

## Comments at the Utah Trial Lawyers Association Annual Meeting, September 14, 2007

It is truly an honor to be asked to serve as President of this organization. I appreciate the privilege it is to lead this group for a short period.

Roger and I were talking last night about the organization. We both commented on what tremendous support the President of this group has. That includes our board of governors, the committees within the organization, our tremendous Executive Director, Amanda Jespersen and most important, you as the members of the organization. Without your commitment of time, energy and money, the organization would not continue to exist.

As I listened to our keynote and lunch speakers, Arthur Bryant and Stephanie Mencimer, yesterday, I was struck with just how critical our role is in defending the country's civil justice system. It is under constant threat from a wide variety of entities and individuals. Very few have the necessary knowledge and resources to defend it against attacks by those who want to make our civil justice system inaccessible, toothless or a lapdog for those who have power or money. If we are not prepared to step forward and act in the best interests of our civil justice system, there are very few others who can or will.

Let me give you an example. Last week the Eighth Circuit issued a decision in Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Shank, 2007 U.S. App. LEXIS 20927 (8<sup>th</sup> Cir. 2007). It's a dry caption for a case with tragic facts. Deborah Shank was an employee of Wal-Mart when she was badly injured in a car accident. Wal-Mart paid about \$470,000 of Deborah's medical expenses under its health benefit plan. After Deborah was adjudicated to be incompetent, her husband, as guardian, filed suit on Deborah's behalf against the tortfeasors. She was lucky; the defendants in that case had better than average insurance coverage. She settled her claims for \$700,00. After paying attorney fees and costs, about \$417,000 was placed in a special needs trust for her future needs.

When Wal-Mart found out about the settlement, it decided to seek reimbursement of what it had paid out of Deborah's fund. The language of its health benefit plan was unequivocal: Wal-Mart retained the right to be repaid money it paid for medical expenses out of a plan participant's third party tort claim. The plan language stated that Wal-Mart's right to reimbursement took priority over any other claims to Shank's recovery, was not dependent to any degree on whether Deborah was made whole by the recovery and that Wal-Mart had no obligation to contribute anything to the attorney fees and costs incurred by Shank in obtaining the personal injury recovery.

The fly in Wal-Mart's ointment was ERISA's remedial provisions. Under the language of that statute Wal-Mart was entitled only to "appropriate equitable relief." Deborah's situation presented compelling facts. Allowing Wal-Mart to be reimbursed all its medical expenses went far beyond appropriate equitable relief.

Nevertheless, Wal-Mart sued the Shanks. The trial court ruled in Wal-Mart's favor and the Shanks appealed to the U.S. Court of Appeals for the Eighth Circuit. The court rejected the

Shanks' request that it apply the "made-whole" rule and the common fund doctrine. It acknowledged that Deborah's damages from the car accident far exceeded her settlement but ruled that Deborah and Wal-Mart had "reached a different bargain" in their dealings with each other. The court ruled that, based on its benefit plan language, Wal-Mart was entitled to complete reimbursement of its medical expenses regardless of Deborah's catastrophic injuries. For good measure, it also denied Shank's request that Wal-Mart be required to contribute anything toward her attorney fees and costs incurred in obtaining the \$700,000 settlement. Deborah Shank was not left with a nickel after the court's ruling.

Think about that decision for a moment. Do you feel about it the way I do? Does it make you angry? Does it make you sick? Wal-Mart v. Shank is one of the most unjust, indefensible rulings I've seen in a long time.

In connection with considering whether to change the name of our organization from the Utah Trial Lawyers Association to the Utah Association for Justice, we've largely focused our attention on how others perceive us: what the public thinks when they hear the term "trial lawyers," whether the name change helps us when negotiating with those we commonly find on the other side of the table from us such as insurers, manufacturers and employers, and how the name change will play in dealing with legislative issues. But another aspect of the name change that is critically important is how we see ourselves. We need to remind ourselves regularly who we are and what we are about in our occupations.

Most of us spend relatively little time in trial. But we all spend a great deal of time seeking justice. Justice for our clients. Justice for their loved ones. Justice for wrongdoers. We need to re-evaluate our roles as trial lawyers. We are concerned with far more than improving our skills at presenting arguments to judges and juries. We are all about getting justice for our clients, their loved ones and wrongdoers. That purpose is much bigger and more important than simply having the technical tools to be a good trial lawyer.

Please join me in rededicating ourselves to the cause of justice.