

Agenda item # 4 (c)

BEFORE THE ADMINISTRATIVE LAW JUDGE
THE HONORABLE BERNARD PYLITT
APPOINTED BY THE INDIANA HORSE RACING COMMISSION

DONALD GREGO,)	
Petitioner,)	
)	AN APPEAL OF
v.)	STEWARDS' RULING
)	NO. 14703
)	
INDIANA HORSE RACING COMMISSION STAFF,)	
Respondent)	
)	

PETITIONERS RESPONSE TO RESPONDENTS
MOTION FOR SUMMARY JUDGMENT

The Petitioner, Donald Grego, by counsel, files it's response to Respondents Motion for Summary Judgment as follows:

Statement of Facts

Donald Grego was the owner and trainer of Cielo Classic on July 24, 2014 and still is presently. Donald Grego is currently licensed in Kentucky and Florida, but was licensed in Indiana on July 24, 2014 with no previous violations. Cielo Classic ran in the 7th race at Indiana Grand on July 24, 2014 and placed 3rd. After the race, Cielo Classic was taken to the "spit box" and a blood and urine sample was taken for testing of illegal substances.

The blood sample that was taken on July 24, 2014 was sent to LGC Industries "LGC" in Lexington, Kentucky, on July 25, 2014. That sample was tested on July 27, 2014 (exhibit 1) but the results not signed nor was a formal report done by a laboratory technician or employee of LGC. The samples were then stored at LGC until October 10, 2014, nearly 3 months, when according to an email (exhibit 2) from Holly Newell, Deputy General Counsel for the Indiana Racing Commission, to Pierre Barretrt, Chris Ware, Rick Sams, Joe Gorajec, Terry Richwine,

Seth Wong and Petra Hartmann stating that the Indiana Horse Racing Commission "IHRC" will take

"possession of all 2014 IHRC post-race samples identified in a document that will be attached and sent under separate cover. These are samples that are in LGC's possession and have screened positive but are pending confirmation"

There is no confirmation paperwork that shows a positive in the original sample screened that was signed or witnessed by a LGC laboratory technician or employee. The data sheet from LGC that shows a positive is not noted with a laboratory technician initials or signature is labeled Suspects Collection Data sheet (exhibit 1). Also according to that same document the tested sample levels were 21ng/mL of Ibuprofen and 141ng/mL of Triamcinolone acetonide (Vetalog) on 07/27/2014.

A lab transfer was done on October 9, 2014 from LGC to the possession of the IHRC Director of Security Terry Richwine (exhibit 3). The package was then shipped by FedEx and received by Petra Hartmann on October 10, 2014 at 10:30 a.m. (exhibits 4 & 5). According to these exhibits signed and dated by Petra Hartmann at The Industrial Laboratories in Wheat Ridge, Colorado, there was a "severe leak" and "empty blood tubes" in the box of samples received from IHRC. The sample was tested, signed and notarized on October 28, 2014 by The Industrial Laboratories. The results were reported with levels of 171pg/mL +/- 19pg/mL of Triamcinolone acetonide (Vetalog) and 23ng/mL of Ibuprofen (exhibit 6). At this time, according the Affidavit of Stanley Bowker, submitted by Counsel for IHRC, a telephone call was made to Donald Grego notifying him of the results and inquiring on conducting a split sample test at Mr. Grego's request and expense. He declined and a telephonic hearing was conducted on December 29, 2014 with the IHRC Stewards and Mr. Grego and his counsel, Bernard Ritchie (exhibit 7). An order was issued on January 5, 2015, Ruling No. 14703, which stated that Mr.

Grego is ordered to pay \$1,000.00 for each positive and to return the purse of \$3,400.00 to the Horsemen's Bookkeeper (exhibit 8).

An Amended Notice of Appeal was filed on January 9, 2015 (exhibit 9) and this case was initiated from that appeal.

Argument

In reviewing the Sample Collection Data sheet from LGC the results from the testing that was performed on July 27, 2014 are that 144pg/mL of Triamcinolone acetonide and 21ng/mL of Ibuprofen. These results are not formally recorded by a signature of an LGC employee or notarized by a notary public of Kentucky. The samples then sat in an unknown location and in an unknown condition within LGC until they were taken into possession of the IHRC. During the shipment of the 38 lbs. box with FedEx there were some issues with a sample having a "severe leak" and an "empty blood tube" contained within the samples upon arrival at Industrial Laboratories. Once the blood sample from Cielo Classic labeled sample #: 54901 was tested the results were different than LGC at 171pg/mL of Triamcinolone acetonide and 23ng/mL of Ibuprofen. This raises concerns and questions due to the fact that the levels had increased since they were originally tested on July 27, 2014. The possibility of contamination is likely considering the description of the leak as "severe" by Petra Hartmann who is witness for receiving the box. This gives reasonable doubt to the validity and accuracy of the results reported by Industrial Laboratories.

Secondly, it is our contention that the amounts of the fine for the laboratory results from Industrial Laboratories has changed from \$1,000.00 for both questionable violations to \$2,000.00 for the same laboratory results. In the IHRC Stewards' hearing on December 29, 2014, Stan Bowker was asked to stipulate to the \$1,000.00 fine plus the loss of purse be returned as

discussed in the initial telephone conversation with Mr. Grego. At the hearing Mr. Bowker stated (exhibit 10);

“We had had a discussion with him earlier, if he wanted to waive his right to a hearing, that, that is the guidelines that have been established by the Racing Commission that we would put, that that’s what we would fine him and that would be the loss of purse.

However, he, he has chosen to have the hearing, instead. So, whatever penalty will come out of this hearing, not, not something that had previously been discussed.”

Before the initial phone conversation alerting Mr. Grego of the positive results, there was no letter or documentation from the Steward’s stating that he could pay a fine of any amount and return the purse. But there was a telephone conversation that both parties have recognized occurred, that if Mr. Grego agreed to pay the \$1,000.00 and the return of the purse to avoid a raise in the total fine amount. This is supported by Mr. Bowker’s own admission in that hearing and that is the only reason that we believe the original fine was \$1,000.00 plus the return of the purse. When Mr. Grego receives the order (exhibit 8) it shows that the fine is \$2,000.00 and the return of the purse. This leads us to believe that since Mr. Grego decided to have a hearing and not just pay the fine and return the purse, the fine was increased to \$2,000.00 by the Steward’s. This is against what the guidelines that have been so heavily relied on in this case (exhibit 11).

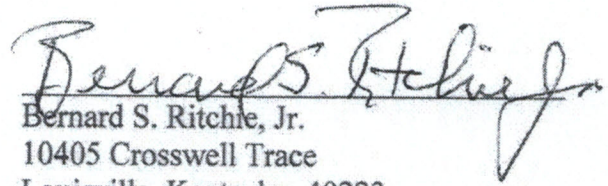
Conclusion

A general issue of material fact exist as to the accuracy of the testing of the blood samples in question and/or samples were contaminated. Each of the laboratories in questions found different levels of Triamcinolone acetonide and Ibuprofen. This fact raises question of validity at both laboratories. Leaking and empty blood tubes as noted by Petra Hartmann as “severe” raises a possibility of contamination. The Petitioner maintains that finding any of guilt in this matter is unsupported by substantial evidence.

Regarding the fine, it is undisputed that Mr. Grego could have settled the whole matter in payment of \$1,000.00 fine and return of the purse. Since Mr. Grego chose to have a hearing on the merits of case, the fine was upped to \$2,000.00 and forfeiture of the purse. We do not believe that Mr. Grego should be penalized for exercising his right to an evidentiary hearing.

WHEREFORE, the Petitioner requests that the Respondents Motion for Summary Judgment be denied.

Respectfully submitted,



Bernard S. Ritchie, Jr.
10405 Crosswell Trace
Louisville, Kentucky 40223
P: (502) 724-3587

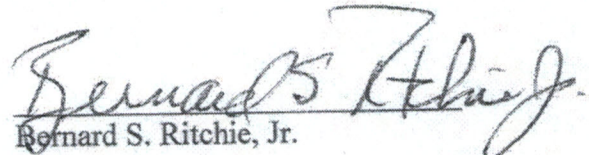
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served via U.S. Mail, first class, postage paid, and via email, this 20 of July, 2015 to the following parties of record:

Holly Newell
Indiana Horse Racing Commission
1302 North Meridian, Ste. 175
Indianapolis, IN 46202
Email: hnewell@hrc.in.gov

Bernard L. Pylitt
Administrative Law Judge
Katz & Korin, PC
334 North Senate Avenue
Indianapolis, IN 46204
Email: bpylitt@katzkorin.com

Respectfully,


Bernard S. Ritchie, Jr.

ATTACHMENT 1
Last Updated: 8-Oct

Recently Added
Multiple Findings

Total Samples: 78
Total Findings: 89

SUSPECTS - Collection Date

SUSPECTS - Collection Date					ANALYTE DETAILS - SCREENING RESULTS				Further Details	Estimated Completion Date
LOC Lab Number	HRRC Tag Number	Trace	Collection Date	Received Date	Suspicious For	Conc.	UOAL	Matrix		
126435	004202	Indiana Grand	02/01/14	02/10/14	Fluorbutyl				DEAD HORSE - PENDING DOO DEAD HORSE	
126685	004202	Indiana Grand	02/01/14	02/10/14	Toluene					
124473	004518	Shelbyville Fair	02/01/14	02/03/14	Chloralene					
124468	0045407	Shelbyville Fair	02/01/14	02/03/14	Methylprednisolone					
128365	0042918	Indiana Grand	02/20/14	02/10/14	Deamethasone/Betamethasone	124	pp/ml	urine		
119500	0045245	Portland Fair	02/03/14	02/12/14	Deamethasone/Betamethasone	163	pp/ml	serum		
116354	0047172	Indiana Grand	02/03/14	02/12/14	Deamethasone/Betamethasone	33	pp/ml	serum		
115843	0047190	Indiana Grand	02/03/14	02/12/14	Deamethasone/Betamethasone	20	pp/ml	serum		
119352	0047170	Indiana Grand	02/03/14	02/12/14	Deamethasone/Betamethasone	29	pp/ml	serum		
119682	0047170	Indiana Grand	02/03/14	02/12/14	Dexamethasone/Betamethasone			urine		
119504	0045348	Portland Fair	02/03/14	02/12/14	Methylprednisolone	138	pp/ml	serum		
119918	0045366	Portland Fair	02/03/14	02/12/14	Triptolizone	4.7	pp/ml	serum		
119283	0048132	Hoosier Park	02/03/14	02/12/14	Triptolizone			urine		
116582	0048132	Hoosier Park	02/03/14	02/12/14	Triptolizone			urine		
119254	0047198	Indiana Grand	02/03/14	02/12/14	Triptolizone			urine		
119254	0047198	Indiana Grand	02/03/14	02/12/14	Triptolizone			urine		
119053	0047137	Indiana Grand	02/03/14	02/12/14	Deamethasone/Betamethasone	59	pp/ml	serum		
119053	0047137	Indiana Grand	02/03/14	02/12/14	Flunixin	12.9	pp/ml	serum	Cocaine/phenylbutazone	
119029	0047114	Indiana Grand	02/03/14	02/12/14	Phenylbutazone			serum		
119118	0045698	Hoosier Park	02/03/14	02/12/14	Deamethasone/Betamethasone	5.35	pp/ml	serum		
115388	0045645	Hoosier Park	02/02/14	02/11/14	Isophthalate			serum		
116624	0045204	Shelbyville Fair	02/02/14	02/02/14	Deamethasone/Betamethasone	291	pp/ml	serum		
118811	0045229	Shelbyville Fair	02/01/14	02/01/14	Flunixin	179	pp/ml	serum		
115565	0046029	Hoosier Park	02/01/14	02/05/14	Furosemide			serum	Absent, status = present	
117406	0041611	Hoosier Park	01/20/14	02/04/14	Isopropredesone	55	pp/ml	serum		
117406	0041611	Hoosier Park	01/20/14	02/04/14	Furosemide	122	pp/ml	serum		
117700	0041029	Indiana Grand	01/20/14	02/04/14	Methylprednisolone			serum	Present, status = absent	
117254	0043315	Connersville Fair	01/20/14	02/04/14	Tetracycline	735	pp/ml	serum		
117254	0043315	Connersville Fair	01/20/14	02/04/14	Furosemide	35	pp/ml	serum	Fly	
117695	0045992	Indiana Grand	01/20/14	02/04/14	Phenylbutazone	5.8	pp/ml	serum	Absent, status = present	
117165	0045744	Indiana Grand	01/20/14	02/04/14	Tetracycline	43	pp/ml	serum		
117143	0045929	Indiana Grand	01/20/14	01/20/14	Deamethasone/Betamethasone	149	pp/ml	serum	Fly	
118995	0045901	Indiana Grand	01/20/14	01/20/14	Methylprednisolone	1.3	pp/ml	serum	UNLINED HORSE	
118995	0045901	Indiana Grand	01/20/14	01/20/14	Isoprofen	21	pp/ml	serum		
116629	0044319	Hoosier Park	01/23/14	01/23/14	Triptolizone Acetate	144	pp/ml	serum		
116906	0045502	Hoosier Park	01/23/14	01/23/14	Methylprednisolone	350	pp/ml	serum		
116587	0045266	Goosier Fair	01/23/14	01/23/14	Phenylbutazone	2.9	pp/ml	serum		
116975	0045275	Goosier Fair	01/23/14	01/23/14	Chloralene			urine		
116561	0045855	Goosier Fair	01/23/14	01/23/14	Furosemide			urine		
115835	0044855	Indiana Grand	01/23/14	01/23/14	Triptolizone			serum	Absent, status = present	
116278	0044829	Indiana Grand	01/23/14	01/23/14	Flunixin			urine		
118228	0045402	Indiana Grand	01/23/14	01/23/14	Flunixin	7.1	pp/ml	serum		
116688	0045218	Hoosier Park	01/23/14	01/23/14	Phenylbutazone	6.5	pp/ml	serum	Cocaine/phenylbutazone	
115235	0044818	Indiana Grand	01/23/14	01/23/14	Triptolizone			serum		
114659	0045213	Shelbyville Fair	01/23/14	01/23/14	Deamethasone/Betamethasone	52	pp/ml	urine		
114659	0045213	Shelbyville Fair	01/23/14	01/23/14	FLUOX			serum		
118147	0044774	Indiana Grand	01/23/14	01/23/14	Furosemide			serum	Absent, status = present	
114650	0045294	Shelbyville Fair	01/23/14	01/23/14	Hydrocortisone acetate			urine		
114251	0045235	Shelbyville Fair	01/23/14	01/23/14	Methylprednisolone			urine		
114661	0045235	Shelbyville Fair	01/23/14	01/23/14	Methylprednisolone	1.9	pp/ml	urine		
114661	0045235	Shelbyville Fair	01/23/14	01/23/14	Triptolizone Acetate	243	pp/ml	serum		
114639	0045222	Shelbyville Fair	01/23/14	01/23/14	Triptolizone			urine		
114388	0045171	Hoosier Park	01/23/14	01/23/14	Triptolizone			urine		
114570	0048112	Hoosier Park	01/23/14	01/23/14	Triptolizone			urine		
113977	0045663	Indiana Grand	01/23/14	01/23/14	Triptolizone			urine		
115611	0045092	Hoosier Park	01/23/14	01/23/14	Lidocaine metabolites			urine		
113812	0045073	Hoosier Park	01/23/14	01/23/14	Triptolizone			urine		
113919	0045089	Hoosier Park	01/23/14	01/23/14	Flunixin	110	pp/ml	serum		
113589	0045177	Portland Fair	01/23/14	01/23/14	Furosemide			serum	Absent, status = present	
114026	0045194	Portland Fair	01/23/14	01/23/14	Lidocaine			urine		
113050	0048558	Hoosier Park	01/23/14	01/23/14	Stacodol	56	pp/ml	serum		
113027	0048565	Hoosier Park	01/23/14	01/23/14	Furosemide			serum		
112498	0045927	Indiana Grand	01/23/14	01/23/14	Methylprednisolone			serum		
112970	0045188	Portland Fair	01/23/14	01/23/14	Diphenhydramine metabolites	429	pp/ml	serum		
112149	0045661	Indiana Grand	01/23/14	01/23/14	Hydrocortisone			urine		
112149	0045661	Indiana Grand	01/23/14	01/23/14	Artemisin			urine		
112161	0045913	Indiana Grand	01/23/14	01/23/14	Bromhexine			urine		
111474	0045879	Indiana Grand	01/23/14	01/23/14	Methylprednisolone	160	pp/ml	serum		
111826	0044556	Hoosier Park	01/23/14	01/23/14	Deamethasone/Betamethasone	35	pp/ml	serum		
110816	0045934	Indiana Grand	01/23/14	01/23/14	Furosemide			serum		
110288	0045132	Shelbyville Fair	01/23/14	01/23/14	Hydrocortisone			urine		
110087	0045207	Indiana Grand	01/23/14	01/23/14	Deamethasone/Betamethasone			serum	Absent, status = present	
105205	0045186	Indiana Grand	01/23/14	01/23/14	Deamethasone/Betamethasone	34	pp/ml	serum		
103769	0045285	Indiana Grand	01/23/14	01/23/14	Deamethasone/Betamethasone	24	pp/ml	serum		
105829	0045285	Hoosier Park	01/23/14	01/23/14	Methylprednisolone	83	pp/ml	serum		
106166	0045287	Indiana Grand	01/23/14	01/23/14	Deamethasone/Betamethasone	1.4	pp/ml	serum		
109380	0045378	Indiana Grand	01/23/14	01/23/14	Deamethasone/Betamethasone	748	pp/ml	serum		
107260	0045650	Indiana Grand	01/23/14	01/23/14	Methylprednisolone	34	pp/ml	serum		
107259	0045638	Indiana Grand	01/23/14	01/23/14	Deamethasone/Betamethasone	67	pp/ml	serum		
106991	0045028	Connersville Fair	01/23/14	01/23/14	Deamethasone/Betamethasone	67	pp/ml	serum		
106541	0044168	Hoosier Park	01/23/14	01/23/14	Mephobarbital metabolites			urine		
105527	0044164	Hoosier Park	01/23/14	01/23/14	Tramadol			urine		
105470	0045810	Indiana Grand	01/23/14	01/23/14	Methylprednisolone	811	pp/ml	serum		
104874	0044126	Hoosier Park	01/23/14	01/23/14	Deamethasone/Betamethasone	118	pp/ml	serum		
104792	0045589	Indiana Grand	01/23/14	01/23/14	Lidocaine			serum		
104782	0045819	Indiana Grand	01/23/14	01/23/14	Flunixin			serum		
104764	0045949	Indiana Grand	01/23/14	01/23/14	Synalgin			serum		
103137	0044409	Indiana Grand	01/23/14	01/23/14	Deamethasone/Betamethasone			serum		
103158	0044408	Indiana Grand	01/23/14	01/23/14	Deamethasone/Betamethasone	37	pp/ml	serum		
102634	0034417	Hoosier Park	01/23/14	01/23/14	Methylprednisolone	460	pp/ml	serum		
					Methylprednisolone	42	pp/ml	serum		

T.R
10-8-14

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CMW
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EXHIBIT
I

Richwine, Terry

From: Newell, Holly
Sent: Thursday, October 09, 2014 10:44 AM
To: Pierre Barratt; Chris Ware; Rick Sams
Cc: Gorajec, Joe; Richwine, Terry; Seth Wong; Petra Hartmann
Subject: IHRC samples

Importance: High

Gentlemen,

IHRC Director of Security Terry Richwine and Investigator Kevin Tompkins, will be arriving at LGC around 11 a.m. EST today to take possession of all 2014 IHRC post-race samples identified in a document that will be attached and sent under separate cover. These are samples that are in LGC's possession and have screened positive, but are pending confirmation.

The IHRC expects all samples to be segregated, temperature controlled, and ready to be moved to IHRC possession.

Holly Newell
Deputy Counsel, Indiana Horse Racing Commission
1302 North Meridian
Suite 175
Indianapolis, IN 46202

(317)233-3119





LGC Science, Inc.
1745 Alysheba Way
Suite 160
Lexington, KY 40509

Tel: 859-721-0180
Fax: 859-264-0371

DOCUMENTATION OF SAMPLE TRANSFER

Date: October 09, 2014

ASSOCIATED PARTIES:

Indiana Horse Racing Commission
1302 N. Meridian, Suite 175
Indianapolis, IN 46202

LGC Science Inc.
1745 Alysheba Way, Suite 160
Lexington, KY 40509

DECLARATION:

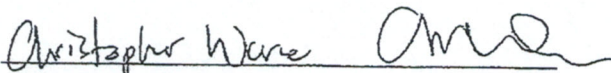
The samples enumerated on *Attachment 1* have been transferred to a representative of the Indiana Horse Racing Commission by LGC Science Inc. on this date. All samples listed in *Attachment 1* have been inspected and verified by both parties. Henceforth, the Indiana Horse Racing Commission assumes custody for all enumerated samples.

SIGNATURES:



Indiana Horse Racing Commission

10-9-14 11:24 AM
Date/Time



LGC Science Inc.

09 Oct. 2014 @ 1124 am
Date/Time

Attachment 1





LGC Science, Inc.
 1745 Alysheba Way
 Suite 160
 Lexington, KY 40509
 t: 859-721-0180
 f: 859-264-0371

**Sample Record
 Send To Laboratory
 Industrial Laboratories Inc.**

TO BE COMPLETED BY TESTING LABORATORY UPON RECEIPT OF SAMPLE FOR TESTING:

Laboratory: Industrial Laboratories

Date/Time Samples Received: 10-10-14 / 10:30 am

Was package received in good condition with all seals intact? Box sealed

Sample # 0044468 (111569) - severe leak

Received By: Petra Hanhman Director, DTS
 (Signature and Title)

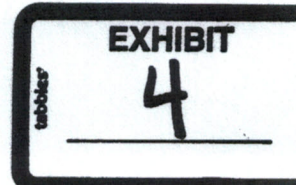
Upon receipt of this sample, please complete this notification and send promptly by email or facsimile to:

chris.ware@lgcgroup.com

Fax (859) 264-0371 Attn: Chris Ware

126365
 111569 - leak
 114545

000025





LGC Science, Inc.
1745 Alysheba Way
Suite 160
Lexington, KY 40509
t 859-721-0180
f 859-264-0371

**Sample Record
Send To Laboratory
Industrial Laboratories Inc.**

TO BE COMPLETED BY TESTING LABORATORY UPON RECEIPT OF SAMPLE FOR TESTING:

Laboratory:

Industrial Labs

Date/Time Samples Received:

10-10-14 / 10:30 am

Was package received in good condition with all seals intact?

yes

Received By:

Petra Hankmann, Director/DTS

(Signature and Title)

Upon receipt of this sample, please complete this notification and send promptly by email or facsimile to:

chris.ware@lgcgroup.com

Fax (859) 264-0371

Attn: Chris Ware

(empty blood tubes)

000026

EXHIBIT

5



INDIANA HORSE RACING COMMISSION.
1302 N. MERIDIAN STREET
SUITE 175
INDIANAPOLIS, IN 46202

*changed
alotted
out-*

AFFIDAVIT

I hereby certify that Industrial Laboratories at 4046 Youngfield Street, Wheat Ridge, Colorado; has analyzed the sample identified below:

54901, Indiana Grand, race date July 24, 2014.

Sample matrix: Serum

The sample was received in good & secure condition on: October 10, 2014

Laboratory ID number: IL-R-14-15485

The sample was analyzed using:
Liquid Chromatography Mass Spectrometry-Mass Spectrometry (LC-MS/MS)

The sample contained: Triamcinolone acetonide & ibuprofen

Concentration: 171 +/- 19 picograms per milliliter (pg/mL) (Triamcin acet)
approximately 23 ng/mL (ibuprofen)

Comments: Reported uncertainties represent expanded uncertainties expressed at approximately the 99.7% confidence level using a coverage factor of k=3.20

SIGNED:

Petra Hartmann
Petra Hartmann
Director, Drug Testing Services
Date: October 28th, 2014

Sworn to me this day:
28 day of October, 2014.
Michelle Stringer
NOTARY PUBLIC

4046 Youngfield St., Wheat Ridge, Colorado 80033 TEL (303) 287-8891 FAX (303) 287-0864
www.industrialabs.net

Receipt of analysis services acknowledges the terms and conditions on the website
www.industrialabs.net/terms/terms.html

This report is not to be reproduced in whole or in part without obtaining prior written authorization

MICHELLE STRINGER
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20134033071
MY COMMISSION EXPIRES MAY 23, 2017

EXHIBIT
6

showing the race results and purse for Race 7 at the Indiana Grand Race Course is attached to this Affidavit as Exhibit 2.¹

5. At all times relevant, Cielo Classic was owned by Donald Grego, who was licensed by the Commission as an owner.
6. At all times relevant, Cielo Classic was trained by Grego, who was licensed by the Commission as a trainer.
7. Blood and urine samples were collected from Cielo Classic after the July 24, 2014 race.
8. On October 28, 2014, Industrial Laboratories identified Sample No. 54901 as being positive for two substances: triamcinolone acetonide and ibuprofen.
9. The Stewards notified Grego of the positive tests.
10. Grego declined to have a split sample tested.
11. The IHRC stewards conducted a telephonic hearing for Grego on December 29, 2014. Grego was represented by counsel during the hearing.
12. Commission regulations dictate that the Stewards shall consider the classification level of the violation as currently established by the Uniform Classification Guidelines of Foreign Substances and Recommended Penalties and Model Rule published by the ARCI, and impose penalties and disciplinary measures consistent with the recommendations therein. 71 IAC 8.5-1-7.
13. On January 5, 2015, the IHRC Stewards issued Ruling No. 14703, a true and accurate copy of which is attached hereto as Exhibit 13.

¹ Equibase Chart results have been updated to reflect Stewards' Ruling No. 14703. The revised Chart is attached as Exhibit 3.





INDIANA HORSE RACING COMMISSION
AMENDED APPEAL

State Form 48793 (R3 / 7-13)

In Re: 14703 (Ruling Number)

Donald R. Grego
(Name of Appellant)
1327 Lance Drive Louisville
(Address) (City)
953378
(IN License Number)

(502) 445-5272
(Telephone)
KY 40216
(State) (ZIP)
09/15/1947
(Date of Birth (month, day, year))

I hereby appeal the decision of the Judges/Stewards at Indiana Grand on 01/05/2015
in connection with the above referenced ruling. (Date of Ruling (month, day, year))

Reasons for Appeal (attach additional sheets if necessary): 1.) I was not notified of any changes by the Indiana
either before or after I had renewed my training license at Indiana Grand. 2.) Due to the time between the
race at Indiana Grand on 07/24/2014, lab receiving sample on 10/10/2014 and results on 10/28/2014, I
question the accuracy of the results and chain of custody of the sample. 3.) After the hearing on 12/29/2014, I
was notified that the fine was increased \$1000.00 for the same results I am currently contesting.

Donald R. Grego
(Signature of Appellant)

01/09/2015
(Date (month, day, year))

If you will be represented by legal counsel and know the name of your attorney, please complete the following.

Name of Attorney: Bernard S. Ritchie, Jr.

Mailing Address: 10405 Crowell Trace

Louisville, KY 40223

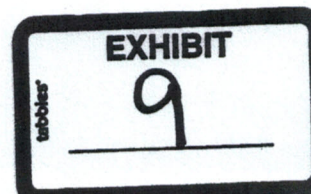
Telephone Number / Fax Number: (502) 724-3587

DO NOT WRITE BELOW THIS LINE.

All appeals shall be made in writing and must be filed with the Commission within fifteen (15) days
after the Judges' or other Officials' ruling is served upon the Appellant.

(Signature of Judge/Steward or Other Official)

Distribution: Executive Director, Judges/Stewards, Appellant



1 STEWARD STAN BOWKER: Yeah.

2 STEWARD BILLY TROILO: That was May 15th.

3 STEWARD STAN BOWKER: May 15th. All right.

4 The new guidelines went into effect on May 15th.

5 BERNARD RITCHIE: Okay. And as I understand
6 it, the, the, the meet started on May 6th, is
7 that correct?

8 STEWARD STAN BOWKER: Right. There was a,
9 there was a gap of nine or ten days before the,
10 the new rules went into effect.

11 BERNARD RITCHIE: Yes. Okay. With that, I
12 think we've stipulated probably --

13 Can we also stipulate that as a result of
14 the previous findings regarding the medications,
15 that Mr. Grego was fined a thousand dollars and
16 ordered to return his purse of the four hundred
17 dollars.

18 STEWARD STAN BOWKER: That, no, that, that
19 is what -- you're, you're talking about this
20 medication violation?

21 BERNARD RITCHIE: Yes.

22 STEWARD STAN BOWKER: Yeah, this, that is
23 not a, that has not been determined yet.

24 We had had a discussion with him earlier, if
25 he wanted to waive his right to a hearing, that,

EXHIBIT

10

1 that is the guidelines that have been established
2 by the Racing Commission that we would put, that
3 that's what we would fine him and that would be
4 the loss of purse.

5 However, he, he has chosen to have the
6 hearing, instead. So, whatever penalty will come
7 out of this hearing, not, not something that had
8 previously been discussed.

9 BERNARD RITCHIE: All right. I see. Okay.
10 All right. I, I think that's about all of the
11 stipulations I would offer at this time.

12 STEWARD STAN BOWKER: Okay. All right.

13 What I'm going to do first is, we're going
14 to call on, on, on the Horse Racing Commission
15 Investigator, Kevin Tompkins, Tompkins.

16 Kevin's going to give us a, a review, a
17 time, timeline review of when the race was, when
18 the tests were run, when the, when we got the
19 report back from the lab, those types of things,
20 so we've got a, a timeline here that, that will
21 be part of this record.

22 So, Kevin, if you will take that over, I
23 would appreciate it at this point.

24 KEVIN TOMPKINS: Okay.

25 BERNARD RITCHIE: May I ask Kevin's last

Recommended Penalty and Model Rule (Continued)

The following are recommended penalties for violations due to the presence of a drug carrying a Category "C" penalty and overages for permitted NSAIDs and furosemide: *(All concentrations are for measurements in serum or plasma.)*

LICENSED TRAINER	Phenylbutazone (≥ 2.0 - 5.0 mcg/ml) Flunixin (>20 - 100 ng/ml) Ketoprofen (>10 - 50 ng/ml) Furosemide (>100 ng/ml) and/or no furosemide when identified as administered	Phenylbutazone (>5.0 mcg/ml) Flunixin (>100 ng/ml) Ketoprofen (>50 ng/ml) and CLASS C Violations
1 st Offense (365-day period) in any jurisdiction	Minimum of a written warning to maximum fine of \$500	Minimum fine of \$1,000 absent mitigating circumstances
2 nd Offense (365-day period) in any jurisdiction	Minimum of a written warning to maximum fine of \$750	Minimum fine of \$1,500 and 15-day suspension absent mitigating circumstances
3 rd Offense (365-day period) in any jurisdiction	Minimum fine of \$500 to a maximum fine of \$1,000	Minimum fine of \$2,500 and 30-day suspension absent mitigating circumstances
LICENSED OWNER	Phenylbutazone (≥ 2.0 - 5.0 mcg/ml) Flunixin (>20 - 100 ng/ml) Ketoprofen (>10 - 50 ng/ml) Furosemide (>100 ng/ml) and/or no furosemide when identified as administered	Phenylbutazone (>5.0 mcg/ml) Flunixin (>100 ng/ml) Ketoprofen (>50 ng/ml) and CLASS C Violations
1 st Offense (365-day period) in any jurisdiction	Horse may be required to pass commission-approved examination before being eligible to run	Loss of purse. Horse must pass commission-approved examination before being eligible to run
2 nd Offense (365-day period) in any jurisdiction	Horse may be required to pass commission-approved examination before being eligible to run	Loss of purse. If same horse, placed on veterinarian's list for 45 days, must pass commission-approved examination before being eligible to run
3 rd Offense (365-day period) in any jurisdiction	Disqualification and loss of purse. Horse must pass commission-approved examination before being eligible to run	Loss of purse, Minimum \$5,000 fine. If same horse, placed on veterinarian's list for 60 days, must pass commission-approved examination before being eligible to run

*If the trainer has not had more than one violation within the previous two years, the Stewards/Judges are encouraged to issue a warning in lieu of a fine provided the reported level is below 3.0 mcg/ml absent of aggravating factors.

After a two-year period, if the licensee has had no further violations, any penalty due to an overage in the 2.0-5.0 category will be expunged from the licensee's record for penalty purposes.

BEFORE AN ADMINISTRATIVE LAW JUDGE
APPOINTED BY THE INDIANA HORSE RACING COMMISSION

DONALD R. GREGO,
Petitioner,

v.

INDIANA HORSE RACING COMMISSION
STAFF,

Respondent.

2015 JUL 28 P 1:16
INDIANA HORSE RACING COMM

In Re: AN APPEAL OF STEWARDS'
RULING NO. 14703

**IHRC STAFF'S REPLY TO PETITIONER'S RESPONSE
TO STAFF'S MOTION FOR SUMMARY JUDGMENT**

The Indiana Horse Racing Commission Staff (hereinafter the "Commission Staff"), by counsel, pursuant to Ind. Code § 4-21.5-3-23, respectfully submits its Reply to Petitioner's Response to Staff's Motion for Summary Judgment. The Commission respectfully maintains that it has established that it is entitled to summary judgment, and Petitioner's Response has designated no genuine issue of material fact with respect to the matters referenced in Stewards' Ruling No. 14703, and has included no affidavits as required by Ind. T.R. 56., making an entry of summary judgment in favor of Commission Staff appropriate. In support thereof, the Commission submits the following Memorandum:

I. INTRODUCTION

On June 19, 2015, Commission Staff filed its Motion for Summary Judgment ("Motion") in accordance with the deadlines established by the *Second Pre-Hearing Order* filed on June 5, 2015. (Exhibit 1) In support of its Motion, the Staff designated several affidavits and set forth the "undisputed material facts," which it maintains support the entry of summary judgment in the Staff's favor. (Indiana Horse Racing Commission Staff's Motion for Summary Judgment and Memorandum in Support Thereof, pp. 2-4)

The Second Pre-Hearing Order required that any Motion for Summary Judgment be filed on or before June 19, 2015. Petitioner Grego did not file a Motion for Summary Judgment. On July 20, 2015, Petitioner Grego timely filed his Response to Staff's Motion for Summary Judgment, but failed to designate any material issue of fact and failed to include any opposing affidavits. On July 21, 2015, the ALJ issued a *Supplemental Second Pre-Hearing Order*, specifically requesting that Commission Staff file a Reply to Grego's response on or before July 28, 2015, and allowing time for Grego to file a sur-reply, if desired. (Exhibit 2)

II. ANALYSIS

As previously stated, on June 19, 2015, the Commission Staff filed its Motion with a number of supporting affidavits as provided for by Indiana Rule of Trial Procedure 56. Trial Rule 56 provides in pertinent part:

(C) Motion and proceedings thereon. The motion and any supporting affidavits shall be filed in accordance with the provisions of Rule 5. An adverse party shall have thirty (30) days after service of the motion to serve a response **and any opposing affidavits. . . . A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto.** The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . .

Indiana Trial Rule of Procedure 56 (C) (Emphasis added)

Ind. Code 4-21.5-3-23 is the Administrative Orders and Procedures Act provision that governs summary judgment motions. Section (b) provides that an administrative law judge "shall consider a [summary judgment] motion . . . as would a court that is considering a motion for summary judgment filed under Trial Rule 56..." I.C. 4-21.5-3-23(b)

Grego timely filed his Response on July 20, 2015. However, Grego's response fails to "designate to the court each material issue of fact," as required by Rule 56(C). Further, Grego's

response is devoid of opposing affidavits, which, if available, are also required to be provided at the time the Response is due. *Id.* Indiana courts have consistently determined that the requirement that a response to a motion for summary judgment, and opposing affidavits be filed is a “bright-line” rule. See, *Desai v. Croy*, 805 N.E. 2d 844 (Ind. App. Ct. 2004) (“*Seufert* and the line of cases that follow it establishes a bright line rule for trial courts and the parties who litigate summary judgment motions.” (*Id.* at 849)). The *Desai* court went on to hold:

[W]here a nonmoving party fails to respond within thirty days by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit under Rule 56(F) indicated why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response under 56(I), the trial court lacks discretion to permit that party to thereafter file a response.

Id. at 850

In his Response, Grego has made vague, unsupported commentary regarding the Staff’s case against him. However, he cannot put mere supposition in his brief and ask the ALJ to decide if this is a material fact. His response does not designate for the ALJ (or opposing counsel) exactly what his position is, and exactly what he believes to be an issue of material fact. His response does not include any affidavits.

Once the Staff filed its Motion, designating evidence and supplying affidavits to establish that there are no issues of material fact, the burden shifted to Grego to present evidence to the contrary by the time specified for the response. IND. R. TRIAL P. 56(C). He did not do so; indeed, he did not present any evidence on the merits of the Motion when his response was filed on July 20, 2015. If the non-moving party fails to properly respond or designate evidence before the response deadline as required by Trial Rule 56, and the moving party has shown that it is entitled

to summary judgment, summary judgment must be entered against the non-moving party. *Morton v. Moss*, 694 N.E.2d 1148, 1152 (Ind. App. Ct. 1998).

Similarly, a party may not wait until a summary judgment hearing to oppose the underlying motion. *Seufert v. RWB Med. Income Props. I Ltd. P'ship*, 649 N.E.2d 1070, 1073 (Ind. Ct. App. 1995) ("If the non-moving party does not respond to a properly supported motion by setting forth specific facts showing a genuine issue for trial, then T.R. 56(E) mandates that summary judgment, if appropriate, be entered against him.").

The Commission has shown that it is entitled to summary judgment in these proceedings because there can be no dispute that: (1) a horse racing in Indiana is prohibited from having illegal foreign substances in its system at the time of a race; (2) Cielo Classic had illegal foreign substances in his system at the time of the race, and his trainer, Donald R. Grego, is responsible for the presence of these substances under the applicable law and regulations; and (3) the sanction imposed by the Stewards against Grego is reasonable and appropriate.

Grego has offered no designation of material issues of fact, and has provided no affidavits to support his opposition to Staff's Motion. Staff has made its prima facie case; Grego has not designated anything in opposition. Therefore an entry of summary judgment is appropriate. Commission Staff has met its obligation pursuant to Indiana Trial Rule 56 and I.C. 4-21.5-4-23. The obligation shifted to Grego, and he failed to designate any material issue of fact that the ALJ should consider.

III. CONCLUSION

It is respectfully submitted that Grego's Response is inadequate in that it failed to meet the requirements of a proper response pursuant to Ind. T.R. 56(C), specifically, Grego did not designate issues of material fact, and he did not provide any opposing affidavits.

WHEREFORE, the Commission Staff respectfully requests that the Administrative Law Judge enter an Order granting its Motion for Summary Judgment.

Respectfully submitted,



Holly Newell (Atty. No. 25029-29)
Deputy General Counsel
INDIANA HORSE RACING COMMISSION
1302 North Meridian, Suite 175
Indianapolis, IN 46204
*Counsel for the Indiana Horse Racing Commission
Staff*

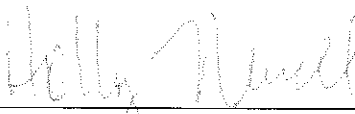
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served via electronic mail and deposited in the U.S. mail, first-class postage prepaid, on the 28th day of July, 2015, to:

Bernard Pylitt
Administrative Law Judge
Indiana Horse Racing Commission
Katz & Korin, P.C.
The Emelie Building
334 North Senate Avenue
Indianapolis, IN 46204-1708
bpylitt@katzkorin.com

Bernard S. Ritchie, Jr.
10405 Crosswell Trace
Louisville, KY 40233

Joe Gorajec
Executive Director
Indiana Horse Racing Commission
1302 N. Meridian Street
Indianapolis, IN 46204
jgorajec@hrc.IN.gov



Holly Newell

BEFORE THE ADMINISTRATIVE LAW JUDGE
THE HONORABLE BERNARD PYLITT
APPOINTED BY THE INDIANA HORSE RACING COMMISSION

DONALD GREGO,
Petitioner,

v.

INDIANA HORSE RACING COMMISSION STAFF,
Respondent

)
)
) In Re: AN APPEAL OF
) STEWARDS' RULING
) NO. 14703
)
)
)
)

PETITIONER'S SUR-REPLY

Petitioner, Donald Grego, by counsel, hereby submits his Sur-Reply in opposition to Respondent's Motion for Summary Judgment as follows:

Respondent has contended that the Petitioner has failed to meet the requirements of the proper response pursuant to Indiana Trial Rule 56, since it did not designate issues of material fact as well as did not provide any opposing affidavits. The Respondent further maintains that it has set forth "undisputed material facts" which entitled it to summary judgment. It will be seen, however, that the sum and substance of the Petitioner's response complies with Ind. T.R. 56. The exhibits filed by the petitioner and the inferences drawn therefrom create issues of fact precluding summary judgment for the Respondent.

Petitioner's exhibits 1 thru 6 are either from answers to interrogatories or production of documents received from the respondent. Exhibit 7 is a portion of the affidavit of Petra Hartmann which was filed by the respondent in a motion for summary judgment. Exhibit 8 is ruling number 14703 of the Steward's finding and penalty of the Indiana Horse Racing Commission and as such should be a matter of judicial notice. Exhibit 9 is the Petitioner's appeal and is the initial pleading which initiated this proceeding. Lastly, exhibits 10 and 11 are

the transcript of the initial hearing between the Petitioner and the racing steward on December 29, 2014 and the recommended penalty and model rule sheet, which are all a matter of judicial notice.

The exhibits submitted support our contention that there are issues of fact regarding the accuracy of the results of the samples and/or contamination of the samples taken on July 24, 2014 at Indiana Grand. In part Ind. T.R. 56 states:

“Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court.”

It should also be noted that there is no affidavit from any person at Industrial Laboratories in Colorado who actually tested samples and observed the results. The sum and substance of Petra Hartmann’s affidavit is that she supervised the testing but did not engage in the testing herself. Her conclusions regarding the results were simply reported to her by someone else from the laboratory and therefore her conclusion is simply based on hearsay. If this matter was tried her testimony at trial regarding the results would be objected to as hearsay since we could not inquire of her as to the difference of the results from the Lexington, Kentucky laboratory. (exhibit 1)

Conclusion

It is said in law in Indiana that “summary judgment is appropriate only if the designated evidentiary matter shows that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law”. Ind. T.R. 56(C) Furthermore any doubt as to a fact or an inference to be drawn therefrom is resolved in the favor of the party opposing the summary judgment. *Hensilwood v. Hendricks County* 653 N.E.2d 1062 (1995, Ind. App. Ct. transfer

denied 1996) In this case there are issues of fact regarding the accuracy of the testing of the blood samples as well as the finding of guilt of Donald Grego is supported by substantial evidence.

WHEREFORE, the Petitioner requests that the Respondent's motion for summary judgment be denied.

Respectfully submitted,



Bernard S. Ritchie, Jr.
10405 Crosswell Trace
Louisville, Kentucky 40223
P: (502) 724-3587

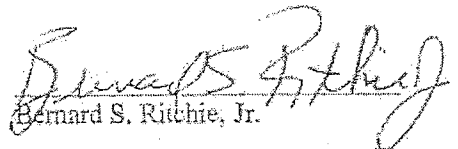
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served via U.S. Mail, first class, postage paid, and via email, this 7th of August, 2015 to the following parties of record:

Holly Newell
Indiana Horse Racing Commission
1302 North Meridian, Ste. 175
Indianapolis, IN 46202
Email: hnewell@hrc.in.gov

Bernard L. Pylitt
Administrative Law Judge
Katz & Korin, PC
334 North Senate Avenue
Indianapolis, IN 46204
Email: bpylitt@katzkorin.com

Respectfully,


Bernard S. Ritchie, Jr.

BEFORE THE ADMINISTRATIVE LAW JUDGE
THE HONORABLE BERNARD PYLITT
APPOINTED BY THE INDIANA HORSE RACING COMMISSION

DONALD GREGO,
Petitioner,

v.

INDIANA HORSE RACING COMMISSION STAFF,
Respondent

)
)
) In Re: AN APPEAL OF
) STEWARDS' RULING
) NO. 14703
)
)
)
)

PROPOSED ORDER

The Court having considered the respective briefs of the parties and being sufficiently advised,

Respondent's motion for summary judgment is DENIED.

Date

The Honorable Bernard L. Pylitt
Administrative Law Judge

Distribution:

Holly Newell
Indiana Horse Racing Commission
1302 North Meridian, Ste. 175
Indianapolis, IN 46202
Email: hnewell@hrc.in.gov

Bernard S. Ritchie, Jr.
10405 Crosswell Trace
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BEFORE AN ADMINISTRATIVE LAW JUDGE
APPOINTED BY THE INDIANA HORSE RACING COMMISSION

DONALD R. GREGO,
Petitioner,

v.

INDIANA HORSE RACING COMMISSION
STAFF.

In Re: AN APPEAL OF STEWARDS'
RULING NO. 14703

Respondent.

AFFIDAVIT OF PETRA HARTMANN

Comes now the undersigned, and being duly sworn upon her oath, alleges and says as follows:

1. I am an adult, over eighteen (18) years of age, of sound mind, and have personal knowledge of and am competent to testify as to the matters contained herein.
2. I am and was at all times relevant employed as the Drug Testing Services Director of Industrial Laboratories ("Industrial"). At all times relevant, Industrial has regularly conducted tests of samples taken from race horses to detect the presence of any foreign substance in the horse's system at the time of a race.
3. At all times relevant, Industrial Laboratories was engaged by the Indiana Horse Racing Commission to analyze serum and urine samples from horses participating in pari-mutuel racing in Indiana.
4. On or about October 10, 2014, urine and blood/serum Samples No. 54901 taken from Indiana Grand on July 24, 2014, was received by Industrial Laboratories in good and secure condition.
5. Industrial Laboratories was engaged to perform an analysis of serum and urine Samples No. 54901, which were collected after a race at Indiana Grand Racing and Casino on July 24, 2014.



6. In my role as the Drug Testing Services Director at Industrial, the testing of serum and urine Samples No. 54901 were conducted under my supervision and control.

7. Industrial testing determined that serum Sample No. 54901 contained ibuprofen. Detection, identification and confirmation of the presence of ibuprofen was performed utilizing liquid chromatography mass spectrometry-mass spectrometry (LC-MS/MS).

8. Industrial testing determined that serum Sample No. 54901 contained triamcinolone acetonide at a level of 171 picograms per milliliter ("pg/mL") (+/-19 pg/mL). Detection, identification and confirmation of the presence of triamcinolone acetonide was performed utilizing liquid chromatography mass spectrometry-mass spectrometry (LC-MS/MS).

9. I sent an Affidavit to the Indiana Horse Racing Commission confirming these results on October 28, 2014. A true and accurate copy of that document is attached to this Affidavit and identified as Exhibit 9.

10. Attached Exhibit 9 reflects entries, reports, records and/or data compilations that were made at or near the time of the occurrence of the matters set forth in each of the records, by or from information transmitted by a person with knowledge of the existence of the matters recorded therein.

11. Attached Exhibit 9 and the entries, reports, records and/or data compilations that it reflects are, and were, kept in the course of regularly conducted business activities of the Commission.

12. Attached Exhibit 9 and the entries, reports, records and/or data compilations that it reflects are, and were, made and gathered as a part of the regular business practice and activity of the Commission.

13. I certify the authenticity of Exhibit 9 pursuant to the provision of Indiana Rules of Evidence 803(6).

Swit. from
LBC lab - Out 9am



INDIANA HORSE RACING COMMISSION.
1302 N. MERIDIAN STREET
SUITE 175
INDIANAPOLIS, IN 46202

(A)

AFFIDAVIT

I hereby certify that Industrial Laboratories at 4046 Youngfield Street, Wheat Ridge, Colorado; has analyzed the sample identified below:

54901, Indiana Grand, race date July 24, 2014.

Sample matrix: Serum

The sample was received in good & secure condition on: October 10, 2014

Laboratory ID number: IL-R-14-15485

The sample was analyzed using:
Liquid Chromatography Mass Spectrometry-Mass Spectrometry (LC-MS/MS)

The sample contained: Triamcinolone acetone & Ibuprofen

Concentration: 171 +/- 19 picograms per milliliter (pg/ml.) (triamcin acet)
approximately 23 ng/ml (Ibuprofen)

Comments: Reported uncertainties represent expanded uncertainties expressed at approximately the 99.7% confidence level using a coverage factor of k=3.20

SIGNED:

Petra Hartmann

Petra Hartmann
Director, Drug Testing Services

Date: October 28th, 2014

Sworn to me this day:

28 day of October, 2014.

Michelle Springer
NOTARY PUBLIC

4046 Youngfield St., Wheat Ridge, Colorado 80033 TEL (303) 287-8891 FAX (303) 287-0864
www.industrialabs.net

Receipt of analysis services acknowledges the terms and conditions on the website
www.industrialabs.net/terms/terms.html

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MICHELLE STRINGER
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20134033071
MY COMMISSION EXPIRES MAY 23, 2017

000040



Comments (0)

View Case

Cited Cases

Citing Case

HENSHILWOOD v. HENDRICKS COUNTY

NO. 54A01-9502-CV-38.

553 N.E.2d 1062 (1995)

Steve HENSHILWOOD and Kelly Henshilwood, Individually and for and On Behalf of Their Minor Daughter, Laura Henshilwood, Appellants-Plaintiffs, v. HENDRICKS COUNTY, Board of Commissioners of Hendricks County, Hendricks County Highway Department, Hendricks County Department of Health, Appellees-Defendants.

Court of Appeals of Indiana.

Transfer Dated January 11, 1996.

Andrew C. Chamstrom, E. Joseph Kremp, III, Wooden McLaughlin & Sterner, Indianapolis, for appellants.

Kenneth Collier-Magar, Collier-Magar & Kirages, Indianapolis, for appellees.

OPINION

NAJAM, Judge.

STATEMENT OF THE CASE

Steve and Kelly Henshilwood, individually and on behalf of their minor daughter, Laura Henshilwood (hereinafter "the Henshilwoods") appeal from the trial court's grant of a motion for summary judgment in favor of Hendricks County, Board of Commissioners of Hendricks County, Hendricks County Highway Department and Hendricks County Department of Health (collectively "the County"). The Henshilwoods brought a negligence action against the County for injuries Laura sustained when she came into contact with contaminated water which had overflowed onto their property. The County denied liability on the basis of governmental immunity and the absence of a duty owed to the Henshilwoods. The trial court found that although the County was not immune from suit, the County owed no duty to the Henshilwoods and entered summary judgment on that ground. The County brings a cross-appeal from the trial court's determination that the County was not entitled to immunity under the Indiana Tort Claims Act.¹

We affirm in part, reverse in part, and remand.

ISSUES

The parties present two issues for our review which we restate as follows:

1. Whether the trial court erred when it determined the County was not immune from liability under the Tort Claims Act.

2. Whether the trial court erred when it found, as a matter of law, that the County owed no duty to the Henshilwoods.

FACTS

The facts relevant to this appeal show that the Henshilwoods' home is located on the west side of County Road 0 in southern Hendricks County. On the east side of County Road 0 is a ditch which flows south through a culvert, crosses underneath County Road 0 and ends at the Henshilwoods' property. Sometime during late 1988 or early 1989, water from the ditch began to overflow onto the Henshilwoods' land. Ordinarily, a cement box with a grate over the top collected the water from the culvert and emptied it into an underground pipe which ran from the southeastern to the southwestern corner of the Henshilwoods' property. However, during heavy rains and on other occasions, water from the ditch would overflow onto the southeastern portion of the Henshilwoods' property where it would pool until it would eventually drain into the underground pipe.

Steve Henshilwood spoke with the County Engineer, Walter Reeder, regarding the flooding on his land. The County proposed running an open trench across the Henshilwoods' property to extend the flow of the ditch from the front to the back of their property. The Henshilwoods rejected the proposal as being too expensive and aesthetically objectionable. Thereafter, a neighbor of the Henshilwoods contacted the County regarding pooling that was also occurring in his yard. The County again suggested that the Henshilwoods run an open trench through their yard in order to alleviate the pooling in both yards, and the Henshilwoods again rejected the proposal.

David and Jo Williams (the "Williams") live north of the Henshilwoods on the east side of County Road 0. In 1987, prior to the Henshilwoods' flooding, the Williams experienced the backup of raw sewage in their yard and house due to problems with their septic system. The County directed the Williams to perform correctional work on their existing system and also instructed them to install

[653 N.E.2d 1086]

a subsurface drain pipe across their yard to help move surface water away from the septic field and to the ditch.

In June of 1990, the County Engineer filed a complaint with the Health Department regarding suspected sewage contamination of the water in the ditch along County Road 0. Various tests of the water revealed unsatisfactory levels of E-Coli bacteria. Another complaint was later filed by a nearby property owner regarding contamination, and further tests of the water showed the continued presence of E-Coli bacteria in the ditch water. The Henshilwoods were not aware that the ditch water was contaminated. In October of 1990, Laura Henshilwood became ill after playing in leaves in the area of her yard where water from the ditch had pooled. Laura was subsequently diagnosed with Typhoid.

DISCUSSION AND DECISION

Standard of Review

In reviewing the trial court's ruling on a motion for summary judgment, this court applies the same standard applied by the trial court. *Walling v. Appel Service Co.* (1994), Ind. App., 641 N.E.2d 647, 648-49; *Miller v. Monsanto* (1993), Ind. App., 626 N.E.2d 538, 541. Summary judgment is appropriate only if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). We resolve any doubt as to a fact, or an inference to be drawn therefrom, in favor of the party opposing summary judgment. *Terre Haute First Nat. Bank v. Pacific Employers Ins. Co.* (1994), Ind. App., 634 N.E.2d 1336, 1337. Even if the trial court does not believe that the non-moving party will be successful at trial, summary judgment should not be entered where material facts conflict or where conflicting inferences are possible. *State Street Duffy's Inc. v. Loyd* (1993), Ind. App., 623 N.E.2d 1099, 1101, *trans. denied*.

Issue One: Immunity

On cross-appeal, the County contends that the immunity provisions of the Indiana Tort Claims Act, Indiana Code § 34-4-16.5-3, preclude liability in this case. The absence of governmental immunity would require further inquiry into the duty element of negligence; however, because a finding of immunity would render moot the issue of duty, we begin our analysis with that threshold determination. See *Peavler v. Monroe County Bd. of Comm'rs* (1988), Ind., 528 N.E.2d 40, 47.

A governmental entity is subject to liability for torts committed by its agencies and its employees unless one of the immunity provisions of the Tort Claims Act applies. *Id.* at 42. The party seeking immunity bears the burden of proving that its conduct falls within one of the exceptions set out in the Act. *Mullin v. Municipal City of South Bend* (1994), Ind., 639 N.E.2d 278, 281.

The County first contends it was immune from liability pursuant to Indiana Code § 34-4-16.5-3(2). That subsection of the statute provides that a governmental entity or employee acting within the scope of his employment is not liable if a loss results from:

“the condition of a reservoir, dam, canal, conduit, drain or similar structure when used by a person for a purpose which is not foreseeable.”

We agree with the Henshilwoods that the ditch was not used for an unforeseeable purpose. Use of the ditch to collect water was its intended use, and clearly foreseeable and known to the County. The County cannot claim immunity under this clause.

Second, the County claims immunity under I.C. § 34-4-16.5-3(7), which provides immunity for a loss that results from:

“the adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment.”

The County is not entitled to immunity under this provision because contrary to its assertion, the Henshilwoods do not allege in their complaint that the County failed to adopt or enforce any law within the meaning of this provision.

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Next, the County asserts it is immune from suit pursuant to I.C. § 34-4-16.5-3(9) which states that a governmental entity or an employee acting within the scope of his employment is not liable if a loss results from:

“the act or omission of someone other than the governmental entity or the governmental entity's employee.”

The County argues that because the Henshilwoods claim is premised upon the fact that sewage was released from the Williams' property into the culvert and then into the ditch, the County cannot be liable.

While the County correctly asserts that it cannot be liable for an act or omission of a third party, the Henshilwoods' claim against the County is a separate and distinct claim not necessarily arising from any negligence by the Williams. In their complaint, the Henshilwoods allege several separate acts of negligence by the County, including that it was negligent in constructing the ditch, failing to maintain the ditch, instructing the Williams' to direct further water into the ditch, failing to warn of known contamination of the ditch, and failing to prevent the spread of communicable diseases. Thus, the County's liability, if any, is not derived solely from the acts or omissions of a third party. The County

has not shown it is immune from liability under this theory.

The County maintains it is also entitled to immunity under I.C. § 34-4-16.5-3(10) which states that a governmental entity is not liable if the loss results from:

“the issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization, where the authority is discretionary under the law.”

The County asserts that it originally issued permits with regard to septic system installations and, thus, any subsequent failure to revoke these permits cannot be the basis for liability. Again, the County's argument misses the mark. The Henshilwoods do not allege that the County negligently issued or failed to revoke any permit; rather, they contend it failed to adequately construct and maintain the ditch.

Finally, the County asserts that it is entitled to immunity pursuant to I.C. § 34-4-16.5-3(11) because the Henshilwoods' loss resulted from:

“failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of the governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.”

Contrary to the County's contention, the Henshilwoods do not claim that it made a negligent or inadequate inspection of any nongovernmental property. Indeed, the Henshilwoods' concede that the County made seemingly adequate inspections of the Williams' property which revealed breaches in the septic system. Reply Brief of Appellant at 13. The Henshilwoods claim that the County failed to exercise ordinary care with respect to the ditch, property under the County's control. We conclude this exception does not shield the County from liability.

In sum, we agree with the trial court that the County is not entitled to immunity pursuant to any of the above-mentioned exceptions to the Tort Claims Act. Thus, the trial court properly denied the County's motion for summary judgment on its claim of statutory immunity.

Issue Two: Duty

Because we have found no immunity, we must consider the Henshilwoods' claim against the County for negligence. To recover under a theory of negligence, a plaintiff must establish three elements: (1) a duty on the part of the defendant in relation to the plaintiff; (2) a failure by the defendant to conform its conduct to the requisite standard of care; and (3) an injury to the plaintiff proximately caused by the failure. *Smith v. Beatty* (1994), Ind. App., 639 N.E.2d 1029, 1032.

In the instant case, the issue of duty is dispositive. The existence of a duty, that is, whether the law recognizes any obligation on the part of a particular defendant to conform its conduct to a certain standard for the benefit of the plaintiff, is a question of law for the court. *Webb v. Jarvis* (1991),

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Ind., 575 N.E.2d 992, 995. The duty of ordinary care owed to another arises as a matter of law out of some relationship existing between the parties, and it is for the court to determine whether such relations give rise to a duty. *Id.*

In order to recover against a governmental entity for negligence, the plaintiff must show more than a duty owed to the public as a whole. *Greathouse v. Armstrong* (1993), Ind., 616 N.E.2d 364, 368. Liability of a governmental entity will not be found unless the relationship between the parties is one that gives rise to a special or private duty owed to a particular individual. *Id.*

The Henshilwoods contend the trial court erred when it granted summary judgment to the County and found, as a matter of law, that the County did not owe the Henshilwoods a private duty. Specifically, the Henshilwoods contend the trial court erroneously relied on our supreme court's decision in *Mullin v. Municipal City of South Bend (1994), Ind., 639 N.E.2d 278*.

In *Mullin*, a neighbor called 911 to report a fire at the plaintiff's home. The dispatcher asked if anyone was inside the house, and the neighbor responded "I think so." *Id.* at 280. Fire trucks, but no ambulances were dispatched to the scene. It was not until the fire trucks arrived that an ambulance was requested, and one of the plaintiff's children died before an ambulance finally arrived. The plaintiff filed suit against the City and alleged negligence due to the dispatcher's failure to send an ambulance to the scene immediately. *Id.*

The *Mullin* court followed the decision of the Georgia Supreme Court in *City of Rome v. Jordan (1993), 263 Ga. 26, 426 S.E.2d 851, 863*, and adopted the following three part test for determining the circumstances under which a private duty is imposed on a governmental entity: (1) an explicit assurance by the municipality, through promises or actions, that it would act on behalf of the injured party; (2) knowledge on the part of the municipality that inaction could lead to harm; and (3) justifiable and detrimental reliance by the injured party on the municipality's affirmative undertaking. *Id.* at 284. The *Mullin* court applied this three-part test and determined that the evidence did not establish a private duty on the part of the City in connection with its decision not to dispatch an ambulance to the scene of the fire. *Id.* at 285.

In the present case, the trial court applied the *Mullin* public/private duty test and determined that the designated evidence did not show that the County made any explicit promise to the Henshilwoods with regard to the contents of the ditch water. The court further found that any duty to warn of or eliminate the contamination was owed to the general public and that the Henshilwoods had not established they relied on the County to act as they were unaware that the ditch water was contaminated. Therefore, the trial court concluded that the County owed no private duty to the Henshilwoods.

The test adopted in *Mullin* does not apply to the circumstances of this case. The language used in the public/private duty analysis established in *City of Rome*, and adopted in *Mullin*, makes it clear that the test applies only in determining whether a duty is owed based on a governmental entity's alleged failure to act. The test does not apply to an alleged affirmative act of negligence where the entity itself has created the plaintiff's perilous situation. The court in *City of Rome* expressly limited its analysis to cases involving a municipality's failure to act, rather than its affirmative acts of negligence. *City of Rome*, 426 S.E.2d at 862 n. 2.

Indeed, the public policy reasons underlying the *Mullin* decision do not apply to a governmental entity's affirmative negligence. In accordance with existing Indiana law regarding government provided protection and rescue services, the court in *Mullin* reasoned that it was poor public policy to impose upon the government the obligation to guarantee and assure the welfare of every member of the public. *Mullin*, 639 N.E.2d at 284. The supreme court stated that the "mere existence of rescue services does not, standing alone, impose upon the governmental entity a duty to use them for the benefit of a particular individual." *Id.* The court concluded that a private duty may attach once the entity has been made aware of the plight of

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an individual, leads that person to believe that governmental rescue services will be used, and that individual detrimentally relies on that promise. *Id.* at 285. Only in such a case would it be "unfair to leave that individual worse off than if the individual had not sought assistance from the government at all." *Id.*; see *Koher v. Gary Dial, et. al.*, (filed July 26, 1994), Ind. App. No. 17A03-9412-CR-443 (application of *Mullin* test established private duty owed by County as facts showed injured party relied on County's promise to

(dispatcher ambulance).

The traditional rule which bars liability for mere nonfeasance, or the defendant's failure to act, has its origins in the reluctance of courts to impose a duty of care absent a special relationship between the parties. *Ember v. B.F.D., Inc.* (1986), Ind. App., 490 N.E.2d 764, 770. However, the law recognizes a critical distinction between the failure to act, as in the failure to protect the welfare of citizens or to provide rescue services, and an affirmative act of negligence which in itself causes the plaintiff's harm. See *City of Rome*, 426 S.E.2d at 862 n. 2. In the latter case, rather than a gratuitous undertaking to aid or alleviate the plaintiff's peril, the governmental entity has created the plaintiff's peril by some affirmative act. Put another way, while an entity is generally shielded from liability on the ground that the decision not to act is a policy decision, or that the duty to act is owed to the public at large and not to any particular person, a public entity may nevertheless be liable for its affirmative acts of negligence. *Prosser & Keeton on Torts* § 131, at 1049 (5th ed. 1984), (1988 Supp. at 149); see *Hansen v. Audubon* (1985), Iowa, 378 N.W.2d 903, 907 (City's failure to repair or maintain existing sewer system was not discretionary function but affirmative negligence; City liable for sewage backup in plaintiff's house).

We hold that the three-part public/private duty analysis adopted in *Mullin* does not apply to cases in which the plaintiff alleges that the government's affirmative act of negligence has created the situation in which the plaintiff suffered harm. The governmental entity's affirmative act in relation to a particular individual gives rise to a private duty to that plaintiff. Under the facts of this case, the Henshilwoods have demonstrated the County owed them a duty to maintain the ditch so as not to allow the continued overflow of water onto their land or a duty to warn affected property owners of the contamination discovered by the County.² The trial court's grant of summary judgment to the County on the issue of duty is reversed.³

Affirmed in part, reversed in part, and remanded.

BAKER and BARTEAU, JJ., concur.

FootNotes

1. We heard oral argument on July 13, 1995.

2. In *Rodman v. City of Wabash* (1986), Ind. App., 497 N.E.2d 234, this court found that the City owed a duty of reasonable care in maintaining the sewage system to all sewage drain users as a class and no special or private duty to the plaintiffs as individuals. *Id.* at 240. We determined on the facts of that case that the plaintiffs had failed to show they suffered a particularized injury different in kind than suffered by the general public. *Id.* The facts of the instant case are distinguishable, in that only the Henshilwoods and another neighbor experienced the flooding of contaminated water from the ditch on their land. The Henshilwoods have sufficiently alleged they suffered a particularized injury.

3. The County contends that E-Coli bacteria, as was detected in the ditch water, does not cause Typhoid. We note that genuine issues of material fact remain regarding whether the County's actions were the proximate cause of Laura's injuries.

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