STATE COURT
DocketWatch®

SUMMER
2012

Iowa Supreme Court Deeply Divided on Whether the Iowa Constitution Contains a Right to Education

by Ryan Koopmans

In April, the Iowa Supreme Court rejected a plea to read a right to a "minimally sufficient" education into Iowa's Constitution. The case, *King v. State*,[1] is noteworthy for that ruling alone—especially because education reform was at the top of the legislative agenda in Iowa this year. But the five separate opinions—totaling 163 pages—are about much more than education. Several issues surfaced in this case, chief among them constitutional interpretation and the role of the judiciary. The justices also wrangled over how to apply the rational-basis test, issue preservation, and the pleading requirements applicable to a motion to dismiss. The case also highlights the split among the justices that formed when Justices Waterman, Mansfield, and Zager joined the court after the 2010 retention election.

I. The Decision

The plaintiffs—several students and their parents—sued the State, the Department of Education, and Iowa's former Governor, Chet Culver, in 2008, claiming that they weren't doing enough to serve Iowa's largest and smallest school districts. The plaintiffs didn't claim that the schools were underfunded; rather, they faulted the defendants for giving too much control to the local school districts and for not implementing statewide academic standards. As a result, the plaintiffs claimed that the defendants violated the education, equal protection, and due process clauses of the Iowa Constitution.

The district court dismissed the entire lawsuit, ruling that the claims were nonjusticiable political questions. The case was briefed and then argued in the Iowa Supreme Court in March 2010, and then reargued in June 2011 after Justices Waterman, Mansfield, and Zager joined the court.

By a 4-3 vote, the Iowa Supreme Court affirmed the dismissal of the lawsuit, although not on political question grounds. Justice Mansfield, joined by Chief Justice Cady and Justices Waterman and Zager, reached the lawsuit's merits and held that the plaintiffs' criticisms of the Iowa's education policy, even if true, do not amount to a violation of Iowa's education clause. The majority also ruled

... continued page 7

New Jersey Supreme Court Rules Homeowners' Association's Sign Restriction on the Interior of a Unit Is Unconstitutional

by Jaime K. Fraser

On June 13, 2012, the Supreme Court of New Jersey affirmed the appellate division's ruling and found that the sign restrictions adopted by Mazdabrook Commons Homeowners' Association ("Association") violate the free speech clause of the state constitution.[1] In *Mazdabrook Commons Homeowners' Ass'n v. Khan*[2] ("*Mazdabrook*"), the court held that a homeowner's free-speech right to post political signs in his home outweighed the private property interest of a homeowners'

... continued page 9

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

Pennsylvania Supreme Court Excludes *Any Exposure* Theory in Asbestos and Toxic-Tort Litigation

by William L. Anderson & Kieran Tuckley

On May 23, 2012, the Pennsylvania Supreme Court issued a unanimous decision holding that the trial court had properly excluded the plaintiffs' expert witnesses from espousing the opinion that every occupational exposure to asbestos contributes substantially to mesothelioma.[1] This is the *any exposure* theory that has served as the foundation for a significant expansion of asbestos litigation in recent years by incorporating even the smallest amount of occupational exposure as a "substantial factor" in causing disease. This article provides background information on the *any exposure* theory and explains the significance of this ruling and why this and other courts are regularly rejecting it. The Pennsylvania opinion is only the latest in a series of similar opinions excluding the *any exposure* theory as unscientific and unsuitable to support causation in toxic tort litigation.

I. The *Any Exposure* Theory

The *any exposure* theory, as articulated by many plaintiffs' expert witnesses, typically states that each and every exposure to any kind of asbestos in an occupational setting that is above (or different from) background exposures is a substantial factor in causing disease.[2] Critically, these experts will testify that background fibers (those found in the ambient air) by an individual are not causative, even though they can contribute millions of fibers to a person's lungs over a lifetime. The experts who testify to the position decline to determine the levels of occupational asbestos to which a plaintiff may have been exposed or make any determination as to whether such levels are greater than the person's lifetime background exposures or would otherwise be sufficient to cause disease. They view the mere fact of occupational exposure as sufficient, thus creating a basis for liability for such miniscule exposures as removing gaskets, handling brake pads, or merely being in the presence of small amounts of asbestos in buildings.

As plaintiffs have pursued litigation against asbestos-manufacturing companies, the *any exposure* theory has become the basis for expanding litigation to even the most minor of exposures and products in which fibers are bound up in resins or plastics. The vast majority of courts addressing the admissibility or sufficiency of this theory, however, have rejected it.[3] Some asbestos jurisdictions do continue to permit experts to present this theory, and those and other experts have attempted in recent years to expand its use into other toxic-tort litigation.

II. Background of the Case

The *Betz* case arose in 2005 when the plaintiff, Charles Simikian, commenced a lawsuit against a number of defendants asserting that his exposure to asbestos caused his mesothelioma. Mr. Simikian was a brake mechanic who worked with asbestos-containing brake pads. In *Simikian*, however, the parties agreed that the trial court should review the viability of the *any exposure* theory generally without regard to specific case

facts. Thus, Mr. Simikian's particular exposures were not a focus so much as the notion that the *any exposure* theory could support causation regardless of the extent and nature of an individual plaintiff's claimed exposures. Plaintiffs asserted that under the *any exposure* theory, Mr. Simikian and anyone else who had even casual contacts with asbestos-containing products could claim that each such exposure was responsible for their disease.[4]

In response, the defendants filed motions challenging the admissibility of the *any exposure* theory under Pennsylvania's *Frye* standard on the grounds that it did not meet the standard of general acceptance in the relevant scientific community.[5] Judge Robert Colville of the Pennsylvania Superior Court for Allegheny County held a three-day hearing, after which he excluded this testimony.[6] Other courts have cited to and relied on Judge Colville's opinion as one of the best-articulated exposés of the logical holes and scientific flaws in the *any exposure* theory. In 2010, however, a majority of the intermediate court of appeals reversed Judge Colville's order.[7] The intermediate court held that Judge Colville had abused his discretion by analyzing the flaws in the theory himself, without citing to expert or briefing position articulating those same findings, and by rejecting the underpinnings of the theory as set forth by plaintiffs' expert.[8] The Pennsylvania Supreme Court accepted review and reversed the intermediate court, restoring Judge Colville's original decision.[9]

III. The Pennsylvania Supreme Court's Analysis

The Pennsylvania Supreme Court agreed with virtually all of the criticisms asserted by Judge Colville. The court agreed that Judge Colville was correct to challenge how the plaintiffs' expert could reason that even the smallest of occupational exposures could cause disease, yet the same type of fibers in the ambient air are not causative, regardless of overall lifetime dose.[10] The court noted that Dr. Maddox's reliance on case reports, animal studies, and regulatory pronouncements provided an unreliable basis for a causation opinion.[11] Further inconsistencies in the *any exposure* theory included Dr. Maddox's admission that individual exposures differ in the potency of fiber type, the concentration, or intensity of exposure, and the duration of the exposure. The *any exposure* theory fails to consider the different nature of these exposures, even though Dr. Maddox agreed that these factors "need to

... continued page 5

Texas Supreme Court Rules in Favor of Private-Property Owners in Case on Public Access to Beaches

by Brittany La Couture & Tim Sandefur

In a case of first impression, the Texas Supreme Court recently ruled in *Severance v. Paterson*[1] that the rights of private-property owners trump the public's right to access beaches on private property. The court held 5-3 that when an act of nature "suddenly and dramatically" pushes back the vegetation line on a beach, the public easement that state law creates on beaches does not move along with it.[2] In other words, while easements may change gradually, an avulsion[3] does not entitle the state to a drastic expansion of its claim over existing private property.[4] This article will describe the background and decision in *Severance* and examine how this case fits in with coastal-property jurisprudence.

I. Background

Texas's Open Beaches Act ("OBA") was passed in 1959 to help enforce the public's right to use the state's coastal beaches.[5] The OBA applies to state-owned beaches as well as to those where a public easement has been established over privately owned land.[6] Hurricane Rita, which hit the Texas coast in September 2005, washed away much of the public and private property burdened by these easements, and moved the line of vegetation landward over the property lines of owners whose Galveston Island lands were previously unencumbered.[7] The state sought to enforce the OBA easements against them and condemn homes that were now located on the beach.[8] The property owners sued in federal district court,[9] which held that the public easement automatically "rolls" from one parcel of land to the next according to natural changes in topography.[10] The case was appealed to the Fifth Circuit, which by certification asked the Texas Supreme Court in October 2011 to resolve whether easements under the OBA "rolled" with such sudden changes to the landscape.[11]

II. The Decision

The case was first brought before the federal district court, then appealed to the U.S Court of Appeals for the Fifth Circuit, which asked the Texas Supreme Court to determine whether Texas

recognizes a rolling easement on beachfront real property.[12] Emphasizing the "fundamental, natural, and inherent" nature of rights associated with land ownership,[13] the Texas Supreme Court ruled that state law did not automatically transform private beaches into public ones after such a storm event. The right to exclude others from one's property is one of the most important rights of property owners, and the state may only take it away through eminent domain with just compensation, an appropriate use of state police power, legally established easements, or other pre-existing limitations on rights of real-property owners that have existed "since time immemorial."[14]

The court found that none of these were present.[15] It rejected the state's argument that when there is avulsion old easements "roll" with the vegetation line onto adjacent property where no easement had ever been established.[16] The court quoted Justice Holmes: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[17] "[I]t does not follow," the court added, "that the public interest in the use of privately owned dry beach is greater than a private property owner's right to exclude others from her land when no easement exists on that land."[18]

The court held that although real-property owners were warned that the state may use the OBA to try to enforce an easement on their property as the line of vegetation fluctuated, this did not displace the owners' right to exclude, which was one of the rights the owners purchased with the land.[19] This point was reinforced by the Texas Legislature's 1969 Interim Beach Study

... continued page 6

Supreme Court Reaffirms Its Holding from *Citizens United*

by Edward Greim & Justin Whitworth

In denying a recent petition for certiorari and summarily reversing a decision of the Montana Supreme Court, the United States Supreme Court adhered to principles of stare decisis and reaffirmed its 2010 decision in *Citizens United v. Federal Election Commission* ("*Citizens United*"), which held that corporations and labor unions' independent spending for political campaigns enjoys First Amendment free-speech protection.[1] The Montana Supreme Court had upheld a state law that prohibited corporate political expenditures, reasoning that *Citizens United* did not apply in Montana because of the state's purportedly distinctive history of its "political system being corrupted by corporate interests."[2] The United States Supreme Court disagreed, summarily reversing without granting certiorari.[3]

In a brief per curiam decision opinion joined by five Justices, the Court framed the issue as "whether the holding of *Citizens United* applies to the Montana state law."[4] Without hesitation, the Court answered that "[t]here can be no serious doubt that it does."[5] The Court found Montana's arguments in support of upholding its law to be unoriginal and unconvincing.[6] As the Court held in *Citizens United*, there is little uncertainty that independent corporate political spending "does not give rise to corruption or the appearance of corruption."[7]

Justices Ginsburg, Sotomayor, and Kagan joined the dissenting opinion authored by Justice Breyer, which expressed a strong desire to grant certiorari and reevaluate *Citizens United*.[8] Moreover, Justice Breyer found that, even if he agreed with the holding in *Citizens United*, the Montana state law should not be struck down because of the state court's finding that "independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana."[9] Nevertheless, Justice Breyer ultimately decided that it was appropriate to deny the petition because it was apparent to him from the per curiam opinion that *Citizens United* would not be overturned.[10]

Critics of the Court's 2010 decision had hoped that the Justices would "reconcile their sweeping statement of free speech principles in *Citizens United* with the real-world facts" in Montana and throughout the country that allegedly show that corporate independent expenditures do create corruption.[11] Yet the *Citizens United* majority had clearly grappled with and disposed of a wide array of arguments and purported evidence of "corruption," making it clear in a lengthy and reasoned decision that its rationale did not rest merely on the fleeting nature of the evidence before it. It is clear that the Court did not believe that Montana's history presented either the quality or quantum of evidence that would have justified a close reexamination—let alone a complete reversal—of such a recent and exhaustively considered decision.

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Endnotes

1 Citizens United v. Fed. Election Comm'n, 558 U.S. 50 (2010).

2 Adam Liptak, *Court Declines to Revisit Its* Citizens United *Decision*, N.Y. Times, June 25, 2012.

3 Am. Tradition P'ship, Inc. v. Bullock, No. 11A762 (U.S. 2012).

4 *Id.*

5 *Id.*

6 *Id.* ("Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.").

7 Citizens United v. Fed. Election Comm'n, 558 U.S. 50 (2010).

8 *Am. Tradition P'ship*, No. 11A762.

9 *Id.*

10 *Id.*

11 *Supreme Court Reverses Anti*-Citizens United *Ruling From Montana*, Huffington Post, June 25, 2012.

Pennsylvania Supreme Court Excludes *Any Exposure* Theory in Asbestos and Toxic-Tort Litigation

Continued from page 3...

be considered in trying to estimate the relative effects of different exposures."[12] The court also took issue with Dr. Maddox's "extrapolation down" technique under which he relied on studies showing disease at high exposures to support his opinion that the same thing would occur at low exposures.[13]

The court ultimately concluded that the *any exposure* theory of Dr. Maddox was incompatible with causation rules under Pennsylvania law. The court explained that Dr. Maddox's *any exposure* theory is unable to support a finding of causation because "one cannot simultaneously maintain that a single fiber among millions is *substantially* causative, while also conceding that a disease is dose responsive."[14] The court described this position as a "fiction" that would subject defendants to full joint-and-several liability for injuries, even in cases where exposure to a defendant's product could be classified as minimal in relation to other exposures.[15] Because of the internal inconsistencies and large analytical gaps within Dr. Maddox's testimony, the court unanimously held that his opinion was unreliable and Judge Colville did not abuse his discretion in excluding these opinions during a *Frye* hearing.[16]

IV. The Significance of the Pennsylvania Decision

From a national perspective, the Pennsylvania Supreme Court joins a number of courts in holding that the *any exposure* theory is either inadmissible under rules regarding expert testimony, or insufficient to prove causation as a matter of law. The Supreme Court of Texas, the Sixth Circuit Court of Appeals, and an array of lower state and federal court decisions have concluded that the theory is not scientifically sound.[17] These decisions in some ways are not particularly novel, in that they require plaintiffs in asbestos cases only to prove what must be shown in any other toxic-tort case—that the plaintiff experienced a sufficient dose of a toxic substance to cause the alleged disease. They are significant, however, in rejecting the primary basis for assertion of causation in many, if not most, asbestos cases on dockets today.

Pennsylvania itself had in fact been something of a battleground state, due to the competing decisions of Judge Colville and several other trial judges who had rejected the theory, and the clashing decision of the intermediate court declaring it acceptable. The *Betz* decision is thus also critical for Pennsylvania asbestos and toxic-tort cases. Pennsylvania law is now clear—experts in key asbestos dockets such as Philadelphia can no longer claim that any asbestos exposure is enough for causation. The asbestos docket in Texas changed dramatically after that state's supreme court began requiring proof of dose and causation in the 2007 *Borg-Warner* opinion. If Pennsylvania trial courts apply the ruling accurately, the result will likely be a significant reduction in the Pennsylvania asbestos docket as well.

The issue continues to be litigated in other jurisdictions, including the United States Ninth Circuit Court of Appeals and Supreme Court of Virginia, both of which have *any exposure* cases pending. A growing number of non-asbestos cases have included assertions of this theory to support causation (e.g., benzene, diacetyl popcorn lung disease, dental cream cases, medical monitoring and groundwater cases), but to date the theory has not gained much traction in non-asbestos

toxic-tort cases. Presumably, the Pennsylvania opinion will make it more difficult to expand the theory into other areas as well.

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Endnotes

1 Betz v. Pneumo Abex LLC, No. 38 WAP 2020, 2012 WL 1860853 (Pa. May 23, 2012).

2 *Id.* at *2.

3 *See infra* Section IV. For a more thorough review of the *any exposure* theory, see Mark A. Behrens & William L. Anderson, *The 'Any Exposure' Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 Sw. U. L. Rev. 479 (2008).

4 *In re* Toxic Substances Cases, No. A.D. 03-319, 2006 WL 2404008, at *1 (C.P. Allegheny, Aug 17, 2006).

5 *Id.* Pennsylvania has adopted the *Frye* standards for testing the validity of expert testimony. In short, Pennsylvania requires that an expert's methodology must be generally accepted within the relevant scientific field. *See* Grady v. Frito-Lay, Inc., 839 A.2d 1038 (Pa. 2003).

6 *Id.* at *2.

7 Betz v. Pneumo Abex LLC, 998 A.2d 962 (Pa. Super. 2010), *rev'd* No. 38 WAP 2020, 2012 WL 1860853 (Pa. May 23, 2012).

8 *Id.* at 976.

9 Betz v. Pneumo Abex LLC, No. 38 WAP 2020, 2012 WL 1860853 (Pa. May 23, 2012).

10 *Id.* at *22.

11 *Id.* at *23.

12 *Id.*

13 *Id.* at *25.

14 *Id.* at *23 (emphasis added).

15 *Id.* (citing Gregg v. V-J Auto Parts Co., 943 A.2d 216, 226-227 (Pa. 2007)).

16 *Id.* at *25.

17 *See, e.g.,* Moeller v. Garlock Sealing Techs., 660 F.3d 950 (6th Cir. 2011); Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 607-08 (N.D. Ohio 2004), *aff'd sub nom.* Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005); Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 773 (Tex. 2007), *reh'g denied* (Oct. 12, 2007); Smith v. Kelly-Moore Paint Co., 307 S.W.3d 829 (Tex. App. 2010); Butler v. Union Carbide Corp., 712 S.E.2d 537 (Ga. Ct. App. 2011); Daly v. Arvinmeritor, Inc., No. 07-19211, 2009 WL 4662280 (Fla. Cir. Ct. Nov. 30, 2009); Free v. Ametek, No. 07-2-04091-9 SEA, 2008 WL 728387 (Wash. Super. Ct. Feb. 28, 2008).

Texas Supreme Court Rules in Favor of Private-Property Owners in Case on Public Access to Beaches

Continued from page 4...

Committee report, which stated that "[a]n easement is a property interest; the State can no more impress private property with an easement without compensating the owner of the property than it can build a highway across such land without paying the owner."[20]

The court explained that historically the State of Texas, and before that the Republic of Texas and Mexico, all recognized the beachfront properties on Galveston Island to be without limitation.[21] No subsequent action had altered this longstanding recognition of the owners' rights, proving that the "rolling easement" theory had not existed "since time immemorial."[22] And without such a pre-existing restriction on private property rights, the state would have to pay for property if it wanted to take it for public use.

III. Implications

The *Severance* decision was greeted by loud complaints by government and environmental groups as an example of pro-business activism.[23] These critics pointed out that the decision differed sharply from similar cases in other states.[24] New Hampshire, New Jersey, Idaho, Hawaii, and Oregon state courts have all enforced public easements across privately owned beach property.[25] But the *Severance* majority pointed out that "[t]hese jurisdictions have long-standing restrictions inherent in titles to beach properties or historic customs that impress privately owned beach properties with public rights,"[26] which are not present in Texas.

The local effect of this ruling is that property owners must explicitly grant public-access easements before the state may operate publicly funded beach clean-up and renourishment programs on Galveston beaches.[27] While many homeowners' associations in the Galveston area have willingly granted easements in exchange for government aid in maintaining beaches, not all landowners are willing to trade away their right to exclude.[28] In fact, there is currently a debate about

whether property owners will use this decision to justify the construction of concrete protective bulkheads to prevent erosion.[29] These structures have previously been disallowed by the Texas General Land Office because they contribute to erosion on neighboring property, but given the decision in *Severance,* the GLO may have to allow their construction.[30]

The biggest question that remains undecided is where the line should be drawn between "gradual" and "dramatic" changes in the coast line: when does erosion that creates a rolling easement become protected avulsion?[31] Only future litigation can resolve this complicated question.

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Endnotes

1 No. 90-0381, 2012 WL 1059241(Tex. Mar. 30, 2012).

2 *Id.* at *3.

3 "Avulsion . . . is the sudden and perceptible change in land and is said not to divest an owner of title." *Id.* at *24.

4 *Id.* at *3.

5 *Id.* at *7.

6 *Id.*

7 *Id.* at *8-9.

8 The Texas legislature has defined public and private beaches along the Gulf of Mexico as land between the mean low-tide line and the line of vegetation. *Id.* at *12.

9 *Id.*

10 Severance v. Patterson, 485 F. Supp. 2d 793, 802-04 (S.D. Tex. 2007).

11 *Severance*, 2012 WL 1059241, at *10.

12 *Id.*

13 *Id.* at *5.

14 *Id.* at *6. Texas courts have interpreted "time immemorial" as referring to the time when Spanish or Mexican civil law governed. *Id.* at *41-42.

15 *Id.*

16 *Id.*

17 *Id.* at *34.

18 *Id.* at *35.

19 *Id.*

20 *Id.* at *22.

21 *Id.* at *16.

22 *Id.*

23 Nick Jimenez, *Render Ballot Justice to These Five Justices*, Caller, Apr. 22 2012, http://www.caller.com/news/2012/apr/22/render-ballot-justice-to-these-five-justices/.

24 *Id.*

25 *Id.* at *35-36.

26 *Id.* at *36.

27 Heber Taylor, *Clean Beaches and Public Access*, Daily News, May 14, 2012, http://galvestondailynews.com/story/314482.

28 *Id.*

29 Harvey Rice, *Galveston Beach Homeowners Prepare to Exert Rights: Battle May Be Looming After High Court Ruling*, Chron, May 9, 2012, http://www.chron.com/news/houston-texas/article/Galveston-beach-homeowners-prepare-to-exert-rights-3547164.php.

30 *Id.*

31 Matt Festa, *Decision on Open Beaches Act/Rolling Easement Case (Severance v. Patterson)*, Land Use Prof Blog, Jul. 18 2012, http://lawprofessors.typepad.com/land_use/2010/11/decision-on-open-beaches-act-rolling-easement-case-severance-v-patterson.html.

Iowa Supreme Court Deeply Divided on Whether Iowa Constitution Contains a Right to Education

Continued from front cover...

that the plaintiffs' equal protection and due process claims failed because there was a conceivable rational basis for not establishing greater statewide standards—namely, that "[t]he legislature may have decided that local school board autonomy is preferable in certain instances to state mandates." Moreover, the plaintiffs didn't claim that the state treats school districts differently from one another (i.e., unequally); they claimed only that the state should be more active in regulating those school districts. That, said the majority, does not amount to a violation of the equal protection clause.

The majority also questioned whether the state can ever violate *substantive* due process by failing to act. The plaintiffs alleged that the state was not doing enough to regulate schools, not that it was taking some wrongful affirmative action. As the majority noted, that is an unusual due process claim. The due process clause

of the Iowa Constitution, like the U.S. Constitution, provides that "no person shall be deprived of life, liberty, or property, without due process of law." Normally, the right to liberty is associated with the right to be left alone—to live one's life without government intrusion. The plaintiffs in this case argued the opposite—that the state government should have injected itself into school governance to a greater degree. The majority expressed "serious doubt" whether such a claim would ever have merit, but nonetheless left the issue open because the state's "inaction" survived rational-basis review.

Justices Wiggins, Appel, and Hecht dissented, with Wiggins and Appel each writing separate opinions. These three justices believe the plaintiffs' claims are justiciable and that the judgment should be reversed and the case remanded to the district court for further proceedings. Justice Wiggins, joined by Justices Appel and Hecht, faulted the majority for reaching the merits of the lawsuit, since the State had not raised those issues in its appellate briefing. (The State did address the merits in the district court.)

Justice Appel also wrote a lengthy dissent (joined by Justice Hecht) in which he discussed the importance of education and concluded that education is a fundamental right under the Iowa Constitution. He would subject any "deprivations of a basic or adequate education" to "heightened judicial review," and analyze "other material differences in education" under some form of the rational-basis test. The plaintiffs, in his view, alleged sufficient facts to withstand a motion to dismiss under either standard.

Chief Justice Cady and Justice Waterman also wrote separate concurring opinions, although they also joined Justice Mansfield's opinion in full. They responded directly to the dissenting opinions and emphasized additional reasons for dismissing the plaintiffs' claims.

II. Differing Views on Constitutional Interpretation

King highlights the split on the Iowa Supreme Court that that has repeated several times since the 2010 retention elections. Indeed, the majority's and dissent's approaches to constitutional interpretation could not be further apart.

In analyzing whether article IX, division 2, section 3 of the Iowa Constitution contains a right to a minimally sufficient education, Justice Mansfield considered three sources, starting with the text of section 3 and the surrounding provisions. He then moved to the court's relevant precedents, most of which were decided shortly after the ratification of the Iowa Constitution. And finally, he considered the debates of the constitutional convention. These three sources led Justice Mansfield, who was joined by Chief Justice Cady and Justices Waterman and Zager, to conclude that article IX, division 2, section 3 does not contain a right to a minimally sufficient education: (1) the text of section 3 and the surrounding provisions suggest that section 3 merely allows the legislature to fund schools, it doesn't require the legislature to do so; (2) the Iowa Supreme Court held shortly after the 1857 convention that "no aspect of the Iowa Constitution, including the education clause, authorized the legislature to provide for public schools (as opposed to merely funding them)"; and (3) one delegate to the 1857 convention proposed an amendment to section 3 that would have required the State to provide education "without charge," but after another delegate argued that the local districts should "regulate this matter themselves" the convention rejected the amendment by a vote of twenty-five to eight.

In contrast to Justice Mansfield, who started his analysis with the text of the constitutional provision, Justice Appel began with a detailed, twenty-two-page analysis of the "historical roles of national and state government in educating children" and the "relationship of education to democratic government, personal liberty, and human dignity." He quoted some of our nation's founders—Thomas Jefferson, John Adams, and Benjamin Rush—as well as several nineteenth-century Iowa governors. He noted, for example, that Governor James Grimes "emphasized education" in his 1856 inaugural address, the year before the constitutional convention. Justice Appel also relied on statements made during the constitutional convention, as well as several facts that post-date the ratification of Iowa's Constitution. He found it significant to the constitutional question that Iowa held a statewide education summit in 1954 at President Eisenhower's request, that Governor Ray served as the chairman of the Education Commission of the States from 1981 to 1982, that Governor Branstad has recently proposed legislative changes to Iowa's education system, and that the United States ratified the United Nation's 1948 Universal Declaration of Human Rights, which declares that education is a "human right."

Justice Appel's reliance on such a wide array of sources drew this response from Justice Mansfield:

> We do not think a resolution of this case requires us to review the history of education generally or what past Iowa governors have said on the subject. We are judges, not historians. For judges, some history,

such as our own precedent, is highly relevant. But there are risks when we draw on political history as source material for judicial decisionmaking. One risk is that we may unwittingly diminish the importance of more relevant historical events, such as the ratification debates on the Iowa Constitution, by submerging them in other political history that has only background importance. Another risk is that political trends might then be used to justify the outcome in a particular case. It is not surprising to us that Iowa's governors have believed education to be a critical responsibility of government. But demonstrating that education has been a vital concern of the political branches of government does not answer the present question whether this particular case ought to proceed through the judicial branch.

Justice Waterman also criticized Justice Appel's "wide-ranging survey of authorities," noting specifically that he "fail[s] to see how a 1948 UN Declaration helps our court ascertain the intent of the framers of the Iowa Constitution ratified ninety years earlier." That comment, in turn, drew a response from Justice Appel. He noted that several U.S. Supreme Court Justices have relied on foreign law in their decisions, that many of our nation's founders were influenced by a broad array of foreign sources, and that "the University of Iowa College of Law has a program in international and comparative law" that "'provides an essential theoretical foundation for all lawyers by affording unique insight into the nature of law and legal process.'"

For his part, Chief Justice Cady joined Justice Mansfield's opinion in full, but he also wrote that Justice Appel had "captured the rich history of [education] in Iowa and has provided insight into its constitutional stature." That the Chief Justice would be more willing to consider modern-day events is consistent with his theory that Iowa's Constitution is a "living document" that changes "with the increasing knowledge and understanding of the world."[2] Nonetheless Chief Justice Cady concluded that the allegations of this case, even if true, did not state a claim under the right to education—assuming there is one. And so he was "content to wait for a different case" in which to explore Justice Appel's historical account.

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Endnotes

1 King v. State, 2012 WL 13366597 (Iowa Apr. 20, 2012).

2 The Hon. Mark Cady, *Iowa View: Why the Iowa Constitution is a 'Living' Document*, Des Moines Register, Apr. 15, 2012.

New Jersey Supreme Court Rules Homeowners' Association's Sign Restriction on the Interior of a Unit Is Unconstitutional

Continued from front cover...

association. The court found the restriction at issue—which had amounted to a near-complete ban on all residential signs—to be unreasonable and unconstitutional. However, the homeowners' associations can still adopt reasonable time, place, and manner restrictions, providing adequate alternative means of communication.[3]

Background and Procedural History

Wasim Khan ("Khan"), a Morris County homeowner within the Association, was sued by the Association for failure to pay his maintenance fees and fines incurred from his planting a rosebush against his home. Khan filed a counterclaim alleging, among other things, that his right to free speech had been violated by the Association's prohibition of all window signs except for one "For Sale" sign. Kahn was running for Parsippany Town Council in 2005 and wanted to publicize his candidacy.

Section 12 of the Association's Public Offering Statement provides in pertinent part: "(k) No signs are permitted on the exterior or interior of any Unit, except for one 'For Sale' sign on the interior of a Unit." Article X(a)(vii) of the recorded Declaration of Covenants and Restrictions ("Declaration") provides: "No signs . . . shall be erected or installed in or upon any Building, the Common Facilities or any part thereof without the prior written consent of the Board."

The trial judge awarded the Association $3500, comprised of $2000 in unpaid assessment fees and $1500 in fines for the over-height rosebush. The judge dismissed Khan's counterclaim about the sign prohibition in its entirety. Khan appealed, and the Association cross-appealed.

The appellate division reversed in part, finding that the Association's sign restriction was unconstitutional.[4] The Association's sign restriction effectively eliminated "an entire means of expression without a readily available alternative."[5]

Supreme Court of New Jersey's Analysis

Following the Association's appeal, the supreme court reviewed the case with emphasis on Article I, Paragraph 6 of the New Jersey Constitution, which provides that no law shall restrict the freedom of speech. The freedom of speech can be "invoked against private entities 'because of the public use of their property.'"[6] In *Mazdabrook*, the Supreme Court of New Jersey relied on precedent from three cases.

First, the court applied *State v. Schmid*, which created a three-pronged test determining the parameters of free-speech rights on privately owned property.[7] *Schmid* requires courts to consider "(1) the nature, purposes, and primary use of such private property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property."[8] In *Schmid*, a non-student was arrested and convicted of trespass for entering the main campus of Princeton University without permission to distribute political materials. On appeal, the court found that the defendant's expressional activity was within the public and private uses of the campus.[9] The court held that constitutional rights of speech may be enforced against private entities.[10] Private-property owners may create and enforce "'reasonable rules to control' expressional rights on their property," and the "reasonableness of those rules would depend on whether 'convenient and feasible alternative means' to free expression existed."[11] Second, *New Jersey Coalition against War in the Middle East v. J.M.B. Realty Corp.*[12] applied the *Schmid* test to require regional shopping centers to permit leafleting on political and societal issues.[13] The court in *Coalition* found that all three factors in the *Schmid* test favored the plaintiff's expressional rights over the defendants' private property rights and decided the case on the basis of a "general balancing of expressional rights and private property rights."[14] Third, *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*[15] upheld sign restrictions that permitted homeowners to place only one sign in the window of their home and one sign in a flowerbed adjacent to their home. In *Twin Rivers*, the association was a common-interest community, and the residential property served private purposes. The association did not invite people to use the property commercially, as seen with the shopping centers in *Coalition*. The sign restriction in *Twin Rivers* was to "avoid the clutter of signs" and preserve the uniformity and "aesthetic value of the common areas."[16] The court found these reasons to be legitimate interests of a community association. However, the key in *Twin Rivers* was that the association did not completely prohibit the owners from posting signs; it only limited the number and location of signs.

The third factor in *Schmid* requires the court to consider the "fairness of the restrictions imposed . . . in relation to the plaintiffs' free speech rights."[17] The private property interest in *Twin Rivers* was stronger than the interests asserted in *Schmid* and *Coalition* because the association in *Twin Rivers* had not invited the public onto its property.[18]

The Supreme Court of New Jersey held that Khan's rights prevailed when balancing (a) the Association's private-property owner's interest, (b) Khan's private-property owner's interest, and (c) Khan's free-speech right. First, the primary use of the property in question is residential, which would normally favor the Association. However, the residence is owned by Khan, and the use concerns what he does inside his own home. Therefore, this factor weighed in Khan's favor.[19] Second, the private property is accessible to the public, but the public is not invited, as in *Schmid* and *Coalition*. However, this is less relevant in *Mazdabrook* because Khan is an owner. As such, the second factor in the *Schmid* test favors Khan because the near-absolute restriction on signs inside one's own home is overly restrictive.[20] Third, the purpose of the expressional activity must be weighed against the Association's property interest in uniformity and aesthetic appearance. The exclusion of all but "For Sale" signs constitutes a major restriction on Khan's expressional rights, yet there is only minimal interference with the Association's property or common areas.[21] It would not be fair or reasonable to uphold the Association's restrictions, especially in an owner's home. Therefore, Khan's free-speech right in his own home outweighed the Association's property interests.[22]

The supreme court noted that the Association has the power to adopt reasonable time, place, and manner restrictions to serve the community's legitimate interests.[23] The court also noted that an association may reasonably limit the number, location, and size of signs.[24] However, Mazdabrook banned all signs, except one "For Sale" sign,

without the prior written consent of the Board. The Association's board had not adopted any written criteria to guide its unilateral decision-making process.[25] Therefore, the clause "without the prior written consent of the Board" does not provide Khan with a reasonable alternative.[26] The court also found the Association's restriction unreasonable because it prohibited too much speech, not solely because it had content-based discrimination.[27] Courts must consider whether "convenient, feasible, alternative means" of substantially the same expressional activity exist for the individual whose rights may be restricted on private property.[28] The dissent in the appellate division agreed with the Association that there were other readily available alternatives for Khan to speak about his political candidacy, i.e. mailing information, distributing leaflets, or going door-to-door.[29] However, the supreme court disagreed because these other alternatives require more time and money.[30] The court was not persuaded that Khan's alternatives were substantially similar or adequate.[31]

The court also disagreed with the argument that Khan had waived his constitutional right when he purchased a unit in the homeowners' association because "waivers must be knowing, intelligent, and voluntary."[32] The court found that Khan may have knowingly waived his right to post signs at various locations, but he did not knowingly waive his right to free speech and expression.[33] The court discussed that "restrictive covenants that unreasonably restrict speech . . . may be declared unenforceable as a matter of public policy."[34] Therefore, there was no waiver or adequate substitute for the restriction imposed on Khan's free speech.

Case Significance

Many homeowners' associations in New Jersey have sign restrictions, and the *Mazdabrook* ruling gave homeowners more rights and protections against these associations. However, this case was limited to signs posted on windows and doors; the decision did not address whether signs may be posted on lawns. Court watchers anticipate that there will likely be future cases where homeowners seek to expand the ruling of the court in *Mazdabrook*.

New Jersey is one of the leading states in the country pioneering the laws in community associations. Other states may apply *Mazdabrook* to community-association cases that appear before them.

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Endnotes

1 Mazdabrook Commons Homeowners' Ass'n v. Khan, 2012 N.J. LEXIS 668 (N.J. June 13, 2012).

2 *Id.*

3 The Court noted that the ban on political signs was not content-based discrimination because the restriction constituted almost a total ban on all signs despite content.

4 The Appellate Division also reversed the rosebush fines due to a procedural notice error.

5 Mazdabrook Commons Homeowners' Ass'n v. Khan, 2010 N.J. Super. Unpub. LEXIS 2170, 27-29.

6 *Mazdabrook*, 2012 N.J. Unpub. LEXIS 668 (citing State v. Schmid, 84 N.J. 535, 560 (1980)).

7 State v. Schmid, 84 N.J. 535 (1980).

8 Mazdabrook Commons Homeowners' Ass'n v. Khan, 2012 N.J. Super. Unpub. LEXIS 668, at 24 (citing State v. Schmid, 84 N.J. 535, 563 (1980)).

9 *Schmid*, 84 N.J. at 564-65.

10 *Id.* at 563-65.

11 *Mazdabrook*, 2012 N.J. LEXIS 668, at 25 (citing *Schmid*, 84 N.J. at 563, 67).

12 138 N.J. 326 (1994).

13 *Id.*

14 *Mazdabrook*, 2012 N.J. LEXIS 668, at 26-27 (citing *Coalition*, 138 N.J. at 362-65).

15 192 N.J. 344 (2007).

16 *Mazdabrook*, 2012 N.J. LEXIS 668, at 25 (citing *Twin Rivers*, 192 N.J. at 351).

17 *Mazdabrook*, 2012 N.J. LEXIS 668, at 29 (citing *Twin Rivers*, 192 N.J. at 366-67).

18 *Id.*

19 *Mazdabrook*, 2012 N.J. LEXIS 668, at 30-31.

20 *Id.* at 31-32.

21 *Id.* at 36.

22 *Id.* at 40.

23 *Id.* at 37.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Mazdabrook*, 2012 N.J. LEXIS 668, at 42.

28 *Id.* at 38 (citing *Twin Rivers*, 192 N.J. at 358-59).

29 Mazdabrook Commons Homeowners' Ass'n v. Khan, 2010 N.J. Super. Unpub. LEXIS 2170, at 43-44.

30 *Mazdabrook*, 2012 N.J. LEXIS 668, at 38-39.

31 *Id.*

32 *Id.* at 43.

33 *Id.* at 43-44.

34 *Id.* at 47 (citing *Twin Rivers*, 192 N.J. 371).

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