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Missouri Supreme Court Overrules 20 Years of Precedent in Holding Noneconomic Damages Cap in Medical Malpractice Cases Unconstitutional

*By Stephen R. Clark and Kristin E. Weinberg**

Overruling its own twenty-year precedent in *Adams By and Through Adams v. Children's Mercy Hospital*[1] (*Adams*), the Missouri Supreme Court, in a four-to-three decision, held in *Watts v. Lester E. Cox Medical Centers* (*Watts*) that the cap on non-economic damages in medical malpractice cases in Mo. Rev. Stat. § 538.210, passed as part of the comprehensive tort reform passed by the Missouri Legislature in 2005, violates article I, section 22(a) of the Missouri Constitution's right to trial by jury.[2] The Missouri Supreme Court also held that Mo. Rev. Stat. § 538.220 grants a trial judge authority to determine the manner by which future damages shall be paid, including what amount shall be paid in future installments.[3]

I. Facts

In *Watts*, the plaintiff alleged the defendants' medical malpractice caused disabling brain injuries to a newborn.[4] The jury returned a verdict in favor of the plaintiff and awarded $1,450,000.00 in non-economic damages and $3,371,000.00 in future medical damages.[5] The trial court entered judgment reducing the non-economic damage award to section 538.210's $350,000.00 cap and established a payment schedule under section 538.220 for the future medical damages spanning fifty years.[6] Lodging several state constitutional challenges to section 538.210's cap, including that it violated the Missouri Constitution's right of trial by jury, the plaintiff appealed.[7] The respondents argued that *Adams*, where the Missouri Supreme Court held that section 538.210's statutory cap on non-economic damages does not violate the state constitutional right to a trial by jury, controlled.[8]

II. Constitutional Right to Jury Trial

Article I, section 22(a) of the Missouri Constitution provides "[t]hat the right of trial by jury as heretofore enjoyed shall

... continued page 8

New Jersey Voters Overwhelmingly Approve Constitutional Amendment To Overturn Judicial Pensions Case

*by Thomas M. Johnson, Jr.**

On Election Day 2012, New Jersey voters overwhelmingly approved the New Jersey Judicial Salary and Benefits Amendment to the state constitution, which "allow[s] contributions set by law to be taken from the salaries of Supreme Court Justices and Superior Court Judges for their employee benefits." The amendment overturned a recent New Jersey Supreme Court decision, *DePascale v. State of New Jersey*, in which the court struck down the bipartisan Pension and Health

... continued page 10

INSIDE

FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Tenth Circuit Rejects Challenge to the Judicial Merit Selection Process in Kansas

*by Clayton Callen and Justin Whitworth**

The U.S. Court of Appeals for the Tenth Circuit has become the latest federal appellate court to weigh in on the constitutionality of the so-called "merit selection" method for selecting state court judges.[1] Like the Eighth Circuit and Ninth Circuit courts before it, the Tenth Circuit upheld the key provision of the "merit selection" process against an Equal Protection Clause challenge.[2] The Tenth Circuit's decision was not unanimous, however. Further, the two judges in the majority disagreed on the appropriate analysis and application of relevant Supreme Court precedent. The divergent reasoning applied by the Tenth Circuit demonstrates the need for clarity from the Supreme Court. Only time will tell if such clarity will be provided.

The Kansas Judicial Nominating Commission

Kansas, like a host of other states, utilizes the "merit selection" process for nominating and appointing state appellate court judges.[3] Commonly referred to as the "Missouri Plan," the process features judicial nominating commissions that are charged with selecting nominees for state appellate courts. Until the middle of the twentieth century, state court judges in Kansas were popularly elected. However, in part as a result of the infamous "Kansas triple play,"[4] Kansas voters approved a constitutional amendment establishing the Kansas Supreme Court Nomination Commission (Commission) in 1958.[5] Shortly thereafter, Kansas enacted legislation implementing the amendment and eventually made it applicable to the Kansas Court of Appeals.[6]

The Commission is composed of nine members: a chairperson who is a licensed attorney, and one attorney and one non-attorney member from each of the four U.S. congressional districts in Kansas.[7] Importantly, the chairperson is elected at large by licensed Kansas attorneys,[8] and the four attorney members are elected by the licensed attorneys residing in their respective congressional districts.[9] The non-attorney members are appointed by the governor.[10] Thus, a controlling majority of the Commission is made up of attorneys elected exclusively by other attorneys.

The Commission meets when there is a judicial vacancy and submits a list of three nominees to the governor.[11] The governor must make the appointment from among the list of nominees selected by the Commission.[12] If the governor fails to do so, the Commission makes the appointment itself.[13] Thus, the Commission presents the governor with exclusive options from which to make the appointment. Additionally, in practice, the Commission's power can be manipulated to exercise even greater control over the appointment process. For example, the Commission may nominate two unqualified or politically radioactive nominees, leaving the governor with little choice but to nominate the Commission's preferred candidate.[14]

In *Dool v. Burke*, four non-attorneys and registered

Kansas voters filed suit in the U.S. District Court for the District of Kansas alleging that they were unconstitutionally denied the right to vote in the election for the attorney members of the Commission.[15] Specifically, the plaintiffs argued that limiting the election of these Commission members to licensed attorneys violates the "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment by denying non-attorneys the right to vote. The plaintiffs' request for a preliminary injunction was denied by the district court and the State's motion to dismiss was ultimately granted.[16] The plaintiffs promptly appealed to the Tenth Circuit.

In a *per curiam* ruling, the Tenth Circuit affirmed the district court by a vote of 2-1.[17] Although both judges in the majority applied rational basis scrutiny in upholding the attorney-only elections, they did so for different reasons. Generally, laws denying the franchise to a class of otherwise qualified voters are subject to strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment.[18] The Supreme Court has carved out an exception to this rule, however, for "limited purpose" elections that have a disparate impact on the specific class of citizens permitted to vote.[19] Laws limiting the franchise in such "limited purpose" elections receive only rational basis scrutiny.[20]

In *Dool*, the non-attorney challengers argued that strict scrutiny was applicable because the election of Commission members is an election of "general interest" affecting all Kansas voters.[21] In separate concurring opinions, the majority disagreed. Judge Matheson opined that the Commission "performs a limited purpose" and "has a disproportionate effect on the voting population of attorneys."[22] Specifically, Judge Matheson noted that the Commission has a "limited role" and "does not make, administer, or enforce laws" or have "taxing or borrowing authority."[23] Accordingly, he found that the election of Commission members qualified as a "limited purpose" election warranting deferential rational basis scrutiny.[24]

Conversely, Judge O'Brien found that the Commission did not fit within the exception for "limited purpose" elections set out in *Ball* and *Salyer*, but he nonetheless applied rational basis scrutiny to uphold the law. To reach this conclusion, Judge O'Brien relied upon a hodgepodge

... continued page 5

Declining to Follow its Neighbor Missouri, the Kansas Supreme Court Holds Noneconomic Damages Cap in Medical Malpractice Cases Constitutional

*by Stephen R. Clark and Kristin E. Weinberg**

The Kansas Supreme Court, in *Miller v. Johnson*,[1] recently upheld Kansas' statutory cap on non-economic damages in personal injury cases, including medical malpractice cases, as constitutional. Specifically, the Kansas Supreme Court held the cap, set forth in K.S.A. 60-19a02, does not violate Sections 5 and 18 of the Kansas Constitution Bill of Rights providing a right to a jury trial and a right to damages, respectively. This decision is in contrast to its neighboring state's supreme court, which recently declared a statutory cap on non-economic damages in medical malpractice cases unconstitutional for violation of the right to a jury trial.[2]

I. Facts

In *Miller*, the appellant-patient sued the appellee-doctor for medical malpractice stemming from a surgery in which the doctor erroneously removed the patient's left ovary instead of the right ovary.[3] After trial, the jury found the doctor completely at fault and awarded the patient $759,679.74 in total monetary damages, including $575,000.00 in non-economic damages.[4] The district court reduced the non-economic damages award to $250,000.00 as required by the limitations in K.S.A. 60-19a02.[5] Both sides appealed, and the Kansas Supreme Court transferred the case from the Court of Appeals.[6] On appeal, the patient raised four state constitutional challenges to the validity of K.S.A. 60-19a02.

II. Constitutional Challenges and Analysis

First, the patient argued K.S.A. 60-19a02 violates Section 5 of the Kansas Constitution's Bill of Rights, which provides: "The right of trial by jury shall be inviolate."[7] The *Miller* Court acknowledged that: (a) Section 5 "preserves the jury trial right as it historically

existed at common law when our state's constitution came into existence;" (b) medical malpractice claims were historically triable to a jury; and (c) damages, including non-economic damages, were historically a question of fact for Kansas juries in common-law tort actions.[8]

Without much discussion of the historical nature of jury trials in medical malpractice cases or non-economic damages cases, the Kansas Supreme Court determined that K.S.A. 60-19a02 does indeed "encroach[ ] upon the rights preserved by Section 5," but such encroachment "does not necessarily render K.S.A. 60-19a02 unconstitutional under Section 5."[9] Section 5 of the Kansas Constitution mirrors article 1, section 22(a) of the Missouri Constitution, under which the Missouri Supreme Court saw fit to declare a statutory cap on non-economic damages as an unconstitutional infringement on the right to a jury trial.[10] In a strong dissent, Justice Beier took issue with the *Miller* Court majority's failure to discuss the meaning of the term "inviolate" as used in the Kansas Constitution.[11] The majority, however, went on to further analyze the patient's Section 5 challenge in conjunction with her next argument.

Second, the patient argued K.S.A. 60-19a02 violates Section 18 of the Kansas Constitution's Bill of Rights, which provides: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."[12] Specifically, she argued that by placing a $250,000.00 ceiling on noneconomic damages, the

... continued page 6

Virginia Supreme Court Limits Insurer's Duty to Defend in Climate Change Lawsuits

*by Jason Scott Johnston and Levi W. Swank**

AES Corp. v. Steadfast Insurance Co.,[1] was a closely watched Virginia Supreme Court case that, as the *New York Times* put it, basically asked whether an insurance company has to "foot the bill for a company facing damages over climate change."[2] The case was significant for the insurance industry and others interested in climate change litigation, because it was the first of its kind to reach an appellate court. The court ultimately held that an insurer has no duty to defend or indemnify against climate change-related injuries under the terms of its general commercial liability (GCL) insurance policy.

The Case

In *Native Village of Kivalina v. ExxonMobil Corp.*, the Native Village of Kivalina, an Inupiat Eskimo community and tribe located on a barrier island in northwest Alaska, sued The AES Corporation (AES) and other energy companies.[3] The lawsuit alleged that carbon dioxide emitted by AES contributed to climate change, which in turn exposed Village land to erosion from sea waves when the water would have otherwise been frozen. Steadfast, AES's GCL insurer, obtained a declaratory judgment from a Virginia trial court, holding that it had no duty to defend or indemnify AES in the *Kivalina* litigation because AES's alleged contribution to global warming was beyond the scope of the indemnity provided by Steadfast's GCL policy.[4]

The Virginia Supreme Court granted AES's appeal on the issue of whether the injuries alleged in the complaint constituted an "occurrence" covered by its insurance policy. The court affirmed the trial court decision on September 16, 2011,[5] though it later withdrew its opinion after AES petitioned for rehearing.[6] Despite much speculation that the Virginia Supreme Court would revise its earlier decision,[7] it issued a nearly identical opinion in the case's final iteration.

Using the "eight corners" approach, comparing the "four corners" of the complaint with the "four corners" of the policy,[8] the court looked first to the language of Steadfast's GCL policy. The policy obligated Steadfast to defend AES for property damage caused by an "occurrence," which the policy defined as "an accident, including continuous or repeated exposure to substantially the same general harmful condition."[9] Other Virginia cases defined an "accident" as "an event which creates an effect which is *not* the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated."[10] In its complaint, however,

Kivalina alleged that AES and others had emitted millions of tons of carbon dioxide "intentionally," and that AES "knew or should have known of the impacts"[11] of carbon dioxide emissions on coastal Alaskan villages like Kivalina because of the "clear scientific consensus that global warming is caused by emissions of greenhouse gases . . . ."[12]

AES argued that the *Kivalina* complaint described an "accident" because it also alleged negligent action by AES, which it knew or should have known would result in environmental damage.[13] The court stated, however, that "negligence" and "accident" are not synonymous terms.[14] Because the Kivalina plaintiffs did not allege that

...continued page 13

Tenth Circuit Rejects Challenge To Judicial Merit Selection Process in Kansas

Continued from page 2...

of Supreme Court and Court of Appeals precedent to create a new "threshold inquiry" for Equal Protection analysis. According to Judge O'Brien, strict scrutiny "cannot reasonably apply to every election unable to be wedged into the fact-bound and exceedingly narrow exception established in *Salyer* and *Ball*."[25] Instead, he determined that strict scrutiny analysis should only apply to the elections of officials performing "general governmental functions."[26] As a result, though Judge O'Brien concluded that the election of Commission members was not a "limited purpose" election, he found that the "Commission does not exercise the type of governmental functions necessary to trigger strict scrutiny."[27] Like Judge Matheson, Judge O'Brien determined that the Commission is "removed from the day-to-day decisions affecting the lives of the electorate" and "has no say in matters of safety or welfare."[28] And, like Judge Matheson, Judge O'Brien concluded that limiting the franchise to attorneys furthered a rational state interest of "limit[ing] the influence of politics on the nomination process and ensur[ing] the quality of its judicial nominees."[29]

In dissent, Judge McKay exposed this inherent insufficiency in the majority's reasoning, noting that "[t]he selection of judicial candidates is quintessentially governmental in nature . . . ."[30] Quoting an article authored by Professor Nelson Lund, the dissent noted that the election in question warranted strict scrutiny '"for the same reason that the Supreme Court applies strict scrutiny to primary elections conducted by political parties and elections to the electoral college."'[31] In other words, it is of no matter that the election of Commissioners is a preliminary step in the selection of judges, because the Commission serves a powerful role in "determining who will exercise one of the three most critical governmental functions," *i.e.* the judicial function.[32] As Judge McKay concluded: '"[b]y delegating to the state's lawyers the authority to elect a controlling majority of a body that exercises almost all of the discretion involved in appointing supreme court justices, Kansas has virtually given the state bar the authority to elect those who choose the justices. The State's choice of a complex procedure that obscures that effect cannot alter the reality of the effect."'[33] Accordingly, Judge McKay found that strict scrutiny was appropriate, and would have struck down the attorney-only elections as unconstitutional.

In sum, *Dool* represents another setback to those hoping to reduce the control of state bar associations over the selection of state appellate judges. However, Judge McKay is the first to author a dissent in this series of cases, and it warrants watching to see if his arguments prove persuasive to future courts considering such challenges.

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Endnotes

1 *See* Dool v. Burke, No. 10–3320, 2012 WL 4017118 (10th Cir. Sept. 13, 2012) [hereinafter Dool].

2 *See* Carlson v. Wiggins, 675 F.3d 1134 (8th Cir. 2012); Kirk v. Carpeneti, 623 F.3d 889 (9th Cir. 2010).

3 Currently, 35 states use some method of the "Missouri Plan" to select their judicial nominees. Each with varying forms of how the commission is composed. Commissions are composed of as little as six members (*e.g.*, North Dakota) or as many as 49 members (*e.g.*, Minnesota).

4 Jeffrey D. Jackson, *The Selection of Judges in Kansas: Comparison of Systems*, 69 J. Kan. B. Ass'n (Jan. 2000), at 33-34 (Governor Fred Hall had been defeated in his party's primary so he decided to go after the next best thing, that being Chief Justice of the Kansas Supreme Court. He convinced a loyal supporter, then Chief Justice, Bill Smith, to resign. Next, he ceded the governorship to his Lieutenant Governor, John McCuish, who then appointed Hall to the vacant Chief Justice position. Alas, the Kansas triple play.).

5 Kan. Const. art. III, § 5.

6 Kan. Stat. Ann. §§ 20-119 *et seq*. (legislation implementing the amendment); Kan. Stat. Ann. § 20-3004(a) (applying amendment to appellate courts).

7 Kan. Stat. Ann. §§ 20-119, 20-120.
8 *Id.*
9 *Id.*
10 Kan. Const. art. III, § 5.
11 Kan. Stat. Ann. §§ 20-132, 20-3007.
12 Kan. Const. art. III, § (a), (e).
13 Kan. Const. art. III, § 5(b).
14 Nelson Lund, *May Lawyers be Given the Power To Elect Those who Choose Our Judges? "Merit Selection" and Constitutional Law*, 34 Harv. J.L. & Pub. Pol'y 1043, 1050 (2011).
15 *Dool*, 2012 WL 4017118 at *1.
16 Dool v. Burke, No. 10-1286-MLB, 2010 WL 4568993 (D. Kan. Nov. 3, 2010).
17 Judge Terrence L. O'Brien and Judge Scott M. Matheson, Jr., concurring, Senior Judge Monroe G. McKay, in dissent.
18 *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969).
19 Ball v. James, 451 U.S. 355, 371 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 729 (1973).
20 *Id.*
21 *Dool*, 2012 WL 4017118 at *5.
22 *Id.* at *10–11.
23 *Id.*
24 *Id.*
25 *Id.* at *5.
26 *Id.* at *5–7 (interpreting Reynolds v. Sims, 377 U.S. 533 (1964), and its progeny).
27 *Id.* at *7.
28 *Id.*
29 *Id.* at *9.
30 *Id.* at *12.
31 *Id.* (quoting Lund, *supra* note 14, at 1053).
32 *Id.*
33 *Id.* (quoting Lund, *supra* note 14, at 1055).

Kansas Supreme Court Holds Cap on Noneconomic Damages in Medical Malpractice Constitutional

Continued from page 4...

cap denies her a remedy guaranteed by Section 18.[13] Kansas courts interpret Section 18 to provide "an injured party . . . a constitutional right to be made whole and a right to damages for economic and noneconomic losses suffered."[14]

Acknowledging that the "legislature may modify the common law in limited circumstances without violating Section 5," the Kansas Supreme Court held that a *quid pro quo* analysis applies to both Section 5 and Section 18 claims.[15] A *quid pro quo* analysis is a two-step examination.[16] First, a court must determine "whether the modification to the common-law remedy or the right to jury trial is reasonably necessary in the public interest to promote the public welfare."[17] Second, the court must "determine whether the legislature substituted an adequate statutory remedy for the modification to the individual right at issue."[18] In her dissent, Justice Beier strenuously objected to the use of a *quid pro quo* analysis to the patient's Section 5 claim, noting that none of the

Pennsylvania High Court Hears Challenge to Voter ID

by Anita Y. Woudenberg

Voter ID laws, defined as laws requiring photo evidence of identification at the polls, are a growing trend across the country. The first states to adopt such laws were Georgia, Indiana, Kansas, and Tennessee. Proponents claim that the impetus behind these laws is to minimize voter fraud by ensuring that those voting are, in fact, the person they claim to be. Opponents view them as an effort to disenfranchise the poor, the infirmed, and the elderly, analogizing the law to the unconstitutional poll taxes historically used to prevent black Americans from voting.

Of these laws, Indiana's was the first to be challenged in court on grounds that it was voter discrimination and a violation of federal due process. In 2008, Indiana's law withstood constitutional scrutiny when the United States Supreme Court held that Indiana's law did not impose an undue burden on voters.[1] In 2010, the Indiana Supreme Court upheld the law on the grounds that no evidence of an injury resulting from the law was presented.[2]

Since these rulings, numerous states have adopted substantially similar laws, including Mississippi, Pennsylvania, South Carolina, Texas, and Wisconsin. This article focuses on the state court challenge to Pennsylvania's voter ID law.

... continued page 14

nineteen states that have considered whether a statutory damages cap violates the right to a jury trial has applied a *quid pro quo* analysis to the determination.[19]

Employing the first step of the *quid pro quo* analysis, the *Miller* Court held K.S.A. 60-19a02's non-economic damages cap is reasonably necessary in the public interest to promote the public welfare because "the potential [for the cap to lower insurance premiums] is enough."[20] Applying the second step and noting that K.S.A. 60-19a02 "unquestionably functions to deprive [the patient] of a portion of her noneconomic damages . . . ," the Miller Court pointed out the patient did receive compensation for her loss, finding it noteworthy that K.S.A. 60-19a02 does not impose a cap on total damages.[21] The Supreme Court found "the deprivation caused by K.S.A. 60-19a02, although very real, [to be] limited in scope."[22] Further, the court found the Kansas Health Care Provider Insurance Availability Act, which mandates that all health care providers maintain professional liability insurance in certain amounts, in addition to the Kansas Health Care Stabilization Fund's excess insurance coverage requirement, "make the prospects for recovery of at least the statutory minimums directly available as a benefit to medical malpractice plaintiffs when there is a finding of liability," which is "something many other tort victims do not have."[23]

Based on precedent finding Kansas' statutory mandatory insurance and excess coverage requirements to provide an adequate statutory remedy for the legislature's modification of common-law remedies, the *Miller* Court then determined that although the legislature has not increased the cap to adjust for inflation, such failure has not "sufficiently diluted the substitute remedy to render the present cap unconstitutional" when viewed in light of the other provisions benefiting medical malpractice plaintiffs.[24] Accordingly, the *Miller* Court held that the legislature has substituted an adequate remedy for the modification of Section 5 and Section 18's constitutional protections, thereby rendering K.S.A. 60-19a02 non-violative of those sections.[25]

For her third constitutional challenge to K.S.A. 60-19a02, the patient argued the cap violates the equal protection provisions of Section 1 of the Kansas Constitution Bill of Rights, which provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."[26] Section 1 is only an issue if there is different treatment among similarly situated individuals.[27] The patient argued K.S.A. 60-19a02's cap treats women and the elderly differently. Noting that an equal protection challenge to a facially neutral statute requires a disparate impact traced to a discriminatory purpose—and finding no such discriminatory purpose—the *Miller* Court rejected the patient's disparate impact challenge.[28]

The patient also asserted an equal protection violation claiming the statutory cap treats personal injury plaintiffs differently based on whether their noneconomic damages are greater or less than $250,000.[29] Finding this assertion true, the Kansas Supreme Court had to determine the appropriate level of scrutiny to apply to the classification.[30] While noting that Kansas courts have never held the right to a jury trial under Section 5 and the right to a remedy under Section 18 to be fundamental rights for equal protection purposes (therefore precluding application of a strict scrutiny standard), the *Miller* Court determined that because K.S.A. 60-19a02 is "economic legislation," the rational basis test applies.[31] Thus, K.S.A. 60-19a02's statutory classification must bear some rational relationship to a valid legislative purpose.[32] After applying a rational basis analysis, the Kansas Supreme Court concluded: "We hold that it is 'reasonably conceivable' under the rational basis standard that imposing a limit on noneconomic damages furthers the objective of reducing and stabilizing insurance premiums by providing predictability and eliminating the possibility of large noneconomic damages awards."[33]

For her final constitutional attack on K.S.A. 60-19a02, the patient argued the statutory cap violates the doctrine of separation of powers because the cap "abolishes the judiciary's authority to order new trials and robs judges of their judicial discretion by functioning as a statutory remittitur effectively usurping the court's power to grant remittiturs."[34] The Kansas Supreme Court rejected this challenge, explaining in part that while the cap prevents a trial court from awarding more than $250,000.00, it does not prevent the trial court from granting a new trial under the rules of civil procedure.[35]

III. Implications of the Case

The *Miller* decision brings Kansas in line with the numerous other states that have upheld caps on noneconomic damages as constitutional. In light of neighboring Missouri's recent *Watts* decision striking down similar caps, look for plaintiffs to employ new and creative arguments to bring Kansas medical malpractice

defendants into court in Missouri. Such cases will then involve battles over jurisdiction, venue, and choice of law as they wend their way through the courts.

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Endnotes

1 Miller v. Johnson, No. SC 99,818 (Kan. Oct. 5, 2012).
2 Watts v. Lester E. Cox Medical Centers, ___ S.W.3d ___, 2012 WL 3101657 (No. SC 91867, Mo. July 31, 2012).
3 *Miller*, Slip op. at 9.
4 *Id.* at 9
5 *Id.*
6 *Id.* at 11.
7 *Id.* at 15.
8 *Id.*
9 *Id.* at 16.
10 *See Watts*, No. SC 91867, slip op. at 10–11.
11 *Miller*, slip op. at 73–75.
12 *Id.* at 24.
13 *Id.*
14 *Id.* at 24.
15 *Id.* at 22, 25.
16 *Id.* at 26.
17 *Id.*
18 *Id.*
19 *Id.* at 76.
20 *Id.* at 28–29.
21 *Id.* at 30.
22 *Id.*
23 *Id.* at 31.
24 *Id.* at 35.
25 *Id.*
26 *Id.* at 35.
27 *Id.*
28 *Id.* at 36.
29 *Id.* at 36.
30 *Id.* at 37–38.
31 *Id.* at 37–38.
32 *Id.* at 38.
33 *Id.* at 40.
34 *Id.* at 40–41.
35 *Id.* at 44.

Missouri Supreme Court Holds Noneconomic Damages Cap in Medical Malpractice Unconstitutional

Continued from front cover...

remain inviolate . . . ."[9] The *Watts* Court explained this provision "requires analysis of two propositions to determine if the cap imposed by section 538.210 violates the state constitutional right to trial by jury."[10] First, the court had to determine "whether [the] medical negligence action and claim for non-economic damages is included within 'the right of trial by jury as heretofore enjoyed.'"[11] "Heretofore enjoyed" means "that '[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted' in 1820."[12] Expounding, the court stated: "In the context of this case, the scope of that right also is defined by common law limitations on the amount of a jury's damage award."[13] Thus, "if Missouri common law [in 1820] entitled a plaintiff to a jury trial on the issue of non-economic damages in a medical negligence action [ ], [the plaintiff] has a state constitutional right to a jury trial on her claim for damages for medical malpractice."[14] Second, the court had to determine whether application of section 538.210's cap on non-economic damages left the right to jury trial "inviolate."[15]

Analyzing the first proposition—whether the plaintiff had a right to a jury trial—the *Watts* Court assessed the state of Missouri common law (and the English common law upon which it was based) at the time of the adoption of the Missouri Constitution in 1820.[16] Under applicable law, courts provided redress for medical negligence and permitted recovery of non-economic damages.[17] Reviewing applicable history, the *Watts* Court concluded: "[C]ivil actions for damages resulting from personal wrongs have been tried by juries since 1820," and "[the plaintiff's] action for medical negligence, including her claim for non-economic damages, 'falls into that category' and is the same type of case that was recognized at common law when the constitution was adopted in 1820.'"[18] Put simply, the right to a jury trial attaches to the plaintiff's claim for non-economic damages caused by medical negligence.[19]

The court also determined that Missouri and English common law as of 1820 defined the "scope of [the plaintiff's] right to a jury trial, like the existence of th[at] right."[20] Evaluating select precedent, the Missouri Supreme Court concluded "history demonstrates that statutory caps on damage awards simply did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820 guaranteeing that the right to trial by jury as heretofore enjoyed shall remain inviolate, [and therefore] [t]he right to trial by jury 'heretofore enjoyed' was not subject to legislative limits on damages."[21]

Considering the second proposition—whether the right to a jury trial "'remain[s] inviolate' when a statutory cap requires courts to reduce the jury's verdict"—the *Watts* Court explained: "[I]f the statutory cap changes the common law right to a jury determination of damages, the right to trial by jury does not 'remain inviolate' and the cap is unconstitutional."[22] One of a jury's "primary functions is to determine the plaintiff's damages," so "the amount of non-economic damages is a fact that must be determined by the jury and is subject to the protections of the article I, section 22(a) right to trial by jury."[23]

The *Watts* Court also explained: "Once the right to a trial by jury attaches, . . . the plaintiff has the full benefit of that right free from the reach of hostile legislation."[24] Because section 538.210's cap on a jury's award of non-economic damages "operates wholly independent of the facts of the case," it "directly curtails the jury's determination of damages and, as a result, necessarily infringes on the right to trial by jury when applied to a cause of action to which the right to jury trial attaches at common law."[25] Since Missouri's common law in 1820 "did not provide for legislative limits on the jury's assessment of civil damages, Missouri citizens retain their individual right to trial by jury subject only to judicial remittitur based on the evidence in the case."[26]

The court's determination of section 538.210's constitutional invalidity resulted in its conclusion that *Adams* violates article I, section 22(a)'s right to a jury determination of damages.[27] The *Watts* Court rejected the *Adams* Court's reasoning that section 538.210's cap is substantive law, not a fact issue, and it does not limit the jury's constitutional role in determining damages because "the jury remains free to award damages consistent with the evidence in the case" and the trial court applies the cap after the jury fulfills its constitutional duty of determining damages.[28]

After holding section 538.210's cap on noneconomic damages in medical malpractice actions unconstitutional, the Missouri Supreme Court interpreted section 538.220 to give a trial court the discretion to consider the needs of a medical malpractice plaintiff and the facts of a particular case in deciding what portion of future medical damages will be in a lump sum and what portion will be paid in installments.[29] Reviewing the trial court's decision to require a payment schedule spanning fifty years at an inconsistent interest rate, the Missouri Supreme Court held that the trial court abused its discretion because its payment schedule "guaranteed that the jury's damages award would not actually cover [ ] future medical damages and, therefore, would take from [the plaintiff] the full value of the jury's award."[30] Accordingly, the *Watts* Court remanded the case for the entry of a new periodic payment schedule to guarantee the plaintiff's receipt of the benefit of the jury's award for future medical care.[31]

III. Dissent—Majority Leaps into a New Era of Law

In a strong dissent, the Honorable Mary R. Russell, joined by Judges Breckenridge and Price, argued that *Adams* controls the decision and that the majority opinion "overrules this Court's well-reasoned, longstanding precedent in Adams without persuasive justification" and described the opinion as "a wholesale departure from the unequivocal law of this state and leaps into a new era of law."[32]

IV. The Swing Vote

Commentators have noted that a swing judge cast the deciding vote in the 4-3 decision.[33] A member of the court, Judge Zel Fischer, a Republican appointee, recused himself for reasons unknown.[34] The Chief Justice, a Democrat appointee who wrote the majority opinion, appointed a state trial court judge, Judge Sandra Midkiff, a Democrat appointee, to sit on the court in place of Judge Fischer in this case.[35] Judge Midkiff voted with the majority to overrule the *Adams* case and find the statute unconstitutional.[36]

V. Implications of the Case

The *Watts* decision brings Missouri into the split among jurisdictions on the issue of whether statutory caps on noneconomic damages violate an individual's constitutional right to a jury trial. The decision guts a major component of tort reform passed by the Missouri Legislature in 2005. Since the passage of the tort reform damages caps, Plaintiffs' lawyers have been reluctant to

bring medical malpractice cases. It is widely believed that the removal of those caps will lead to an increase in medical malpractice cases being brought in Missouri.

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Endnotes

1 Adams By and Through Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992).
2 Watts v. Lester E. Cox Medical Centers, No. SC 91867, slip op. at 2–3 (Mo. July 31, 2012).
3 *Id.* at 3.
4 *Id.* at 1.
5 *Id.*
6 *Id.* at 1–2.
7 *Id.* at 2.
8 *Id.*
9 *Id.* at 6.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.* at 6–7.
14 *Id.* at 7.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at 8.
19 *Id.*
20 *Id.*
21 *Id.* at 10.
22 *Id.* at 7.
23 *Id.* at 10–11.
24 *Id.*
25 *Id.* at 11–12.
26 *Id.* at 12.
27 *Id.*
28 *Id.* at 14. *See also id.*, dissenting op. at 3–4 (Russell, J., concurring in part and dissenting in part).
29 *Id.* at 26 (majority opinion).
30 *Id.* at 26.
31 *Id.* at 26–27.
32 *Id.*, dissenting op. at 2 (Russell, J., concurring in part and dissenting in part).
33 Blythe Bernhard & Virginia Young, *Medical Malpractice Cap is Struck Down by Missouri Supreme Court*, St. Louis Post-Dispatch, Aug. 1, 2012, *available at* http://www.stltoday.com/news/state-and-regional/missouri/medical-malpractice-cap-is-struck-down-by-missouri-supreme-court/article_7bb71afd-add3-5cde-a253-07faaade808c.html); Scott Lauck, *Court Tosses Medical Malpractice Damage Cap,* Missouri Lawyers Weekly, Aug. 6, 2012, at 1.; Scott Lauck, *Circuit Judge Lands Starring Role in Damage Cap Case*, Missouri Lawyers Weekly, Aug. 6, 2012, at 9.
34 *Id.*
35 *Id.*; Watts v. Lester E. Cox Medical Centers, No. SC 91867 (Order dated March 13, 2012 signed by Chief Justice Richard B. Teitelman).
36 *Id.*

New Jersey Voters Overwhelmingly Approve Constiutional Amendment to Overturn Judicial Pensions Case

Continued from front cover...

Care Benefits Act, to the extent that it required judges to pay more for their employee benefits.[1] In *DePascale*, the court noted that Article VI of the state constitution prohibits the Legislature from reducing the "salaries" of judges in active service, and held that increases in health care and pension contributions effectively reduce judicial "salaries" by reducing take-home pay. In particular, the court emphasized that the framers of the Constitution adopted Section VI to protect the independence of the judiciary, which the court believed was threatened by the Act.[2]

The decision provoked a vigorous dissent (the vote was 3-2) by Justice Anne Patterson, Governor Chris Christie's first appointee to the court, who criticized the majority for disregarding the "strong presumption of constitutionality" afforded to acts of the legislature, "[p]articularly in matters of fiscal policy."[3] Also, in Justice Patterson's view, a "law that governs the pension and health benefit contributions of more than one-half million state and local government employees" cannot be understood as an "assault" on judicial independence.[4]

This article provides a brief history of the Pension and Health Care Benefits Act and the *DePascale* litigation challenging it. It also discusses ways in which this decision is likely to have continuing significance in the debate in New Jersey about the proper role of the judiciary and the

composition of the current Supreme Court, which is likely to change in the coming year.

I. The Pension and Health Care Benefits Act

On June 28, 2011, Governor Chris Christie signed into law the Pension and Health Care Benefits Act, a bipartisan reform of the state's underfunded employee pension and health care systems. The Act requires all state employees, including judges, to contribute a higher percentage of their wages to public benefit plans in which they participate. By enacting the Act, the Legislature intended to take an initial step towards ensuring the future solvency of public benefit plans for all state employees and to address fiscal challenges confronting the state during difficult economic times. Over a seven-year period, the Act increases pension contributions for sitting justices and judges from three percent to twelve percent of salary, and judicial contributions to health care benefits from 1.5 percent of salary to thirty-five percent of the required premium.[5] Unlike on previous occasions when the Legislature increased judicial contributions to benefits, the Act did not provide judges with a corresponding increase in wages. Thus, the Act operates to reduce the take-home pay of judges in active service.

II. The Trial Court's Decision

Soon after the Act passed, Superior Court Judge Paul DePascale sued the state, arguing that the law violates Article VI of the New Jersey Constitution, which provides that the "salaries" of judges in active service "shall not be diminished during the term of their appointment."[6]

A trial court agreed with Judge DePascale, holding that it violated the Constitution to increase a sitting judge's mandatory contributions to benefits without an offsetting increase in wages. The trial court based its decision in part on what it perceived to be the "clear and unambiguous" meaning of the word "salaries" in Article VI.[7] In particular, the court reasoned that the term "salary" was at times used in statements by the drafters of the Constitution and in subsequent New Jersey statutes interchangeably with the broader term "compensation," which all parties agreed would cover health and pension benefits.[8] The court further claimed that the "precise issue in this case, whether 'salary' as applied to judges includes pension and health benefits, is one of first impression in New Jersey," but found persuasive a recent state appellate decision holding that a statute protecting the "salary" of municipal employees was broad enough to cover sick, vacation, and personal days.[9]

In addition, the court noted that the overriding purpose of Article VI was to promote judicial independence, and that "the drafters [of the Constitution] intended to give the judges complete protection and every possible safeguard" against legislative interference.[10] In reaching this conclusion, the court looked to the 1947 Constitutional Convention proceedings, which it identified as "perhaps the best indication of drafter[s'] intent."[11] Reviewing those proceedings, the trial court pointed to several statements by drafters identifying the "independence . . . of the judicial branch" as a core purpose underlying Article VI.[12]

Following this decision, the state supreme court took the unusual step of accepting the case for immediate review (or "direct certification"), bypassing the state's intermediate court of appeals, and ordering expedited briefing.

III. The Supreme Court's Decision

The New Jersey Supreme Court affirmed the trial court's decision.[13] The court focused heavily on the purpose of judicial independence served by Article VI of the New Jersey Constitution. The court reached back to the Declaration of Independence, noting that "one of the grievances specifically laid out against King George III was that '[h]e has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.'"[14] Thus, the framers of the U.S. Constitution "were anxious to preserve the independence of the judiciary by ensuring that a judge's livelihood would not be totally dependent on the other branches of government."[15]

The court reasoned that Article VI of the state constitution served a similar function—"to protect judges from attempts by the two other branches of government to influence judicial decision-making through economic means."[16] The court rejected the argument that the term "salaries" in the 1947 Constitution (which remains in effect today) was intended to be any narrower than the term "compensation" in the 1844 Constitution that preceded it.[17] In summary, the court concluded that "nowhere in the annals of the Constitutional Convention is there any evidence that the 1947 No-Diminution Clause was intended to serve a purpose different from the one contained in the Federal Constitution or in our 1844 Constitution."[18]

The court stated that it was "fully cognizant of the serious fiscal issues that confront the State and that led to the passage" of the Act, and that "those issues require resolution."[19] But the court ruled that any such solutions must "conform to the requirements of our Constitution," and concluded that the Act could not be constitutionally applied to reduce the take-home pay of a sitting justice or judge.[20]

Justice Patterson, joined by Justice Hoens, dissented. Justice Patterson argued that the majority did not accord sufficient deference to the Legislature in reviewing the constitutionality of economic legislation.[21] Justice Patterson also looked to how the word "salary" had been used in the New Jersey Constitution over time and in contemporary dictionaries and concluded that it was understood as a "concept distinct from and independent of pension and health benefits."[22] Judge Patterson also identified passages in the 1947 Constitutional Convention proceedings in which delegates had expressly disapproved of enshrining judicial pension rights in the Constitution, and preventing future Legislatures from altering them.[23] As one delegate put it: "Who knows that in some time to come, with depression staring the State in the face and thousands of our citizens needing the necessaries of life, it might not be advisable to alter the pension structure?"[24] Thus, Justice Patterson concluded that the text and extrinsic evidence of the framer's intent supported the constitutionality of the Act.[25] Finally, although Justice Patterson shared her colleagues' concern for judicial independence, she did not believe the Act could be construed as a "legislative attack" on the judiciary, because it applied equally to hundreds of thousands of state employees—including the judges' own staff.[26]

IV. Significance of the Case

DePascale is no longer good law, because New Jersey voters overturned the decision by amending the Constitution by ballot earlier this month. Nevertheless, the court's decision is likely to have continuing significance in political debates about the future of the New Jersey Supreme Court.

The manner in which the decision was overturned is significant. The case was controversial since its inception because it was a lawsuit brought by judges and decided by judges to determine how much judges need to pay the state to fund their own health care and pension benefits. Following the court's decision, the New Jersey Legislature voted by large, bipartisan majorities to place a constitutional amendment on the ballot to overturn the decision, and an overwhelming number of New Jersey voters voted in favor the amendment—with one unofficial tally showing 82.58% voting yes and 17.42% voting no. The most significant constituencies opposing the amendment were the New Jersey Bar Association and the judges themselves. The quick and decisive nature in which the case was overturned indicated widespread public dissatisfaction with the outcome. Thus, the case is likely to continue to shape public attitudes about the court.

The case may also play a role when Governor Christie appoints nominees to fill the two current vacancies on the Supreme Court, which he is likely to do this year. Governor Christie has vowed to appoint judges who will respect the Legislature's prerogative to make key fiscal decisions on behalf of the State, such as how much money to spend on public education—an issue on which the court has played an active role for over 30 years. The Governor may claim the vote on this amendment (from both voters and legislators) as a mandate for judges who respect the Legislature's choices about how best to allocate the State's scarce resources.

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Endnotes

1 *See* DePascale v. State of New Jersey, 47 A.3d 690 (N.J. 2012).
2 *Id.* at 692.
3 *Id.* at 706 (Patterson, J., dissenting).
4 *Id.*
5 *See id.* at 693.
6 N.J. Const. art. VI, § 6.
7 *Id.* at *28–29.
8 *Id.* at *23–28.
9 *Id.* at *32 (citing Hyland v. Twp. of Lebanon, 419 N.J. Super. 375 (App. Div. 2011)).
10 DePascale v. State, No. MER-L-1893-11, 2011 N.J. Super. Unpub. LEXIS2626 (Law Div. Oct. 17, 2011).
11 *DePascale*, N.J. Super. Unpub. LEXIS2626, at *21.
12 *See id.*
13 The majority decision was signed jointly by Justices LaVecchia and Albin, and Judge Wefing, who is temporarily assigned to fill a vacancy on the Court.
14 *See DePascale*, 47 A.3d at 696.
15 *Id.*
16 *Id.* at 697.
17 *See id.* at 698.
18 *Id.*
19 *Id.* at 704.
20 *Id.* at 704–05.
21 *See id.* at 708 (Patterson, J., dissenting).
22 *Id.* at 710.

23 *See id.* at 716–17.
24 *Id.* at 717.
25 *See id.* at 718.
26 *Id.* at 723.

Virgina Supreme Court Limits Insurer's Duty to Defend in Climate Change Lawsuits

Continued from page 4...

property damage was caused by a fortuitous act, "there is no 'occurrence' within the meaning of a GCL policy."[15]

The Concurrence

While Justice Mims agreed with the majority's reasoning, he disagreed that the reasoning could be limited to the specific CGL policy and the specific facts alleged in the complaint. "Our jurisprudence," he prophesied, "is leading inexorably to a day of reckoning that may surprise many policy holders."[16] This "surprise" is that negligence may never be covered by a GCL insurance policy because proximate causation, a necessary prerequisite to a finding of negligence, requires that an alleged injury be the "natural or probable consequence" of an action. According to Justice Mims, the implication of *AES Corp.* is that, because Virginia equates an "occurrence" with an "accident," GCL "occurrence" provisions do not cover negligence.

The Limited Significance of *AES Corp.*

It is possible that the Virginia Supreme Court's decision will be analyzed and consulted by judges and litigators in other jurisdictions. But, for the reasons set forth below, the author believes its significance is likely to be limited outside Virginia. First, the GCL policy at issue in *AES Corp.* defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful condition."[17] Based on this provision, the Virginia Supreme Court decided that "occurrence" in the GCL policy simply means "accident." It is not the only court to equate these two terms, and the history of the standard GCL policy suggests that the expansion of "accident" to include "occurrence" was intended simply to make clear that an accident could be a continuous rather than abrupt event. Hence, although some observers might say that it might seem to make the term "occurrence" mere surplusage—violating a canon of contract interpretation—the court's equation of "accident" with "occurrence" is defensible on these grounds.

What is much more controversial is the Virginia Supreme Court's interpretation of an "accident" as something that is not the "natural and probable consequence" of the insured's action, but is instead something that happens "unexpectedly."[18] The court took this definition from two past cases interpreting the meaning of the term "accident." The first of these cases does not involve an insurance contract, but rather a state workers' compensation statute.[19] As for the second case, a life insurance policy covering death by accident is a different kind of contract than is the comprehensive GCL at issue in *AES Corp.*, and so on very basic principles of contract interpretation other courts would likely hold that the two contracts should be interpreted differently.[20]

A final reason that the Virginia Supreme Court's opinion in *AES Corp.* will likely have little impact outside the Commonwealth is that judicial adoption of the alternative interpretation of "occurrence" and "accident" under the commercial GCL policy does not necessarily mean that insurers will have a duty to defend against global warming lawsuits such as *Kivalina*. The standard commercial GCL policy (including the one at issue in *AES Corp.*) also contains a "pollution exclusion" clause excluding from coverage "claims of property damage" arising out of the "discharge, release, or escape of pollutants," where "pollutants" are defined to include any "gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes . . . ."[21] Because every human being on the planet emits carbon dioxide when she exhales, there are arguments to be made that carbon dioxide emissions are not a "gaseous irritant" or "contaminant" falling within the GCL pollution exclusion, but others might argue that, given the structure and history of the GCL policy, it is this clause, if any, where the harm allegedly caused by such emissions should be excluded from coverage.

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Endnotes

1 725 S.E.2d 532 (Va. 2012).
2 Lawrence Hurley, *Va. Court Rules That Insurance Doesn't Cover Global Warming Claims*, N.Y. Times, Sept. 16, 2011, http://www.nytimes.com/gwire/2011/09/16/16greenwire-va-court-rules-that-insurance-doesnt-cover-glo-97999.html.
3 *See* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Cal. 2009).
4 *See* Steadfast Ins. Co. v. AES Corp., 2010 Va. Cir. LEXIS 35 (Va. Cir. Ct. Feb. 5, 2010).

5 *See* AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28 (Va. 2011).
6 AES Corp. v. Steadfast Ins. Co., 2012 Va. LEXIS 103 (Va. Jan. 17, 2012).
7 J. Wylie Donald, *Just When You Thought It Was Over, Rehearing Is Granted in* Steadfast v. AES, Climate Lawyers Blog (January 31, 2012), http://climatelawyers.com/post/2012/01/31/Just-When-You-Thought-It-Was-Over-Rehearing-is-Granted-in-Steadfast-v-AES.aspx.
8 *Id.* at 535.
9 *Id.* at 534.
10 *Id.* at 536 (citing Lynchburg Foundry Co. v. Irvin, 16 S.E.2d 646, 648 (1941)).
11 *Id.* at 534.
12 *Id.* at 534.
13 *Id.* at 536–37.
14 *Id.* at 538.
15 *Id.*
16 *Id.*
17 *Id.* at 534 (majority opinion).
18 *Id.* at 536.
19 Lynchburg Foundry Co. et al v. Irvin, 16 S.E.2d 646 (Va. 9141).
20 Zurich General Accident & Liability Ins. Co., Ltd. v. Flickinger, 33 F.2d 853 (4th Cir. 1929).
21 *See, e.g.*, Hirschhorn v. Auto-Owners Ins. Co., 809 N.W.2d 529, 531 (Wis. 2012).

Pennsylvania High Court Hears Challenge to Voter ID Law

Continued from page 6...

In March 2012, Pennsylvania adopted Act 18, a voter ID law that requires: 1) in-person voters to furnish proof of residency by way of a driver's license or other, government-issued identification, and 2) absentee voters to similarly furnish proof of their identity with their absentee voter application.[3] The law provides for provisional voting, which allows a voter who cannot satisfy the ID requirement to nonetheless vote and return with six days with the requisite ID or alternatively, proof of indigence that precluded her from securing the ID.[4] The law also makes the IDs available for free, where necessary, to ensure all voters have the opportunity to vote in compliance with the law.[5]

Two months after the adoption of the Act, ten individuals and four organizations filed the lawsuit *Applewhite v. Commonwealth* to enjoin it, alleging the law disenfranchises, burdens, and deters them and their members from exercising their right to vote, violating Pennsylvania's Constitution.[6] They brought a challenge under Pennsylvania's constitutional provision governing elections, which provides that "elections shall be free and equal."[7] They brought another claim under Pennsylvania's "qualifications of electors" provision, which enumerates the requirements for Pennsylvanians to vote, authorizing the Legislature to only regulate registration.[8] They brought a third claim under Pennsylvania's "absentee voting" provision, which provides for absentee voting and allows the Legislature to proscribe the manner, time, and place of such voting.[9]

The trial court allowed substantial amicus briefing from both sides of the issue to fully explore the merit of the Act and conducted a six day hearing with more than twenty-five witnesses and fifty exhibits.[10] On the merits, the court found the plaintiff's facial challenge to the law, which requires proof that the law is not constitutional in any application, was not sufficient because the law had a plainly legitimate sweep and because the alleged, possible burdens were not self evident on the face of the Act.[11]

The court also concluded that the law's purported disenfranchisement was neither immediate nor inevitable—a requirement to issue a preliminary injunction—because voters with special hardships like those challenging the law had alternatives such as absentee voting, provisional voting, and even judicial relief options.[12] As such, on August 15, 2012, the trial court declined to issue the requested injunction prior to the upcoming 2012 election.[13]

In its September 18, 2012 decision, the Supreme Court of Pennsylvania disagreed.[14] Observing that the trial court had properly analyzed the merit of the law in general, the Pennsylvania Supreme Court nevertheless concluded that the trial court had failed to assess whether implementation of the law was sufficiently underway to ensure that voters were not disenfranchised during the then-looming November election.[15] The court was particularly concerned that the Pennsylvania Department of Transportation, which is responsible for issuing driver's licenses, was not providing the public with the "liberal access" to the IDs contemplated under the Act.[16] The type of IDs the Department of Transportation was issuing in compliance with the Act—secure IDs—imposed rigorous proof-of-citizenship requirements, including a certified birth certificate requirement.[17] Even the Act's alternative "Department of State" ID card, which is offered under the Act as a "safety net," required a similar, rigorous Department of Transportation application vetting process.[18] While the state agencies charged with implementing the Act indicated they were in the

process of implementing remedial measures allowing the Department of Transportation to issue non-secure IDs as quickly as possible,[19] the Supreme Court remanded the issue to the trial court to more fully assess the actual availability of alternative ID cards and to, if necessary, issue an injunction to ensure voters were not disenfranchised in the upcoming election.[20]

On remand, the trial court determined that the remedial measures in place were not sufficient given that only five weeks remained before election day.[21] Assurances of government officials to implement the plan were not sufficient for the court given their acknowledgement that the measures might trigger unforeseen problems that could impede the plan.[22] As a result, on October 2, 2012, the district court issued a partial injunction of Act 18 solely for the 2012 election, enjoining the provision's requirement that those failing to produce an ID must vote provisionally.[23] But the court allowed the requirement that those working the polls ask for the ID at the polling places to remain in force. The court reasoned that the source of constitutional injury was not in the act of asking for IDs, but in the act of either not allowing a voter to vote or in not allowing that vote to be counted.[24] Allowing poll workers to ask for IDs, the court reasoned, promotes the educational transition of the voting requirements for subsequent elections.[25]

The Pennsylvania case was one of several that were challenged in court during the 2012 election season: voter ID statutes in South Carolina, Wisconsin, Mississippi, and Texas were also litigated. Many other states are looking to implement voter ID laws, so although the 2012 election has passed, it is likely that legal issues regarding voter ID will continue to come before state and federal courts.

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Endnotes

1 Crawford v. Marion Cty Election Bd., 553 U.S. 181 (2008).
2 League of Women Voters of Indiana, Inc., v. Rokita, 929 N.E.2d 758 (Ind. 2010).
3 *See* 25 P.S. §§ 2600–3591.
4 *Id.* § 3050(a.2)(1)(i), (ii). ; *id.* § 2050(a.4)(5)(ii)(D).
5 *Id.* § 2626(b).
6 No. 330.MD.2012, 2012 WL 3332376, slip op. at *1 (Com. Ct. Aug. 15, 2012).
7 *Id.* at *9
8 *Id.* at *13–14.
9 *Id.* at *10.
10 *Id.* at *1, n. 3, 4; *id.* at *2
11 *Id.* at *9.
12 *Id.* at *31
13 *Id.* at *32.
14 Applewhite v. Com., No. 71 MAP 2012, 2012 WL 4075899 (Pa. Sept. 18, 2012).
15 *Id.* at *2.
16 *Id.* at *2.
17 *Id.* at *2.
18 *Id.* at *2.
19 *Id.* at *2.
20 *Id.* at *3.
21 Applewhite v. Com., No. 330.MD.2012, 2012 WL 4497211 (Com. Ct. Oct. 2, 2012).
22 *Id.* at *2.
23 *Id.* at *5.
24 *Id.* at *4.
25. *Id.* at *4.

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