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# Cary v. Oneok, Inc.: Oklahoma Supreme Court Upholds Plaintiff's Right to Attend Trial

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# Casenote

## ***Cary v. Oneok, Inc.:* Oklahoma Supreme Court Upholds Plaintiff's Right to Attend Trial**

*When Americans leave a courtroom feeling that their cries have been heard, we should all share pride in the fact that our legal system works as well as it does.*

—Joseph A. Wapner<sup>1</sup>

*Adversary procedure has served as a guardian of individual liberty since its inception.*

—Stephan Landsman<sup>2</sup>

### I. Introduction

Sadly, for the rest of his life, Eric Cary will not enter a room without receiving curious glares. Eric is different. Severely burned in a fire just short of his third birthday, he now bears permanent scars that will likely spell a lifetime of prejudice. What are Eric's solaces? Surely, his loving family is comforting and he is fortunate to have narrowly escaped death. But what of his ability to face those responsible for causing his life altering scars? Should he not be able to sit and watch while those responsible for his injuries are made to answer? Is this not Eric's unequivocal right? The simple answer is no.

Most authorities agree that a civil litigant does not have an *absolute* right to attend trial.<sup>3</sup> However, courts disagree on when, if at all, a plaintiff can be properly excluded from court

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1. LAWYER'S WIT AND WISDOM: QUOTATIONS ON THE LEGAL PROFESSION, IN BRIEF 183 (Bruce Nash et al. eds., 1995).

2. *Id.* at 182.

3. *See infra* note 41 and accompanying text.

when his or her appearance would likely prejudice a jury.<sup>4</sup> This issue is especially prevalent in bifurcated trials, where defendants vehemently argue that the prejudicial effect of a disfigured plaintiff far outweighs the plaintiff's right to be in the courtroom.<sup>5</sup>

A majority of jurisdictions in the United States believe that plaintiff exclusion, under certain circumstances, is permissible.<sup>6</sup> Most of these jurisdictions follow a two-part test, set forth in *Helminski v. Ayerst Laboratories*.<sup>7</sup> In *Helminski*, the court held that plaintiff exclusion is appropriate if (1) the plaintiff's appearance is likely to cause jury prejudice at the liability portion of the trial and (2) he or she is not able to assist counsel and understand the proceedings.<sup>8</sup>

A minority of courts, including the court in *Cary v. Oneok, Inc.*,<sup>9</sup> have found that plaintiff exclusion is simply not tolerable.<sup>10</sup> Some of these courts have couched their arguments against exclusion on Constitutional Due Process grounds.<sup>11</sup> Others have found that the *Helminski* test offers plaintiffs too little protection against expulsion.<sup>12</sup>

This case note will argue that, in the *Cary* decision, the Oklahoma Supreme Court correctly upheld Eric's right to attend trial, and that the *Helminski* test sets the bar too low with respect to plaintiff exclusion. The latter argument is reached for two reasons. First, a plaintiff's right to attend trial, while not absolute, is nevertheless a fundamental precept of the adversary system. Second, although a disfigured or disabled plaintiff may incite jury sympathy, the jury should be trusted to impartially perform its role as fact-finder.

Part II(A) will begin by examining the case law for both the majority and minority views regarding plaintiff exclusion. Opinions both preceding and subsequent to the *Helminski* decision will be analyzed. In Part II(B), the background will then

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4. See *infra* notes 15-71 and accompanying text.

5. See *infra* note 151 and accompanying text.

6. See *infra* note 41 and accompanying text.

7. 766 F.2d 208 (6th Cir. 1985).

8. See *id.* at 218.

9. 940 P.2d 201 (Okla. 1997).

10. See *infra* note 27 and accompanying text.

11. See *infra* note 19 and accompanying text.

12. See *infra* note 241 and accompanying text.

turn to a discussion of the adversary system. After providing a brief history of the development of the adversary system, two specific topics will be explored: the litigant's role in the adversary system, and the advocate's duty vis à vis the party in interest.

Part II(C) will address jury sympathy, including a short summary of the jury's role in American jurisprudence. This section will focus on why juries should be trusted to arrive at the truth, and will examine mechanisms used in controlling jury sympathy. It will also explore the types of diversions that exacerbate the truth finding process. The background section will conclude in Part II(D) with an examination of the Americans with Disabilities Act,<sup>13</sup> and its applicability to the judiciary.

Part III will focus on the *Cary* decision, outlining both the majority and dissenting opinions and summarizing the lower courts' decisions. The analysis section, Part IV, will argue that: (1) juries should be trusted to put prejudice aside; (2) a plaintiff's presence at trial is entrenched in the adversary system; and (3) keeping a plaintiff from trial violates the letter and spirit of the Americans with Disabilities Act.<sup>14</sup>

## II. *Background*

### A. *Case Law*

#### 1. *The Minority View: The Plaintiff Remains*

In early decisions, when faced with a motion to exclude a plaintiff from the proceedings, courts generally denied the motion, but did not clearly articulate a reason.<sup>15</sup> Modern courts have tried to be more diligent in expressing a plaintiff's right to

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13. 42 U.S.C. §§ 12101-12213 (1998).

14. *See id.*

15. *See, e.g.,* *Sherwood v. City of Sioux Falls*, 73 N.W. 913 (S.D. 1898) (allowing plaintiff to be brought into the courtroom on cot, despite defendant's objection that plaintiff's appearance would prejudice jury); *Bryant v. Kansas City Rys. Co.*, 228 S.W. 472 (Mo. 1921) (holding that plaintiff, an injured minor, should be allowed to remain in the courtroom so long as plaintiff is not paraded in front of jury to gain their sympathy); *Chicago Great Western Ry. Co. v. Beecher*, 150 F.2d 394 (8th Cir. 1945) (holding that plaintiff injured by freight train was correctly allowed to remain in court because the court found no authority for excluding a party from the courtroom); *Ziegler v. Funkhouser*, 85 N.E. 984 (Ind. Ct. App. 1908) (stating, "[i]t is the right of every party litigant to be present in person in court upon the trial of his own case. . .").

attend trial.<sup>16</sup> Generally, courts finding plaintiff exclusion to be violative of fundamental constitutional rights have offered the most aggressive argument. For example, in *Carlisle v. County of Nassau*,<sup>17</sup> a New York state court held that a paraplegic plaintiff may not be excluded from the jury selection phase of his trial even though he was amply represented by counsel.<sup>18</sup> The court stated that "the fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial."<sup>19</sup> The defendant in *Carlisle* argued that the plaintiff forfeited his right to be present during trial because he chose to be represented by counsel.<sup>20</sup> The court answered that "[t]he attorney is not the alter ego of his client, but his representative or agent. . .[and]. . .he may not supplant the client either at his or the court's unbridled pleasure."<sup>21</sup>

Other courts in the minority seem to suggest a rule, based not on constitutional protection, but on an unequivocal right to be present at trial. In *Florida Greyhound Lines, Inc. v. Jones*,<sup>22</sup> for instance, a Florida state court allowed the plaintiff to be brought into the courtroom on a stretcher, over defendant's claim that plaintiff's presence would prejudice the jury.<sup>23</sup> The plaintiffs, husband and wife, were traveling in their car when they were struck from behind by defendant's bus.<sup>24</sup> At trial, Mrs. Jones was brought into the courtroom on a stretcher, and,

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16. See, e.g., *Carlisle v. County of Nassau*, 64 A.D.2d 15, 408 N.Y.S.2d 114 (2d Dep't 1978); *Talcott v. Holl*, 224 So. 2d 420 (Fla. Dist. Ct. App. 1969); *Purvis v. Inter-County Tel. & Tel. Co.*, 203 So. 2d 508 (Fla. Dist. Ct. App. 1967); *Mason v. Moore*, 226 A.D.2d 993, 641 N.Y.S.2d 195 (3d Dep't 1996).

17. 64 A.D.2d 15, 408 N.Y.S.2d 114 (2d Dep't 1978).

18. See *id.* at 18, 408 N.Y.S.2d at 116.

19. *Id.* The court determined that the "fundamental constitutional right" was derived from the Seventh Amendment, which states, in pertinent part, "the right of trial by jury shall be preserved." *Id.* (quoting U.S. CONST. amend. VII). The court also cited the portion of the New York State Constitution that reads "[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever." *Id.* (quoting N.Y. CONST. art. I, § 2). See also *Rozbicki v. Huybrechts*, 589 A.2d 363, 365 (Conn. 1991); *In re Watson*, 154 Cal. Rptr. 151 (Cal. Ct. App. 1979).

20. See *Carlisle*, 64 A.D.2d at 15, 408 N.Y.S.2d at 117.

21. *Id.*

22. 60 So. 2d 396 (Fla. 1952).

23. See *id.* at 397.

24. See *id.* at 396.

according to the defense, appeared in a “weak, sickened, and stupefied condition.”<sup>25</sup> In addition to her prone position on the stretcher, Mrs. Jones was accompanied by a nurse and hospital attendant.<sup>26</sup> Responding to defendant’s claim that Mrs. Jones should have been excluded from trial, the court stated:

One who institutes an action is entitled to be present when it is tried. That, we think, is a right that should not be tempered by the physical condition of the litigant. It would be strange, indeed, to promulgate a rule that a plaintiff’s right to appear at his own trial would depend on his personal attractiveness, or that he could be excluded from the court room if he happened to be unsightly from injuries which he was trying to prove the defendant negligently caused.<sup>27</sup>

The court ultimately held that the plaintiff’s presence at trial was proper, absent any proof that she was presented in an attempt to prejudice the jury.<sup>28</sup>

In *Purvis v. Inter-County Telephone & Telegraph Co.*,<sup>29</sup> a Florida court again upheld a plaintiff’s right to attend trial.<sup>30</sup> In *Purvis*, the plaintiff was injured in an automobile accident and was excluded from trial.<sup>31</sup> He was ordered not to appear because the trial court felt that his physical appearance and irrational and argumentative nature would influence the jury.<sup>32</sup> The appellate court, citing *Florida Greyhound Lines*, held that plaintiff’s exclusion was improper under the circumstances.<sup>33</sup> The court reasoned that Mr. Purvis’ condition was inapposite to a situation where a plaintiff’s grossly disfigured countenance would warrant exclusion.<sup>34</sup> The court noted that the plaintiff’s disposition was not so abrasive as to warrant exclusion, and

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25. *Id.* at 397.

26. *See id.*

27. *Florida Greyhound Lines*, 60 So. 2d at 397.

28. *See id.*; *see also* Talcott v. Holl, 224 So. 2d 420, 421 (Fla. Dist. Ct. App. 1969) (holding that the plaintiff could be allowed to be brought into courtroom on a stretcher, where the court, commenting on plaintiff’s appearance, stated that “[a]s the plaintiff in the case, she was entitled to be present”).

29. 203 So. 2d 508 (Fla. Dist. Ct. App. 1967).

30. *See id.* at 511.

31. *See id.* at 508.

32. *See id.* at 511.

33. *See id.* (citing *Florida Greyhound Lines, Inc. v. Jones*, 60 So. 2d 396, 397 (Fla. 1952)).

34. *See Purvis*, 203 So. 2d at 510. Specifically, the court distinguished *Purvis* from the plaintiff in *Dickson v. Bober*, 130 N.W.2d 526 (Minn. 1964), where the

that "[his] mental attitude. . . [was] expressed in such vague terms that absent more specific finding [they could] not see how his attitude would influence the jury."<sup>35</sup> Further, the court stated that "in absence of a showing that [plaintiff] was incompetent or so incapacitated that he could not comprehend the trial proceedings, he had a right to be present in the courtroom."<sup>36</sup>

More recently, New York's Appellate Division, Second Department stated, "[i]t is axiomatic that, absent an express waiver or unusual circumstance, a party to a civil action is entitled to be present during all stages of the trial."<sup>37</sup> The court, in *Mason v. Moore*, found that the trial court properly dismissed defendant's motion to exclude plaintiff from trial.<sup>38</sup> The plaintiff, an infant, "sustained brain damage as a result of asphyxia during delivery."<sup>39</sup> Commenting on defendant's motion to exclude, the court noted that "the movant relie[d] solely on a stereotypical assumption that a party's disability will prejudice the jury."<sup>40</sup>

## 2. *The Majority View: "No need, No Plaintiff"*

A clear majority of courts in the United States have held that, because a civil litigant does not have an absolute right to attend trial, he or she may be properly excluded under the right circumstances.<sup>41</sup> Most of these courts follow a two-part test that was set forth in *Helminski v. Ayerst Laboratories*.<sup>42</sup> In *Helmin-*

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injured plaintiff was described as being little more than a vegetable. *See Purvis*, 203 So. 2d at 510.

35. *Id.* at 511.

36. *Id.*

37. *Mason v. Moore*, 226 A.D.2d 993, 994, 641 N.Y.S.2d 195, 197 (3d Dep't 1996).

38. *See id.*

39. *Id.* at 994, 641 N.Y.S.2d at 196.

40. *Id.* 994, 641 N.Y.S.2d at 197. *See also* *Marks v. Mobil Oil Corp*, 562 F. Supp. 759 (E.D. Pa. 1983), *aff'd*, 727 F.2d 1100 (3d Cir. 1984).

41. *See Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985); *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988); *Dickson v. Bober*, 130 N.W.2d 526 (Minn. 1964). *See also* Allen P. Grunes, *Exclusion of Plaintiffs from the Courtroom in Personal Injury Actions: A Matter of Discretion or Constitutional Right?*, 38 CASE W. RES. L. REV. 387 (1988). There, the author wrote: "[i]f a litigant is entitled to be present in the courtroom during trial, this entitlement cannot be traced to any express constitutional provision." *Id.* at 390.

42. 766 F.2d at 218.

*ski*, the plaintiffs brought a products liability action on behalf of their son, Hugh.<sup>43</sup> Hugh was rendered developmentally retarded by in utero exposure to a surgical anesthetic manufactured by the defendant.<sup>44</sup> After commencement of the trial, the defendant successfully moved for bifurcation.<sup>45</sup> In addition, the trial court ordered that Hugh be prohibited from attending the liability phase of the proceedings.<sup>46</sup> On appeal, the Sixth Circuit held, *inter alia*, that Hugh was improperly excluded because “a plaintiff with a solely physical abnormality may not be excluded involuntarily, absent disruptive behavior, even when the abnormality is due allegedly to the defendant’s wrongful conduct.”<sup>47</sup>

However, the court held that under the circumstances, Hugh’s exclusion was *not* reversible error.<sup>48</sup> It did so by adopting a two-part test.<sup>49</sup> First, “the party seeking exclusion must establish that the party’s appearance or conduct is likely to prevent the jury from performing its duty.”<sup>50</sup> Second, if the court finds that jury prejudice is possible, “the court must next consider whether the party can understand the proceedings and aid counsel.”<sup>51</sup> In applying the two-part test, the *Helminski* court reasoned that the trial court’s decision to exclude was not reversible because Hugh’s appearance was potentially prejudicial and because he could neither understand the proceedings

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43. *See id.* at 210.

44. *See id.*

45. *See id.* at 211-12. The definition of a bifurcated trial is as follows: “The trial of the liability issue in a personal injury. . . case separate from and prior to trial of the damages question.” BLACK’S LAW DICTIONARY, 163 (6th. ed. 1990); *see also* FED. R. CIV. P. 42(b). The rule states:

[the] court, in furtherance of convenience or to avoid prejudice. . . may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or. . . issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

*Id.*

46. *See Helminski*, 766 F.2d at 212. This case was tried in the United States District Court for the Eastern District of Michigan. *See id.* at 208.

47. *Id.* at 217.

48. *See id.* at 218-19.

49. *See Helminski*, 766 F.2d at 218.

50. *Id.*

51. *Id.*



nor assist counsel.<sup>52</sup> They so held despite finding that the lower court's exclusion of Hugh "was inappropriate inasmuch as it was not based upon the court's observations but merely upon Ayerst's assertion of prejudice."<sup>53</sup>

In reaching its decision, the *Helminski* court relied on two cases, *Dickson v. Bober*,<sup>54</sup> and *Morley v. Superior Court of Arizona*.<sup>55</sup> Both courts held that a plaintiff might be excluded from his or her trial if the risk of jury prejudice is too great.<sup>56</sup> Unlike *Helminski*, neither court advanced a procedural test.<sup>57</sup> However, both courts agreed that a plaintiff's sympathetic appearance, together with his or her inability to aid counsel or understand proceedings, gave sufficient reason to warrant exclusion.<sup>58</sup>

Since *Helminski*, courts have continually followed the two-part test established therein.<sup>59</sup> For instance, in *In re Richardson-Merrell, Inc.*,<sup>60</sup> an Ohio court held that infant plaintiffs suffering from birth defects allegedly caused by defendant's product should be excluded from the courtroom.<sup>61</sup> Applying the first part of the *Helminski* test, the court stated that because "[t]here is no more protected and beloved member of human society than a helpless newborn infant," the infants' presence at trial would be "inherently prejudicial."<sup>62</sup> The court then found that "[i]t [was] equally clear that the second prong of the *Helminski* test [was] met. . . [T]here was no testimony by chil-

52. *See id.*

53. *Id.*

54. 130 N.W.2d 526 (Minn. 1964).

55. 638 P.2d 1331 (Ariz. 1981).

56. *See Dickson*, 130 N.W.2d at 530; *Morley*, 638 P.2d at 1333.

57. *See Dickson*, 130 N.W.2d at 530; *Morley*, 638 P.2d at 1333.

58. *See Dickson*, 130 N.W.2d at 530; *Morley*, 638 P.2d at 1334.

59. *See, e.g., In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988); *Gonzalez-Marin v. Equitable Life Assur. Soc. of U.S.*, 845 F.2d 1140 (1st Cir. 1988); *In re Richardson-Merrell, Inc. Bendectin Products Liability Litigation*, 624 F. Supp. 1212 (S.D. Ohio 1985); *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. App. 1987); *Monteleone v. Gestetner Corp.*, 140 Misc.2d 841, 531 N.Y.S.2d 857 (Sup. Ct. N.Y. County 1988); *Province v. Center for Women's Health and Family Birth*, 25 Cal. Rptr. 2d 667 (Cal. Ct. App. 1993); *Reems v. St. Joseph's Hosp. and Health Ctr.*, 536 N.W.2d 666 (N.D. 1995); *Bremner v. Charles*, 821 P.2d 1080 (Or. 1991).

60. 624 F. Supp. 1212 (S.D. Ohio 1985), *amended by In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988).

61. *See In re Richardson-Merrell, Inc.*, 624 F. Supp. 1212, 1223-24 (S.D. Ohio 1985).

62. *Id.* at 1224.

dren. . . nor could [plaintiffs] assert. . . that the children could meaningfully consult with counsel. . .”<sup>63</sup> The court did not reach the question of whether plaintiffs could understand the proceedings, ostensibly due to their young age.<sup>64</sup>

In *Gage v. Bozarth*,<sup>65</sup> an Indiana state court applied the two-part *Helminski* test, finding that the plaintiff was properly excluded from trial.<sup>66</sup> In *Gage*, the seven-year-old plaintiff was struck by the defendant’s car, rendering him quadriplegic and requiring the use of a ventilator to breathe.<sup>67</sup> At trial, defense counsel presented evidence of “city-wide sympathy for [plaintiff’s] plight.”<sup>68</sup> Based upon this evidence, the court concluded that “the presence of [the plaintiff] had the potential to prejudicially affect the jury.”<sup>69</sup> The court also found that “Gage [was] unable to understand the proceedings and assist his counsel.”<sup>70</sup> Consequently, the trial court’s order to keep the plaintiff from attending trial was upheld.<sup>71</sup>

## *The Adversary System*

### *History and Development*

The adversary system is a part of a jurisprudential history that extends over a thousand years.<sup>72</sup> In the Middle Ages, there was justice by ordeal,<sup>73</sup> where God was considered the final arbiter.<sup>74</sup> From ordeals came trial by battle where each party in a dispute would take an oath that his position was truthful and righteous.<sup>75</sup> Then, the two would fight until one party either

63. *Id.*

64. *See id.*

65. 505 N.E.2d 64 (Ind. Ct. App. 1987).

66. *See id.* at 69.

67. *See id.* at 65.

68. *Id.* at 69.

69. *Id.*

70. *Gage*, 505 N.E.2d at 69.

71. *See id.* at 67, 69.

72. *See* FRANKLIN D. STRIER, RECONSTRUCTING JUSTICE 11 (1994).

73. *See* ANNE STRICK, INJUSTICE FOR ALL 25 (1977). The general concept of an “ordeal” was to subject a suspected wrongdoer to any number of torturous perils, such as water, fire, food, and poison. *See id.* If the suspect survived the ordeal, it was said that God had found him innocent; but if the suspect perished, surely he was guilty. *See id.* at 26; *see also* STRIER, *supra* note 72, at 12; STEPHAN LANDSMAN, THE ADVERSARY SYSTEM 9 (1984).

74. *See* STRIER, *supra* note 72, at 11-12.

75. *See* LANDSMAN, *supra* note 73, at 8.

yielded, was defeated, or slain.<sup>76</sup> If a litigant was unwilling to risk his own life, he could hire a mercenary, or “champion” to fight in his stead.<sup>77</sup> Not unlike some modern day lawyers, these battling advocates would frequently roam the countryside in search of potential litigants.<sup>78</sup>

In the year 1215, the Roman Catholic Church announced that it would no longer participate in such events, and the use of trial by ordeal began to decline.<sup>79</sup> At the same time, trial by battle also waned in popularity.<sup>80</sup> By the middle of the thirteenth century, “[l]itigants looked to *peers* for redress, rather than divine retribution or reward.”<sup>81</sup> Nevertheless, many historical commentators believe that the remains of these antiquated judicial systems can be found in courts today.<sup>82</sup> One author writes, “[t]rial by ordeal is alive and functioning in the United States – under a pseudonym. Stripped of sword but still murderous, judicial ordeal is now called adversary system.”<sup>83</sup>

Today, the medieval judicial systems have evolved into two common types of jurisprudential methods: the adversary system and the inquisitorial system. The two methods employ vastly different approaches. However, they are both aimed at seeking truth and justice.

#### a. *The Inquisitorial Model*

The earliest inquisitorial courts were the papal ecclesiastical courts established in 1233, followed by the courts of the Spanish Inquisition in 1478.<sup>84</sup> Although they were associated with unfettered torture and caprice, the modern definition of the inquisitorial system is the “judicial procedure in which the

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76. *See id.*

77. *See* STRIER, *supra* note 72, at 12.

78. *See id.*

79. *See* BAILY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 105-06 (1994).

80. *See* STRIER, *supra* note 72, at 12.

81. *Id.*

82. *See* STRICK, *supra* note 73, at 37; KUKLIN & STEMPEL, *supra* note 79, at 106.

83. STRICK, *supra* note 73, at 37 (quotations omitted).

84. *See* HOWARD ABADINSKY, LAW AND JUSTICE: AN INTRODUCTION TO THE AMERICAN LEGAL SYSTEM 24 (3d ed. 1995).

judges are at the center of the fact-gathering process.”<sup>85</sup> In the inquisitorial system the judge’s responsibility is to find the truth.<sup>86</sup> He or she controls the trial process, calls and questions witnesses, and limits or expands the scope of the inquiry.<sup>87</sup> The attorney’s role in the inquisitorial system is limited to providing relevant evidence to the court,<sup>88</sup> and suggesting queries for the judge to ask during questioning.<sup>89</sup> In the end, the judge – often the very same person so intimately involved in the fact-gathering process – renders a decision.<sup>90</sup>

Opponents of the inquisitorial system have argued that “[b]y such pervasive involvement with the prosecution of the case . . . the judge cannot hope to maintain her impartiality.”<sup>91</sup> However, those in support of the inquisitorial system claim that it is “worth the risk of some latent judicial bias to avoid having control of the proceedings devolve to those openly biased – the attorneys.”<sup>92</sup>

### b. *The Adversary Model*

By the end of the 18th century, the central tenets of the adversary system were apparent in both the judicial systems of England and America.<sup>93</sup> As intimated above, the ideals of the adversary system have been compared to those of combat,<sup>94</sup> where two parties posture zealously until one emerges as the victor. The adversary system has been dubbed the judicial manifestation of a competitive nature.<sup>95</sup> It has been linked to the principals of capitalism, and its effect on our psyche has

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85. *Id.* at 24. This type of adjudication is used throughout the European continent and Latin America. *See id.*

86. *See id.*

87. *See* STRIER, *supra* note 72, at 16.

88. *See* ABADINSKY, *supra* note 84, at 24-25.

89. *See* STRIER, *supra* note 72, at 16. If a party wishes to ask a question directly, counsel must submit a brief to the court, called an “article of proof” and must describe the question to be asked. If the court accepts the question, it is given to the judge who conducts the questioning. *See* ABADINSKY, *supra* note 84, at 25.

90. *See* ABADINSKY, *supra* note 84, at 25.

91. STRIER, *supra* note 72, at 16.

92. *Id.*

93. *See* LANDSMAN, *supra* note 73, at 18-19.

94. *See* ABADINSKY, *supra* note 84, at 26; STRICK, *supra* note 73, at 37.

95. *See* KUKLIN & STEMPLER, *supra* note 79, at 105 n. 53.

been said to mirror that of competitive sports.<sup>96</sup> One commentator writes:

The fact that our society has so many competitive institutions . . . does suggest that the adversary system of justice reflects the same deep-seated values we place on competition among economic suppliers, political parties, and moral political ideas. It is an individualistic system of judicial process for an individualistic society.<sup>97</sup>

Today, most authorities agree that the central tenets of the adversary system are party control of the litigation and judicial passivity.<sup>98</sup> Both stand in stark contrast to the methods and beliefs engendered in the inquisitorial process described above. The first of the two central tenets, party control, allows litigants complete autonomy in seeking judicial redress.<sup>99</sup> Parties are allowed to attempt any cause of action they see fit, and “[i]f they want the judge to decide one dispute, the judge will not insist on resolving another even though [the judge] perceives the latter to be the real cause of the conflict.”<sup>100</sup> Further, litigants are completely responsible for building the strongest case possible. Adherence to this system “encourages the adversaries to find and present their most persuasive evidence. . . . It also focuses the litigation upon the questions of greatest importance to the parties, making more likely a decision tailored to their needs.”<sup>101</sup>

Judicial passivity, the second central tenet of the adversary system, is perhaps the most notable difference between the inquisitorial system and the adversary system. That is, while

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96. See STRIER, *supra* note 72, at 27. See also KUKLIN & STEMPEL, *supra* note 79, at 106.

97. Robert J. Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYER'S ETHICS* 174 (David Luban ed., 1983).

98. See, e.g., STRIER, *supra* note 72, at 13-14; KUKLIN & STEMPEL, *supra* note 79, at 106-107; LANDSMAN, *supra* note 73, at 2-4. Landsman also considers the highly structured forensic procedure as an important component of the adversary system. See LANDSMAN, *supra* note 73, at 4-5. Strier would add the presumption of conflict, zealous advocacy, a lay jury, and zero sum remedies to the list of adversary system characteristics. See STRIER, *supra* note 72, at 13-16.

99. See STRIER, *supra* note 72, at 14.

100. *Id.*

101. LANDSMAN, *supra* note 73, at 4.

both systems advocate that the judge be *neutral*, the adversary system requires that the judge also be *passive*.<sup>102</sup>

In the inquisitorial system, the judge is intimately involved in every phase of the trial, including its determinative outcome.<sup>103</sup> However, in the adversarial system, the judge "is expected to refrain from making any judgments until the conclusion of the contest and is prohibited from becoming actively involved in the gathering of evidence or the settlement of the case."<sup>104</sup> If the judge disobeys this mandate, "he runs a serious risk of prematurely committing himself to one or another version of the facts and of failing to appreciate the value of all the evidence."<sup>105</sup> Proponents of the adversary system argue that the most equitable judicial decisions will be reached when parties are allowed to zealously litigate their most salient arguments before an impartial and passive judge, where outcomes are not based on bias or prior knowledge, but on the stronger argument.<sup>106</sup>

## 2. *The Individual in the Adversary System*

Many believe that the "battle instinct" that pervaded early judicial practice is still alive today in the adversary system - only in a less belligerent form.<sup>107</sup> By providing civil channels in which individuals can come forward and resolve their disputes, the adversary system "reliev[es] tensions and aggressions that would otherwise find more destructive outlets. . . [and thus]. . . it may be the agent of catharsis."<sup>108</sup> Proponents also believe that feelings of procedural fairness and satisfaction in judicial decisions can only be accomplished through individual control of litigation.<sup>109</sup> Under an adversary system, "if parties are intimately involved in the prosecution of their cases and feel they were given fair opportunity to present their evidence, they are more likely to accept the results, whether favorable or unfavor-

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102. See STRIER, *supra* note 72, at 36.

103. See *supra* text accompanying notes 76-81.

104. LANDSMAN, *supra* note 73, at 2.

105. *Id.* at 2-3.

106. See STRIER, *supra* note 72, at 28-37. See also LANDSMAN, *supra* note 73, at 1-6.

107. See STRIER, *supra* note 72, at 26-27.

108. *Id.* at 27.

109. See *id.* at 28.

able.”<sup>110</sup> Using the adversary process also “serve[s] to reduce post-litigation friction and to increase compliance with judicial mandates.”<sup>111</sup> It is believed that the adversary system is intimately connected to how we identify ourselves as Americans, and that “party control best reflects the American values of *laissez-faire*, individualism and competition.”<sup>112</sup> Moreover, “[t]he adversary system coincides with our prevalent political philosophy because it affords the parties the opportunity to participate in decisions affecting their interests.”<sup>113</sup>

Being involved in the judicial process can have a profound effect on the individual rights of litigants.<sup>114</sup> One adversary system proponent writes:

Party control . . . affirms human individuality. It mandates respect for the opinions of each party rather than those of his attorney, of the court, or of society at large. It provides that those views will be heard and considered. The individualizing effect of adversary procedure . . . [provides] . . . individual satisfaction.<sup>115</sup>

The protection of individual rights under the adversary system is considered by many to be paramount to all other judicial functions, including the attainment of truth.<sup>116</sup> Those who champion the adversary process believe that before a person may be deprived of life, liberty or property, the system “require[s] that certain processes be duly followed which ensure regard for the dignity of the individual, irrespective of the impact of those processes upon the determination of truth.”<sup>117</sup>

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110. *Id.* at 31 (citing John Noonan, *The Purpose of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1486 (1966)).

111. LANDSMAN, *supra* note 73, at 44.

112. STRIER, *supra* note 72, at 30.

113. *Id.*

114. *See* STRIER, *supra* note 72, at 33; LANDSMAN, *supra* note 73, at 46. Adversary system proponent Monroe Freedman wrote “[t]he essentially humanitarian reason for such a system is that it preserves the dignity of the individual, even though that may occasionally require significant frustration of the search for truth. . . .” MONROE FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 8 (1975).

115. LANDSMAN, *supra* note 73, at 46.

116. *See* STRIER, *supra* note 72, at 33-34; FREEDMAN, *supra* note 114, at 2.

117. FREEDMAN, *supra* note 114, at 3.

### C. *The Jury*

Historically, juries evolved in order to counteract the unfettered wheeling of justice by tyrannical governments.<sup>118</sup> The Magna Carta, signed in 1215, ordered that no man shall be imprisoned until he is offered a fair trial by his peers.<sup>119</sup> While early juries were limited to findings of fact,<sup>120</sup> by 1700, juries were given the power to disagree with the law.<sup>121</sup> Today, this concept is called jury nullification.<sup>122</sup>

The jury is also intimately intertwined with the development of the American judicial system. During the British colonization, each colony's charter contained some provision for a jury system.<sup>123</sup> After the American Revolution, the First Continental Congress assured colonists the right to be tried by their peers.<sup>124</sup> In the writing of the Declaration of Independence, the drafters "declare[d] among [their] grievances against the English King that he had been depriving colonists. . . of the right of jury trial."<sup>125</sup> Today, the jury is indoctrinated into American jurisprudence with the adoption of the Sixth<sup>126</sup> and Seventh<sup>127</sup> Amendments.

In American democratic society, "the legitimacy of the law depends on acceptance by the people."<sup>128</sup> It is said that the jury "remains our best tool for ensuring that the law is being applied in a way that wins the people's consent."<sup>129</sup> For many "the jury

118. See PAULA DIPERNA, JURIES ON TRIAL 21-30 (1984); RITA J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 5-8 (1980); CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 39-40 (1962).

119. See DIPERNA, *supra* note 118, at 27.

120. See *id.*

121. See *id.*

122. See *id.* at 27-28. "Jury in a criminal case possesses de facto power to 'nullification' to acquit defendant regardless of strength of evidence against him." *Cargill v. State*, 340 S.E.2d 891, 914 (Ga. 1986).

123. See DIPERNA, *supra* note 118, at 28.

124. See *id.*

125. *Id.*

126. The Sixth Amendment provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right to. . . an impartial jury of the State and district wherein the crime shall have been committed. . ." U.S. CONST. amend. VI.

127. The Seventh Amendment provides, in pertinent part, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . ." U.S. CONST. amend. VII.

128. JEFFERY ABRAMSON, *WE, THE JURY* 7 (1994).

129. *Id.*



remains [the] only realistic opportunity to participate in govern[ment]."<sup>130</sup> Jury duty is a ubiquitous institution in America, where "the noble principle remains that every citizen is equally competent to do justice."<sup>131</sup>

### 1. *The Jury's Inherent Bias - Mr. Prejudice and Miss Sympathy*

*Mr. Prejudice and Miss Sympathy are the names of the witnesses whose testimony is never recorded, but must nevertheless be reckoned with in trials by jury.*<sup>132</sup>

The justice system in the United States has set up a paradox for the juror: in one instance we ask that he or she be a "peer" of the litigants; in the next, we require that the juror be unknowing and unassuming so that bias may be kept from the courtroom.<sup>133</sup> Thus, "[t]he local knowledge that gives competence to the juror as neighbor and peer destroys the impartiality of the juror as neutral arbiter of events."<sup>134</sup>

Critics argue that juries are often prejudiced, ad hoc, arbitrary, idiosyncratic whimsical beings that "decide cases according to emotion, prejudice, and sympathy more than according law and evidence."<sup>135</sup> Following the same logic, some stress that jurors are unable to evenly weigh the facts or evidence because of a preconceived notion of what the truth should be.<sup>136</sup> Whatever the reasoning, it is clear that jurors do bring inherent biases into the courtroom.

### 2. *In Juries We Trust*

There can be no doubt that the jury remains a vital part of American jurisprudence. Why is this so? Noted American at-

130. *Id.* at 2.

131. *Id.*

132. SIMON, *supra* note 118, at 21 (citing JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 108).

133. See ABRAMSON, *supra* note 128, at 18.

134. *Id.*

135. *Id.* at 4. See also SIMON, *supra* note 118, at 15.

136. See DONALD E. VINSON & DAVID S. DAVIS, JURY PERSUASION: PSYCHOLOGICAL STRATEGIES & TRIAL TECHNIQUES 13 (3d ed. 1993). The authors believe that "jurors' perceptions of the trial process and their ultimate decisions are largely determined by their pre-existing cognitions which act as screens or filters to interpret, distort or reinforce information presented during the trial." *Id.* at 14-15.

torney Clarence Darrow once said, "I never saw twelve men in my life, that, if you could get them to understand a human case, were not true and right."<sup>137</sup> Darrow's quote perhaps best describes why the "unnecessary delay" and "total unpredictability" allegedly cast from the jury is tolerated by the judicial system, and society in general.<sup>138</sup> Despite the criticisms, "[a] basic assumption of the law has been that the jury can understand the case presented to it."<sup>139</sup> Further, jury proponents believe that "jurors are smarter than assumed by lawyers working from manuals."<sup>140</sup>

Although it is inherently difficult to objectively "grade" a jury, one indication of how well the jury performs is to compare its decision with that of the legal "expert," the judge. A 1980 survey conducted by the University of Chicago shows that in civil cases, 79% of trial judges would have reached the same verdict as the jury.<sup>141</sup> Further, the study revealed that the difficulty or complexity of the case made little difference in the rate of disagreement between judge and jury.<sup>142</sup> In fact, only in circumstances where "the weight of the evidence [was] so close that the verdict could [have gone] either way" did a significant difference in opinion exist.<sup>143</sup> Those conducting the research came to the "unequivocal conclusion that the jury understands its job and performs it competently."<sup>144</sup>

Jury trust also stems from the belief that a jury is "[a] body truly representative of the community."<sup>145</sup> Gone are the days of "blue-ribbon" juries, where only people of "above average levels of intelligence, morality, and integrity" qualified to serve.<sup>146</sup> Today, courts widely hold that "the constitutional guarantee of trial by an impartial jury require[s] that the jury pool be a mir-

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137. LAWYER'S WIT AND WISDOM: QUOTATIONS ON THE LEGAL PROFESSION, IN BRIEF 85 (Bruce Nash et al. eds., 1995).

138. See STRIER, *supra* note 72, at 107.

139. *Id.* at 113.

140. ABRAMSON, *supra* note 128, at 5.

141. See SIMON, *supra* note 118, at 50. The number is even greater for criminal cases. See *id.*

142. See *id.* at 51.

143. *Id.*

144. *Id.* at 52.

145. ABRAMSON, *supra* note 128, at 99 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

146. See ABRAMSON, *supra* note 128, at 99.

ror image or microcosm of the eligible community population."<sup>147</sup>

Requiring such a cross-section of the community potentially invites as many backgrounds, views, and biases, as there are seats in a jury box.<sup>148</sup> While at first glance, such a requirement may ostensibly confound jury bias, closer analysis reveals that once such a group is cast, it "will achieve the 'overall' or 'diffused' impartiality that comes from balancing the biases of its members against each other."<sup>149</sup> Diverse juries lead to just outcomes, and "[j]urors wishing to . . . persua[de] [will] now have to abandon arguments that depended on the particular prejudices or perspective of their own kind."<sup>150</sup>

### *Controlling Jury Sympathy*

Sympathetic clients provide cunning attorneys with the opportunity to turn the unfortunate into the tactical - the tragic into the profitable. Sympathy can be a defense counsel's nightmare. The defense's "main fear. . . is that no matter how defensible the case. . . the jury will ignore the fact reason and common sense and out of sympathy alone, find for the plaintiff."<sup>151</sup> However, authorities agree that jury sympathy can be mitigated, thus preserving the status quo of impartiality.<sup>152</sup>

One of the basic steps in lessening the effect of sympathy is to inform jurors of their role. In its *Standards Relating to Juror Use and Management*, the American Bar Association ("ABA") "recognizes the need to inform prospective jurors of their role and responsibilities as Jurors."<sup>153</sup> The ABA suggests that orien-

147. *Id.* at 100. See also *Taylor v. Louisiana*, 419 U.S.522, 528 (1975); SIMON, *supra* note 118, at 29-30.

148. See ABRAMSON, *supra* note 128, at 100-101. The American Bar Association identifies a number of different groups that may make up a cross-section of a community, including African-Americans, Hispanic-Americans, Native-Americans, women, persons who work for a daily wage, common laborers, non-theists, students and professors, young people, and opponents of the death penalty. See American Bar Association, *Standards Relating to Juror Use and Management* 16 (1983).

149. ABRAMSON, *supra* note 128, at 101 (quoting *People v. Wheeler*, 583 P.2d 748, 755 (Cal. 1978)).

150. *Id.*

151. J. Ric Gass, *Handling Sympathy In Jury Trials: Introduction*, PLI Litig. & Admin. Practice Course Handbook Series No. 455 at 37, 43 (1993).

152. See *id.*

153. American Bar Association, *supra* note 148, at 137.

tation programs should be conducted by courts in order to inform jurors of their role, and that such programs should be designed to increase prospective jurors' understanding of the judicial system and prepare them to serve competently as jurors.<sup>154</sup>

Sympathy may also be controlled using pretrial *voir dire*<sup>155</sup> to eliminate potential jurors, who, in counsel's mind, will likely succumb to sympathy.<sup>156</sup> During *voir dire*, counsel can "[i]dentify]. . . trial issues and facts which will arouse sympathy and question on them."<sup>157</sup> Further, each juror chosen should "promise to set sympathy aside."<sup>158</sup> Counsel should "make [jurors] understand that that promise is a part of their oath" and as such the juror has entered into a "contract and covenant" with defense counsel.<sup>159</sup>

Once trial begins, defense can discuss sympathy candidly with jurors while trying to make it look like the plaintiff is relying on sympathy.<sup>160</sup> Counsel should also "emphasize any inconsistency that shows a play for sympathy . . . [and] . . . emphasize any exaggeration."<sup>161</sup> In addition, when offering expert testimony, counsel should "use experts with disabilities" as a way to soften the plight of the plaintiff by showing how others similarly situated have overcome their handicap.<sup>162</sup> Finally, the defense should attempt to include a sympathy warning into the jury instructions.<sup>163</sup>

In cases where the defendant is a corporation, a member of corporate management should regularly attend trial in order to

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154. *See id.* at 128.

155. The *voir dire* is "[a] preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

156. *See* John P. Daniels, *Handling Sympathy In Jury Trials: General Considerations and in the Defense Case in Chief*, PLI Litig. & Admin. Practice Course Handbook Series No. 455 at 57 (1993).

157. Roy F. Hughs, *Handling Sympathy In Jury Trials: Handling Sympathy in Voir Dire*, PLI Litig. & Admin. Practice Course Handbook Series No. 455 at 80 (1993).

158. *Id.*

159. *Id.*

160. *See id.*

161. Daniels, *supra* note 156, at 58.

162. *See id.*

163. *See id.* at 57.

“humanize” the defendant.<sup>164</sup> The same corporate representative should remain during the entire trial, so the defense can “give the jury some human being with such [sic] to identify.”<sup>165</sup>

#### D. *The Americans with Disabilities Act and the Judiciary*

The issue of whether the Americans with Disabilities Act (“ADA”) gives rise to a cognizable cause of action for a plaintiff who is excluded from trial is yet to be litigated. The fact that the *Cary* court addressed this issue in dicta suggests that the ADA may very well be used in plaintiff exclusion cases in the near future.<sup>166</sup> Whether such a cause of action would be successful remains to be seen. While an entire article could be devoted to discussing the possibilities and logistics of such a suit, this background section will briefly examine the statutory framework that *could* be used to argue that the ADA prohibits plaintiff exclusion.<sup>167</sup>

In enacting the ADA, Congress found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”<sup>168</sup> Although the ADA is traditionally thought of as a way for disabled persons to gain access to employment and public services, the legislature stated that its purpose for enacting the statute was to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>169</sup> Clearly, the ADA represents Congress’ commitment to a society that sees beyond physical imperfections.

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164. See *id.* at 58.

165. *Id.*

166. See *Cary v. Oneok, Inc.*, 940 P.2d 201, 212 (Okla. 1997).

167. For details regarding the purposes and provisions of the ADA, see Penn Lerblance, *Introducing the Americans with Disabilities Act: Promises and Challenges*, 27 U.S.F.L. REV. 149 (1992); Dick Thornburgh, *The Americans with Disabilities Act: What it Means to All Americans*, 64 TEMPLE L. REV. 375 (1991); Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMPLE L. REV. 471 (1991).

168. 42 U.S.C. § 12101(a)(2) (1994).

169. 42 U.S.C. § 12101(b)(1) (1994).

Contesting plaintiff exclusion under the ADA would mainly involve Subtitle II of the Act, regarding access to public services.<sup>170</sup> Section 12132 of Subtitle II provides that:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.<sup>171</sup>

Determining the applicability of the ADA in plaintiff exclusion cases involves statutory interpretation of the above language, especially the terms “public entity,” “qualified individual,” and “disability.” A “public entity” is defined as “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”<sup>172</sup> The plain meaning of “instrumentality of a State” suggests, and courts have agreed, that the judiciary falls under the statutory definition of “public entity.”<sup>173</sup> Further, case law suggests that “public entity” is to

170. See 42 U.S.C. §§ 12131-12165 (1994).

171. 42 U.S.C. § 12132 (1994). As defined in the regulations enacted pursuant to the ADA, a public entity may not:

Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded to others;

Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

\* \* \*

Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit or service to beneficiaries of the recipients program;

\* \* \*

Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

45 C.F.R. § 84.4 (1997).

Although 45 C.F.R. § 84.4 addresses nondiscrimination in programs and activities receiving federal financial assistance, Congress has stated that the regulations “are applicable to all programs and activities [by public entities].” H.R. REP. No. 101-485, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 164 Stat. 473.

172. 42 U.S.C. § 12131(1) (1994).

173. *Galloway v. Superior Court of D.C.*, 816 F. Supp. 12 (D.D.C. 1993); See also *People v. Caldwell*, 159 Misc.2d 190, 603 N.Y.S.2d 713 (N.Y. Crim. Ct. 1993)

be given the broadest of interpretations, allowing the ADA to cast a wide net.<sup>174</sup>

The ADA defines "qualified individual" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services . . . provided by a public entity."<sup>175</sup> Quite easily, plaintiffs, defendants, lawyers, jurors and the like fall within the definition of "qualified individuals."

The final threshold requirement of the ADA is for the "qualified person" to have a "disability."<sup>176</sup> Gleaned from the legislative intent of the ADA, courts have established a three-factor test to determine whether persons meet the statutory definition of "disability."<sup>177</sup> The court must determine (1) whether plaintiff's condition is a physical or mental impairment; (2) whether that impairment affects a major life activity; and (3) whether the major life activity is substantially limited by the impairment.<sup>178</sup> Although the ADA does not define "major life activity,"<sup>179</sup> Congress has commented that major life activities include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and work-

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(ruling that as a "public entity," court had a responsibility to "reasonably accommodate blind juror as required by ADA").

174. *See, e.g.,* *Stoutenforough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 674 (1996) (requiring the NFL required to provide hearing impaired persons with equal access to some form of broadcast of games in "black-out" areas); *Innovative Health Systems, Inc. v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996) (holding that city planning board and zoning board of appeals are considered "public entities" under ADA); *Doe v. Judicial Nominating Comm'n for Fifteenth Judicial Circuit of Florida*, 906 F. Supp. 1534 (S.D. Fla. 1995) (finding that judicial nominating commission is a "public entity" as defined in ADA); *Piquard v. City of East Peoria*, 887 F. Supp. 1106 (C.D. Ill. 1995) (ruling that board of trustees for city police pension fund is considered "public entity" for purposes of ADA); *Colman v. Zatechka*, 824 F. Supp. 1360 (D. Neb. 1993) (noting that University of Nebraska is a "public entity" under ADA). *But see* *Ellis v. Morehouse School of Medicine*, 925 F. Supp. 1529 (N.D. Ga. 1996) (holding that a private medical school is not considered "public entity" under ADA).

175. 42 U.S.C. § 12131(2) (1994).

176. *See* 42 U.S.C. § 12132 (1994).

177. *See* *Cerrato v. Durham*, 941 F. Supp. 388, 391 (S.D.N.Y. 1996).

178. *See id.* at 391-92 (quoting *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994)).

179. *See* *Deghand v. Wal-Mart, Stores, Inc.*, 926 F.Supp. 1002, 1011 (D.Kan. 1996).

ing.”<sup>180</sup> In addition, Congress has stated that “[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation.”<sup>181</sup>

### III. *Cary v. Oneok, Inc.*<sup>182</sup>

#### A. *Facts*

In July of 1989, Lorie Cary rented a house in Yukon, Oklahoma for herself and her two children – Eric, age 2, and Erin, age 4.<sup>183</sup> Prior to moving in their new home, Ms. Cary called Oneok, Inc. (d.b.a. . “Oklahoma Natural Gas Company” or ONG) to request that gas service be turned on.<sup>184</sup> Defendant’s technician arrived at Plaintiff’s home, initiated the gas service, and lit the pilot lights on both the cooking stove and the hot water heater.<sup>185</sup> According to Defendant, the technician also inspected the appliances to ensure that they were in safe working order.<sup>186</sup> Approximately one week after the service call, Ms. Cary and her two children moved into the home.<sup>187</sup>

One day before the fire, Eric’s father visited the Cary home in Yukon. He brought with him a lawn mower and a container filled with extra gasoline.<sup>188</sup> In an attempt to keep the children

180. H.R. REP. NO. 101-485(III), at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 451.

181. *Id.* Congress has also expressed that the term “impairment” is to be broadly construed:

[Impairment] is intended to cover those who have a record of an impairment . . . [but] . . . [i]t also includes persons who have been misclassified as having an impairment. . . For example, severe burn victims often face discrimination in employment and participation in community activities which results in substantial limitation of major life activities. These persons would be covered under this test because of the attitudes of others toward the impairment, even if they did not view themselves as “impaired.”

*Id.*

182. 940 P.2d 201 (Okla. 1997).

183. *See* Petitioner’s Brief at 7, *Cary v. Oneok, Inc.*, 940 P.2d 201 (Okla. 1997) (No. 81-356); Respondent’s Brief at 4, *Cary* (No. 81-356).

184. *See* Petitioner’s Brief at 7; Respondent’s Brief at 4.

185. *See* Petitioner’s Brief at 7-8; Respondent’s Brief at 4.

186. *See* Respondent’s Brief at 4. It is uncontested that the water heater was in working order and complied with applicable building codes. *See Cary v. Oneok, Inc.*, No. 81-356, at 2 (Okla. Ct. App. 1994).

187. *See* Petitioner’s Brief at 8, *Cary* (No. 81-356).

188. *See* Petitioner’s Brief at 8; Respondent’s Brief at 5.



away from the gas, Mr. Cary placed the container against the wall, securing it in place by wedging the lawnmower and other garage items against the container.<sup>189</sup>

The next day, Eric was playing in the yard; the garage door had been left open so Eric could get back in the house.<sup>190</sup> Ms. Cary had just left the bathroom when she heard the explosion.<sup>191</sup> She rushed to the kitchen and headed toward the garage where she heard her son crying.<sup>192</sup> Flames burst through the door.<sup>193</sup> Realizing she could not reach the garage through the kitchen door, Ms. Cary ran around the outside of the house and into the garage through the side entrance.<sup>194</sup> With the help of a garden hose and a helpful neighbor, Ms. Cary located Eric and carried him out of the garage onto the driveway.<sup>195</sup> She immediately began administering CPR.<sup>196</sup> Soon after, an ambulance arrived and Eric was rushed to the hospital.<sup>197</sup> He was subsequently flown by helicopter to the Children's Hospital Burn Center.<sup>198</sup> Eric suffered second and third degree burns over 30% of his body.<sup>199</sup>

It is undisputed that Eric accidentally spilled the gas, which in turn caused the fire.<sup>200</sup> Firefighters found the emptied gasoline container within two feet of the water heater. However, the parties controvert the ignition of the gasoline. According to Plaintiffs, and in accord with the Yukon Fire Department's opinion, the gas leaked out of the container, across the floor, and met the pilot flame of the floor-mounted water heater.<sup>201</sup> Plaintiffs also sought the opinion of an in-

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189. See Petitioner's Brief at 8; Respondent's Brief at 5.

190. See Petitioner's Brief at 8; Respondent's Brief at 5.

191. See Petitioner's Brief at 8; Respondent's Brief at 5.

192. See Petitioner's Brief at 8; Respondent's Brief at 5.

193. See Petitioner's Brief at 8; Respondent's Brief at 5.

194. See Petitioner's Brief at 9; Respondent's Brief at 6.

195. See Petitioner's Brief at 9; Respondent's Brief at 6.

196. See Petitioner's Brief at 9; Respondent's Brief at 6.

197. See Petitioner's Brief at 9; Respondent's Brief at 6.

198. See Respondent's Brief at 6.

199. See Petitioner's Brief at 9.

200. See Petitioner's Brief at 9; Respondent's Brief at 7.

201. See Petitioner's Brief at 9. Plaintiffs make explicit the potential dangers of floor-mounted water heater. See *id.* at 1-5. Plaintiffs set forth numerous authorities that now require gas-fired water heaters to be at a minimum of 18" off the ground. See *id.* In addition, plaintiffs point out that Oklahoma now requires a statewide minimum of 18" off the ground for all newly installed water heaters. See

dependent fire investigation firm, which concurred with the findings of the Yukon Fire Department.<sup>202</sup> Oneok, through its own experts, aver that it was not the water heater that caused the fire, but the electrical contacts on a freezer that was also kept in the garage.<sup>203</sup>

### B. *Procedural History*

Eric Cary's mother brought suit against Oneok as Eric's next friend.<sup>204</sup> In addition, Eric brought actions against the manufacturers and retailers of both the water heater and the gasoline container, as well as the landlord of the Carys' rental home.<sup>205</sup> The complaint against Oneok alleged that its technician had negligently inspected and lit the water heater that caused Eric's injuries.<sup>206</sup> Plaintiff asserts that Ms. Cary should have been warned of the danger inherent in ground-mounted water heaters before the water heater was lit.<sup>207</sup>

Prior to the commencement of the proceedings, Oneok made a request to bifurcate the trial, which was granted by the court.<sup>208</sup> It then made a motion to exclude Eric from trial, arguing that his appearance would unduly prejudice the jury.<sup>209</sup> The trial court granted Defendant's motion.<sup>210</sup> Before trial, the defense requested permission to question Ms. Cary, in front of the jury, as to Eric's absence.<sup>211</sup> Oneok wanted Ms. Cary to testify that Eric's absence was due to his lack of memory, and *not* because he was too disfigured.<sup>212</sup> The court settled the question

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Petitioner's Brief at 5 (citing the mechanical code of the Building Officials and Code Administrators International); Respondent's Brief at 2 n.2. The Cary home was exempt from such requirement because the 18" requirement only applied to newly installed water heaters. *See* Petitioner's Brief at 5; Respondent's Brief at 2 n.2.

202. *See* Petitioner's Brief at 10.

203. *See* Respondent's Brief at 2 n.2, 7.

204. *See* Cary v. Oneok, Inc., 940 P.2d 201, 202 (Okla. 1997).

205. *See* Cary v. Oneok, Inc., No. 81-356, 1-2 (Okla. Ct. App. 1994). Summary judgment was ordered in favor of the manufacturer and retailer of both the water heater and gasoline container. *See id.* at 2 n.1.

206. *See id.*

207. *See* Cary, 940 P.2d at 202.

208. *See id.* at 202 (Okla. 1997).

209. *See id.*

210. *See id.*

211. *See id.* at 202.

212. *See id.*

by plainly stating: “[His lack of memory is] not the reason he’s not here. He’s not here because he’s scarred so badly I think it would be unfairly prejudicial.”<sup>213</sup> The liability phase of the trial proceeded, and the jury returned a verdict in favor of the defendant.<sup>214</sup>

Eric Cary appealed the trial court’s decision to the Oklahoma Court of Appeals, Third Division.<sup>215</sup> He alleged that the trial court erred in bifurcating the trial and in keeping him from attending his trial.<sup>216</sup> On the bifurcation issue, the court held that “Eric fail[ed] to demonstrate [that] the bifurcation was prejudicial and detrimental, and that the trial court abused its discretion by making a clearly erroneous conclusion and judgment, against reason and evidence.”<sup>217</sup> On the issue of exclusion, Eric argued that the Oklahoma Constitution, Article II, Section 6, mandated that the courts of Oklahoma be open to every citizen.<sup>218</sup> The court answered that “this constitutional provision has been construed as requiring that a litigant be given ‘open access’ to a court.”<sup>219</sup>

The court also found unpersuasive Eric’s argument that, because of his absence, he was unable to assist his counsel.<sup>220</sup> Finally, the court rejected Eric’s argument that his dismissal from the courtroom violated the Americans with Disabilities Act of 1990,<sup>221</sup> stating “[a] party will not be permitted to raise an issue before this Court for the first time on appeal.”<sup>222</sup> The court therefore affirmed the trial court’s decision in its entirety.<sup>223</sup>

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213. *Cary*, 940 P.2d at 202.

214. *See id.*

215. *See Cary v. Oneok, Inc.*, No. 81-356 (Okla. Ct. App. 1994).

216. *See Cary*, 940 P.2d at 202.

217. *See Cary*, No. 81-356 at 3.

218. *See id.*

219. *Id.* (citing *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915, 919 (Okla. 1989)).

220. *See Cary*, No. 81-356 at 3-4 (citing *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6<sup>th</sup> Cir. 1985)).

221. 42 U.S.C. §§12101-12213 (1994).

222. *Cary*, No. 81-356 at 4 (citing *Bane v. Anderson, Bryant & Co.*, 786 P.2d 1230 (Okla. 1989)).

223. *See Cary*, No. 81-356 at 4.

### C. *The Majority Opinion*

The Oklahoma Supreme Court granted certiorari to determine whether Eric Cary was properly excluded from trial.<sup>224</sup> Writing for the majority, Justice Summers stated that “only in the case of extreme circumstances may a party be excluded from the proceedings,” and found that Eric’s appearance and young age were not “extreme circumstances.”<sup>225</sup> The majority concluded that “[i]t is impermissible that [Eric] is kept from observing and participating in the proceedings solely because of his status as a party who was burned, and is thus physically scarred.”<sup>226</sup>

Despite finding that a plaintiff could only be excluded in “extreme circumstances,” the court went on to apply the *Helminski* test.<sup>227</sup> Recall that the *Helminski* test allows plaintiff exclusion only when the plaintiff’s physical condition may cause jury prejudice and when plaintiffs cannot comprehend the proceeding, nor aid counsel during the proceeding.<sup>228</sup> Liberally construing the *Helminski* factors, the majority determined that neither requirement of the *Helminski* test was met.<sup>229</sup> Although the majority found that possible jury prejudice might occur, Justice Summers stated, “[w]e do not agree. . . that the likelihood of jury sympathy is the equivalent of prejudice.”<sup>230</sup> He continued, “[t]he record is far from clear that Eric could not meaningfully comprehend what was going on.”<sup>231</sup> The majority then cited several cases where young plaintiffs were permitted to remain in the courtroom despite their inability to completely understand the proceedings,<sup>232</sup> stating that “a child Eric’s age likely has some understanding of the basic events of a trial as they occur, and there is nothing in the record to the contrary.”<sup>233</sup>

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224. See *Cary v. Oneok, Inc.*, 940 P.2d at 201 (Okla. 1997).

225. *Id.*

226. *Id.* at 204-205.

227. See *id.* at 203.

228. See *id.* at 205.

229. See *Cary*, 940 P.2d at 205.

230. *Id.*

231. *Id.*

232. See *id.* (citing *Chicago Great Western Ry. Co. v. Beecher*, 150 F.2d 394 (8th Cir. 1945); *Anderson v. Sears, Roebuck & Co.*, 377 F. Supp. 136 (E.D. La. 1974)).

233. *Cary*, 940 P.2d at 205.

Further, the majority opined that “Oneok failed to show that Eric Cary would have been no assistance to his attorney.”<sup>234</sup> Justice Summers noted that Eric did have some recollection of the event, and, even had he not, that “physical presence of a party cannot be anticipated, as developments may occur at trial that were unplanned by the attorney.”<sup>235</sup> The majority also found that *Helminski* was factually distinguishable from the present case.<sup>236</sup> There, the plaintiff was developmentally retarded, autistic, not toilet trained, and unable to speak.<sup>237</sup> The majority reasoned that without his disfiguring injuries, Eric was by all accounts a normal six-year-old boy.<sup>238</sup> In reaching its decision, the majority relied on the jury’s ability to find facts independent of emotion,<sup>239</sup> noting that “[a] jury will generally follow the court’s instructions and decide a case based on the law presented.”<sup>240</sup>

The majority believed that the *Helminski* test promulgated too harsh a rule, stating that “[t]here may need to be a re-examination of those cases, including *Helminski*, which hold that a disfigured plaintiff may be excluded if he or she cannot aid the attorney or comprehend the proceedings.”<sup>241</sup> In dicta, the majority referred to the Americans with Disabilities Act<sup>242</sup> in defense of its argument.<sup>243</sup> After quoting the relevant language of the ADA,<sup>244</sup> the court observed that “there may be some case law that will need re-evaluation in light of the Act” because many exclusion decisions were decided prior to the enactment of the ADA.<sup>245</sup>

The majority realized the practical limits on a plaintiff’s right to be at trial, and agreed with the dissent insofar as a party’s right to be at trial is not absolute.<sup>246</sup> It contemplated

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234. *Id.* at 206.

235. *Id.*

236. *See id.*

237. *See id.*

238. *See Cary*, 940 P.2d at 206.

239. *See id.* at 205.

240. *Id.*

241. *Id.*

242. 42 U.S.C. § 12132 (1994).

243. *See Cary*, 940 P.2d at 205.

244. *See supra* text accompanying note 242.

245. *Cary*, 940 P.2d at 205 n.5.

246. *See id.* at 204.

“situations in which the disruptive behavior of a party would necessitate the party’s exclusion. . . and a trial may proceed after a party has voluntarily waived the right to be present.”<sup>247</sup> Nevertheless, the majority did not find that Eric’s condition fit into this rubric.<sup>248</sup>

In conclusion, the majority held that, if Eric’s absence was to be characterized as harmless error, it would “trivialize his right to observe and be a part of the proceedings which likely will profoundly influence much of the rest of his life.”<sup>249</sup> The majority ordered that the lower court’s decision be vacated, and that judgment for the defendant be reversed.<sup>250</sup>

#### D. *The Dissent*

The dissent criticized the majority for “desiring. . . to avoid a result perceived to be harsh,” and attacked the decision on five fronts.<sup>251</sup> First, the dissent argued that Eric was adequately represented by his next friend (Ms. Cary), so that no statutory or constitutional prejudice had taken place.<sup>252</sup> The dissent explained that, because Eric was statutorily prohibited from bringing suit against Oneok,<sup>253</sup> his interest shifted from that of *dominus litus*<sup>254</sup> to that of beneficiary.<sup>255</sup> Justice Opala wrote: “Although the minor is the sole real party interest. . . as a person *non sui juris* he is not party to the suit but a beneficiary of its proceeds.”<sup>256</sup> Thus, the dissent saw no error in excluding

247. *Id.* at 204.

248. *See id.* at 205.

249. *Id.* at 206.

250. *See Cary*, 940 P.2d at 206.

251. *Cary*, 940 P.2d at 206 (Opala, J., dissenting).

252. *See id.* at 207.

253. Oklahoma’s statute regarding litigious minors is as follows:

INFANTS OR INCOMPETENT PERSONS. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. . . .”

OKLA. STAT. tit.12, § 2017(C) (1991).

254. *Dominus litis* is defined as “master of the suit, i.e., the person who was really and directly interested in the suit as a party, as distinguished from his attorney or advocate.” BLACK’S LAW DICTIONARY, 487 (6th ed. 1990).

255. *See Cary*, 940 P.2d at 208-10 (Okla. 1997) (Opala, J., dissenting).

256. *Id.* at 210 (emphasis removed). *Non sui juris* is defined as “not of his own right; not possessing full social and civil rights; under guardianship.” BLACK’S LAW DICTIONARY, 1000 (6th ed. 1990).

Eric because he “cannot be viewed as a true party plaintiff,”<sup>257</sup> and because his mother acquired the role of *dominus litus*.<sup>258</sup>

The dissent did not believe that Eric was prejudiced by his exclusion at trial.<sup>259</sup> Because Eric was not to be called as a witness, exclusion did not prevent him from testifying at trial.<sup>260</sup> Plaintiff’s counsel asserted that Eric’s presence at trial would have affected the veracity of witnesses.<sup>261</sup> Justice Opala disagreed, stating that “[t]he record does not disclose how a witness fabrication would ever have been deterred by the presence of a child whose inability accurately to recount the circumstances leading to his injury was known to opposing counsel and to all witnesses in the case.”<sup>262</sup>

Second, the dissent condemned the court’s decision to disregard “a rich body of national jurisprudence” on the issue of plaintiff exclusion.<sup>263</sup> The dissent enumerated a three-part test,<sup>264</sup> based on *Helminski*, which the trial court was obliged to follow before excluding Eric.<sup>265</sup> According to the dissent, because the trial court correctly followed the three-step inquiry, the decision to exclude was error free.<sup>266</sup> The dissent also noted

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257. *Cary* at 211 (Opala, J., dissenting).

258. *See id.* at 209-11.

259. *See id.* at 211.

260. *See id.*

261. *See id.*

262. *Cary*, 940 P.2d at 211 (Opala, J. dissenting).

263. *Id.* at 212.

264. According to the dissent, a court may exclude a plaintiff from the proceedings if the following three steps are met:

First, the *nisi prius* judge must determine if a litigant’s appearance or conduct is likely to prejudice the jury against a defendant who seeks to bar that litigant’s attendance. Second, if prejudice be found probably to result from a litigant’s presence, the court must next direct its probe to whether the excluded litigant’s testimony is either expected or necessary in light of that person’s ability to comprehend the proceedings about to be conducted. Finally, the court must assess the negative legal fallout, if any, from the excluded person’s absence upon the quality of process that is that person’s due. If the excluded litigant’s presence is not critical to his effective representation at trial, there is less or little prejudice to the fairness factor from that person’s absence. A litigant’s presence could not be viewed as critical if he/she has no capacity to understand the proceedings and to assist counsel in their conduct.

*Id.* (emphasis removed) (footnote omitted).

265. *See id.* at 212.

266. *See id.* at 213.

that “[w]here issues of liability and damages are to be tried together, a litigant’s presence in the courtroom should not be restricted.”<sup>267</sup> It therefore conceded that, without bifurcation, Eric would *not* have been properly excluded from trial.<sup>268</sup> The dissent stressed, however, that this case *was* bifurcated.<sup>269</sup> Thus, Justice Opala criticized the majority for citing single-issue cases as authority.<sup>270</sup>

Third, the dissent opined that allowing Eric to attend trial would violate Oneok’s right to an impartial trial guaranteed by both the Oklahoma<sup>271</sup> and Federal<sup>272</sup> Constitutions.<sup>273</sup> The dissent argued that, once a movant has satisfied its burden of production and persuasion by fulfilling the requirements of the three-part test,<sup>274</sup> the movant becomes clothed in the protections of due process, which guarantee the defendant an impartial trial.<sup>275</sup> Despite the harsh overtones, the dissent argued that weighing a plaintiff’s right to attend trial against a defendant’s right to a fair trial was a matter of necessary procedure.<sup>276</sup> Justice Opala wrote: “Chaos, caprice and *ad hoc* pronouncements would inevitably follow the slightest departure from an even-handed procedural regime.”<sup>277</sup>

Fourth, the dissent argued that the majority incorrectly reweighed evidence that was before the trial court.<sup>278</sup> It found that the re-weighing of evidence was inappropriate because the trial court’s decision to exclude was not an abuse of discre-

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267. See *Cary*, 940 P.2d at 213 (Opala, J., dissenting).

268. See *id.* at 212-13.

269. See *id.*

270. See *id.* at 213. Specifically, Justice Opala questioned the majority’s use of *Florida Greyhound Lines v. Jones*, 60 So. 2d 396 (Fla. 1952), *Chicago Great Western Ry. Co. v. Beecher*, 150 F.2d 394 (8th Cir. 1945), *Anderson v. Sears, Roebuck & Co.*, 377 F. Supp. 136 (E.D. La. 1974), and *Mason v. Moore*, 226 A.D.2d 993, 641 N.Y.S.2d 195 (3d Dep’t 1996). See *id.*

271. The Oklahoma Constitution, in pertinent part, reads as follows: “No person shall be deprived of life, liberty, or property, without due process of law.” OKLA. CONST. art. II, § 7.

272. The U.S. Constitution, in pertinent part, reads as follows: “. . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . .” U.S. CONST. amend. XIV, § 1.

273. See *Cary*, 940 P.2d at 206 (Opala, J., dissenting).

274. See *supra* note 264 and accompanying text.

275. See *Cary*, 940 P.2d at 214 (Opala, J., dissenting).

276. See *id.*

277. *Id.*

278. See *id.*



tion.<sup>279</sup> According to the dissent, in order to reverse on an abuse-of-discretion standard, the reviewing court must find the lower court's decision to be clearly erroneous.<sup>280</sup> The dissent argued that "[t]he conduct of a jury trial lies within the sound discretion of the nisi prius judge, and the trial court is duty-bound to withhold from the triers any material deemed prejudicial."<sup>281</sup> Thus, because Eric was excluded using the correct procedural analysis, *viz* the three-part test, the dissent found no abuse of discretion by the trial court.<sup>282</sup> The dissent also noted that it would be manifestly unfair to promulgate a rule that was unknown to the parties at the time of trial.<sup>283</sup>

Lastly, the dissent criticized the court's use of the ADA, stating that "[b]ecause [the mother] did not press this issue at nisi prius, neither the appellate nor this court (on certiorari) may reach it on review."<sup>284</sup> The dissent asserted that using the ADA, even in dicta, was inappropriate because "[c]ourts are not allowed to forecast what they might do about an issue that is not before them."<sup>285</sup> The dissent concluded, "[a] reversal. . . may not be grounded either on some theory invoked *sua sponte* or on any pressed argument which lacks record support."<sup>286</sup>

#### IV. Analysis

In finding that Eric was improperly excluded from trial,<sup>287</sup> the Oklahoma Supreme Court correctly invoked the heightened level of scrutiny that should be adopted by courts whenever plaintiff exclusion is at issue.

While this case note does not advocate that a party to a civil proceeding has an absolute constitutional right to attend trial,<sup>288</sup> it does join *Cary* in saying that *Helminski*<sup>289</sup> impermis-

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279. *See id.*

280. *See Cary*, 940 P.2d at 214 (Opala, J., dissenting).

281. *Id.*

282. *See id.*

283. *See id.*

284. *Id.* at 215 (citing *Bane v. Anderson, Bryant & Co.*, 786 P.2d 1230, 1237 (Okla. 1990) and *Mills v. Mills*, 512 P.2d 143, 145 (Okla. 1973)).

285. *Cary*, 940 P.2d at 215 (Opala, J., dissenting) (citing *Hughey v. Grand River Dam Auth.*, 897 P.2d 1138, 1143-44 (Okla. 1995)).

286. *Id.* at 215 (emphasis removed).

287. *See supra* text accompanying notes 224-26.

288. *See supra* text accompanying notes 17-21.

289. *See supra* text accompanying notes 48-51.

sibly allows for plaintiff exclusion. This case note advances three general arguments why the *Helminski* test is flawed and why the more rigorous standard established in *Cary* should be applied. First, juries should be trusted to reach a just decision despite the influence of a sympathetic plaintiff. Second, the plaintiff's right to be in the courtroom and confront a wrongdoer is a basic precept of the adversary system. Third, excluding a plaintiff from the courtroom is in violation of both the letter and intent of the Americans with Disabilities Act.<sup>290</sup>

### A. *Trust the Jury*

It would be difficult, if not impossible, to find a person left unaffected after seeing a disfigured plaintiff. Even if one could be found, discovering eleven companions would be hopeless. Undoubtedly, jurors will feel for a burned, handicapped, or dysfunctional plaintiff.<sup>291</sup> It would be utterly naïve to believe that once in a jury box, the juror leaves her entire background, bias and compassion behind.<sup>292</sup>

The *Cary* majority correctly believed that despite these very human qualities, jurors can nevertheless be trusted to put emotion aside and decide a case on the merits.<sup>293</sup> This view is consistent with the belief that jurors, although no longer “blue ribbon,”<sup>294</sup> can do their job fairly, equitably, and free from sympathy's grasp.<sup>295</sup> Jury trust is derived from an amalgam of beliefs. The concept of trial by one's peers is entrenched in American judicial history,<sup>296</sup> and an assumption exists that every person is qualified “to do justice.”<sup>297</sup> In reality, as this author concedes, it is inherently difficult to sit in the jury box and be devoid of compassion for a person who has suffered. Admittedly, there will be those who will let sympathy overcome rea-

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290. See 42 U.S.C. §§ 12101-12213 (1994).

291. See *supra* text accompanying notes 132-36.

292. See *supra* text accompanying notes 132-35. See also *supra* note 136 and accompanying text.

293. See *supra* text accompanying notes 239-40.

294. See *supra* text accompanying note 146.

295. See *supra* text accompanying notes 137-40.

296. See *supra* text accompanying notes 123-27.

297. ABRAMSON, *supra* note 128, at 2. See also *supra* text accompanying notes 133-35, 143-44.

son.<sup>298</sup> However, advocates of plaintiff exclusion presuppose that a jury box is filled with such jurors.<sup>299</sup> This is simply not the case.<sup>300</sup> Experts agree that jurors are capable of putting aside their emotions and following instructions.<sup>301</sup> Ask yourself - if you were charged with deciding a case involving a sympathetic juror, could you rule fairly and without prejudice? Because most would agree that they are capable of doing so, and because juries represent a "microcosm" of society, there is little fear that a jury box will become hopelessly biased by sympathetic persuasion.<sup>302</sup> Indeed, diverse juries ensure that judicial decisions are well reasoned.<sup>303</sup>

Clearly, when jury decisions so often mirror those of the legal experts, to wit, the judges, it can hardly be said that jurors are remiss in their duty.<sup>304</sup> A study determined that 79% of judges concurred in the decision that the jury had rendered.<sup>305</sup> If, as critics argue, jurors were not qualified to reach fair decisions, would the level of concurrence between judge and jury be even close to 80%? Researchers agree that the jury "understands its job" and can "perform it competently."<sup>306</sup> *Helminski* and its progeny must be criticized for their lack of faith in the jury's ability to find facts.

Jury sympathy that does occur can be mitigated using a variety of factors.<sup>307</sup> The courts can provide orientation sessions to jurors and inform them about their role as impartial fact-finders.<sup>308</sup> If a case involves an especially sympathetic plaintiff, the court may warn the jurors about what they are going to see and instruct them to be wary of their emotions.<sup>309</sup> Undoubtedly, such instruction is not beyond a juror's comprehension.<sup>310</sup>

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298. See *supra* text accompanying notes 135-36.

299. See *supra* text accompanying notes 135-36.

300. See *supra* text accompanying notes 137-40.

301. See *supra* text accompanying notes 138-40.

302. See *supra* text accompanying notes 145-47.

303. See *supra* text accompanying notes 148-50.

304. See *supra* text accompanying notes 141-43.

305. See *supra* text accompanying note 141.

306. See *supra* text accompanying notes 143-44.

307. See *supra* text accompanying notes 153-65.

308. See *supra* text accompanying notes 153-54.

309. See *supra* text accompanying notes 153-54.

310. See *supra* text accompanying notes 152-58.

*Voir dire* can be used to weed out jurors who seem especially susceptible to sympathetic appearances.<sup>311</sup> It seems entirely plausible for a practitioner to ask pointed questions to test for emotional susceptibility. Defense counsel may use a variety of trial techniques to de-emphasize the plaintiff's condition, such as exposing plaintiff's attempt to use sympathy during opening and closing statements,<sup>312</sup> and using experts to de-emphasize plaintiff's plight.<sup>313</sup> In addition, jury instruction can be used to once again remind jurors to put aside sympathetic urges.<sup>314</sup>

### B. *Maintain the Adversary System*

When courts banish plaintiffs from the courtroom, they are removing the nucleus of adversary procedure.<sup>315</sup> The autonomy of the individual litigant is the single most identifiable characteristic of the adversary system.<sup>316</sup> Party control of the litigation is what sets the system apart from other judicial paradigms.<sup>317</sup> Yet, the idea of party control goes beyond the mere representation of interest. The *Cary* dissent argued that, because Eric was represented at trial,<sup>318</sup> his interest was lessened to that of a "beneficiary."<sup>319</sup> It is untenable to reduce a plaintiff's interest in this way.<sup>320</sup> No one can be an adequate substitute for the plaintiff's interest at trial. A "next friend" (i.e. a mother) can represent a plaintiff, yet can not *replace* his or her interest at trial.<sup>321</sup> A lawyer handles the development and strategy of a case, but is not the "alter ego" of the plaintiff.<sup>322</sup> Justice Summers aptly stated that keeping a plaintiff from his day in court "trivialize[s] his right" to confront a wrongdoer.<sup>323</sup>

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311. See *supra* text accompanying notes 155-59.

312. See *supra* text accompanying note 160.

313. See *supra* text accompanying note 162.

314. See *supra* text accompanying note 163.

315. See *supra* text accompanying notes 110-16.

316. See *supra* text accompanying notes 99-102.

317. See *supra* text accompanying notes 85-93.

318. Recall that Eric was represented both by counsel and his mother as next friend.

319. See *Cary v. Oneok, Inc.*, 940 P.2d 201, 209-11 (Okla. 1997).

320. See *supra* text accompanying notes 107-17.

321. See *supra* text accompanying notes 21, 27, 35-37.

322. See *supra* text accompanying note 21.

323. *Cary*, 940 P.2d at 206.

Eric's counsel expressed some particularly poignant analysis when he wrote:

The party, as opposed to his or her lawyer, is the human being whose future is actually at stake in a trial. When this affected individual is able to be present in the courtroom, . . . to look a witness or prospective juror in the eye, that witness or prospective juror may find it more difficult to lie, or to stretch the truth. "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"<sup>324</sup>

Indeed, a witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts."<sup>325</sup>

The Framers chose the adversary model of justice over all others,<sup>326</sup> with the belief that the adversary model championed the ideals of impartiality and zealous advocacy.<sup>327</sup> Unlike the inquisitorial model of justice, the adversary system allows parties the unrestrained ability to bring forth their most salient arguments.<sup>328</sup> But, is it not "strange indeed" to think that a party can bring forth its most salient case without the plaintiff stepping foot in the courtroom?<sup>329</sup> As in Eric's case, it is often "far from clear that [a plaintiff][can] not meaningfully comprehend what was going on."<sup>330</sup>

A plaintiff's ability to confront a wrongdoer - to make responsible parties answer for their actions - is vital in the adversary process.<sup>331</sup> Without direct involvement, a plaintiff's satisfaction with a decision may be wholly unfulfilling.<sup>332</sup> This applies, perhaps counter-intuitively, to both favorable and adverse decisions.<sup>333</sup> Favorable decisions, even when large sums of money are involved, can leave an excluded plaintiff feeling

324. Petitioner's Brief at 17, *Cary v. Oneok, Inc.*, 940 P.2d 201 (Okla. 1997) (No. 81-356) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988)).

325. *Coy*, 487 U.S. 1012, 1089 (quoting *Z. Chaffee, Jr., THE BLESSING OF LIBERTY* 35 (1956)).

326. See *supra* text accompanying note 93.

327. See *supra* text accompanying notes 93-97.

328. See *supra* text accompanying note 106.

329. See *supra* text accompanying notes 27-29, 39-40.

330. *Cary v. Oneok, Inc.*, 940 P.2d 201, 205 (Okla. 1997).

331. See *supra* text accompanying notes 93-97.

332. See *supra* text accompanying notes 110-12.

333. See *supra* text accompanying notes 109 and 116.

ambivalent.<sup>334</sup> It is unlikely that any sum of money can substitute for an accounting of a wrongdoer's action.

This is not to say that a party may never be excluded from trial. As the *Cary* court perceived,<sup>335</sup> there are *extreme* circumstances for which exclusion is necessary.<sup>336</sup> One can imagine circumstances where a plaintiff is so disruptive that trial cannot practically proceed or where counsel's motive is to shamelessly parade a plaintiff in front of the jury in an attempt to arouse sympathy.<sup>337</sup> Seemingly, the *Helminski* test was formulated to address these circumstances, and to ensure that defendant's due process rights to a fair trial are upheld.<sup>338</sup> However, *Helminski* swings the pendulum too far. It sets forth a standard that too easily abrogates plaintiff's right to attend trial.<sup>339</sup>

### C. *The Americans with Disabilities Act and its Applicability to Excluded Plaintiffs*

Although the *Cary* court only addressed the ADA issue in dicta, its analysis may have been a prophetic depiction of the future of plaintiff exclusion.<sup>340</sup> Analysis of the ADA's Subtitle II supports the supposition that plaintiffs seeking redress are protected from exclusion under the ADA.<sup>341</sup>

According to the ADA, "public entities" are not to deny handicapped persons any benefit, service or program.<sup>342</sup> Courts have construed "public entities" to include the judiciary.<sup>343</sup> So, as long as a plaintiff can show that he or she is in fact "disabled,"<sup>344</sup> the ADA prohibits courts from excluding plaintiffs from trial. The regulations established pursuant to the ADA

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334. See *supra* text accompanying notes 112-18.

335. See *Cary*, 940 P.2d at 204.

336. See *supra* text accompanying note 34 and 37

337. See *supra* text accompanying note 44.

338. See *supra* text accompanying notes 263-70.

339. See *supra* text accompanying notes 107-17.

340. See *Cary*, 940 P.2d at 205.

341. See *supra* text accompanying notes 166-81.

342. See *supra* text accompanying note 171.

343. See *supra* text accompanying notes 172-74.

344. See *supra* text accompanying notes 176-81 (setting forth the three-part test to determine whether a person qualifies as "disabled"). Note that although Eric does not clearly pass the three-part test, Congress explicitly stated that severe burn victims are "disabled," because the effect of their appearance is a limitation on major life activity. See *supra* note 181 and accompanying text.

state that a public entity shall not deny a "qualified handicapped person"<sup>345</sup> of a "service" that the public entity provides.<sup>346</sup> Arguably, there is no judicial character more fitting of the title "qualified individual" than a plaintiff in a civil trial; and when a court denies a plaintiff the right to attend his or her own trial, it has denied a "service."<sup>347</sup> The ADA regulations also state that a public entity may not aid or perpetuate discrimination against a disabled person.<sup>348</sup> To be sure, a court effectively perpetuates discrimination when it complies with a defendant's request to keep a plaintiff out of court.

After courts have been identified as "public entities," and plaintiffs have been deemed "qualified persons," the final threshold requirement of the ADA is for the "qualified person" to have a "disability."<sup>349</sup> This factor will be determined on a case by case basis. However, considering Congress' intent to broadly define "impairments," the rule being advocated herein will be available to many with diverse disabilities.<sup>350</sup> Interpreting the ADA as prohibitive of plaintiff exclusion is clearly within the congressional intent of the ADA. Congress has summarized its position as follows:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society; the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . . .<sup>351</sup>

If courts continue to exclude plaintiffs, they will surely run afoul of Congress' intent to admonish "stereotypic assumptions" of disabled persons' ability to participate in society. Thus,

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345. See *supra* text accompanying notes 171-75.

346. See *supra* note 171 and accompanying text.

347. See cases cited *supra* note 34.

348. See *supra* note 171 and accompanying text.

349. See *supra* text accompanying note 176.

350. See *supra* note 181 and accompanying text.

351. 42 U.S.C. §§ 12101(7)-(8) (1994).

based on the above statutory analysis, and the analysis in Part II(D) of this case note, it appears that a plaintiff who has been excluded from his or her own trial may have a valid claim under the ADA.

## V. Conclusion

Despite the substantial weight of authority to the contrary, the *Cary* court correctly upheld Eric's right to be at trial, despite his limited understanding of the trial and ability to aid counsel. In doing so, the court dispelled the "stereotypical assumption" that juries are unable to displace their sympathy.<sup>352</sup> In addition, *Cary* ensures that Oneok will be made to answer *not only* to the court and counsel, but also to *Eric* himself.<sup>353</sup> Hopefully, the *Cary* decision will thrust the minority position into the majority, and the *Helminski* test will become extinct.

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352. See *Mason v. Moore*, 226 A.D.2d 993, 994, 641 N.Y.S.2d 195, 197 (3d Dep't 1996).

353. See *supra* text accompanying note 323.

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To my beautiful wife Alison, for her love and support.