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IN THE COURT OF APPEALS OF INDIANA

Randy C. Axelrod, M.D.,
Appellant-Plaintiff,

v.

Anthem, Inc. and all of its affiliates, WellPoint, Inc., and Amgen, Inc.,
Appellees-Defendants.

April 13, 2021

Court of Appeals Cause No.
19A-PL-1171

Appeal from the Marion Superior Court

The Honorable Cynthia J. Ayers, Judge

Trial Court Cause No.
49D04-0710-PL-042057

Shepard, Senior Judge.

Statement of the Case

[1] Randy C. Axelrod, M.D., a former executive of WellPoint, Inc., sued Anthem Inc. and all of its affiliates, WellPoint, Inc., and Amgen, Inc. after his employment was terminated. He raised claims of wrongful discharge and six other grounds for relief.

[2] Pre-trial activity featured nine years of trial court hearings, dozens of depositions, and more than a million documents. The jury trial ran twenty days, and produced a quick verdict for the defense.

[3] Axelrod's motions for mistrial or new trial were denied prior to entry of final judgment, and his post-trial motions were likewise denied. Axelrod now appeals, contending the trial court misapplied Trial Rule 60(B)(3). We affirm.

Issues

[4] Axelrod presents three issues, which we restate as:

I. In its denial of relief, did the court misapply Rule 60(B)(3)?

II. Did collective misconduct by counsel for WellPoint and Amgen result in a jury verdict that was unfairly procured?

III. Did the trial court abuse its discretion by denying Axelrod's Trial Rule 60(D) motion for post-trial discovery?

Facts and Procedural History

The Parties

[5] Anthem, an Indianapolis-based health care insurer, acquired Blue Cross and Blue Shield of Virginia in 2003. Anthem hired Axelrod that year as Vice President and General Manager of Healthcare Management for its Southeast Region, covering

Virginia. He reported directly to Tom Snead, the President of Anthem's Southeast Region. WellPoint, another health care insurer, merged with Anthem in 2004 and the post-merger entity was known as WellPoint. Axelrod continued to report to Snead in Virginia. His responsibilities included Virginia, Georgia, and the Southeast Region.

[6] In 2005, Snead and Dr. Sam Nussbaum, WellPoint's Executive Vice President and Chief Medical Officer, nominated Axelrod as a potential successor to Nussbaum, though he later was eliminated as a candidate. That same year, WellPoint acquired New York-based Empire Blue Cross and Blue Shield. WellPoint then created an East Region which covered Virginia, Georgia, Maine, New Hampshire, Connecticut, and New York.

[7] WellPoint proceeded to fill various new management positions. Snead left WellPoint at the time of the merger. Dr. Michael Stocker, previously Empire's CEO, became WellPoint's East Region CEO. Gloria McCarthy, a former COO for Empire, was selected as COO of WellPoint's East Region and reported directly to her former colleague Dr. Stocker. Both McCarthy and Stocker were based out of New York. Tom Byrd, Senior Vice President of WellPoint in Virginia, was Axelrod's colleague.

[8] McCarthy selected her team of six executives for the East Region. There were two candidates for Vice President of Healthcare Management: Axelrod and Dr. Alan Sokolow. Byrd and Snead recommended Axelrod, and McCarthy had worked with Sokolow at Empire. McCarthy selected Axelrod and she was his direct supervisor.

His responsibilities were to integrate the newly created East Region, which he began undertaking in January 2006.

[9] As for Amgen's connection to this litigation, it is a pharmaceutical company that manufactures various drugs including one named Aranesp. WellPoint and Amgen conducted business regarding clinical studies as well as products that could be administered to WellPoint's members.

Axelrod's Involvement in Development of Drug Fee Schedule

[10] In early 2006, Axelrod, Tim Miller, and others at WellPoint developed a special fee schedule for various cancer-related drugs. These included Aranesp, and Procrit, a similar drug manufactured by Ortho-Biotech, an Amgen competitor. The fee schedule adjusted the reimbursement differential for the two drugs and encouraged physicians to prescribe Procrit instead of Aranesp. Axelrod discussed the reimbursement policy with WellPoint senior leaders including Nussbaum and McCarthy. WellPoint adopted the reimbursement policy in May 2006, also deciding to bar coverage for Aranesp unless an insured patient was allergic to Procrit.

[11] Representatives from Ortho-Biotech approached Axelrod, asking him to testify in an injunction request they sought in an anti-trust lawsuit against Amgen concerning Aranesp and Procrit. In May 2006, WellPoint agreed that Axelrod could testify

during Ortho-Biotech's case about WellPoint's pricing differentials, and it provided him with an attorney.[1]

Axelrod's Job Performance

[12] During the same timeframe, and within weeks of selecting him for the position, McCarthy began to complain about Axelrod's job performance and considered terminating him. She communicated such with her human resources representative Caroline Koziatek. Koziatek and her superior Randall Brown, former Executive Vice President of Human Resources for WellPoint, advised Stocker and McCarthy to give Axelrod more time. For his part, Brown was concerned about possible adverse reaction by those in Virginia to Axelrod's termination, because it would result in a lack of balance in executive representation in the East region.

[13] Two members of Axelrod's WellPoint team, Sokolow and Dan Finke, expressed concerns to McCarthy about Axelrod's performance. McCarthy followed up with Axelrod about those concerns, including his failure to fly to New York for her meetings.

[14] For his part, Axelrod consulted with Nussbaum, Snead, and Byrd in early 2006 about difficulties working with McCarthy, and he submitted his resume to a headhunter in February 2006. At that time, Nussbaum began mentoring him about a

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[1] Axelrod testified in favor of the fee schedule he developed in response to Amgen's practices. Amgen settled with Ortho-Biotech and pleaded guilty to illegal kickbacks designed to entice health care providers to use its drugs. With that "leveraging" Axelrod procured a rebate for WellPoint consumers from Amgen for one of its high-profile drugs. Axelrod testified about Amgen's illegal kickbacks in the anti-trust action. Amgen's Appellee's Appendix Vol. 3, pp. 176-77.

more productive working relationship with McCarthy, stressing the importance of attending meetings with her in person in New York.

[15] McCarthy contacted Byrd, expressing her high level of frustration with Axelrod's performance, but agreeing to give him more time. By late April 2006, though, McCarthy rated Axelrod's potential for termination as high.

Axelrod's Termination

[16] McCarthy called Axelrod on June 6, 2006 to discuss his job performance. He knew she was unhappy and later claimed she was unspecific and had not asked him to do anything differently. Byrd recalled Axelrod expressing frustration with McCarthy during this period. After the phone call, McCarthy decided to proceed with his termination. On July 10, 2006, she traveled to Virginia to inform him personally of her decision. Though McCarthy testified that the decision was hers alone and based on his performance, Axelrod contended that she was required to obtain approval from senior management.

[17] During these same months, Amgen had learned of WellPoint's differential reimbursement policy. While Axelrod was still employed, Jeff Baker, Amgen's National Account Director, set up a meeting with him. On the advice of counsel, that meeting was delayed until August 7, 2006 because Axelrod was scheduled to testify in the anti-trust action. Baker testified that Amgen first learned about Axelrod's termination on July 11, 2006, when confirming the meeting with him. For years thereafter, Amgen sought to change WellPoint's policy, but it remains in place.

[18] None of the deponents in this lawsuit were aware of any contact between Amgen and WellPoint about Axelrod's termination, so Axelrod relied on circumstantial evidence at trial. For example, a statement was made by Amgen's Jeff Baker to Mark Bowker, who had worked closely with Axelrod on the Aranesp decisions. Baker said "[Bowker] better watch himself or he'll find himself out of a job just like Randy Axelrod." Tr. Vol. 8, p. 185. Bowker's position was eventually eliminated.

[19] Axelrod also claimed that an Amgen PowerPoint slide demonstrated its role in his termination. On the final slide, this question and answer were displayed. "What is Amgen doing to reverse this decision? . . . Dr. Randy Axelrod is no longer with WellPoint." Appellant's App. Vol. 2, pp. 120-121. Next, Axelrod designated email correspondence from Baker to a colleague in which he stated "[t]his work stuff is beginning to take it's [sic] toll on me. Hopefully that will get better now that the evil medical director was ousted (Dr. Axelrod.)". *Id*. at 121; Appellant's App. Vol. 17, p. 222; Ex. P-109; Ex. Vol. 1, p. 184.

[20] Axelrod's firing set in motion certain termination steps. Though he was an employee at will, a contract known as the Executive Agreement governed his last position at WellPoint. The Executive Agreement provided contingencies for separation, including a severance benefit of approximately $400,000 if his employment was terminated other than for cause, in exchange for execution of a release of any claims against WellPoint and non-compete and non-solicitation agreements. Ex. P-1, Ex. Vol. 1, pp. 12-15.

[21] On the day of his termination in July 2006, Koziatek presented Axelrod with a release and waiver so he could obtain severance benefits. Axelrod took this to his

attorney for review and later declined to sign on grounds (1) it required him to affirm a false statement that he was resigning instead of being terminated, (2) that WellPoint refused to clarify the scope of the non-compete, and (3) that he would have to release all claims he might have. There was miscommunication between WellPoint and Axelrod about whether he was vested in his pension. Axelrod eventually received a pension benefit package and deposited the check for these benefits without claim of underpayment.

Axelrod's Complaint and Initial Trial Court Proceedings

[22] Axelrod filed his initial complaint on October 3, 2007, naming Anthem and WellPoint as defendants, and asserting five legal claims. He filed a separate action in Virginia against Amgen in March 2008, but that action was dismissed. In June 2008, he added Amgen to this Indiana litigation.

[23] The defendants moved for summary judgment in August 2014, and a hearing occurred in December. On April 15, 2015, the court granted WellPoint summary judgment on some claims, and denied summary judgment to Amgen. The counts remaining for trial against Anthem and WellPoint were breach of contract, good faith and fair dealing,[2] and civil conspiracy. The counts against Amgen were tortious interference and civil conspiracy.

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[2] Axelrod alleged that WellPoint engaged in constructive fraud by telling him that it consented to his testimony against Amgen when it did not, thereby inducing Axelrod to rely on that alleged misrepresentation to his detriment. *See* Appellant's App. Vol. 2, p. 126. The trial court found that "the facts surrounding this consent and testimony are governed by Virginia law [which] does not recognize a constructive fraud claim based on the duty of good faith and fair dealing when there is a binding contract between the parties. *See Ward's Equip.[Inc. v. New Holland North America,*

Discovery Matters

[24] The parties then "were engaged and immersed in a prolonged and complex discovery battle." Appellant's App. Vol, 2, p. 144. In the trial court's words,

> Due to intense disagreements about privileged information, the Court conducted an in-camera review of more than 57,000 documents after they were culled, pursuant to a Court order by a private E-discovery law firm, from thousands more documents. The parties shared the costs of that expense. Throughout the discovery process, more than one million (1,000,000) items were reviewed and/or exchanged.

Id.

[25] Axelrod filed approximately eight motions to compel or motions for sanctions against WellPoint and Amgen. Some were granted, and others were withdrawn upon the parties reaching agreement.

[26] For example, the court conducted an in camera review of Amgen's privilege log and on April 14, 2014, ordered Amgen to produce three relevant unprivileged documents. One was a communication about Axelrod, on which Amgen listed Neil Bair as both the author and the custodian. The court referred to the Bair documents as "two additional (2) emails written by Neil Bair and addressed to unknown recipients from July 14, 2006," Appellant's App. Vol. 4, p. 62, but Amgen characterized them as documents. Issues arose about the accuracy of Amgen's

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Inc.], 493 S.E.2d[516,] 520 [(Va. 1997) ("when parties to a contract create valid and binding rights, an implied covenant of good faith and fair dealing is inapplicable to those rights.")]. However, there are genuine issues of material fact as to whether the contract was valid due to [Axelrod's] allegations regarding the non-competition covenant." *Id.* at 126-27.

privilege log due to those differing characterizations, and Amgen later claimed the author could not be determined. Bair testified that he no longer remembered the documents and could not identify whether he was the author or custodian.

[27] Additional controversy developed involving Amgen's claims about whether the meta-data at issue was in Amgen's possession or if it could be produced, and about Amgen's production of emails to or from Leonard Schaeffer, a former WellPoint CEO and current member of Amgen's Board of Directors.

[28] Another example of the discovery disputes occurred just prior to trial, on June 29, 2017, when the court ordered Amgen to produce electronic evidence such as the authors, recipients, and dates of creation, for documents known as "Executive Briefings." Appellant's App. Vol. 8, p. 94. Axelrod contends that Amgen did not comply. However, the trial court found in its post-trial decision of April 29, 2019 that Amgen produced those documents "a few days prior to trial." Appellant's App. Vol. 2, p. 147.

[29] WellPoint produced a document (Exhibit P-595) that included a May 2006 email from Axelrod to McCarthy, Byrd, and others about the anti-trust case against Amgen. At trial, McCarthy testified that she had not read the email, and there was no electronic history provided to Axelrod about this email.

Contact with Witnesses

[30] Axelrod sought to compel testimony by Christine Miller, a former WellPoint employee, as well as Snead, Byrd, and approximately seven others, many of whom were outside the trial court's jurisdiction. Initially, the first three voluntarily agreed

to testify, and Byrd contacted Axelrod's counsel to seek accommodation of his schedule. On June 16, 2017, WellPoint moved to quash Christine Miller's subpoena, but was denied because WellPoint's counsel was unauthorized to represent her.

[31] On June 29, 2017, the court denied Axelrod's motion to enforce thirteen foreign subpoenas, citing failure to comply with Indiana Trial Rule 45(E),[3] and its own order of June 9, 2016. In it, the court had instructed the parties to apply with the court "with cause shown [for authorization of a subpoena on a witness in another state or in a foreign country] to the extent [it was] in accordance with and permitted by the law of *that state*."[4] *Id.* 201-02. In its June 29, 2017 order, the court found that Axelrod had done the reverse. Appellant's App. Vol. 8, p. 87. He had sought to issue the foreign subpoenas first, later asking the court to enforce them. *Id.* The court concluded that "the subpoenas must be quashed as improper and illegal." *Id.* It further found that Axelrod was "seeking live testimony during the trial from his list of witnesses instead of [] the ordinary subpoena duces tecum-type video. depositions." *Id.*

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[3] Indiana Trial Rule 45(E) provides that "At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of court of the county in which the action is pending when requested . . . . A subpoena may be served at any place within the state; and when permitted by the laws of the United States, this or another state or foreign country, the court upon proper application and cause shown may authorize the service of a subpoena outside the state in accordance with and as permitted by such law."

[4] Both Indiana and Virginia have adopted the Uniform Interstate Depositions and Discovery Act. See Ind. Code Chapter 34-44.5-1 (2010); § 8.01-412.10 Va St. 2018. Indiana Code section 35-37-5-5 (2004) provides for summoning witnesses from another state to testify in criminal matters in Indiana. However, there is no corresponding provision applicable to civil matters.

[32] WellPoint's counsel provided the order to Bud Schill, WellPoint's Virginia counsel, on July 2, 2017. Two days later, at Schill's request, Byrd emailed copies of the court's order to Miller and Snead. Schill advised Byrd of a potential attempt at legal retaliation against him, Christine Miller and Snead. The three vacillated on their decisions about testifying, but Christine Miller ultimately did.

[33] Axelrod argued that WellPoint had tampered with its witnesses by supplying the court's order to his potential witnesses. On July 11, 2017, WellPoint's counsel denied any knowledge of contact with Christine Miller, Snead, or Byrd, stating, "We can say unequivocally none of us have talked to any witnesses or discouraged anybody from testifying." Tr. Vol. 6, p. 152. The following day, after WellPoint's counsel remembered such contact with the witnesses, WellPoint's counsel admitted sending a copy of the order to Schill for forwarding to Byrd.

The Trial

[34] On July 5, 2017, the jury trial began and lasted twenty days, with a defense verdict after forty-three minutes of deliberation.[5] On July 31, 2017, Axelrod filed a motion for mistrial or for a new trial. The trial court heard the motions in February 2018. WellPoint and Amgen moved for entry of judgment on the jury verdict, and it was entered on March 29, 2018.

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[5] Axelrod says in his brief that the verdict was returned after approximately twenty-six minutes, *see* Appellant's Br. p. 9; however, the trial court's order states that the verdict was returned after forty-three minutes, see Appellant's App. Vol. 2, p. 157. Suffice it to say, the verdict was returned very quickly.

[35] In April 2018, Axelrod filed a motion to correct error and/or a motion for relief from judgment, as well as a motion for post-trial discovery, for supplemental relief, and for a hearing. A hearing on all pending motions and responses was continued until January. The trial court's detailed order denying all relief sought by Axelrod was entered on April 24, 2019. Appellant's App. Vol. 2, pp. 142-164. Axelrod now appeals.[6]

Discussion and Decision

I. Indiana Trial Rule 60(B)(3)

[36] Axelrod contends that the trial court's various applications of Trial Rule 60(B)(3) separately and collectively amount to reversible error. Rule 60(B) allows a trial court to grant equitable relief at its discretion. *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65, 72 (Ind. 2006). Generally, we review claims of error under this rule for an abuse of that discretion. *Stonger v. Sorrell*, 776 N.E.2d 353, 358 (Ind. 2002). Because Axelrod argues that the court misapplied the law, however, we review his contentions de novo. *See Gonzalez v. Ritz*, 102 N.E.3d 910, 913 (Ind. Ct. App. 2018) (de novo review of law).

[37] In ruling on a Trial Rule 60(B) motion, the trial court is required to "balance the alleged injustice suffered by the party moving for relief against the interests of the winning party and society in general in the finality of litigation." *Chelovich v. Ruff &*

[6] We held oral argument on this appeal via Zoom on December 8, 2020. We appreciate counsel's flexibility in participating in an oral argument in this novel manner, and we commend counsel for their thorough presentation of the issues.

Silvian Agency, 551 N.E.2d 890, 892 (Ind. Ct. App. 1990). The Rule "affords relief in extraordinary circumstances which are not the result of any fault or negligence on the part of the movant." *Goldsmith*, 761 N.E.2d at 474.

[38] Axelrod raises allegations of fraud, misrepresentation, and misconduct by counsel for WellPoint and Amgen in all phases of trial. He asserts various instances of misconduct in the form of non-compliance with discovery orders; witness tampering; excessive sidebars and objections at trial; disingenuous statements to the trial court; and juror tampering.

[39] Rule 60(B)'s subsections are written in the disjunctive and the pertinent subsection provides as follows:

> (B) On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons:
>
> * * * *
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]

The Rule further provides that "[a] movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense." Thus, the meritorious claim or defense allegation is an additional requirement.

[40] Axelrod's allegations under (B)(3) focus on misconduct, and he challenges the court's application of the *Outback* analysis to those allegations. As we said in *University of Notre Dame v. Bahney*, 158 N.E.3d 809, 813 (Ind. Ct. App. 2020), *trans. pending*, where we applied *Outback*, "[a] plaintiff seeking relief for misconduct under

Rule 60(B)(3) must (1) show that the defendant engaged in misconduct, (2) show that the misconduct prevented the plaintiff from fully and fairly presenting [his] case at trial, and (3) make a prima facie showing that [he] has a meritorious claim." (citing *Cleveland v. Clarian Health Partners, Inc.*, 976 N.E.2d 748, 757 (Ind. Ct. App. 2012), *reh'g denied*, *trans. denied*.). The failure to show any one of the three makes it unnecessary to examine the others. *Cleveland*, 976 N.E.2d at 757.

[41] Therefore, walking through the analysis set out in *Outback* and the required showings under the rule, misconduct "can include both negligent and intentional violations of Indiana's discovery rules" or "can be based on a violation of the Code of Professional Responsibility, even if the conduct at issue does not violate the rules of civil procedure." 856 N.E.2d at 73. Next, "'[f]raud on the court' under the savings clause of Rule 60(B) and 'misconduct' under subsection (B)(3) both require a showing that the fraud or misconduct prevented the movant from fully and fairly presenting the movant's case." *Id*. at 85 (citing *Rocca v. Rocca*, 760 N.E.2d 677, 680 (Ind. Ct. App. 2002), *trans. denied*).

[42] The final requirement is the prima facie showing of a meritorious claim or defense. "This requires a showing 'that vacating the judgment will not be an empty exercise.'" *Id.* at 73. (quoting 12 *Moore's Federal Practice*, § 60.24[1] (3d ed. 1997)). The evidence must be such that it "will prevail until contradicted and overcome by other evidence." *Outback*, 856 N.E.2d at 73. Merit may be established by identifying evidence that, *if credited*, demonstrates that a different result would be reached if the case were retried. *Id*. at 81 (emphasis added). *Outback* further states that a

"'meritorious defense' [can] also [be] established by showing that the judgment was 'unfairly procured.'" *Id*.

[43] *Outback* makes clear that "the 'meritorious defense' requirement does not require a showing that a different result would have been obtained without the misconduct." *Id*. "[N]ew evidence does not have to be result altering to warrant a new trial on a Rule 60(b)(3) motion." *See id*. (quoting *Schultz v. Butcher*, 24 F.3d 626, 631 (4th Cir. 1994)). This is so because, "a litigant who has engaged in misconduct is not entitled to 'the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.'" *Outback*, 856 N.E.2d at 81 (citing *Seaboldt v. Pennsylvania R.R. Co.*, 290 F.2d 296 (3rd Cir. 1961) (quoting *Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521-22, 51 S. Ct. 501, 75 L. Ed. 1243 (1931)).

[44] Our Supreme Court's quotation of the Fourth Circuit's decision in *Schultz* is very helpful. *Schultz* involved a boating accident resulting in injury, and the withheld document was a Coast Guard accident report which was conclusive evidence of fault. The defendants possessed the report and knowingly withheld it, preventing the movant's ability to fairly present her case. Because the withheld evidence would have bolstered the defense and might have led to additional evidence supporting the report, which was favorable to the defense, a new trial was warranted.

[45] Axelrod relied heavily on *Outback* in support of his claims. In that dram shop case, after suffering a verdict of $39 million, Outback argued on appeal that a new trial was warranted due to attorney misconduct in discovery violations and failure to supplement discovery before and during the trial. Plaintiffs' counsel had failed to

disclose (1) the existence of a favorable witness in its response to interrogatories, (2) evidence that the witness had made a previous statement favorable to the plaintiffs, and (3) that the witness would testify inconsistently with her deposition testimony about the state of intoxication of a customer she served. Our Supreme Court held that the cumulative effect of the Rule 26 and 33 violations–inaccurate responses to interrogatories, failure to challenge the deposition testimony, failure to list the witness before calling her in their case-in-chief, failure to supplement discovery responses, and use of the testimony during closing argument–cumulatively amounted to misconduct producing a result that was unfairly procured. 856 N.E.2d at 81.

[46] Citing three separate passages in the trial court's order, Axelrod challenges the denial of his post-trial requests. He contends that each of these illustrates that the court misapplied Rule 60(B)(3) by erroneously requiring him to show (1) a different result would have occurred, (2) clearly opposite evidence, (3) misconduct involving undoubtedly duplicitous or clearly malicious intent, and (4) clear misconduct or fraud or other subterfuge.

[47] We begin our analysis under claims (1) and (2). To establish breach of contract against WellPoint, Axelrod had to prove (a) the existence of a contract, (b) a breach of that contract, and (c) damages from the breach. *See Fowler v. Campbell*, 612 N.E.2d 596, 600 (Ind. Ct. App. 1993). The basis of Axelrod's claim was that WellPoint wrongfully withheld severance benefits by refusing to clarify the scope of the non-compete clause of the Executive Agreement.

[48] Axelrod also alleged a breach of the implied covenant of good faith and fair dealing. "Every contract imposes upon each party a duty of good faith and fair dealing in its

performance and its enforcement." *Weiser v. Godby Bros., Inc.*, 659 N.E.2d 237, 240 (Ind. Ct. App. 1995) (quoting Restatement (Second) of Contracts § 205 (1981), *trans. denied*).[7] He claimed WellPoint breached the covenant by wrongfully withholding severance benefits in refusing to clarify the scope of the non-compete provision of the Executive Agreement.

[49] As for Amgen, Axelrod alleged tortious interference with a business or contractual relationship. On these elements, Virginia law is similar to ours. Axelrod was required to prove: "(i) the existence of a valid contractual relationship or business expectancy; (ii) knowledge of the relationship or expectancy on the part of the interferer; (iii) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (iv) resultant damage to the party whose relationship or expectancy has been disrupted." *See Lewis-Gale Medical Center, LLC v. Alldredge,* 710 S.E.2d 716, 720 (Va. 2011); *Bilimoria Computer Systems, LLC v. America Online, Inc.*, 829 N.E.2d 150, 156 (Ind. Ct. App. 2005). And, when a contract is *terminable at will*, a plaintiff, to present a prima facie case of tortious interference, must allege and prove not only an *intentional* interference that caused the termination of the at-will contract, but also that the defendant employed *improper* methods." *Id*. Because Amgen conceded elements (i), (ii), and (iv), the only issues in dispute involved (iii) and the improper means requirement.

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[7] *Contra, Hamblen v. Danners, Inc.*, 478 N.E.2d 926, 929 (Ind. Ct. App. 1985) ("Indiana does not recognize that a duty of good faith and fair dealing is owed by an employer to an employee at will.").

[50] For WellPoint and Amgen, Axelrod alleged a civil conspiracy the elements of which are governed by Virginia law.

> A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. There can be no conspiracy to do an act which the law allows. Thus, to survive demurrer, an allegation of conspiracy, whether criminal or civil, must at least allege an unlawful act or an unlawful purpose.

Hechler Chevrolet, Inc. v. General Motors Corp., 337 S.E.2d 744, 748 (Va. 1985) (internal citations omitted). These likewise are similar to Indiana law. *See Birge v. Town of Linden*, 57 N.E.3d 839, 845 (Ind. Ct. App. 2016).

[51] Axelrod claimed that his employment was terminated by WellPoint, in concert with Amgen, as the consequence of Amgen's displeasure with his price reimbursement differential plan and his testimony against Amgen in the anti-trust action. The alleged reward to WellPoint was the "benefit of access to [Amgen's] senior leadership and to specialty pharmacy contracting." Appellant's App. Vol. 2, p. 130.

[52] Axelrod claimed that the Bair document contained background information, and the meta-data from this document and the Executive Briefings, which were produced days before trial, would have established certain elements of a conspiracy to fire him such as a connection between Amgen and WellPoint to that effect. He also sought emails to or from Schaeffer for the same purpose. He claimed that certain "Succession Planning" documents, in their native version, would have shown his excellent employment history and performance ratings, such that the conspiracy was the real reason for his termination.

[53] Axelrod says WellPoint used improper means to prevent presentation of favorable testimony, including the live testimony of Christine Miller, Snead, and Byrd. Christine Miller testified in person at trial. Counsel for Axelrod made the strategic decision not to call Snead and Byrd at trial, also abandoning use of their deposition testimony. Neil Bair testified that he did not recall authoring the Executive Briefing document; however, Axelrod had the opportunity to explore its contents and the potential circumstantial evidence and inferences that could be drawn from it to support his conspiracy claim. He presented the theory that Amgen had conspired with WellPoint to terminate him through evidence of PowerPoint slides and email exchanges pointing in this direction.

[54] In short, Axelrod could not make a showing to support allegation (1) because the same or similar kinds of evidence and inferences therefrom were rejected by the jury in favor of contradictory evidence or were overcome by other evidence. The trial court did not misapply the Rule as suggested here.

[55] Next, Axelrod claims the court further misapplied the Rule by requiring him to establish clearly opposite evidence. What is apparent from the trial court's word choice is that though Axelrod hoped to liken his case to that of *Outback* and *Schultz*, in those cases, the withheld evidence was clearly opposite such that merit was established. The trial court took note of the dissimilarities and elaborated on them yet did not hold Axelrod to that standard. We conclude that Axelrod's reading of *Outback* stretches the holding too far. The court did not violate the Rule as suggested in allegation (2).

[56] In allegation (3), Axelrod contends that the trial court committed reversible error by inserting an intent element that is not required by the Rule, by using language to suggest that the conduct of counsel would have to be *undoubtedly duplicitous or clearly malicious*. *See id.* at 162 (emphasis added). Axelrod argues that under *Outback*, the misconduct component of the Rule "can include both negligent and intentional violations of Indiana's discovery rules." *Outback*, 856 N.E.2d at 73. He alleges that the misconduct he points to is negligent conduct that was sufficient.

[57] Again, we conclude that Axelrod's reading of *Outback* proves too much. The court's comments reflect its analysis comparing and contrasting the nature of the evidence withheld in *Outback* to that alleged here. The evidence at issue on the counts of civil conspiracy was hotly debated during the discovery process and trial. Given the jury's rejection of Axelrod's civil conspiracy argument, the court concluded that the withheld evidence would have to have been clearly opposite in order to prevail until contradicted or overcome by other evidence or counsels' misconduct must have been undoubtedly duplicitous or clearly malicious to entitle Axelrod to a new trial.

[58] Put another way, in *Outback*, the jury heard evidence that the patron was not intoxicated, when there was evidence clearly opposite. The jury rejected the argument of the patron's liability without the benefit of the withheld evidence. In contrast, the jury heard the evidence Axelrod presented about the alleged civil conspiracy between WellPoint and Amgen but rejected it. More evidence of the same was unlikely to make the argument any more compelling such that a jury would rule in Axelrod's favor. The trial court was not requiring Axelrod to meet a new threshold requirement but was using different words to say that, under these

facts, he would have to have shown extreme misconduct to have warranted a new trial; but, he had not and could not.

[59] Next, in allegation (4), Axelrod asserts that the trial court misapplied the Rule by requiring *clear misconduct* or *fraud or some other subterfuge*. *Id.* at 158 (emphasis added). He cites language from *Schultz* to argue he was only required by the Rule to establish that misconduct occurred. Appellant's Br. p. 33 (quoting *Schultz*, 24 F.3d at 630) "([A]n adverse party's failure, either inadvertent or intentional, to produce such obviously pertinent requested discovery material in its possession is misconduct under the meaning of Rule 60(b)(3).").

[60] We think this argument puts too much weight on the trial court's word choice. Placed in context, the court noted that in addition to Axelrod's other allegations of misconduct through allegedly withheld evidence or witness tampering,

> [he] argued that opposing counsel made a mockery of the court, during trial, by the interjection of unnecessary objections to the admission of evidence. He claimed he was prejudiced by hundreds of time-consuming and irrelevant sidebars that distracted the jury.

Appellant's App. Vol. 2, p. 157. Here, the court contrasted the misconduct in *Schultz* and *Outback* with that of the present case and concluded that the conduct was dissimilar.

[61] The trial court did not misapply the requirements of Rule 60(B)(3) in any of these ways.

II. Misconduct

[62] We begin by acknowledging that there were many instances before, during, and after trial, where counsels' approach was not as one would hope or expect. The trial judge stated as much in her order, finding nevertheless that the admonishments and rulings before and during trial were enough to keep counsels' actions within bounds. With this in mind, we examine the allegations in turn. Generally speaking, Axelrod contends that misconduct by defense counsel through witness tampering, juror tampering, withholding evidence of the authors, recipients, and creation dates of documents, and misrepresenting the authorship of a document resulted in a verdict unfairly procured.

[63] As for Amgen, Axelrod reiterates his points about the discovery process, conduct he argues was disrespectful to the court, and excessive sidebars and objections. Amgen contends that its counsel complied with court orders and admonishments while advocating for the client. Axelrod repeats his claims of witness and juror tampering, disingenuity to the court, and excessive objections and sidebars against WellPoint. He cites Indiana Code section 34-47-3-3 (1998) (assaulting, influencing, or intimidating witnesses), contending that WellPoint violated this statute.

[64] WellPoint noted during oral argument that Axelrod's accusations against it, claiming tampering, were grave and pointed to what could be felonious behavior.[8] Without

[8] *See e.g.*, Ind. Code § 35-44.1-2-2 (2017) (obstruction of justice).

citing a particular rule,[9] Axelrod also claims that counsel for WellPoint violated the Rules of Professional Conduct by misrepresenting its degree of involvement with the witnesses then correcting the record the next day. WellPoint argues that it did what Axelrod had a duty to do–informing those witnesses that they could no longer be compelled by the subpoenas–citing various cases for that proposition, also arguing it was not in violation when it paid certain expenses related to former employees' attendance for deposition or trial.[10]

[65] The trial court noted Axelrod's difficulties with compelling the testimony of out-of-state witnesses, despite the court's guidance. The court also noted Axelrod's belief that the defendants should have voluntarily produced the witnesses, observing that some witnesses did appear. On balance, the trial court found no witness tampering.

[66] As for juror tampering, Axelrod argues that WellPoint and Amgen intimidated a juror from serving. The voir dire of Juror #2392144 occurred before and after a lunch break. In the afternoon session, the juror identified a personal conflict with the trial schedule. Axelrod found this to be suspicious because the conflict had not been previously disclosed, and he believed that her employer was a client of the defendants' law firms. Axelrod alleged that counsel had tampered with her during

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[9] Indiana Rule of Professional Conduct 8.4 subsections (b) (commission of criminal act reflecting adversely on lawyer's honesty, trustworthiness or fitness as a lawyer) and (c) (engaging in dishonesty, fraud, deceit or misrepresentation) and Rule 3.3 (a)(1) (making a false statement of fact or law to a tribunal without correction) are suggested by the allegations.

[10] *See In Re Anonymous*, 896 N.E.2d 916, 917 (Ind. 2008) ("improper use of subpoenas tended to give the third party . . . the false impression that he could be held in contempt of court if he failed to appear and produce the documents requested."); N.Y. State Bar Ass'n Formal Ethics OP. 962, 2013 WL 1781018, at *3-4 (ethically permissible to pay witnesses' reasonable expenses not contingent upon the witness's testimony or the outcome of the matter).

the lunch break, encouraging her to cite a conflict so that she could be excused from jury duty. The trial court interviewed the juror in chambers regarding Axelrod's allegations prior to releasing her from service, finding no interference.

[67] As for conduct during discovery, the court observed that Axelrod had not made clear which elements of his complaint would have been supported by the allegedly withheld evidence, stating the withheld evidence "was largely conjectural as to its impact on the jury and the probability of a different verdict." Appellant's App. Vol. 2, p. 158.

[68] The trial court also addressed allegations about defense counsel's conduct during the trial,[11] concluding that "none of the transgressions, alleged by Dr. Axelrod, in this all-out war of a case, though frustrating, unfortunate, and extremely time consuming for everyone concerned, wholly prevented Dr. Axelrod from a fair opportunity to present his evidence." *Id.* at 160.

[69] The trial court was in the "best position to gauge the behavior of the attorneys and whether or not it impacts the jury and in what context." *Wisner v. Laney*, 984 N.E.2d 1201, 1206 (Ind. 2012). We conclude after examining each of Axelrod's claims, he has not established that the judgment was unfairly procured.

[70] The trial court did not misapply the requirements of Rule 60(B)(3). We find no reversible error here.

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[11] Axelrod complained that excessive objections and sidebars prevented him from fairly presenting his case. However, studies show that juries would advise counsel to "be factual, fair, and courteous," and "don't object so often." The Honorable Joseph F. Anderson, Jr., *Setting Yourself Apart From The Herd: A Judge's Thoughts On Successful Courtroom Advocacy*, S.C. L. Rev. 617, 621 (1999). Often, objections or interruptions cut against the maker.

III. Post-Trial Discovery

[71] Axelrod asserts that the trial court abused its discretion by denying his request for limited post-trial discovery. Post-trial discovery is provided for in Indiana Trial Rule 60(D):

> In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule.

[72] "Discovery under T.R. 60(B) is permissive rather than mandatory." *In re T.M.Y.,* 725 N.E.2d 997, 1005 (Ind. Ct. App. 2000), *trans. denied*. "The grant or denial of motions for discovery rest within the sound discretion of the trial court and will only be reversed for an abuse of that discretion." *Keystone Square v. Marsh Supermarkets, Inc.*, 459 N.E.2d 420, 425 (Ind. Ct. App. 1984).

[73] Axelrod says he requested discovery "related to three issues that had arisen during trial: the concealment of evidence, credible evidence of witness interference/tampering, and potential jury tampering." Appellant's Br. p. 56. WellPoint suggests that Axelrod's request arguably could not be characterized as limited, noting that Axelrod sought eleven "separate discovery demands, including four depositions and sweeping requests for '[a]ll documents' relating to six different topics." WellPoint's Br. p. 48 (quoting Appellant's Br. pp. 55-56). Amgen notes that "limitations are necessarily placed on [post-trial] discovery to prevent it from becoming a tool of oppression and harassment." Amgen Br. p. 43 (quoting *Benjamin*

v. Benjamin, 798 N.E.2d 881, 889-90 (Ind. Ct. App. 2003)). Amgen claims that Axelrod "seeks various unidentified documents (in a case where millions of pages of documents already were produced) and several non-party depositions (in a case where over thirty depositions were taken)" including the "deposition of a dismissed juror, her supervisor, and her in-house counsel at her workplace." Amgen Br. p. 44.

[74] In discussing Axelrod's request in light of the requirements of Trial Rule 60(B)(2) and (3), the trial court stated the following:

> The evidence that Dr. Axelrod wants to put before a new jury in this case is not newly discovered evidence, but alleged withheld evidence. Anthem/Wellpoint and Amgen both denied that any requested production of evidence was withheld during discovery and that they were in complete compliance with all discovery orders. The document and witness testimony sought here by Dr. Axelrod is unlikely to satisfy any of the above-noted *Faulkinbury*[12] requirements. This case has been litigated for nearly twelve (12) years. It would be fundamentally impractical and likely futile to allow post-trial discovery, despite the doctor's recommenced search for evidence as hundreds of hours have already been spent in discovery with few germane results. Dr. Axelrod's request to re-open discovery would assuredly cause an undue post-trial burden and expense on opposing counsel.
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> * * * *
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> There is no question that Dr. Axelrod's quest to expose all the reasons he believed were part of his termination was indeed hampered by a long, contentious, arduous, and sometimes outright hostile discovery

[12] *Faulkinbury v. Broshears*, 28 N.E.3d 1115, 1125 (Ind. Ct. App. 2015): (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon retrial of the case; and (9) it will probably produce a different result at retrial.

> process, which included several lengthy "meet and confer" sessions between attorneys at which hundreds of documents were exchanged. Initially, many of the documents produced by defense counsel were clearly irrelevant. At times, there was outright non-cooperation by opposing counsel. However, the Court provided Dr. Axelrod with a plethora of additional opportunities to obtain access to evidence including: extended time for depositions, an extended period for supplemental discovery, trial and hearing continuances, and extended response time to objection to discovery requests. Also, during trial, defense counsel attempted to offer for their truth exhibits that were clearly hearsay, that involved negative notes from peer staff reviewers, who had no oversight capabilities or responsibilities as to Dr. Axelrod's employment. None of these witnesses had been deposed or were available to be cross-examined; all such objections were sustained by the Court.

Appellant's App. Vol 2., pp. 151, 162-63.

[75] We further note that Indiana Appellate Rule 66(A) provides,

> No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.

The trial court did not commit error here, let alone reversible error.

Conclusion

[76] We see no error and affirm the judgment.

[77] Affirmed.

Pyle, J., and Altice, J., concur.