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Indiana Law Blog Newsletter

Thank you for subscribing to the ILB Newsletter. Invite your friends and colleagues to sign up to receive this free weekly newsletter, emailed every Monday morning. The issues are intended to bridge the gap between the former **Indiana Law Blog** and its anticipated replacement (more about which will be coming later). Because it is a weekly, the **ILB Newsletter** (unlike the blog) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and provide some depth on news you may have had questions about. Because it is a newsletter, length will be limited to what I believe the normal reader can tolerate. (BTW, feedback and suggestions are encouraged - send to ilb.newsletter at indianalawblog.com.)

Holiday Schedule: The **ILB Newsletter** will publish *only twice* in November, and twice in December. This issue is the second and last for November; the December publication dates will be Dec. 4th and Dec. 18th. See you then!

Opiod story is being told in obituaries

Some quotes from a powerful Oct. 19th story in the Columbia Journalism Review:

> Stories about the opioid crisis aren't just being told in expansive features and smartly reported articles. They're being told in the obituaries. They carry the most weight across the huge swaths of the country that are near-news deserts, like southwest Michigan, where the Jonatzkes live. In these places, there aren't any deeply reported local stories about heroin use. But there are obituaries. Lots of them. * * *
>
> These obituaries track the devastating human cost of a modern-day plague, challenge the stigma of addiction, and build a case for better public policy and social services. In some cases, the person who died specifically requested that their story be told honestly. * * *
>
> In 1989, the Chicago Tribune published a story about how newspapers were split on whether, in the AIDS era, it was important to publish a cause of death in an obituary. If it wasn't mentioned, "a good obit writer" left clues so that a discerning reader could figure it out, according to the story. It noted that the Tribune itself didn't require a cause of death in its obituaries, but when it appeared, it was often AIDS. That was because "some members of the homosexual community have encouraged friends and family to acknowledge AIDS as a cause of death, in order to de-mystify the disease." * * *

> OBITS HAVE LONG SERVED as our "collective memory," reflecting what our society prizes and what it abhors. As recently as the 1950s, cancer was unmentionable in obituaries. * * *
>
> Today, another public health crisis shows no signs of letting up. About 59,000 people died of overdoses last year, a 19-percent increase over the previous year, making overdoses the leading cause of death for Americans under 50. Many grieving families feel that honesty is their first and best weapon. "Silence = Death," as the old slogan goes.

Some ILB readers may recall the much-awaited Oct. 7, 2014 Indiana Supreme Court decision in *Evansville Courier & Press and Rita Ward v. Vanderburgh County Health Dept*,, holding that certificates of death are public records, where Justice Massa wrote:

> This case presents the issue of whether the certificates of death that doctors, coroners, and funeral directors file with county health departments pursuant to Indiana Code chapter 16-37-3 are public records that a county health department must provide public access to under the Indiana Access to Public Records Act. We believe they are, and therefore we reverse the trial court.
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> Death Certificates Are Public Records and May Be Freely Obtained from the County Health Department.
>
> Appellants argue the trial court's ruling was erroneous because (1) although the Department claims it does not have the requested records, Indiana Code section 16-37-3-3 requires the Department to maintain a copy of each death certificate filed, and (2) those death certificates are "public records" subject to APRA and not covered by any statutory exemption. We agree.
>
> A. County Health Departments Must Keep a Copy of Each Death Certificate Filed. * * *
>
> B. Death Certificates Are Public Records for the Purpose of APRA.
>
> Appellants contend death certificates, including the cause of death information thereupon, are public records and therefore subject to APRA, which provides: "Any person may inspect and copy the public records of any public agency during the regular business hours of the agency." Ind. Code § 5-14-3-3(a) (2010 & Supp. 2013). * * *
>
> In our society, death is an intimate and personal matter. We recognize that public disclosure of the details of a decedent's death may cause pain to his family and friends. We are also mindful of the importance of open and transparent government to the health of our body politic. Our General Assembly has considered these competing interests and, insofar as we can determine, concluded that the public interest outweighs the private. Indeed, in recent history, it has rejected three bills that would have exempted death certificates from APRA. See H.B. 1067 § 11, 114th Gen. Assem., 2nd Reg. Sess. (Ind. 2006); H.B. 1551 § 9, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005); H.B.

1540 § 8, 113th Gen. Assem., 1st Reg. Sess. (Ind. 2003). Even if we wished to rebalance the scales, it is beyond our power to do so.

Conclusion. We reverse the trial court and remand this case for entry of summary judgment in plaintiffs' favor.

The *Indianapolis Star* published this long Oct. 8, 2014 story - a few quotes:

"The court got it right," said Steve Key, executive director of the Hoosier State Press Association.

"It's a victory for the public because now individuals can either do research to find out about family histories and whether there's a propensity for heart disease or cancer in a family," Key said. "And communities can check records to see if there's a correlation between cancer deaths and abandoned or closed manufacturing plants or possibility contamination of the water supply."

The Indiana Supreme Court overturned lower court decisions in favor of the Vanderburgh County Health Department, which had deemed the records – at least those that list the cause of death – as confidential. It also claimed not to have records to provide because it had no paper copies and instead maintained the information in a computer database. * * *

The decision distinguished between three types of death records. The first is the death certificate, which lists a cause of death and is filed with the county health officials by a doctor or funeral home attendant. Local health officials then use that information to create a permanent record that does not include the cause of death. Finally, the health department must provide a certification of death to anyone with "a direct interest in the matter" for personal or property rights issues.

At issue in the case were the first two types of records.

"We're happy that Justice Massa and the court saw what we saw: That we were disputing two different sets of records," he said. "And the intent of all the legislation dating back to the 1880s was public safety – to make the cause of death available to researchers and others. It makes perfect sense to us that public records should be available to the public."

A year later, the significance of the decision was emphasized again, in an Oct., 2015 Kokomo Tribune editorial:

This decision is important because of the effect it can have on entire communities.

"Cause of death may not be pleasant to think about," wrote Bob Zaltsberg, editor of the Bloomington Herald-Times, in a column we published last year. "But access to the information can lead to understanding health risks in a family; can hold authorities accountable in the case of a high profile death; or can point to serious public health or environmental risks in a community."

To use an example that hits close to home, if Howard County Coroner Jay Price hadn't recognized the trend of high-volume opiate deaths in our community, the Wagoner Medical Clinic might still be in the business of poisoning our citizens. While the revelation of such information may be painful for a grieving family, public culpability in these matters is essential to the health of our state.

CA 7: Ban on women exposing breasts in public doesn't violate First Amendment or equal protection clause

So holds a 2-to-1 panel decision of the U.S. Court of Appeals for the 7th Circuit (*Tagami v. City of Chicago*), decided Wednesday; the majority opinion is by Judge Sykes, joined by Judge Easterbrook, and the dissent is by Judge Rovner. (h/t Eugene Volokh) Some quotes from the opinion:

> SYKES, Circuit Judge. Sonoku Tagami celebrated "GoTopless Day 2014" by walking around the streets of Chicago naked from the waist up, though wearing "opaque" body paint on her bare breasts. She was cited for violating a Chicago ordinance prohibiting public nudity. She responded with this lawsuit alleging that the ordinance is unconstitutional. She contends that banning women from exposing their breasts in public violates the First Amendment's guarantee of freedom of speech and amounts to an impermissible sex-based classification in violation of the Fourteenth Amendment's Equal Protection Clause. The district court dismissed the suit and we affirm. * * *
>
> ROVNER, Circuit Judge, dissenting. As in many First Amendment cases, the speech at issue here is that which offends many, makes many others uncomfortable, and may seem trivial and unimportant to most. The First Amendment protects not just the speech which a majority of people find persuasive and worthwhile, but to the contrary, its protections are most essential when the speech is that with which most take offense. See, e.g., *Rankin v. McPherson* , 483 U.S. 378, 387 (1987). This is the caveat that must be emphasized beyond all else in this case. * * *
>
> There could not be a clearer example of conduct as speech than the one here. Tagami was not sunbathing topless to even her tan lines, swinging topless on a light post to earn money, streaking across a football field to appear on television, or even nursing a baby (conduct that is exempted from the reach of the ordinance). Her conduct had but one purpose —to engage in a political protest challenging the City's ordinance on indecent exposure. Tagami engaged in the paradigm of First Amendment speech —a public protest on public land in which the participants sought to change a law that, on its face, treats women differently than men. It is difficult to imagine conduct more directly linked to the mes-sage than that in which Tagami engaged. The ordinance prohibits bare (female) breasts; Tagami bared her breasts in protest. * * *

> Whether out of reverence or fear of female breasts, Chicago's ordinance calls attention to and sexualizes the female form, see *Free the Nipple-Fort Collins*, 237 F. Supp. 3d at 1133, and imposes a burden of public modesty on women alone, with ramifications that likely ex-tend beyond the public way. Women, like men, take their bodies with them everywhere, and when the law imposes a different code of dress on women, when it requires them to cover up in a way that men need not, it is quite possible that women will be treated differently—in the workplace, in the public square, on the subway—precisely because they are required to dress differently. * * * In any case, it strikes me as open to question whether there exists a broad consensus in support of the notion that a woman appearing bare-chested in public constitutes indecent exposure: only three states (**Indiana**, Tennessee, and Utah) have statutes clearly treating the exposure of the female breast as indecency, and section 213.5 of the Model Penal Code is limited to public exposure of the genitals (male or female). * * *
>
> The question before us is not whether Tagami should prevail but whether she *might* prevail after a full development of the record. Tagami has presented us with potentially viable First Amendment and sex discrimination claims. Like any other litigant with a viable case, she should be permitted to develop the record in support of her claims, and the City in turn should be required to present evidence to justify its actions. I respectfully dissent.

Here is a Feb. 22, 2017 Denver Post story re the Colorado case cited by Judge Rovner. It is headed *"Federal judge orders Fort Collins to 'free the nipple' — from city regulation: Judge ruled the city ordinance discriminated against women and perpetuated sexualization of breasts."*

And here is the Nov. 13, 2014 Chicago Tribune story (with video) reporting on the initial filing of the federal lawsuit in *Tagami*.

Indiana has had its own topless case, *C.T. v. State* (9-16-2010). The Court of Appeals panel elected not to hold oral argument and initially designated its opinion as Not for Publication, but later reclassified it as For Publication, upon a grant of *C.T's* motion. Transfer was denied by the Supreme Court. An *Indianapolis Star* story at the time, which is no longer available online, reported in part:

> The 14th Amendment's equal protection clause says no state "shall deny to any person within its jurisdiction the equal protection of the laws."
>
> The girl's appointed public defender, Joel M. Schumm, argued Indiana's nudity law was unfair because it covers the nipples of women, but not men. * * *
>
> Schumm said he was disappointed with the appeals court ruling and its decision not to hear oral arguments in the case. He will discuss with the girl the possibility of moving the case to the Indiana Supreme Court.

The ILB had a Sept. 16, 2010 post on the appeal, which raised only an equal protection claim--no First Amendment claim had been raised in the trial court. A quote from the

summary in Schumm's initial brief:

> The public nudity statute violates the Equal Protection Clause by prohibiting the display of female nipples while allow men to bare their nipples without limitation. Although the burden is on the State to offer an "exceedingly persuasive" justification for disparate treatment, here the State offered no argument, much less any evidence, to justify treating women differently from men. Moreover, the justifications offered by other courts, such a maintaining public sensibilities, are based on long-standing sexual stereotypes and do not serve a legitimate government interest.

Here is a quote from the panel's NFP opinion, written by Judge Bradford:

> In the end, C.T. would have us declare by judicial fiat that the public display of fully-uncovered female breasts is no different than the public display of male breasts, when the citizens of Indiana, speaking through their elected representatives, say otherwise. This we will not do. We conclude that Indiana's public nudity statute furthers the goal of protecting the moral sensibilities of that substantial portion of Hoosiers who do not wish to be exposed to erogenous zones in public.

Supreme Court: Whistleblower protection statute does not apply to the State itself because the legislature did not expressly say so

In a Supreme Court opinion Nov. 2nd, *Esserman v. IDEM*, Justice Slaughter writes for the 4-1 majority:

> Plaintiff seeks damages under Indiana's False Claims and Whistleblower Protection Act for what she claims was a retaliatory discharge by her employer, the Indiana Department of Environmental Management. * * *
>
> We adhere to *Pulaski 's* determination that a statute does not waive immunity unless that intention is "clearly evince[d]" , creating a presumption against waiver of sovereign immunity absent statutory language to the contrary. * * *
>
> We will thus find a waiver of sovereign immunity only when the statute at issue contains an unequivocal affirmative statement that clearly evinces the legislature's intention to subject the State to suit for the specific statutory claim asserted. * * *
>
> As we have said, we will not presume the legislature intended the Act to apply to the State. The Act must clearly evince the legislature's waiver of the State's sovereign immunity by providing an unequivocal affirmative statement of the legislature's intention to allow this statutory cause of action against the State. The Act does not do so here. The statute [IC 5-11-5.5-8], while clearly stating that an employee may sue her employer, does not name the State (or one of its agencies or officials) as a permissible whistleblower defendant. Had the legislature intended to subject the State to whistleblower liability, it could

have expressed that intention any number of ways. It could have said , for example, that state employees are eligible plaintiffs under Section 8; or defined "employer" to include the State ; or authorized remedies that are unique to State employees to make clear they, too, are among those entitled to sue. This is not an exhaustive list, to be sure . But the legislature did none of these things — or anything else that would "clearly evince" or "unequivocally express" its intention to waive State immunity for whistleblower claims. * * *

David, J., dissents with separate opinion.

While I appreciate Justice Slaughter's thoughtful majority opinion, I must respectfully dissent. In my view, the term "employer" is clear and unambiguous. I believe its plain meaning includes the State. * * *

While I agree with the majority that the legislature could have defined employer in this section to include the State, I do not believe that not including such a definition serves to exclude the State looking at the plain language here. There is no limiting language indicating any exceptions or carve outs for the State or any other entity that has employees. Employer is not a term of art and its plain meaning is broad and easily understood. Thus, I believe that Esserman could bring a claim pursuant to the whistleblower statute.

Here is an Oct. 20th story by Kara Kenney of WRTV6, aired before the Supreme Court opinion.

Federal appeals courts rapidly being restyled: Nearly half of appeals judges are eligible for senior status

The Sunday, Nov. 12th NY Times has a lengthy front-page story by Charlie Savage, headed *"Trump Is Rapidly Reshaping the Judiciary. Here's How."* It begins:

WASHINGTON — In the weeks before Donald J. Trump took office, lawyers joining his administration gathered at a law firm near the Capitol, where Donald F. McGahn II, the soon-to-be White House counsel, filled a white board with a secret battle plan to fill the federal appeals courts with young and deeply conservative judges.

Mr. McGahn, instructed by Mr. Trump to maximize the opportunity to reshape the judiciary, mapped out potential nominees and a strategy, according to two people familiar with the effort: Start by filling vacancies on appeals courts with multiple openings and where Democratic senators up for re-election next year in states won by Mr. Trump — like **Indiana**, Michigan and Pennsylvania — could be pressured not to block his nominees. And to speed them through confirmation, avoid clogging the Senate with too many nominees for the district courts, where legal philosophy is less crucial.

> Nearly a year later, that plan is coming to fruition. * * * Republicans are systematically filling appellate seats they held open during President Barack Obama's final two years in office with a particularly conservative group of judges with life tenure. Democrats — who in late 2013 abolished the ability of 41 lawmakers to block such nominees with a filibuster, then quickly lost control of the Senate — have scant power to stop them.

Another Savage, this one David G. Savage, long-time Supreme Court reporter for the LA Times, had a report on district court appointees on Nov. 10th that began:

> Brett J. Talley, President Trump's nominee to be a federal judge in Alabama, has never tried a case, was unanimously rated "not qualified" by the American Bar Assn.'s judicial rating committee, has practiced law for only three years and, as a blogger last year, displayed a degree of partisanship unusual for a judicial nominee, denouncing "Hillary Rotten Clinton" and pledging support for the National Rifle Assn.
>
> On Thursday, the Senate Judiciary Committee, on a party-line vote, approved him for a lifetime appointment to the federal bench. Talley, 36, is part of what Trump has called the "untold story" of his success in filling the courts with young conservatives.

This op-ed in the Nov. 9th NY Times, written by Shira A. Scheindlin, a former federal district court judge, asks the reader to "consider some of the least qualified and most bizarre of his selections."

Oral arguments scheduled before the Indiana Supreme Court the remainder of November, 2017

Tuesday, Nov. 21st:

- 9:00 AM - ***NIPSCO Indust. Group v. Northern Ind. Pub. Serv. Co.*** (93A02-1607-EX-01644) (Appeal from agency) When a gas utility filed its fourth rate petition for updates to its seven-year plan designating improvements to transmission, distribution, and storage systems, some of the utility's industrial customers intervened in the proceeding and objected to the fourth petition. The Indiana Utility Regulatory Commission approved the utility's fourth petition. The customers appealed, and a divided Court of Appeals panel affirmed. *NIPSCO Indus.*

Grp. v. N. Indiana Pub. Serv. Co., 78 N.E.3d 730 (Ind. Ct. App. 2017). The customers have petitioned the Supreme Court to accept jurisdiction over the appeal.

- 9:45 AM - ***Aaron Lee Fansler v. State of Indiana*** (27S02-1710-CR-00672) (Grant) Aaron Fansler was arrested at a motel by officers conducting an undercover drug investigation. Following a jury trial in the Grant Circuit Court, Fansler was convicted and sentenced on drug charges. The Court of Appeals affirmed, concluding, among other things, that the unrecorded incriminating statements Fansler made in the motel room were inadmissible under Evidence Rule 617, but the error in admitting the statements was harmless. *Fansler v. State*, 81 N.E.3d 671 (Ind. Ct. App. 2017), *vacated*. The Court has granted a petition to transfer and assumed jurisdiction over the appeal.

Thursday, Nov. 30th:

- 9:00 AM - ***Town of Ellettsville, Indiana Plan Commission and Richland Convenience Store Partners, LLC v. Joseph V. DeSpirito*** (53S01-1709-PL-00612)(Monroe) The town's plan commission approved a landowner's amended subdivision plat that would allow relocation of a sewer easement, but the neighbor being served by the easement sought judicial review. The Monroe Circuit Court granted the neighbor summary judgment, concluding the commission erred by approving the amended plat when the neighbor had not consented to the easement relocation. The Court of Appeals reversed, remanded with instructions to grant the commission and the landowner summary judgment, and adopted the legal standard for relocating easements in Restatement (Third) of Property (Servitudes) § 4.8 (2000). *Town of Ellettsville v. DeSpirito*, 78 N.E.3d 666 (Ind. Ct. App. 2017), *vacated*. The Supreme Court has granted transfer and has assumed jurisdiction over the appeal.

The briefs and lower court opinions may be accessed via the links above. Webcasts of the Supreme Court's oral arguments are available here.

Recommended this week

- ***The Pocket App*** - A "read it later" service that lets you save articles as you come across their links in newspapers, twitter, etc., and read them later in a clean, uncluttered view. I use it constantly. *Lifehacker* review.

- ***The Files App***, which appeared with iOS 11, turned out to be a godsend, once I'd figured out what it does. For starts, it can list and access the content of all of your cloud services - Dropbox, Box, Google drive, iCloud, etc., and allow you to move documents between these services with a flick of the finger! See this article in *MacRumors*.

- *Will Bezos ignore state's social record?* Commentary by Mickey Mauer in Oct. 7th *IBJ* on Indiana's chances "to land the $5 billion Amazon second headquarters,

known as HQ2."

- **MOOCs, MOOCs, MOOCs!** Massive Open Online Courses - here is a clearinghouse, Class Central.
