ZILLMAN ON MAINE TORTS: THE DEFINITIVE TREATISE

§18.13 REPLEVIN

The ancient writ of replevin is one of the oldest known remedies. In Maine, there is a three-step procedure that must be followed. First, the Plaintiff must file a complaint with the Court, together with a motion for approval of the writ of replevin, as well as affidavits that establish an immediate right to possession of the property. Second, the Plaintiff must win a court-ordered seizure of the property. Third, the Court asserts its jurisdiction to adjudicate which party owns the property. If a Plaintiff fails to follow the three-step procedure, the Court lacks jurisdiction, and the Plaintiff has no power to request a Court determination as to ownership.

DOUGHTY V. SULLIVAN, 661 A.2D 1112 (ME. 1995)

LIPEZ, Justice.

Ethelyn Sullivan (Ethelyn) appeals from the judgment entered . . . in the District Court . . . in favor of Cecil Amos Doughty (Amos) on his complaint requesting a writ of replevin and damages for Ethelyn's wrongful conversion of an 18-foot Pointer boat which Amos allegedly purchased from Neil Doughty (Neil). . . . We vacate [the] judgment[ ].

Background

The record reveals that Bernard Doughty loaned his son, Neil, $1,000 to enable Neil to purchase an 18-foot Pointer boat. To evidence the loan, Neil gave his father a signed "receipt" which stated, "Received from Bernard Doughty $1,000 for one 18-foot Pointer and 45 H.P. motor." Neil Doughty signed this receipt. Bernard believed the receipt gave him a security interest in the boat. Neil testified that he did not intend to give his father a security interest in the boat. He simply wanted his father to have the boat if something happened to him while he was at sea.

Neil stored the boat during the winter of 1989–1990 in the yard of John and Ethelyn Sullivan, his sister. Although Neil used the boat a few times, during the summer of 1990 seawater disabled the engine and Neil left the boat on its mooring in Chandler's Cove. According to John Sullivan, he towed the boat from Chandler's Cove to Bennett's Beach in early October 1990, where he left the boat on the beach for a couple of weeks. Bernard testified that he instructed John to haul the boat back to the Sullivan's' yard because he was concerned that the boat would be destroyed over the winter unless it was removed from the beach. Sullivan and a friend testified that they hauled the boat to the Sullivan's yard in late October or early November. Bernard believed that he had a right to repossess the boat because Neil had not yet repaid the loan. On November 19, 1990, Bernard signed a document which stated: "As of this date I transfer my ownership and claim to the note for $1,000.00 from Neil Doughty, for the boat (18 Pointer) and 45 HP Chrysler motor as yet unpaid to Ethelyn L. Sullivan." The document was witnessed and signed by a family friend.

During this same time period, Neil accepted an offer by Amos to buy the boat for $500. On November 21, 1990, Amos gave Neil a check for $500 which Neil cashed that same day. Both Neil and Amos testified that, contrary

to the Sullivan's contentions, the boat was still lying on the beach when the sale occurred. Neil could not recall how the boat got from the mooring in Chandler's Cove to Bennett's Beach. Amos testified that he had no idea that someone else claimed an interest in the boat. Sometime after Neil sold the boat to Amos, Amos discovered that the boat was in the Sullivan's yard and he asked Ethelyn to return it to him as he was now the owner. Ethelyn refused, asserting that Bernard owned the boat.

In December 1990, Amos decided that he could not engage in commercial lobstering during 1991 because Ethelyn would not return the boat that he had intended to use. Amos did not attempt to replace the boat until 1992, when he purchased another boat for $1,000.

Amos filed a complaint on July 6, 1992, against Ethelyn, alleging that she had wrongfully converted the boat after he purchased the boat from Neil. Amos sought a writ of replevin pursuant to 14 M.R.S.A. § § 7301–12 (1980) to obtain possession of the boat and damages for Ethelyn's wrongful conversion. . . . At the time he filed his complaint, Amos did not attach a bond or an affidavit to support his request for a writ of replevin. . . .

Prior to the trial, Ethelyn filed a motion to dismiss Amos' complaint for failure to file the pleadings required by M.R.Civ.P. 64 to obtain a prejudgment writ of replevin.[4] Ethelyn contended that 14 M.R.S.A. §§ 7301–7312 and M.R.Civ.P. 64 provided a writ of replevin as a prejudgment remedy only. Amos attempted to cure his failure to conform to M.R.Civ.P. 64 by filing a motion for a writ of replevin and a personal bond for $1,000 and an affidavit before trial.

After a trial, the District Court concluded that it had subject matter jurisdiction pursuant to 14 M.R.S.A. § § 7301–7312 (1980), and that Amos was entitled to seek a postjudgment writ of replevin without first seeking a prejudgment writ of replevin. The court further decided that regardless of whether the receipt signed by Neil evidenced a valid security interest, Bernard had not perfected the interest by the time Amos bought the boat from Neil because

[4] M.R.Civ.P. 64(c) provides in pertinent part: A replevin action may be commenced only by filing the Complaint with the court, together with a motion for approval of the writ of replevin and the amount of replevin bond. The motion shall be supported by affidavit or affidavits setting forth specific facts sufficient to warrant the required finding. . . . Except as provided in subdivision (h) of this rule, the motion and affidavit or affidavits with notice of hearing thereon shall be served upon the defendant in the manner provided in Rule 4 at the same time the summons and complaint are served upon that defendant.

it was more likely than not that the boat was in Chandler's Cove at the time of the purchase and not in Bernard's possession. The trial court concluded that Amos was a bona fide purchaser for value and was entitled to possession of the boat and entitled to $3,680.10 for damages he sustained when Ethelyn converted the boat and prevented him from lobster fishing in 1991. Accordingly, a judgment was entered in favor of Amos. . . .

Jurisdiction to Issue a Post-Judgment Order of Replevin

Ethelyn [ ] contends that because Amos had failed to replevy the boat before the action was tried, the District Court erroneously concluded that it had jurisdiction pursuant to 14 M.R.S.A. §§ 7301–7312 to issue a writ of replevin after a judgment had been entered [footnote omitted]. According to Ethelyn, the statute provides a prejudgment remedy only. Ethelyn further contends that even if Amos was permitted to cure his failure to request a prejudgment writ of replevin, Amos still did not provide a bond "with sufficient sureties." *Ford New Holland, Inc. v. Thompson Machine, Inc.*, 617 A.2d 540 (Me. 1992) (holding personal bond insufficient to satisfy statute). Hence, the District Court was without subject matter jurisdiction to hear Amos' action in replevin.

Amos responds that the bond requirement is intended merely to provide security to the defendant in a replevin action when the plaintiff seeks a prejudgment writ of replevin. Because he was willing to wait until after a judgment was entered before he obtained possession of the boat, Amos argues that requiring him to post a bond is superfluous. According to Amos, the filing of a complaint confers jurisdiction on the District Court to hear an action in replevin pursuant to 14 M.R.S.A. § 7301, rather than the filing of a prejudgment writ of replevin. After a careful review of the laws of other states and our own statute, we conclude that 14 M.R.S.A. §§ 7301–7312 confers jurisdiction on the District Court to hear an action in replevin only if the plaintiff has already replevied the property through the issuance of a prejudgment writ of replevin.

Replevin is one of the oldest legal remedies available under the common law. Historically, replevin lay to recover immediate possession of a specific chattel as compared with other common law actions for trespass or conversion which lay to recover damages for the wrongful taking of a chattel. Cobbey, A Practical Treatise on the Law of Replevin, § 17 (2d ed. 1900). Replevin

sought only to establish the right to possession and not the right to legal title. The common law action of replevin could be commenced only by the issuance of a writ of replevin and seizure of the property which was deemed necessary for the court to obtain jurisdiction over the action. *Hart v. Moulton*, 104 Wis. 349, 80 N. W. 599, 600 (1899).

The plaintiff would apply for a writ of replevin from the court by supplying an affidavit alleging the right to immediate possession of the goods currently in the wrongful possession of a third party [footnote omitted]. If the affidavit satisfied the common law formalities, the court would issue the writ directing the sheriff to seize the chattel and to deliver the same to the plaintiff. Before the sheriff could serve the writ and seize the property, however, he had to obtain a bond from the plaintiff for twice the value of the goods sought to be replevied [footnote omitted]. Upon receiving possession, the plaintiff would bring the action in replevin seeking a judicial determination of his right to possession and any damages incurred by the defendant's wrongful retention of the chattel. Hence, replevin was a unique common law action that entitled a plaintiff to a prejudgment seizure of the chattel, leaving the merits of the plaintiff's claim of right to be tried later. . . .

In Maine, replevin has been a statutory remedy at law since the replevin statute was first enacted in 1821 and copied from the Massachusetts replevin statute enacted in 1789 [footnote omitted]. *Seaver v. Dingley*, 4 Me. (Greenl.) 306, 315–16 (1826). 14 M.R.S.A. §7301 (1980) provides in pertinent part:

> When goods unlawfully taken or detained from the owner or person entitled to the possession thereof, or attached on mesne process, or taken on execution, are claimed by any person other than the defendant in the action in which they are so attached or taken, such owner or person may cause them to be replevied [footnote omitted].

There is no statutory language suggesting that a writ of replevin is merely ancillary to the underlying replevin action. Nor is there any provision that permits the plaintiff to forgo obtaining possession of the chattel until after a judgment on his action. Indeed, all of the provisions presuppose that the property has in fact been replevied before trial. . . .

We also note that our civil rules of procedure contemplate that a replevin action be commenced by applying for a writ of replevin. M. R.Civ.P. 64(c) provides that "a replevin action may be commenced *only* by filing a complaint

with the court, together with a motion for approval of the writ of replevin and the amount of the replevin bond."

In summary, our replevin statute does not authorize the court to issue a postjudgment writ of replevin. The writ of replevin referred to in 14 M.R.S.A. §§ 7301–7312 and Rule 64 is a prejudgment remedy only. [footnote omitted]. The replevin statute does not confer jurisdiction on a court to adjudicate a claim of possession pursuant to the replevin statute until the procedural requirements have been satisfied. If, on the other hand, the plaintiff seizes the property pursuant to a writ of replevin and has provided the appropriate bond to the defendant, the court has jurisdiction pursuant to the replevin statute to determine who is the rightful possessor and to award damages resulting from the wrongful detention of the chattel.

Turning to the facts in the present case, Amos did not file a motion for approval of a writ of replevin, nor did he file the required affidavits alleging his immediate right to possession or a bond for twice the value of the boat, at the time he filed his complaint. Without Amos's affidavit or bond, the District Court had no jurisdiction to issue a writ of replevin to restore the boat to Amos's possession as requested in Amos's complaint. Moreover, because no writ was issued and because the boat was not replevied, the court had no jurisdiction to finally adjudicate which party had the right to possess the boat pursuant to 14 M.R.S.A. § 7301. . . .

SEARIVER MARITIME FINANCIAL HOLDINGS, INC. V. PENA
952 F. SUPP. 455 (S. D. TEXAS 1996)

ATLAS, District Judge.

Plaintiffs have brought suit seeking a declaratory judgment that Section 5007 of the Oil Pollution Act of 1990 ("the OPA"), 33 U.S.C. § 2737, is unconstitutional and contrary to United States treaties and international law, and ask the Court to enjoin permanently the enforcement of Section 5007 against Plaintiffs. . . . Plaintiffs invoke venue in this judicial district [the Southern District of Texas] pursuant to 28 U.S.C. § 1391(e). The Government has filed a Rule 12(b)(3) Motion to Dismiss for Improper Venue. . . . For the reasons stated herein, the Government's Motion is GRANTED, and this action is DISMISSED WITHOUT PREJUDICE.

Factual Background

In 1990, Congress passed the OPA, of which Section 5007 provides: "Notwithstanding any other law, tank vessels that have spilled more than 1,000,000 gallons of oil into the marine environment after March 22, 1989, are prohibited from operating on the navigable waters of Prince William Sound, Alaska." 33 U.S.C. § 2737.

Plaintiffs own the S/R *Mediterranean*, formerly named the *Exxon Valdez*. Plaintiffs state that the *Mediterranean* was the only U.S. flag vessel to which Section 5007 applied at the time of passage in 1990, and that the statute "effectively bars the vessel from participating in any trade from Alaska to other U.S. ports, which was the original purpose in constructing the vessel". . . .

Section 5007 has not yet been enforced against Plaintiffs. The First Amended Complaint does not allege that the vessel has yet done anything to violate Section 5007's prohibition against navigation in Prince William Sound, nor that any enforcement action has been taken or threatened against the vessel. Rather, the only allegation is that SeaRiver "wishes" to have the vessel sail through Prince William Sound so as to participate in Alaska North Slope trade, which was the purpose for the vessel's construction. . . .

Plaintiffs have presented evidence of the connection of this cause of action to Houston, including the following: the S/R *Mediterranean* is owned and operated by two Houston-based companies; all decisions regarding the

ownership and operation of the vessel are made in Houston; the decision to construct the vessel was made in Houston; and the restrictions of Section 5007 have caused "significant losses" for the Plaintiff companies, based in Houston, who own and operate the vessel. . . .

The Government claims that "[t]he only district involved in these events is the District of Alaska, where the *Exxon Valdez* implicated Section 5007 by spilling approximately 11,000,000 gallons of oil, and also where that ship would have to operate before Section 5007 would be violated and could be enforced". . . . The Government points out that the only past event identified by Plaintiffs is the Valdez spill, which occurred in Alaska. *Id*. at 20. The Government also argues that, to the extent future events would be relevant, they would necessarily have to occur in Alaska since Section 5007 bars navigation only in Prince William Sound. *Id*. at 23.

Discussion

The applicable venue statute, 28 U.S.C. § 1391(e), provides that a civil action in which the defendant is the federal government may be brought (1) where the defendant resides, (2) where a "substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated," or (3) where the plaintiff resides if no real property is involved in the action. . . .

A. Is Venue Proper in the Southern District of Texas?

Plaintiffs argue that venue is appropriate under two provisions of Section 1391(e): because Plaintiffs reside in Houston, and because a "substantial part of the events or omissions giving rise to the claim occurred" in Houston.

1. *Burden of Proof*. Once Defendants have raised a proper objection to venue in this judicial district, the Plaintiffs bear the burden of proof to establish that the venue they chose is proper. *Smith v. Fortenberry*, 903 F.Supp. 1018, 1019–20 (E.D.La. 1995); *French Transit, Ltd. v. Modern Coupon Systems, Inc.*, 858 F.Supp. 22, 25 (S.D.N.Y. 1994) [footnote omitted]. As another district court has noted, the burden should be on the plaintiff to institute an action in the proper place, because "[t]o hold otherwise would circumvent the purpose of the venue statutes – it would give plaintiffs an improper incentive to attempt to initiate actions in a forum favorable to them but improper as to venue." *Delta Air Lines, Inc.*

v. Western Conference of Teamsters Pension Trust Fund, 722 F.Supp. 725, 727 (N.D.Ga.1989) [footnote omitted]. Therefore, Plaintiffs bear the burden to establish that the Southern District of Texas is an appropriate venue for this action [footnote omitted].

2. *Residence of Plaintiff*. The Court holds that Plaintiffs' residence is Delaware, the state of incorporation for all three Plaintiffs. Section 1391(e)(3) therefore provides no basis for venue in this judicial district.
3. *Substantial Part of Events*. It is, of course, possible in a given case that there could be more than one district in which a "substantial part of the events . . . giving rise to a claim occurred," and therefore there could be more than one proper venue for a certain cause of action. *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir.1995); *Setco Enters. Corp. v. Robbins*, 19 F.3d 1278, 1281 (8th Cir.1994); *Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 867 (2d Cir.1992). A court is not obliged to determine the "best" venue for a cause of action pending before it, but rather must determine only whether or not its venue is proper. *Setco, 19 F.3d at 1281; Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir.1994) [footnote omitted]. Therefore, even if another district's contacts with the controversy are more substantial than this district, the court need determine only whether substantial events occurred in this district.

   The Government argues not that the connections with Alaska are "more substantial" than those with Texas, but rather that the only event giving rise to application of Section 5007 to Plaintiffs is the Alaskan oil spill, and therefore that *none* of the past events giving rise to Plaintiffs' claims have occurred in the Southern District of Texas. . . . The Government argues further that any future "events" involving possible violations of Section 5007 giving rise to Plaintiffs' claim would take place in Alaska. . . . Plaintiffs, however, argue that the effects of Section 5007 (which, at the time of passage, applied to only SeaRiver's vessel) are felt in Houston, and that these local effects give rise to venue. The Court is not persuaded. The "effects" to which Plaintiffs refer are the injury resulting from Section 5007, rather than an "event giving rise to a claim". . . .

   Events that have only a tangential connection with the dispute at bar are not sufficient to lay venue. *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir.1994). Moreover, the Court is persuaded by the analysis of the Eighth Circuit, when it stated that, by referring to "events or omissions giving rise to the claim," it is likely that "Congress

meant to require courts to focus on relevant activities of the defendant, not of the plaintiff." *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir.1995). . . .

In the instant case, Plaintiffs' decisions in Houston regarding the S/R *Mediterranean* and the harm felt in Houston by the vessel's inability to sail to Prince William Sound also do not bear a sufficiently substantial connection to the events giving rise to Plaintiffs' claims. . . .

Therefore, the Court holds that a "substantial part of the events or omissions giving rise to the claim" did not occur in this judicial district, and that Section 1391(e)(2) does not provide a basis for venue here.

SMITH V. FORTENBERRY, 903 F. SUPP. 1018 (E. D. LA. 1995)

JONES, District Judge

Pending before this Court is a Motion to Dismiss on Grounds of Improper Venue . . . filed by defendant Millis Transfer, Inc. . . .

Background

On July 25, 1993, plaintiff Eric Smith, a Louisiana resident, allegedly was traveling south in Mississippi on a highway towards Louisiana. At that time plaintiff contends that defendant Gregory Fortenberry, allegedly a Mississippi resident, was backing an 18-wheel tractor trailer into a driveway and allegedly blocked both the north and southbound lanes. Plaintiff alleges that codefendant Millis Transfer, Inc. ("Millis"), owned the tractor trailer and is a Wisconsin corporation. Plaintiff alleges that plaintiff's vehicle collided with the trailer, causing him to sustain severe injuries [footnote omitted].

On July 19, 1995, plaintiff filed this lawsuit in this Court, alleging jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332.

Millis responded by filing the instant motion, contending first that, because venue is improper in this district, the matter should be dismissed [footnote omitted]. . . .

Plaintiff counters that venue is proper in the Eastern District of Louisiana because under 28 U.S.C. § 1391(a) – the applicable venue statute – venue is proper in "a district in which a substantial part of the events or omissions giving rise to the complaint occurred." 28 U.S.C. § 1391(a)(2). According to plaintiff, this portion of the statute is applicable because his injuries arise here [footnote omitted]. Plaintiff further posits that venue in this matter is valid and apropos under subsections (2), in particular, and (3), in general, of § 1391(a), which defendant misinterpreted. . . .

Law and Application

I. Improper Venue

The initial issue is whether venue is proper in the Eastern District of Louisiana. "[T]here are cases holding that the burden is on the objecting defendant to establish that venue is improper. But 'the better view' and the clear weight of authority, is that, when objection has been raised, the burden is on the plaintiff to establish that the district he chose is a proper venue."

Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3826 at p. 259. Thus, the burden is on Smith to show that venue is proper in this district.

> A civil action founded on diversity of citizenship may be brought in: (1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a).

In the case at hand, §1391(a)(1) is inapplicable because all defendants do not reside in the same state, according to the Complaint, which alleges that Fortenberry is a resident of Mississippi and Millis is a Wisconsin corporation.

The next question is whether venue is proper under § 1391(a)(2) because "a substantial part of the events or omissions giving rise to the claim" occurred in the Eastern District of Louisiana. In Smith's memorandum in opposition, he concedes that "[t]he accident itself occurred in Mississippi" . . . Even so, Smith declares that venue is proper in this district because he continues to undergo treatment in Louisiana for injuries caused by the accident with Fortenberry, and "has continued to reside in Louisiana during the cause [sic] of his convalescence and disability". . . . Smith further proclaims that because "there may be more than one district in which a substantial part of the events giving rise to the claim occurred, and that venue would be proper in each such district," quoting *Sidco Industries, Inc. v. Wimar Tahoe Corporation*, 768 F.Supp. 1343, 1346 (D.Or.1991), and because his injuries have been treated in Louisiana, venue is proper here under § 1391(a)(2).

The Court finds that Plaintiff's contention flies in the face of the pertinent, plain language of § 1391(a)(2) that venue is proper in "a judicial district in which *a substantial part of the events or omissions giving rise to the claim* occurred." (Emphasis added.) The events or omissions giving rise to the Plaintiff's claim involved the alleged negligence of Fortenberry and Millis' accident in Mississippi, which gives rise to Plaintiff's claim for injuries. . . .

The instant case . . . involves a simple albeit injurious vehicular accident that occurred in Mississippi. The substantial part of the events giving rise to

Plaintiff's claim must be informed by the accident between Smith and Fortenberry. Smith's claim that his treatment in Louisiana should be considered as the substantial part of the events giving rise to the claim is misplaced because the injury he sustained from the accident is the defining event, not the hospitals or physicians' offices where he obtained treatment. Thus, nothing in provision (2) countenances Plaintiff's proposition that medical treatment in Louisiana was "a substantial part of the events giving rise to the claim," and nothing in the cited jurisprudence lends support to plaintiff's misguided epiphany that venue is applicable in the Eastern District of Louisiana.

The Court also finds that §1391(a)(3) is inapplicable. . . .

Hence, the Court holds that venue has not been properly shown for maintenance in this district.

Drafting Considerations

Now that you have reviewed the materials, it's time to consider strategy. Why file this motion at all? As Melody Richardson's lawyer, if you point out the government's failure to serve and file a writ of replevin, won't the government just cure the problem and refile? As for venue, isn't Maine venue sufficient based on Richardson's attempt to sell the sculpture in Maine? Why fight this fight?

In this case, while a motion to dismiss presents a variety of advantages and disadvantages, there is one factor that may tip the balance in favor of filing: the opportunity to advance your "theme," or what some call "the story of your case." Here, Richardson needs to develop a theme that takes into account the government's strong factual and legal position. Richardson's best hope is that the court might sympathize with her plight as the "innocent owner" of the sculpture and rule against the government based on a technical flaw in the government's case (most likely an evidentiary problem). With that in mind, it makes some sense for Richardson to begin the case with a hard-hitting motion that argues: (1) the government is trying to take away a sculpture that has been in Richardson's family, without incident or challenge by the government, for sixty years; (2) the government, in its zeal to take the sculpture, failed to satisfy the most basic jurisdictional requirement of obtaining and serving a writ of replevin; and (3) to make matters worse, the government, with its infinite resources, chose to litigate the case in Maine (at great cost to Richardson) when the sculpture never left California. Although those arguments ultimately may not succeed, they might put the government back on its heels, which in turn might lead to a reasonable settlement.[5]

You should never expect that your theme will make the difference between winning and losing. Indeed, in many cases, there is no need for a theme at all. However, when a theme resonates with the underlying facts and law, it can have a subtly persuasive effect, particularly on a busy judge who just might remember your case as "the one in which the government was trying to take away that nice lady's sculpture."

One way to further your theme is to place the "story of your case" within a larger, favorable, and commonly understood context. For example, imagine a scenario in which a man is charged with a crime, the court dismisses the

[5] Some might call that strategy "seizing the initiative," which is a common approach in the world of chess. B. Pandolfini, *Every Move Must Have a Purpose: Strategies from Chess for Business and Life* (Hyperion 2003).

criminal case on a technicality, and the man proceeds to file a civil rights action against the arresting officer for false arrest. If you are the lawyer defending the officer against the false arrest charge, you might place your case in the following context:

> Probable cause is one of the hallmarks of our criminal justice system. The Fourth Amendment makes clear that "no warrants shall issue, but upon probable cause." That famous phrase provides one of the fundamental protections for citizens in a free society.
>
> Probable cause also provides another protection that is less well known, but equally important. When an arrest warrant issues upon probable cause, there are certain immunities for those who assist the criminal justice system, such as victims, witnesses, investigators, prosecutors, judges, and juries. A well-functioning criminal justice system relies on those immunities in order to prevent subsequent harassing lawsuits by disaffected criminal defendants. This is one such lawsuit.

There are several advantages to that approach. First, it focuses the debate on the ultimately winning issue for the officer: that he is entitled to immunity from suit because the warrant was issued based upon probable cause. Second, by focusing on probable cause, it helps the reader understand that the officer's immunity is part of a well-functioning criminal justice system and not just some technicality. Third, by pointing out that "this is one such lawsuit," it helps define the category of cases where this belongs.

A well-chosen theme can also help you develop a "narrative" to describe "your side of the story." For example, imagine that you are defending a doctor who committed malpractice, but you are trying to argue that the malpractice did not cause the patient's death. In such a case, you might describe "the story of your case" like this:

> This is a case about finding the source of cancer. Over the course of many decades of bitter experience, doctors have learned the common and uncommon pathways for the spread of cancer. For example, it is common for bladder cancer to spread almost anywhere in the body. In contrast, it is extremely unlikely for a cancerous cheek lesion to spread to the bladder.
>
> In this case, Plaintiff's estate adopts the unlikely theory that the patient died because of a cancerous lesion on his cheek that spread to his bladder. The reason Plaintiff's estate relies on the cheek cancer is because the hospital

> admittedly delayed performing a biopsy of the cheek lesion that revealed a malignancy. From that premise, Plaintiff's estate contends that the cheek lesion was the source of the problem.
>
> But the facts support the opposite conclusion. In this case, Smith's bladder cancer spread to the cheek, not the other way around. The likelihood of Smith's bladder cancer spreading to his cheek far exceeds the likelihood of Smith's cheek lesion spreading to his bladder. Moreover, the medical evidence in this case confirms that bladder cancer – not a cheek lesion – was the source of the problem and the cause of death.
>
> In this case there is no allegation of malpractice with respect to the discovery of the patient's bladder cancer. On the contrary, it is common for primary tumors, like the patient's bladder cancer, to remain hidden for a considerable time, and even "appear" for the first time long after the discovery of evidence of their spread to other sites.
>
> That is what happened in this case. The patient died because of a virulent form of bladder cancer that not only spread to his cheek, but it triggered the urinary problems, the wasting disorder, and the renal failure that caused the patient's death. The delay in performing a biopsy of the cheek lesion made no difference because, by the time the patient's bladder cancer spread to his cheek, there was no effective cancer treatment.

For a theme, you can also use a common phrase or metaphor that serves as a unifying principle for your case. For example, imagine a situation in which a Coast Guard officer candidate is discharged for cheating on an examination. The officer, a white male, contends that his discharge was unfair because the Coast Guard did not discharge an African-American officer who cheated on a different exam. Now assume you are the Coast Guard's lawyer, and you are defending the decision to discharge the white officer. In the absence of a theme, your motions might include an introduction like this:

> Mr. Larry Anderson ("Plaintiff") was properly separated from the Coast Guard, under the appropriate notice and comment procedures, after admittedly cheating on an examination at his basic officer training course. Afterwards, he petitioned the Secretary of the U.S. Department of Homeland Security ("the Secretary") for reinstatement, arguing he was entitled to reinstatement because (1) he took too much prescription medicine before he cheated, and (2) a minority officer was retained after cheating on a different examination at the same course.

> The Secretary, in accordance with the recommendations of all three members of the Board for Correction of Coast Guard Records ("the Board") rejected Plaintiff's overmedication and reverse discrimination arguments. The Secretary also found, in accordance with the recommendation of one board member, that Plaintiff's case did not warrant equitable relief because he failed to demonstrate the character traits required of a Coast Guard officer.
>
> Because the Complaint and the documents attached thereto establish, as a matter of law, that the Secretary's decision was authorized by statute, procedurally sound, and well supported by the record, dismissal is warranted. Moreover, dismissal is particularly appropriate given the unusually deferential review accorded military personnel actions under the Administrative Procedure Act ("APA").

There is nothing particularly wrong with that introduction, but it lacks persuasive power due to the absence of a theme. It reads more like a collection of individual points without any particular context or unifying idea. The following is a revised version that includes a reasonable theme:

> This case presents a tale of two Coast Guard officers. One Coast Guard officer, Plaintiff Larry Anderson ("Anderson"), cheated on a test by copying answers from a fellow student. Anderson claims that he cheated because, earlier that day, he ingested too much pain medication, which caused him to be confused. Anderson's method of cheating, however, suggests that he was not confused. Prior to the cheating incident, Anderson was counseled numerous times, failed an exam, and was a barely average student. When confronted with the cheating incident, Anderson suggested that his supervisory officers were partly to blame because they supposedly "did not care" about him. After the cheating incident, Anderson failed another test and continued to have discipline and attitude problems.
>
> The other Coast Guard officer, Michael Rogers ("Rogers"), cheated on a different exam, in a different way, under a different Commanding Officer. Moreover, Rogers responded with a completely different attitude. When confronted, Rogers accepted full responsibility, and he did not try to blame anything or anyone else. Rogers' grade point average placed him in the middle of his Coast Guard class. Rogers never required counseling for any other incident. After the incident, Rogers was an exemplary Coast Guard officer.
>
> The Coast Guard issued a punitive letter of reprimand to Rogers, but he was allowed to remain in the service. The Coast Guard, however, discharged

> Anderson. Anderson contends that the different treatment was "arbitrary and capricious."
>
> The undisputed facts provide ample distinctions between Anderson and Rogers to justify the different administrative treatment. Moreover, pursuant to the extremely deferential standard of review that applies in this case, the decision should be upheld even if reasonable minds could differ on the issue. In this case, the Court should uphold the Coast Guard's decision because, as a matter of law, it was based on substantial evidence after sufficient administrative due process, and it was not arbitrary or capricious.

Notice that the theme does not involve name-calling or hyperbole or anything else that would distract from the underlying facts and law. Instead, the theme seeks to amplify the facts and the law, from the Coast Guard's perspective, by highlighting the differences between the two officers. Indeed, the Coast Guard wants to focus the debate on the "tale of two officers" because the different circumstances justify the different treatment. Indeed, even if you skipped the phrase about a "tale of two officers," you would still have a perfectly valid narrative.

When selecting a theme, however, you must always consider the risk that the other side will turn it against you. Continuing with the example of the Coast Guard officer, opposing counsel might find a way to "embrace" your theme and use it against you, like this:

> Anderson agrees with the Coast Guard that this is a "tale of two naval officers." However, in this case, it is a tale of unfairness. The issue in this case is whether it was "arbitrary and capricious" for the Coast Guard to treat two officers so differently when their circumstances were so similar. On this factual record, and particularly for this motion where the Plaintiff is entitled to the benefit of all reasonable inferences, the answer is yes.

A response like that would bring the case back to the issue that favors the Plaintiff: whether it was unfair for the Coast Guard to expel the white officer but not the African-American officer.

When developing a theme, remember that, in many ways, litigation writing is story-telling with rules. The rules are designed to make sure the case is fairly grounded in the admissible facts and the applicable law. The theme is merely a rhetorical device to amplify the strength of your client's position on the merits. But litigation writing should be more than a boring recitation of factual and legal citations. To make your case come alive, consider using a theme.

How to Construct a Motion

Once you have decided to file a motion, you need to focus on the required elements. What should you include? How should it be organized?

When you file a motion, the first question in the judge's mind will be: what authority supports the request for relief? As you answer that question in your motion, we suggest that you *start with the general and move to the specific*. In other words, you should begin the discussion of each issue with a statement of general legal principles (typically found in statutes, regulations, or "black letter" descriptions of the law) followed by any specific analogous cases. It is much easier for the court to follow an argument that moves from the general to the specific.

As you work through those authorities, remember that the court expects you to *define the controlling test*. Continuing with the example of the Coast Guard officer who was discharged for cheating, consider this statement of the applicable standard of judicial review:

> The Administrative Procedures Act "provides, not for *de novo* review, but only for a judicial determination whether the agency has taken actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or not supported by 'substantial evidence.'" *Farley v. Perry*, 1994 WL 413316 at *3 (D.D.C. July 20, 1994) (quoting 5 U.S.C. § 706(2)(A) and (E)). "The arbitrary and capricious standard is a narrow one that reflects the deference given to agencies' expertise within their respective fields. As long as the agency provides a rational explanation for its decision, a reviewing court cannot disturb it." *Henry v. U.S. Dep't of the Navy*, 77 F.3d 271, 272–73 (8th Cir. 1996) (citing *Nat'l Wildlife Federation v. Whistler*, 27 F.3d 1341, 1344 (8th Cir.1994)). In a case like this, which arises in a military context, the standard of review is even more circumscribed.
>
> Review of a military agency's ruling must be extremely deferential because of the confluence of the narrow scope of review under the APA and the military setting. Falk v. Secretary of the Army, 870 F.2d 941, 945 (2d Cir.1989). Our review of a military correction board's decision is limited to deciding "whether the Board's decision making process was deficient, not whether the decision was correct." *Watson*, 886 F.2d at 1011 n. 16. In appraising the agency's fact finding, we note that substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions does not indicate that substantial evidence fails

> to support an agency's findings. *See, e.g.*, *Baker v. Secretary of Health and Human Services*, 955 F.2d 552, 554 (8th Cir.1992).

There are several points to note about that statement. First, it does the job – it fully informs the court of the applicable governing standard in the case. Second, in many cases, the standard of review is outcome-determinative. In your legal career, you will be amazed at how many disputes are resolved, not strictly on the merits, but based on the standard of review or the burden of proof or what we would call "tie-breaker" rules.[6] In many cases, once the court determines the overall governing standard, the winner is fairly obvious and the case is effectively over. Third, the earlier description of the standard of review puts the case in a favorable context. In other words, this is not just a case of judicial review of an employment decision – it is about the Coast Guard's authority to enforce military discipline.

Applying the Law in Two Paragraphs

If you are involved in litigation during the course of your legal career, you will certainly write plenty of complicated legal motions. To prepare for that, however, it is convenient to practice with some simple exercises. In that regard, one helpful skill is what we call the art of "applying the law in two paragraphs."

With this simplified approach, use one paragraph to explain a case or legal point; use a second paragraph to apply that case or legal point to the present facts. By using two paragraphs, you avoid the common mistake of confusing the description of the law with its application. Here is a simple example from a privacy case:

> In *Hawley*, this Court dismissed a privacy claim in part due to the lack of widespread publicity. Hawley was an account executive who was fired for the improper accounting of certain sales. *Hawley*, 1994 WL 505029 at *1. Although Hawley alleged the company invaded his privacy by distributing an investigative report about his misconduct, the court dismissed the claim due

[6] The world-famous O.J. Simpson case presents an excellent example. In the criminal case in which O.J. was accused of killing his wife, he was found not guilty based on the criminal standard of "beyond a reasonable doubt." In the civil case, however, O.J. was found liable for killing his wife based on the civil standard of a "preponderance of the evidence." Similar facts; different standard; different outcome. *Buell ex rel Buell v. Bruiser Ken*, 1999 WL 390642 at *3 (E.D.N.Y. 1999) (explaining why the O.J. Simpson civil case was not collaterally estopped by the acquittal in the criminal case).

> to the report's "limited" disclosure to six people. *Hawley*, 1994 WL 505029 at *3–4.
>
> The same is true here. Jones complains that Barnes revealed information to one person, Allison Marshall (Amended Complaint ¶ 10). But that allegation does not satisfy the tort's "widespread publicity" requirement. Indeed, in this case, Barnes' statement is more "limited" than the one dismissed in Hawley. Accordingly, the Court should dismiss Count V.

Notice how the first paragraph is only three sentences, but the reader learns the two critical elements in the description of any case: what happened and why. Notice also how the second paragraph applies the law without surplusage. The point is clear: if the disclosure to the six people in *Hawley* was not "widespread publicity," then the disclosure in this case to one person is not "widespread publicity" either.

Moreover, don't forget the larger context in which you are applying the law to the facts of your case. When you make an analogy to a case, or when you distinguish a case, you are engaging in a process of seeking justice through fairness.[7] When you argue by analogy, you are saying to the court: "My client wants the same treatment that another litigant received because the circumstances are the same." In contrast, when you distinguish a case, you are telling the court that "this case should be treated differently because the circumstances are so different." Ultimately that process – treating similar things similarly, and different things differently – is the essence of justice.[8]

"Universal Motion Template"

Drafting a motion is not as complicated as it may first seem. As explained in Chapter Two, Federal Rule 7 defines a motion as an "application to the court for an order," which shall "state with particularity the grounds" and "shall set forth the relief or order sought." The Rules offer scant guidance on what that means. However, many motions follow a similar pattern, and it makes good strategic

[7] The concept of "justice as fairness" is the hallmark of John Rawls' seminal treatise, *A Theory of Justice* (Belknap 1971).

[8] Edward H. Levi, *An Introduction to Legal Reasoning* (University of Chicago Press 1974) ("The determination of similarity or difference is the function of each judge"); *see generally* C. Sunstein, *On Analogical Reasoning*, 106 Harv.L.Rev. 741 (1993) ("Reasoning by analogy is the most familiar form of legal reasoning. It dominates the first year of law school; it is a characteristic part of brief-writing and opinion-writing as well.").