

Litigator of the Week: A Big-League Double Play for This Gibson Dunn Litigator

By **Cogan Schneier**

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Andrew Tulumello co-chairs Gibson Dunn & Crutcher's sports law practice, so he's familiar with the term "double play." He pulled one off this week, bringing home two big victories for his clients, including a U.S. Supreme Court win.

Tulumello, who is also the co-partner in charge of Gibson's D.C. office, scored the wins on behalf of two of the firm's longtime clients, PepsiCo and BNSF Railway.

The first victory came out of U.S. District Court for the Northern District of California. Tulumello and his team won summary judgment on behalf of PepsiCo's subsidiary Frito-Lay against plaintiffs who demanded roughly \$450 million for claims that the company's products were mislabeled. Then, on Tuesday, the Supreme Court ruled for BNSF, limiting the jurisdictions where the railroad giant can be sued.

The win in Northern California, in what's come to be known as the "food court," hinged on an unlikely admission from the plaintiffs during depositions more than two years ago. The case is the first of 65 organized and brought by Mississippi trial lawyer Don Barrett. Barrett began a crusade against the food industry in 2012 aimed at cracking down on what he considers misleading labels.

The plaintiffs in this case alleged Frito-Lay's use of labels that read "0g trans fat" and "Made with All Natural Ingredients" on potato chip products violated consumer protection laws in California by misleading consumers.

Tulumello and his team seized an opening to kill the suit by showing that the labels weren't the main reason



Photo: Diego M. Radzinski/ALM

Andrew Tulumello of Gibson, Dunn & Crutcher.

name plaintiffs Markus Wilson and Doug Campen bought the chips.

The depositions didn't get off to a great start. Tulumello and his colleagues came down with the flu. But the show must go on. Battling a fever of 101 degrees, Tulumello employed a steady rhythm of questioning, easing the witnesses into feeling comfortable. It paid off. Both plaintiffs essentially admitted that they had only purchased the chips because their lawyers told them to. Those were what Tulumello called "case-ending confessions."

"Did he just say what I think he said?" Tulumello recalls asking his co-counsel in a conference room during a break. Though the plaintiffs' lawyers tried to backtrack the statements, the judge ruled their line of questioning was leading and deemed it inadmissible.

That was in 2014, and after three years of legal back and forth, U.S. District Judge Jon Tigar ruled for Frito-Lay on May 26, tossing the case on summary judgment.

“It was just wonderful to get that result,” Tulumello said. “From a strategy perspective, it’s very gratifying to get a win like this based on the plaintiff’s deposition testimony. The [plaintiffs’ lawyers] have prepared their witnesses and so being able to get confessions that end the case isn’t easy. And I think we took a lot of pride in the fact that we were able to get case-ending confessions from both.”

While the FritoLay win was undeniably delicious, Tulumello’s victory for BNSF was perhaps even better--the case was his first before the Supreme Court.

He’d been planning to get there since the court’s 2014 ruling in *Daimler AG v. Bauman*, which said *Daimler*, a German company, could not be sued in California for injuries caused by its subsidiary outside the U.S.

Tulumello had witnessed a similar problem with BNSF. Plaintiffs’ lawyers kept bringing suits under the Federal Employers’ Liability Act against the company in Montana, where they knew the state court was favorable to plaintiffs.

With the *Daimler* ruling, Tulumello saw an opportunity. The Gibson team huddled with BNSF, and came up with a strategy to stop the Montana lawsuits.

“It was a strategy we thought of before, because BNSF had been so plagued by this,” Tulumello explained. “The goal was to try to get to the Supreme Court. We were hopeful that the Montana Supreme Court might see things our way, but we had to be ready to go further than that, and that’s exactly what happened.”

Indeed, the case made its way up through the Montana courts, and the defendants lost before the Montana Supreme Court in a 6-1 ruling.

Tulumello filed a writ of certiorari, and he still remembers how he felt when it was granted. “That was a great moment, because then we knew we were back in the game.”

They weren’t only back in the game. They won it, with an 8-1 ruling for BNSF. The opinion by Justice Ruth Bader Ginsburg concluded that the 14th Amendment bars state courts from hearing cases against out-of-state corporations if that corporation “is not at home” in that state and the incident in question happened somewhere else.

“I think the Supreme Court is sending a strong signal that forum shopping ... does not promote the ideals of the civil justice system,” Tulumello said of the opinion.

Tulumello is “ecstatic” that his first appearance before the high court resulted in a win. He noted he had some help. His wife picked out a lucky tie the morning of the argument, and he prepared almost excessively. He held at least six moot courts, an undertaking he said he likely won’t repeat when he returns to the Supreme Court this fall for a different case.

“But I know what tie I’ll be wearing,” he quipped.

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