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

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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.

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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

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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.