, if those facts that I said were true. do you agree with me?
>
> A: Yes."

The evidence shows that only Allcrete purchased all assets formerly owned by Inc.

F. No Evidence of Wrongdoing by Defendant Dan Muehlberger

63. There is no hint of evidence, nor any reasonable inference, that suggests wrongdoing by Dan Muehlberger in his forming and operating the LLC. The Court finds there is no suggestion that LLC was formed to evade pension fund liability (or any other liability) of the defunct Inc. (Brad Sollars' Closing Argument Tr. 258-59).

64. The Court accepts as true Muehlberger's denial that he ever connived or disguised or tried to evade responsibilities for pension contributions. (Tr. 214)

65. The Court believes Eric Kibbe, who had never heard anything that suggested that "when he [Dan] formed the LLC, [he]was trying to secretly disguise or avoid liability for any type of union obligations of Inc." (Eric Kibbe Tr. 88). The Court also accepts James Rosberg's truthful testimony in answer to this Court's questions. (Tr. 149-150)

II. CONCLUSIONS OF LAW

Based on the credible evidence, the Court concludes that under controlling law defendant Muehlberger LLC cannot be held liable for the pension withdrawal liability of the long-extinct

Muehlberger Inc. Without dispute, LLC was never signatory to nor was LLC ever "in" the Pension Plan. Thus, LLC can only be held liable for "withdrawal liability" through the common law legal theory of "successor liability," a theory first articulated in *Golden State Bottling Company v. NLRB*, 414 U.S. 168 (1973). The Court agrees with defense counsel's analogy that plaintiffs' attempt to impose "successor liability" on LLC is like "trying to fit a square peg into a round hole." Under the particular facts of this case, the successor liability doctrine simply does not fit.

A. Necessary Successor Liability Elements Are Missing Here

The Court has considered the case authorities cited by both parties, and has conducted its own independent research. But for purposes of deciding this case, the most persuasive (and controlling) authorities boil down to two United States Supreme cases, and the two most recent 8th Circuit cases on this subject: *Golden State Bottling Company, Inc.,* supra; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Nutt v. Kees*, *et al.*, 796 F. 3d 988 (8th Cir. 2015); *Prince v. Kids Ark Learning Ctr., LLC*, 622 F. 3d 992 (8th Cir. 2010)[1] Their rules and holdings do not support successor liability here.

The opening sentence of *Golden State* frames the issue for decision with essential factual predicates ─ completely missing here ─ which weigh heavily **against** a finding that the doctrine is applicable here:

> "The principle question for decision in this case is whether the bona fide purchaser of a business, who acquires and continues the business with knowledge that its predecessor has committed an unfair labor practice in the discharge of an employee, may be ordered by the National labor Relations Board to reinstate the employee with back pay."

[1] *Einhorn v. M.L. Ruberton Const. Co.*, 632 F. 3d 89 (3rd Cir. 2011) analyzes exactly the same type of claim as confronts this Court now. *Einhorn* is a careful and comprehensive review of successorship doctrine, and *Einhorn* credits *Golden State* with developing this federal common law: "Federal courts beginning with *Golden State* have developed a federal common law successorship doctrine imposing liability upon successors beyond the confines of the common law rule when necessary to protect important employment related policies." Id. at 94.

414 U.S. at 170. The first and most obvious distinction here is that Muehlberger, LLC was never the "purchaser of a business," and never even purchased "the assets of" Muehlberger, Inc. More pertinent as to missing elements however, is the complete dearth of any evidence or inference that LLC continued Inc.'s concrete business "with knowledge that its predecessor has committed" some form of wrong. The defendant in *Golden State* was true successor of the business, which, in stark contrast to Muehlberger LLC here, "purchased the business with knowledge of the unfair labor practice litigation." *Golden State* at 172.

Here There Was No Timely Notice of Potential Liability Before Acquisition of Assets

Important for later discussion is the Supreme Court's precondition that "notice" to a purchaser means notification of the claims and the potential liability before acquisition:

> "In this case, All American had no complaint that it was denied due notice and a fair hearing. **It was made a party to the supplemental back pay specification proceeding, given notice of the hearing, and afforded full opportunity, with the assistance of counsel, to contest the question of its successorship for purposes of the Act and its knowledge of the pendency of the unfair labor practice litigation at the time of the purchase**." (Bold added)

Id. at 181. Because of countervailing law that asset buyers generally do not assume liabilities, the Supreme Court in *Golden State* requires that the putative "successor" must possess ─ before acquisition of assets ─ an ability to protect itself from the potential liabilities a plaintiff seeks to foist on it:

> "**Since the successor must have notice before liability can be imposed, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.... if the reinstated employee does not effectively perform, he may of course be discharged for cause.** (Bold added)

Id. at 185.[2]

The letter dated March 4, 2013 (Ex. 7) constitutes plaintiffs' earliest (and only) purported "notice" to Muehlberger LLC of its purported $932,499 "withdrawal liability" for Inc.'s long-ago pension contribution delinquencies. Without doubt, that notice was legally too late, and legally ineffective under the successor liability doctrine, because at the time LLC **indirectly** purchased only **some** of the assets that at one time had been owned by Inc., there was nothing LLC could have done to protect itself or mitigate the devastating effects of the financially ruinous pension withdrawal liability plaintiffs seek to impose. Incidentally, *Einhorn* presents the quintessential factual scenario where a purchaser of assets is fully aware of the potential liability for delinquent employee benefits fund contributions before purchase. *Einhorn* reversed summary judgment, on a factual record very much stronger for the pension fund plaintiff therein, as opposed to the pension fund plaintiffs here.

Nutt v. Kees is the 8th Circuit's most recent, on-point authority on legal preconditions for holding a "successor" liable for wrongdoing of a predecessor, in the context of ERISA. Kevin and Lisa Nutt were employed by Osceola Health Care and worked at Osceola Nursing Home. During their employment, Osceola Health Care withheld funds from their paychecks as "pre-tax insurance." Kevin Nutt was injured in an ATV accident, but learned Osceola had not paid health insurance premiums, resulting in a lapsed policy and the Nutts owing "more than $233,000 for the medical services provided to Kevin." 796 F. 3d at 989. The district court

[2] *Einhorn* similarly holds that pension funds can seek delinquent contributions only where the purchaser has notice of the liability "prior to the sale." 632 F. 3d at 99: "In sum, we hold that a purchaser of assets may be liable for a seller's delinquent ERISA fund contribution to vindicate important federal statutory policy where the buyer had **notice of the liability prior to the sale and there exists sufficient evidence of continuity of operations between the buyer and the seller.** The inquiry should be effectuated on a case by case basis balancing the equities presently before the court." (Bold added)

found after bench trial that the Nutt's former employer (the true "wrongdoer") could not provide relief, and thus relied on the theory of successor liability to hold Osceola Therapy & Living Center ("OTLC"), a later purchaser and operator of the facility, liable under a theory of successor liability.

The 8th Circuit reversed for reasons that are controlling here. First, *Nutt* accurately sets forth the doctrinal underpinnings of successorship liability(at 990):

> "The doctrine of successor liability provides an equitable exception to the general rule that a buyer takes the assets of his predecessor free and clear of all liabilities other than valid liens and security interests.... This form of liability allows a plaintiff with a claim against the seller to collect from the purchaser. Such liability ensures that a victimized plaintiff has a complete remedy for the harm he suffered, even if the actual wrongdoer is defunct or otherwise unable to address his damages. See *Prince v. Kids Ark Learning Ctr., LLC*, 622 F.3d 992, 995 (8th Cir. 2010) (per curiam)."

"**[T]he ultimate inquiry** always remains whether the imposition of the particular legal obligation at issue would be equitable and in keeping with federal policy." (Bold added) *Nutt*, 796 F. 3d at 991:

> "Before imposing successor liability, a court must balance the plaintiff's interests, the defendant's interests and federal policy....Imposing successor liability is appropriate **only if it strikes a proper balance between on the one hand preventing wrongdoers from escaping liability and on the other hand facilitating the transfer of corporate assets to their most valuable uses**."(Bold added)

Nutt at 991. As found by this Court, and more fully explained later herein, there is no evidence and no inferences supporting any argument that Dan Muehlberger or the Muehlberger LLC was a "wrongdoer" in any way. The only possible "wrongdoer" in legal parlance would be the Muehlberger Inc. company founded by Dan Muehlberger's father ─ which suffered financial difficulties that ultimately forced it to go out of business. Unfortunately, businesses fail every day, and the Court finds no evidence of any plan, any collusion, any artifice, or any intent or

wrongdoing in the fact that Inc. sought bankruptcy protection, which is a federal right available to all.

In *Nutt*, the district court "correctly noted that several factors weigh in favor of extending successor liability," including "that the Nutts were 'victimized employees.'" Id. at 991. *Nutt* had real wrongdoers (Kees and Osceola defendants) and truly victimized employees. This record shows no comparable "wrongdoers" or "victimized" employees here. To the contrary, solitary union employee James Rosberg's testimony compellingly shows Dan Muehlberger's good faith, guileless actions ─ from Inc., to Allcrete, to LLC ─ all of which has fostered gainful employment for construction employees who uniformly trust, respect and are loyal to Dan Muehlberger.

Additionally, unlike here, the targeted "successor," OTLC "successfully operated the nursing home for Cooper and Berryville Properties for several years before Hargis retired and a second company took over the operation lease." Id. at 991. If all those (quite compelling) factors were "the only governing factors," the 8th Circuit notes that imposing successor liability "might well be sound." Id. But successorship liability inquiry does not end there, because of these countervailing interests:

> "Before imposing liability, a court must consider the [1] countervailing interest of the defendant-successor and [2] the larger policy goal of facilitating the free transfer of assets." (Numbers [1] and [2] added)

Id. at 991. The foregoing concerns lead to this 8th Circuit rule (Id. at 991):

> "**These concerns generally weigh against expanding liability for a predecessor's debt.** *See Vucitech*, 842 F. 2d at 944." (Bold added)

The 8th Circuit then rules that **before imposing financial liability for a predecessor's past misdeed**, courts "look for two factors to ensure that liability is proper ─ [1] notice and [2] a direct transfer of assets from the predecessor. See *Golden State*, 414 U.S. at 185, ..." Id.

(Numbers added) Those crucial two factors "**guard against unfairness because they provide the successor with the opportunity to protect its interests either by acquiring the assets from the seller for a lower purchase price or by insulating itself from liability through an indemnity clause in the sales contract**." (Bold added) Id. at 991-92. Of course, both of those factors ─ in particular a successor's ability to protect its interest before asset purchase ─ flow directly from the law in *Golden State*: *Golden State* involves **both (1) a timely notice requirement**; and (2) **a direct transfer of assets** to the purported successor. The 8th Circuit then holds:

> "**Absent these circumstances, our case law suggests that the balance of equities does not favor the plaintiff**." (Bold added)

Id. at 992. Both factors are totally absent here. Unquestionably, there was absolutely no opportunity for Muehlberger LLC "to protect its interests," either by acquiring the few assets that one time were owned by Inc. for a lower purchase price, or by "insulating itself from liability through an indemnity clause in the sales contract." There was no direct transfer. Thus, 8th Circuit law commands that the balance of equities does not favor the plaintiff.

Although plaintiffs at one time argued that notice is "undisputed," there is no Stipulation that legally sufficient and timely notice was received via the March 4, 2013 letter. In fact, "timely notice" absolutely is disputed ─ as made clear by Mr. Egan.

> "The *Nutt* case is pretty dogmatic about it, that you need to have some kind of notice so that a true purchaser, not Dan Muehlberger, can take into account what this potential liability might entail. Maybe he does something regarding getting a deal on the purchase of assets. That's in the *Nutt* case."

(Defendant's Closing Argument, Tr. 261) The Court concludes there was not timely and effective "notice."

Moreover, the 8th Circuit emphasizes the lack of timely notice, in reversing judgment entered against OTLC, which was a lessee. And while plaintiffs try to use the lessee argument to distinguish *Nutt*, from this case, the 8th Circuit discusses the "lessee" status in terms helpful and analogous to LLC ─ because of the lessee's inability to take protective action. That puts the factual scenario in *Nutt* much more in line with the LLC, because LLC also had no opportunity to protect itself from the potential liability:

> "**The distinction between OTLC's role as a lessee and that as a purchaser radically shifts the balance of equities. As a third party lessee, OTLC could not shield itself from inheriting liability because it did not negotiate directly with the seller. Cooper and Berryville Properties, not Hargis and OTLC bargained for the purchase price, and Cooper and Berryville Properties, not Hargis and OTLC, negotiated the terms such as possible indemnity provision**." (Bold added)

796 F. 3d at 992. Exactly the same here: the LLC "did not negotiate directly" with Inc. for the purchase of assets; it did not negotiate directly with the Bank of Blue Valley which repossessed all of Inc.'s assets; LLC did not negotiate with Allcrete, which purchased all of the former Inc.'s assets in a commercially reasonable sale from the bank. So not only did Dan Muehlberger have no forewarning or notification of the potential pension withdrawal liability when he first bought 15% of Allcrete's assets, thereby reacquiring a few durable assets formerly in the hands of Inc., but by the time he received notice on March 4, 2013 he was in the exact same position as OTLC , according to *Nutt v. Kees* (at 992):

> "Moreover, even if OTLC somehow could have adjusted its lease to account for the potential liability, **OTLC did not receive timely notice of the potential liability**. The district court acknowledged that OTLC learned of the medical bills only *after* the lease had been assigned and OTLC took over operations of the facility in early August, 2010." (Bold added)

In words perfectly applicable to the LLC, the court held (at 993):

> "In light of this analysis and the court's clearly erroneous characterization of OTLC as the purchaser with the ability to take the potential liability to plaintiff into account in negotiating the final acquisition price set at the closing, we conclude that the district court abused its discretion. After all, OTLC was not a party to the unlawful practices of Kees

> and the Osceola defendants, and OTLC operated the nursing home without any significant connection to these culpable parties. [Citing *Golden State*; and *Prince*]

Substitute LLC for OTLC in the quoted passage, and the result is fatal to plaintiffs' claims.

Although it is a tremendous stretch to find that LLC took over the operations of Inc., the final words of *Nutt* would make this factor legally insufficient:

> "Though OTLC took over the operations of Osceola Nursing Home, mere continuation does not create liability. See *Prince*,...." (Id. at 993).

The court states that whether "the successor defendant substantially continued the operations of the wrongdoer," is not the bottom line test for liability. Id. at 993. The final words of *Nutt v. Kees* seal the deal against liability here (Id. at 993):

> "If the doctrine of successor liability required no more than subsequent operation, the doctrine inevitably would discourage the free transfer of assets to their most valuable uses. *See Vucitech*, 842 F. 2d at 944-45.

The weight of authority cited with approval in *Nutt v. Kees* requires a plaintiff to prove meaningful pre-sale knowledge of the potential claim, and fraudulent or improper purpose to escape the predecessor's debt. See, e.g. *Einhorn v. M.L. Ruberton Const. Co.,* supra*,* 632 F. 3d at 99 (Holding that a purchaser of assets "may be liable for a seller's delinquent ERISA fund contributions" where "the buyer had notice of the liability prior to the sale and there exists evidence of continuity of operations between the buyer and seller."); *Truck Driver's Union v. Tasemkin, Inc*., 59 F. 3d 48, 49 (7th Cir. 1995), (Despite a true direct purchaser of assets, successor liability allows lawsuits "against even a genuinely distinct purchaser of a business if the successor had notice of the claim before the acquisition;" and "there was substantial continuity in the operation of the business before and after the sale"); *Steinbach v. Hubbard*, 51 F. 3d 843 at 846 (9th Cir. 1995) (Successorship liability requires "the subsequent employer was a bona fide successor and...the subsequent employer had notice of the potential liability.")

There Is No Evidence Or Inference Of Any Wrongdoing By Dan Muehlberger or LLC

The pension funds' March 4, 2013 letter that first provided notice of the withdrawal claim to LLC, alleges: "Al Muehlberger Concrete Company, LLC, is (a) a disguised attempt to avoid the obligations of the collective bargaining agreement with Al Muehlberger Concrete Construction, Inc.;" During final arguments, plaintiffs' counsel half heartedly asserted a lack of "good faith" on LLC "to try to avoid these liabilities." (Tr. 258). The Court asked plaintiffs' counsel to identify "some particular witness or documents that you can pinpoint me to that shows a lack of good faith as you put it." Id. Counsel's response was candid, but telling:

> "I don't think there's ─ there's no smoking gun. If we had it we would have tried to present it, but ─ and I don't think there is. But I think the totality of circumstances show that there was some intent."

Id. at 259. The Court disagrees. The Court revealed its skepticism in asking counsel, "You just think that after hearing all this that I can say it's more likely than not that Mr. Muehlberger went into bankruptcy, shut down, sold the assets ─ or had the bank sell the assets, and then him buy it back through his son-in-law?" (Tr. 259) The Court must reject plaintiffs' argument, as there is no supportable, and justifiable inference of bad faith or intent on the whole record.

To the contrary, it would be pure speculation for the Court to infer what plaintiffs desire and what the law requires. On a full review of the evidentiary record the Court is convinced that the break in timing, the break in parties with an innocent intervening entity (Allcrete) purchasing assets from the bank, etc., supports what the Court hypothesized during post-evidence discussions with counsel: "For this chain to work, unlike a lot of these other successor liability cases in other contexts, this would be a fraud upon the federal government as well if this all kind of played out...." (Tr. 270) The Court finds and concludes there is no evidence to support such trickery, artifice or guile by LLC or Dan Muehlberger. (Tr. 271) To his credit, plaintiffs' counsel

stated, "I don't know and don't want to comment on that." (Id. at 271). Plaintiffs' counsel also candidly admits this problem for plaintiffs' claims: "The intervening factor with Allcrete, the plaintiffs concede that that's an issue. We concede there was no direct transfer of assets. Allcrete was involved. There's no way around that." (Tr. 256)

Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F. 2d 1323, 1325-26 (7th Cir. 1990) examines 4 exceptions to the general rule of no liability for a successor "that merely purchases for cash the assets of another corporation." Successors can be held liable in these 4 circumstances:

> "(1) There is an express or implied assumption of liability; (2) the transaction amounts to a consolidation, merger, or similar restructuring of the two corporations; (3) the purchasing corporation is a mere continuation of the seller; and (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts."

Id. at 1325-26. Based on the record as a whole, plaintiff pension funds cannot prove any of those 4 exceptions. And in particular, there is no transfer of assets nor a "fraudulent" or otherwise improper purpose. We know from previous discussion that N*utt v. Kees* makes reference to "wrongdoers" and that in *Golden State,* the purchaser of the business had knowledge that its predecessor "committed an unfair labor practice in the discharge of an employee." Not so here.

In *Fall River Dyeing & Finishing Corp*., supra, the Supreme Court affirmed an NLRB holding that a successor employer's obligations to bargain with a predecessor's union is not limited to situations where the union in question only recently was certified before a transition of employers. After a full discussion of important labor law issues that influence successorship law, see 482 U.S. at 36-40, the Supreme Court notes the federal policy goal to prevent an employer to use "a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude toward the union to eliminate its continuing presence."

482 U.S. at 40. Reviewing the Supreme Court's earlier decision in *NLRB v. Burns Int'l Security Services, Inc*., 406 U.S. 272 (1072), the Court noted:

> "If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of §8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor.

Id. at 40. There is no intent of Muehlberger or LLC trying "to take advantage" of anything. The holding in *Burns* states:

> "Where, as here, the union has a rebuttable presumption of majority status, this status continues despite the change in employers. And the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor."

Id. at 41.

The broken chain of custody and break in time destroyed any opportunity for Dan Muehlberger and his LLC to negotiate asset acquisition price based on "withdrawal" liability. Allcrete (not LLC) bought Inc.'s equipment from Bank of Blue Valley without apparent or actual "notice" of liability or opportunity to negotiate that price based on potential liability. The equipment purchased from the auction sites was done in a commercially reasonable manner, without any notice of any potential for liability given to any purchasers of the equipment ─ one of whom became Dan Muehlberger, LLC. The total equities weigh against plaintiffs and in favor of defendant Muehlberger, LLC.

There was No Substantial Continuation of Business Between Inc. and LLC

Refusing to find successor liability is in accord with other cases where liability was imposed such as *Golden State Bottling,* and *Fall River Dyeing and Finishing Corp., v. NLRB,* 482 U.S. 27 (1987). In those situations, the second entity enjoyed substantially the same size and

operation as the previous entity. *Golden State* says the successor "continued without interruption or substantial change...." 414 U.S. at 184.

Turns out that the vastly different size and scale of operations between LLC and Inc. actually does matter. This is mainly because of how withdrawal liability is calculated here. According to the Pension Plan's March 3, 2013 letter, the nearly $1 Million in alleged withdrawal liability is calculated based on the highest contribution rate during the ten years before the year of withdrawal. Average hours means "the highest 3 consecutive years during the 10 years preceding November 1, 2010. (Exhibit 7, Page 4). Herein lies the importance of Defendant producing evidence at trial that Inc. was at its peak less during the ten years before November 2010. The Court concludes that it is against the public policy and defendant's interest to hold the much smaller LLC –that did not reap the benefits of a majority of Inc.'s equipment, work force, or supervisory personnel ─ to answer by way of a business breaking judgment – for the liability left behind by the much larger Inc. The asserted "liability" is calculated based on the size and output of the previous entity in its hey-day.

Fall River holds that successorship law "**requires that the Board focus on whether the new company has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessors business operations**." (Bold added) That's the same as *Golden State Bottling, Co. v. NLRB*, 414 U.S. at 184; *Fall River Dyeing and Finishing*, 482 U.S. at 43. The Supreme Court rules: "Hence, the focus is on whether there is 'substantial continuity' between the enterprises." Id. at 43. *Fall River* says "doing the same jobs in the same working conditions" under the "same supervisors" with the "same production process," "same products," "same body of customers." "Same" means same. This Court concludes that the evidence does not support similar sameness for successorship liability.

The language "without interruption" carries great weight with the Court. Inc. finished bankruptcy proceedings in 2009; Allcrete bought assets; and LLC was not formed until 2 years later with a legitimate cessation of Inc., over a period that saw the creation and demise of an entirely separate company, Allcrete. Dan Muehlberger credibly testified that he did not conceive the creation of LLC until after he had been told by Mark Brandmeyer that Allcrete was shutting its doors.

The *Fall River Dyeing* court determined that successor liability could be applied when there is a "hiatus" between the two businesses, "if other factors indicate a continuity between enterprises." 482 U.S. at 45. Crucially, "hiatus" is most relevant where, as here, "there are other indicia of discontinuity." Id. That is precisely this scenario. The *Fall River* hiatus was a mere 7-month hiatus considered a "normal start-up period," where other indicia of continuity exist. According to the evidence of this case, Inc. was completely defunct for an extended period of years ─ with indisputable "discontinuity" ─ before LLC was even a thought in Dan Muehlberger's mind. *Fall River Dyeing*, at 44-45. Therefore the Court holds that LLC did not substantially continue the business of Inc. "without interruption".

Fall River Dyeing emphasizes the fact that "[p]etitioner acquired **most of** Sterling Wales real property, its machinery and equipment, and **much of** its inventory and materials." (Bold added) *Id*. at 44.[3] Here, LLC acquired only 15% of Allcrete's assets. In *Fall River Dyeing*, the subsequent company took over the entire factory as it existed and repurposed all of the machinery; whereas Dan Muehlberger bought roughly 15% of Allcrete's total equipment, some of which never even belonged to Inc.

[3] Importantly, pension funds cited fn. 10 at p. 44 to argue that direct acquisition is not essential, because defendant bought predecessor's assets "on the open market." But defendant in *Fall River* – wholly unlike LLC here – "was formed with the express purpose of acquiring Sterling Wale's major asset....S**o long as there are other indicia of substantial continuity the way in which a successor obtains a predecessor's assets if generally not determinative of the substantial continuity question**." (Bold added)

In order to determine if successor liability applies, a "nine-factor test [is] to be applied on a case-by-case basis" to determine if there was substantial continuity of business. *Prince v. Kids Ark Learning Ctr., LLC*, 622 F.3d 992, 995 (8th Cir. 2010). *Prince* weighs against plaintiffs because JAML against successor liability is affirmed. These nine factors are laid out as follows:

1. Whether successor company had notice of the charge
2. The ability of the predecessor company to provide relief
3. Whether there has been a substantial continuation of business operations
4. Whether the new employer uses the same plant
5. Whether the new employer uses the same or substantially similar workforce
6. Whether the new employer uses the same or substantially the same supervisory personnel
7. Whether the same jobs exist under substantially the same working conditions
8. Whether the new employer uses the same machinery, equipment, and methods of production
9. Whether the new employer produces the same product

Id.

As to the factor one (1), Dan Muehlberger did not receive **timely notice** of the "charges" at issue. At most he had knowledge ─ years before LLC bought any assets ─ as to some of bankrupt Inc.'s obligations. But there is no evidence, and no reasonable inferences, that Dan Muehlberger and LLC received timely notice of Inc.'s "withdrawal liability" when purchasing a mere 15% of Allcrete's assets in late 2011. Defendant concedes that under factor two (2) Inc. was not capable of providing relief.

The Court finds that there is no substantial continuation of business operations connecting Inc. to LLC. Courts have established that factors 4-9 really should be combined to make up the determination of whether there has been a substantial continuation of business. *Paschal v. Child Development, Inc.,* 2014 WL 55179, *6, (E.D. Ark. January 7, 2014). Here it is impossible for there to be a finding of a substantial continuation of business based on the totality of evidence.

The most basic factor establishing no substantial continuation of business is the years-long hiatus, or break in time between the demise of Inc., and the creation of LLC. The idea that the Court should impose successor liability due to a "substantial continuation" of business when there was a multiyear period between the cessation of business of one corporation and the creation of a separate entity is totally unfounded in case law. Words do matter, and "continuation" means the act or fact of not stopping; going on with a thing after stopping; a beginning again. That is not present here. No cases were found, in researching 8th Circuit and other case law, where "successor liability" was imposed where the defendant was not even in existence until years after the alleged "predecessor" became liable.

Prince, supra, has true continuation, "Kid's Ark simply took over." 622 F. 3d at 993. True knowledge of the liability, and true takeover were not enough. Why? "**The court found no connection between the formation of Kid's Ark and Prince's claim of discrimination**." Id. at 996. (Bold added) "Thus the court determined that imposing successor liability would be inappropriate." This Court concludes the same here.

Concrete companies don't use a plant or a factory, but make their money onsite at different locations in the field. However, both Inc. and LLC have had specific permanent locations used as a headquarters and offices that this Court finds as the equivalent of a plant in looking at this factor. The record established that none of the four (4) locations used by Inc. have ever been used in any respect by LLC. (Tr. 218-219) Therefore, the lack of using the same office and headquarters weighs against continuation of Inc.'s business.

Similarly, LLC's fractional workforce scope and size weigh against a substantial continuity of Inc.'s business. As established in *Prince*, the mere fact that a portion of the same workforce is at the new entity does not mean successor liability should be found. Mere

continuity would not be enough under *Nutt* and *Prince*. In LLC's case, the workforce is substantially less than at Inc. The fact that a fair amount of employees are the same between the two separate entities does not constitute a substantial continuation of business. (Kibbe testimony; Abundis; Rosberg) Every employee had to find other work during the two year gap between Inc. and LLC. (Id.) The fact that some of the employees took the same path to eventually get to LLC by working at Allcrete holds no weight with this Court, because Allcrete has been shown to be a distinct, separate entity from both Inc. and LLC.

The same jobs do exist with LLC as they did at Inc., but this is simply because the type of business that is done. Concrete construction requires certain jobs to be performed and it would be impossible to run a business without these jobs. The Court therefore gives little weight to the mere fact that LLC, as a concrete construction company, has some (or even all) of the same jobs as Inc. (or any other concrete construction company).

Despite the same types of jobs existing at LLC as Inc., the main test in determining if this contributes to a substantial continuity of business is if "those employees who have been retained will understandably view their job situations as essentially unaltered." *Golden State Bottling*, at 184. All three witnesses testifying who work for Dan Muehlberger at LLC stated that they viewed their jobs far differently at LLC than they were at Inc. This evidence weighs against the contention that there is a substantial continuation of business between Inc. and LLC.

The Court agrees that LLC happens to work with the same product that Inc. did: It is a concrete construction company, but the size, scope, scale, etc. are a far cry from Inc.(Dan Muehlberger testimony, Tr. 194-233). Dan Muehlberger has testified to the fact that there is a substantial difference in the type and volume of work that LLC does, compared to what Inc. did

when it existed years ago. LLC also does a substantially greater percentage of smaller residential work than Inc. ever did.

All of these factors combined weigh against substantial continuity of business. LLC is completely independent and distinct from Inc.. There is simply not enough evidence to hold LLC accountable for the "withdrawal" liability of Inc., based on a theory of successor liability (or any theory for that matter.)

B. The Equities Weigh Against Plaintiffs' Claims And In Favor Of Defendant LLC

The Court concludes there is insufficient evidence to impose successor liability. The Court is cognizant of federal policy favoring keeping pension funds alive. But the Court also must consider what I believe to be the innocent LLC's interests. Saddling LLC with nearly $1 Million in liability is not supportable under successorship law. Free transfer of struggling companies' assets is the base policy. Moreover, saddling the innocent LLC with ruinous pension liability actually accrued by Inc. makes no sense. LLC would fold; and gainful employment would be lost (again) for the hard-working employees of LLC. Windfalls are not favored ─ and finding for plaintiffs under these unique facts would be a huge injustice to LLC ─ and a windfall to plaintiffs, who started this based on misreading a photograph, and jumping to the wrong conclusion based on the Muehlberger name. No good purpose, and no overarching federal policy would be served by such a harsh result.

The Court hereby **ENTERS JUDGMENT** against plaintiffs and in favor of defendant, with costs assessed in defendant's favor.

_____ _____

Date Judge Stephen R. Bough

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#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure Hotel & Suites
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To Defeat Summary Judgment and Win at Trial, Litigate Like a Journalist

It's about 3pm. I am sitting in the office of the mayor of Holly Springs, a sleepy suburb of Raleigh, North Carolina. Since about 9am, I have been plodding along in this town reporting the town's relocation of a cemetery. It's a good story, but let's just say it will not lead the 5 o'clock news. The mayor's office is dimly lit and filled with photos of the mayor shaking hands with constituents and famous politicians. As usual, there is a video camera on a tripod a few inches a way from me, pointing at the mayor. My cameraman also has a light trained on the mayor, and there's a microphone cable running from the camera to a tiny microphone clipped to the mayor's tie. The mayor is explaining why the cemetery must be moved when I get a 9-1-1 page from the assignment desk at WRAL-TV, Raleigh's CBS station. 9-1-1 of course, means drop what you're doing and get in the car. Something's happened and you gotta get there ASAP. I interrupt the mayor, apologize profusely as I grab the microphone off his tie, help my cameraman gather the gear, and we sprint for the door.

While there are many sophisticated, intellectual aspects to our practice, litigation is, at its heart, an interpersonal experience. If you cannot convince a stranger at a bar that your client deserves money, you won't be able to persuade a juror that your client

deserves money. Sure, we must have the intellectual ability to discern subtleties in the law, and it helps to have an encyclopedic grasp of the facts. However, we can get clients the money they deserve only if we pull our theories and our clients' story out of our minds and express it to other people—opposing counsel, mediators, judges, and juries, as if to friends at a campfire. This ability is the critical talent that separates the decent litigators from the best.

There are many ways to effect such communication. One excellent way is to model the best practices of print and TV journalists. I will draw on my years as a television news reporter and documentary producer to teach sure-fire ways to immediately improve your advocacy for employees. The beauty of this approach is that excellent examples of the techniques abound for you to study on your phone, tablet, computer, TV, and radio. I will fortify my suggestions with the teaching of David Ball, the renowned jury consultant and author of *David Ball on Damages 3*. It came as no surprise to me to learn that Ball has a doctorate in theater and communications and spent decades in the theater industry before moving to the courtroom (a kind of theater). However, this paper is not merely about good story telling. Good story telling is only one part of the journalist's toolbox and only one part of Ball's teaching (and beyond the scope of this paper). To get success for your client, you must do more than just tell good stories: you should act, write, and speak like a journalist.

1) <u>WILD EFFICIENCY</u>

On the way to the car, an address pops into my pager. I call the assignment desk to see what's going on. There's been an explosion at a chemical factory two hours to the east. The town is evacuated and workers were killed. The TV station's helicopter is on its way to pick me up at the Holly Springs little league field in three minutes. After what seems like an eternity, we hear the thwacking of the chopper blades and see it coming over treetops in the distance. It settles down on the ball field. The videographer and I jump in. In a few seconds, we are aloft, zooming to the chemical factory explosion. I am now the lead story—live, of course-- at 5, 5:30, and six. It's about 3:15pm.

TV news story length has been declining steadily over recent decades. When I first started at WBZ-TV in Boston as a videographer in the 1990s, the average maximum story length was about 90 seconds. In 1997, story length was cut to 70 seconds—to the horror of veteran reporters. When I became a reporter at WRAL, the story maximum length was 60 seconds.

A 60-second story is about twenty sentences long. Imagine taking a story—a story of any complexity—and telling it in 20 sentences. While we can debate the strengths and weaknesses of television news, if you only bemoan the lack of depth of television news you are missing an important point: a great deal of important information can be communicated—and sometimes must be communicated-- in twenty sentences. The distilling process—sorting out what is important to your story and what is not, is one of the most important processes a journalist of any type performs.

For the television journalist, this culling demands what I call "wild efficiency" with words. Each word represents time. You include a word in your story only if it is

absolutely necessary. This necessarily entails prioritization of information: you use a word only if it is more important than the many words you exclude. Write words as if use of each word costs money. You have a budget and need to stay within it or suffer the wrath of supervisors. Doing this two, three times a day for hundreds of days in the crucible of live television brings great efficiency to one's writing.

The same principles apply in court. Whether it's a motion to compel hearing, a summary judgment opposition hearing, opening statement, cross-examination, or the like:

- Review all writing for necessity: is this sentence necessary? Is this word necessary? Is this section necessary? If not, cut it.
- Use short, simple sentences. One fact per sentence. *Ball on Damages*, at 125-26.
- Avoid all "throat clearing words" at the beginning of sentences such as "Therefore," "Thus," "While," "Similarly," "For instance . . . ."
- Murder your darlings.

> If you here require a practical rule of me, I will present you with this: 'Whenever you feel an impulse to perpetrate a piece of exceptionally fine writing, obey it—whole-heartedly—and delete it before sending your manuscript to press. Murder your darlings.
>
> -- Arthur Quiller-Couch's 1914 lecture "On Style"

The problem, according to David Ball, is that "lawyers know too much."

> Unfortunately, you are *trained* to information dump. Your trainer taught you that information persuades judges and jurors. Major wrong.
>
> Treat information as if you're the world's tightest miser—and every little piece of information is a gold nugget. Give jurors the fewest possible nuggets. And before giving one, chisel it down to the smallest usable sliver.

> **Less is more in every case.** In every opening. In every witness exam. In every closing. Wheat, please; not chaff.

Ball on Damages, at 114. That is a description of wild efficiency.[1]

Assume that judges don't have the time or the interest in delving into lengthy treatises on your client's plight. Jurors have even less incentive to pay attention. Get to the point and stay there:

- Opening and Closing Statements should be only as long as necessary to convey your point and foreshadow testimony; *Ball on Damages,* at 175.
- Direct and cross examinations should have an obvious point and elicit only that information that the factfinder needs to make his or her decision;
- At hearings, get right to the point. Use headlines and bullet points.

Efficient writing and speaking makes a bigger impact on your audience because you are providing your audience with more robust, meaningful information in a shorter amount of time. Cut, cut, cut. And when you are done, cut some more.

[1] An important exception to this rule is the fact section in your summary judgment opposition or statement of disputed facts. Your *argument* must be concise and efficient. However, when in doubt, you must err on the side of inclusion rather than exclusion of facts to demonstrate a dispute of material fact. See Section 7 below.

2) <u>FIND YOUR TALISMAN</u>

"Coming to you in ten seconds," a voice says in my earpiece. Fire engine lights flash behind me. A white light behind the camera lights me up. The sun's gone down. Deep breath to slow my pounding heart. Music. Studio anchor. Intro. Toss to me. "Jack, behind me you can see fire engines and rescue crews still on scene at this Garcill factory. Right now, emergency workers are inside the building, still looking for survivors, and looking for clues that might reveal what caused the massive explosion." Cut to my story… video of a victim limping, bleeding, helped by firemen. Narration: "Rescue crews help an injured worker limp toward an ambulance…."

In television news, there is intense pressure to capture the viewer early in a story and keep the viewer tuned in. When I was a journalist, the boogieman was the TV remote. The most damning criticism of your story was "click," the sound a remote control makes when the viewer has decided to change channels. Story boring? "Click." Story confusing? "Click." Story irrelevant? "Click." That's why TV news has become so loud, flashy, and fast.

TV journalists don't have time to start at the beginning. Beginnings are boring. Good TV journalists locate in every story the one fact, image, and/or sound that grabs viewers' attention and, ideally, sums up the story. I call these images "talismans" because of their seemingly magical power to attract the viewer's interest and, ideally communicate the point of the story. It might be a simple as the sound of a mother sobbing. In the chemical fire story, it was the image of a wounded employee limping away from the smoldering building. This makes you start the story not at the beginning

but somewhere in the *middle*: in the very heart of the story. Start with your best stuff and unpack it from there. It's more interesting that way.[2]

In court, your talisman is a powerful or catchy symbol for what the defendant did and why your client deserves money. For example:

- In a race discrimination suit, we got all kinds of data in support of our case through discovery. In the end, all we really needed was the basic data we knew when we took the case: that a few days after receiving a cash bonus for high performance, my client was terminated for poor performance. The employee compensation guide said that "Merrill Pays for Performance." My talisman. Every memo and oral argument I made began with "Merrill Pays for Performance" juxtaposed against his termination for poor performance. The case settled after jury selection.
- In a sexual harassment case, the linchpin was whether a fast-food franchisor could be held responsible for the harasser's harassment. The harasser worked for both the store (the "franchisee") and the franchisor. I needed to show that workers for the franchisor, the store, and even other related companies held themselves out as employees of the franchisor. During the deposition of an employee of a company only *related* to the franchisor, the deponent walked into my conference room wearing the uniform of the franchisor. We discussed this on the record, and she had to admit that if someone saw her working, they would think she worked for the franchisor, even though she did not. I got her

[2] Note that the talisman is perhaps the only exception to David Ball's wise advice to always relate the facts of your case in chronological order. Reveal your talisman--then start at the beginning.

to admit that if she saw the harasser working in a store, she could not tell whether he was working for the franchisor or the store without asking him. In my summary judgment opposition, I led with the shirt the witness wore to her deposition and her deposition testimony. The court found the harasser's employer at the time of the harassment to be a question of fact. The case settled.

- In a personal injury case, I had the football-sized chunk of cement that fell from a tunnel ceiling, hitting my client in the chest as she drove through the tunnel. A state trooper confirmed that that chunk was the one that hit my client. I showed the chunk to the defendant's insurance adjuster before jury selection. The case settled before opening statements.

It is absolutely true that the clearest way to order information is in chronological order. (See Section 5 below). The talisman concept is a narrow exception to that rule. Start with your talisman to take your listener into the heart of the case, then return to the beginning and tell your story in chronological order.

Search actively for your talisman. Start legal memoranda with your talisman. Start your opening argument with your talisman. While cases are complicated, you must find a way to keep them simple. A talisman helps do this by grabbing the listener's attention and drawing her in to the heart of the case.

3) DON'T "BURY THE LEAD"

"Burying the lead" is an old journalistic metaphor for the mistake of placing the biggest news of the story deep in the middle of the story. It's a matter of priority. Put positively, it is your job to figure out what the story is about and make it clear to the listener as soon as possible. The lead is the story's bones. The rest of the story falls into place naturally.

Identifying the lead and choosing your talisman go hand in hand. Usually, finding one will give you the other.

In the explosion story above, the lead was obvious because it was "breaking news": this is what happened and this may be why. The next day, the story gets more complicated: the assignment desk sends you to do one story, but midday you realize that the real story is another: lax regulation, corruption among factory inspectors, greedy corporate owners, injustice to the exploited workers, or the suffering of kids who lost a parent. (In a story about the suffering kids, maybe the talisman is a shot of a boy looking at a photo of his dad saying, "I loved playing catch with my dad." In the wrongful death action about his father, your opening statement starts, "I loved playing catch with my dad.").

In litigation, identifying the lead is critical because everything else falls into place from it:

- Discovery requests;
- Summary judgment opposition;
- Case themes for summary judgment opposition and especially trial;
- Witness selection for depositions and trial.

Simple example: on a hunch, I took the case of a pregnant woman laid off by a major company in the midst of downsizing. The defendant naturally wanted to focus on the legitimate business reasons for selecting her. I got a distracted trying to disprove their business justifications. Then I realized that the most powerful evidence I had was something I learned at the client intake: that right before giving birth, my client's *supervisor* was stripped of her supervisory duties after returning from her first pregnancy, cried to my client, warning her to "document everything." That evidence of discriminatory animus was my lead and the supervisor's tearful encounter with my client was my talisman.

Throughout litigation, continue to search diligently for the point of your case. From the lead you identify, develop case themes and broaden the case's relevance to the jury using the concepts in books like *Reptile*[3]. Hang everything on your lead, begin and emphasize with a talisman, and the point of trial becomes clear for judge and jury.

4) <u>EXPLAIN PLAINLY</u>

Emergency workers aren't sure what caused the explosion. We know the factory made sodium nitrate, a potentially dangerous and explosive chemical. A spokesman says there was welding going on in the factory today. The investigation is still under way.

Simple. The purpose of explaining is to make plain what you are talking about. Television journalists are expert at communicating complicated concepts with simple language. This is critical on TV for two reasons: first are the great time constraints discussed above. Second, like a campfire, like a senate confirmation hearing, like a

[3] David Ball and Don Keenan (Balloon Press 2009).

patent jury trial, like a president's speech, like a chat at the dinner table, television is, in part, spoken communication. Spoken words go by very quickly. It is imperative to speak with the recognition that your audience will have great difficulty understanding and retaining the information you convey unless you use techniques designed to increase the quantity and quality of what the listener hears. The effectiveness of your communication is not measured by what you say. As Anthony Robbins says, "The quality of your communication is the response you get" from your audience.

Lawyers are trained to speak in code. Real people don't understand code. Use plain words to describe concepts like discriminatory animus, causation, psychological harms, and the burden of proof. Id. at 150-51. Instead of "preponderance of the evidence," say, "more likely right than wrong." *Ball on Damages*, at 63. (There is no reason to even mention the term "preponderance of the evidence" until closing argument, when you explain jury instructions to the jury). Id. Instead of "damages," say "harms and losses. Id., at 149.

I represented a client accused of being a threat in the workplace. The record was full of examples of my client being extremely anxious and having digestion problems due to stress. The employer's psychiatrist called this "pathological." While I could have responded in technical psychiatric terms, the more pedestrian route was more effective: I got the employer's psychiatrist to admit that even if "pathological," my client's anxiety was directed inward, not outward. If anyone, he was hurting himself, never others.

With wild efficiency, you are stating only those words which are absolutely necessary for your listener to understand why your client deserves money for her harms

and losses. You are describing complicated concepts and processes in understandable terms. This is not dumbing down communication, it is enhancing it.

5) <u>RESPECT THE MEDIUM</u>

Eyewitnesses say the blast was deafening. The explosion shook the ground like an earthquake. Workers ran from the factory screaming.

I have already emphasized how quickly the spoken word flies by, but it's worth stating again because it's such an important concept. Lots of lawyers think that speech is written words read aloud. The TV journalist knows that it is very difficult for the listener to understand and retain spoken words. This is especially so for complicated stories, concepts, or cases. There are techniques you can use to increase the amount of information understood and retained by your listeners:

1) Use short sentences. *Ball on Damages*, at 120.

2) Use the active voice.

3) Use nouns instead of pronouns

4) Use a basic subject – verb – object sentence structure.

5) In most circumstances, recite facts in chronological order

There are rhetorical or storytelling devices you can use to further enhance retention:

a) Speak slowly and crisply.

b) Shut up! Silence is a very powerful way to allow what you just said sink in. <u>Id.</u> at 126.

c) Repeat. If it is important, it is worth stating several times. Bang the listener over the head with it: "That's important, so let me say it again."

d) Use "headlines" or road signs. E.g., "I'd like to ask you about how the company's actions affected your family life."

Speaking information to someone is like handing the person sand. Remember the ephemeral nature of the medium and do everything in your power to ensure that your message is being understood.

6) <u>ILLUSTRATE YOUR CASE</u>

"Smoke still rises from twisted metal. Firefighters spray water on smoldering walls. Specially trained dogs sniff for chemicals. Everything reeks of soot."

Television is, of course, a visual medium. Good TV news stories use video and sound to enhance the reporter's commentary and use the reporter's commentary to enhance the video and sound. When the video, sound, and reporter's commentary clash, the amount of information hitting the viewer is severely diminished.

It's the same way in court: it is critical to use visuals to help this otherwise ephemeral mode of communication stick. While hearings and trials in court are not TV, they are live performances. There are a number of ways to use pictures, video, and sound to great effect in the courtroom (and a number of ways to screw it up):

a) Paint pictures orally. People dream up pictures in their heads anyway. You might as well suggest accurate pictures. If photos are unavailable, have witnesses paint a picture of the workplace or of a particular interaction. Draw on all the senses. *Ball on Damages*, at 126. If it's an important interaction, such as an incident of sexual

harassment, utilize the techniques of slowing down time, detailed description, and repetition to make sure the full picture is accurately painted in your favor.

b) If actual diagrams or pictures would be helpful, display them on a screen. The most important pictures and diagrams should also be printed large and mounted on foam board for easy access and use.

c) Express data in graphs and charts. Only a certain type of person can process data in a spreadsheet. If data is meaningful, it should be able to be expressed in a graph that makes a big impact on the viewer. Well in advance of trial, refer to Rule 1006 of the Federal Rules of Civil Procedure.[4]

d) Relevant props may be appropriate to include, as well, though are more rare in employment cases. "Things" can be requested in discovery. Never bring a photo of something important when you can bring the real thing. The prop just might be your talisman (see Section 2 above).

You must take control of the judge's or jury's visual experience in the courtroom. Just as good TV journalists know how to use video and sound to enhance their commentary, you must be careful to use visual aids properly or they will distract and detract.

- Silence. When you show the visual aid to the judge or jury, give them a few seconds to look at it. Look at it with them to help direct their attention to it.

[4] "The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court." Fed. R. Civ. P. 1006.

Then orient them to it by explaining, or having a witness explain, what it is we're looking at and only then why it's significant.

- After the visual aid's useful purpose is done, *put it away*. This directs the viewer's attention back to you or your witness. Maintain control of your witness' attention. (That's why I never speak when a judge is reading something). Harnessing the visual aspects of your case is critical to enhancing juror understanding of your case in an age when colorful graphics and data are ubiquitous.

You don't need a lot of visuals to make a big impact. For your most important points, think of ways to express the best facts of your case visually.

7) <u>HARNESS THE JOURNALISTS' PASSION</u>

"WRAL-TV has learned that workers were using torches inside the factory today. Investigators are trying to figure out whether this caused the explosion."

There are two habits of highly effective journalists (of any medium) that I think are particularly useful to employment litigators: tenacious dedication to uncovering the truth, and dedication to objective observation over advocacy.

(a) Tenacious dedication to uncovering the truth

Successful opposition of summary judgment is the key to our success. The key to defeating summary judgment is marshaling sufficient facts to show a dispute of material fact.

- Early on in the case, identify the lynchpins of your case and drill down deeply in the most important aspects of the case. The journalist's and litigator's

currency is information. I used to say I could squeeze a story from a stone. I prided myself on a voracious appetite for facts and uncovering the truth. Adopt this appetite.

- Dig deeply in discovery. Request a broad array of relevant documents.
- In the course of Rule 37 deficiency discussions, insist on full compliance with discovery requests. In a majority of my cases, I bring at least one motion to compel more complete document production, interrogatory answers, or depositions.
- Pound pavement. Just like a reporter. Go to the business location to take photographs if necessary. Call witnesses, meet with witnesses, gather statements and affidavits. A helpful statement from a former employee can help defeat summary judgment or get a case settled.

(b) Objective observation before advocacy

While there is obviously a time for advocacy, from the journalist's point of view, the facts should speak for themselves. The most effective form of advocacy is the presentation of facts in such a way that the listener draws the conclusions you want her to draw before you do. Thus, advocacy for your client should normally begin with a neutral recitation of the facts, especially in Complaints, legal memoranda, and opening statements.

> Show only what a video camera would have seen and heard. Video cameras don't think, analyze, accuse, or infer. They don't read minds. They don't know someone is hungry or angry or in a hurry.
>
> * * *
>
> Video cameras don't see or hear that someone is drunk; they just see some staggering and hear some slurred speech.

Ball on Damages, at 128. Dedication to this approach actually produces more vibrant descriptions of the facts, because you don't take the short cut of a conclusion (he was "drunk"), but are sure to lay out the more fundamental facts that let you make your conclusion ("staggered gait, slurred speech, glassy eyes"). Advocacy too soon puts the listener on the defensive. Instead, feed the listener the facts you worked so hard to uncover. Let the listener draw his or her own conclusions first. Then your advocacy won't seem self-interested—just wise. *Ball on Damages*, at 127. These are valuable attitudes for the litigator.

8) <u>PRACTICE ORAL COMMUNICATION SKILLS</u>

Far too many attorneys do not appreciate that a huge part of their work is verbal communication. That goes for telephone calls with clients and opposing counsel, meetings with staff and co-counsel, drafting memoranda, conducting court hearings, depositions, mediations, and jury trials. You must be comfortable speaking in front of people and comfortable speaking with people to be effective. Lessons from TV journalists:

a) Get lots of practice. Take every opportunity you can to practice law orally. Volunteer for hearings. Take unemployment appeals until you can't stand it any more. Offer to second chair trials. Take small cases to trial. Conduct mock trials. Participate in professional networking events. Introduce yourself to people you don't know. Try cases.

b) Videotape yourself again and again. You may remember hearing a recording of your voice for the first time. It's the same with video. People don't realize their

idiosyncrasies and perhaps even odd behavior when speaking to a group of people. You can inoculate yourself from this by videotaping yourself giving an opening statement, or examining a pretend witness. Videotape mock trials. Review, adjust, and do it again. Television reporters are good at their delivery because they've seen themselves mess up a hundred times and have fixed the quirks.

c) Body Position. You communicate confidence in your belief of your client's claims through your body position and hand gestures. Become familiar with what body positions feel powerful, what hand gestures seem helpful. Videotape and adjust.

d) Voice. So much power and information is communicated through our voice. You would do well to mimic the vocal performance of the best voices in television and radio news. They are subtly musical and authoritative.

Litigation is communication and performance. Learn these rhetorical techniques and practice them as you would any other litigation technique.

9) START A NEW CHAPTER IN YOUR CAREER BY WATCHING, LISTENING TO, AND MIMICING THE BEST COMMUNICATORS

The beauty of infusing the TV journalist's techniques into your own practice is that there are free classes at your fingertips every hour of every day of the week:

a) Watch TV news with your new insight into tricks of the trade and best practices. See what you can integrate into your own practice. You can find examples of excellent TV journalism in almost every medium-sized and large market, and in the national networks. CBS's Sunday Morning is a program with reliably excellent TV journalism.

However, TV is not the only place you'll see such techniques in action:

b) Listen to NPR—it's some of the best radio journalism in the world and follows most of the concepts above;

c) Listen to TED talks (there is a TED app). If you can learn how to speak like the TED talkers, you will be among the best speakers in the world;

d) Listen to professional speakers like Anthony Robbins. Anyone who can talk for hours on end without notes, convey worthwhile content, and remain engaging is worth emulating.

e) Watch the best attorneys in your community conduct hearings and trials. However, be prepared to critique those who don't know how to integrate TV journalism concepts into their legal practice. Most lawyers don't know these techniques!

An evacuation order is still in place for families near the factory. An emergency shelter is open at the middle school. Fire officials hope to be able to return families to their homes tomorrow morning. In the meantime, officials expect to spend the rest of the night searching for survivors-- and clues to the cause of the explosion that shook this town to the core. Live in Henderson, I'm Chip Muller, WRAL-TV news.