STATE COURT
DocketWatch®

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Missouri Supreme Court Unanimously Declares Cap on Punitive Damages Unconstitutional

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

In *Lewellen v. Franklin* (*Lewellen*),[1] the Missouri Supreme Court unanimously held that a mandatory cap on punitive damages,[2] enacted by the Missouri Legislature in 2005 as part of its comprehensive legislative tort reform, violated a plaintiff's right to a jury trial under the Missouri Constitution. Holding the punitive damages cap unconstitutional as to a fraudulent-misrepresentation claim, the *Lewellen* court unanimously followed the controversial 4-3 split decision in *Watts ex rel. Watts v. Lester E. Cox Medical Centers* (*Watts*),[3] in which the Missouri Supreme Court held a statutory cap on noneconomic damages in medical-negligence cases constitutionally infirm under a plaintiff's constitutional right to a jury trial.

I. Facts

In *Lewellen*, the plaintiff alleged that the defendants' advertisements for the sale of vehicles constituted fraudulent misrepresentations and violated the Missouri Merchandising Practice Act (MMPA), Mo. Rev. Stat. §§ 407.010 *et seq.*[4] In addition to awarding the plaintiff $25,000 in actual damages, the jury awarded her $1,000,000 in punitive damages on each of her claims.[5]

Upon the defendants' motions to cap the punitive damage awards pursuant to Mo. Rev. Stat. § 510.265, the trial court reduced the punitive awards to $500,000 and $539,050.[6] The plaintiff appealed, asserting multiple state constitutional challenges to § 510.265's cap on punitive damages, including that it violated the Missouri Constitution's right to a jury trial.[7] Specifically, the plaintiff argued that the statutory cap on punitive damages strips the jury of its function in determining damages.[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 remain inviolate . . . ." Relying on its 2012 split decision in *Watts*,[9] in which it struck down a statutory cap on noneconomic damages in medical negligence cases under article I, section 22(a)'s right to a jury trial, the Missouri Supreme Court explained that the phrase "shall remain inviolate" "means that any change in the right to a jury determination of damages as it existed in

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Minnesota Supreme Court Holds Municipality Cannot Revoke Right to Maintain an Existing Commercial Land Use

By Luke A. Wake*

A difficult and recurring question of municipal law is how, and when, can an existing land-use be phased-out as circumstances in the community change? Obviously land-use planning would be difficult—if not impossible—if the authorities were powerless to control development and or to take steps to eliminate current uses that may be deemed socially undesirable. But, on the other side of the equation, landowners generally want to maintain their property rights to the full

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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

New Mexico Supreme Court Eliminates Foreseeability from Tort Duty Analysis

By Jennifer F. Thompson & Deborah J. La Fetra***

On May 8, 2014, the New Mexico Supreme Court significantly altered the state's tort law duty analysis in *Rodriguez v. Del Sol Shopping Center Associates, L.P.*[1] This ruling held that foreseeability may not be considered in deciding whether a tort duty exists.[2] Rather, courts must articulate and rely on specific public policy rationales.[3]

I. Background

In March 2006, Rachel Ruiz suffered a seizure while driving her mechanically-defective pick-up truck in the Del Sol Shopping Center in Santa Fe, New Mexico.[4] Doctors had advised Ruiz not to drive on account of her medical condition.[5] And she was aware that her truck had mechanical problems, including sudden acceleration and loss of brake control.[6] Ruiz nonetheless drove the vehicle and lost consciousness after having a seizure while driving along a 600-foot entrance straightaway in the shopping center's parking lot.[7] While she was unconscious, Ruiz's truck accelerated, vaulted a six-inch curb narrowly missing a concrete support pillar, crossed a ten-foot wide sidewalk, snapped a metal handrail, and crashed through the floor-to-ceiling glass wall of the Concentra Medical Clinic.[8] The truck eventually stopped inside the health center after striking and killing three people and injuring six others.[9]

Ruiz was imprisoned after pleading no contest to three counts of vehicular homicide and six counts of great bodily injury by vehicle.[10] The surviving victims and the decedents' estates filed premises liability actions against the owners and operators of the shopping center and the medical clinic, alleging they were negligent in maintaining the parking lot and in failing to erect physical barriers between the parking lot and the health clinic.[11] Two separate district courts awarded summary judgment to the defendants, finding they owed no duty to the plaintiffs to protect against this type of occurrence because it was unforeseeable as a matter of law.[12]

The Court of Appeals of New Mexico consolidated the cases for appeal and affirmed the district court's finding of no duty, but under a different rationale.[13] It adopted a policy-driven duty analysis, relying on the Restatement (Third) of Torts, and a 2010 New Mexico Supreme Court decision, *Edward C. v. City of Albuquerque*,[14] which held that "[f]oreseeability . . . is but one factor to consider when determining duty and not the principal question."[15] Rather, courts should focus primarily on "the . . . activity in question, the parties' general relationship to the activity, and public policy considerations."[16]

The court of appeals followed that directive and held that the general duty of care which the owners and occupiers of businesses owe to visitors while inside buildings does not encompass the duty to protect them from runaway, third-party vehicles.[17] The court reasoned that the nature of the activity—providing services to the public in a shopping center—bore no inherent relation to the risk that a vehicle would collide with patrons inside a business.[18] And it found no public policy support in state law for requiring the owners and occupiers of shopping

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centers to design them, or to erect barriers, to protect visitors from this type of incident.[19]

II. The New Mexico Supreme Court's Ruling

The New Mexico Supreme Court reversed the lower court's ruling.[20] It held that "foreseeability is not a factor for courts to consider when determining the existence of a duty, or when deciding to limit or eliminate an existing duty in a particular class of cases."[21] Instead, courts must "articulate specific policy reasons, unrelated to foreseeability considerations, if deciding that a defendant does not have a duty or that an existing duty should be limited."[22] The court focused on the factual nature of the foreseeability analysis and found that only a jury can consider the facts of particular cases.[23]

Apparently recognizing that it was breaking new ground, the court devoted the bulk of its opinion to explaining why foreseeability plays no role in determining duty, comparing and contrasting a foreseeability-driven duty analysis with a policy-driven one.[24] It criticized the former for requiring courts to scrutinize the facts of particular cases, a practice resulting in "fluid" and overly-factually-dependent duty determinations.[25] By contrast, the latter approach enabled courts to articulate a duty standard for a broad class of cases, without considering whether a defendant's conduct was foreseeable under the particular facts of a case.[26] This approach is meant to protect the jury's role in weighing evidence and making factual determinations: "Courts should not engage in weighing evidence to determine whether a duty of care exists or should be expanded or contracted—weighing evidence is the providence of the jury; instead, courts should focus on policy considerations when determining the scope or existence of a duty of care."[27]

The supreme court criticized the court of appeals' reliance on foreseeability, instead of policy.[28] For example, when the lower court considered the "nature of the activity and the parties' relationship" to it, it noted the "sheer improbability and lack of inherent danger" of a vehicle colliding with people inside a building.[29] That discussion, according to the supreme court, rested on the belief that the incident in *Rodriguez* was unlikely to occur, an assumption that rested in turn on the court's assessment of the particular facts at hand.[30] The court held that such considerations applied only in the analysis of

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Supreme Court of Ohio Upholds Challenge to the Application of Zoning Restrictions

*By Oliver Dunford**

Introduction

The Supreme Court of Ohio has long held that land-use restrictions may not apply retroactively to preclude the lawful use of land unless such use creates a public nuisance.[1] Accordingly, when a new zoning law restricts or outlaws existing uses that would otherwise be lawful, these "nonconforming uses" are "grandfathered in" and permitted to continue after the new law's effective date.[2] But only an actual *use* may be grandfathered in. The law generally does not protect the *contemplated* or *expected* use of land.

Or does it? In *Boice v. Village of Ottawa Hills*,[3] the Supreme Court of Ohio upheld a challenge to the application of a zoning restriction, and in the process, may have upended the traditional rule that only land *use* may be protected against retroactive zoning restrictions.

I. Background

Willis and Annette Boice owned two adjoining lots of real property: a 57,000-square-foot lot that included their house, and a vacant 33,000-square-foot lot.[4] When the Boices purchased these lots, the zoning code permitted structures to be built on any lot that was at least 15,000 square feet.[5] An amendment to the zoning code, however, required that "buildable" lots be at least 35,000 square feet.[6] The Boices later wanted to sell the vacant lot as a buildable lot and sought a variance to that effect.[7] The variance, however, was denied.[8]

Following administrative challenges, the Ohio Court of Appeals affirmed the denial.[9] According to the court, "to qualify as a valid preexisting nonconforming use, the use must be both existing and lawful at the time of the enactment of the zoning ordinance."[10] A nonconforming use does not arise simply because a property owner contemplated such use.[11] Here, the Boices "never *used* the [vacant] parcel as a buildable lot and therefore never acquired a vested right to use the property as a buildable lot."[12]

II. The Ohio Supreme Court's Decision

The Boices appealed to the Ohio Supreme Court

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and argued that they had acquired a vested right in the "buildable" status of their vacant lot, and that therefore, the village should have granted the variance.[13] The court, in a 4-to-3 decision, agreed—emphasizing traditional notions of individual property rights.

The court explained that zoning laws "are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled," and therefore, zoning laws are "ordinarily" construed in favor of the property owner.[14] Further, because zoning authority is a police power and "interferes with individual rights," any use of the police power "must bear a substantial relationship to a legitimate government interest and must not be unreasonable or arbitrary."[15] With these precepts in mind, the court determined that the denial of the "area" variance had resulted in "practical difficulties,"[16] including the greatly reduced value of the vacant lot, and concluded that the variance should have been granted.[17]

The majority identified "three pillars" supporting its conclusion: (1) the buildable status of the Boices' vacant lot should have been grandfathered-in; (2) the difference between the 35,000-square-feet requirement and the vacant lot's 33,000 square feet was de minimis; and (3) the Boices had been subject to disparate treatment, as they were the only property-owners who had been denied similar variances.[18]

Discussing the first factor, the majority returned to its earlier theme of individual property rights. Here, the majority relied on *Norwood v. Horney*,[19] the Ohio Supreme Court's landmark decision that prohibited the use of eminent domain for solely economic-development purposes.[20] In particular, the *Boice* majority cited *Norwood*'s discussion of the "Lockean notions of property rights" that were incorporated into the Ohio Constitution, thereby demonstrating "the sacrosanct nature of the individual's 'inalienable' property rights," which are to be held "forever 'inviolate.' "[21]

On these grounds, the majority rejected the argument that "until construction has begun on a lot, the lot has no legal 'use,' and the property owner can have no expectations about the future use of the property. . . ."[22] Otherwise, property would be "subject to gov-

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Powers v. State of Wyoming: Separation of Powers and the Role of the Judiciary

*By Stephen R. Klein**

In its 2013 General Session, the Wyoming Legislature passed Senate File 104, or Senate Enrolled Act 1 ("SEA 1").[1] The bill reassigned most of the duties of the state superintendent of public instruction to a director of education, to be appointed by the governor.[2] On the very day Wyoming Governor Matt Mead signed the bill into law, state Superintendent of Public Instruction Cindy Hill sued, claiming the law violated the Wyoming Constitution.[3] One year later, the Wyoming Supreme Court ruled that SEA 1 was unconstitutional in its entirety.[4] The case is of particular interest here because the extensive decision in *Powers v. State of Wyoming* contributes to discussions of separation of powers and the role of the judiciary.

Cindy Hill's lawsuit was quickly certified by the state district court to the Wyoming Supreme Court, with four questions. The Court's majority found one question dispositive—whether SEA 1 violated Article 7, Section 14 of the Wyoming Constitution—and declined to address the other three.[5] The majority found that SEA 1 deprived the superintendent of exercising her constitutional duty of "the general supervision of the public schools," noting that the law "amends a total of 36 separate statutes and substitutes 'director' for 'state superintendent' in approximately 100 places[,]" and that "the Act transfers the bulk of the Superintendent's previous powers and duties to the Director."[6] The court based its interpretation of the state constitution on the language of the constitution, constitutional history, and legislative history.

Article 7, Section 14 of the Wyoming Constitution has read as follows since Wyoming became a state in 1889:

> "The general supervision of the public schools shall be entrusted to the state superintendent of public instruction, whose powers and duties shall be prescribed by law."[7]

The State and Hill took opposing positions on the

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whether a duty had been breached, not whether it existed in the first place.[31] The court also criticized the lower court's approach to defining public policy by looking to the shopping center's compliance with the state's building code. The court held that statutory compliance with safety standards was relevant only to the factual question of whether the defendants acted reasonably under the circumstances; a question for the jury.[32]

III. Implications

By holding that foreseeability plays no role in a court's duty determination, the New Mexico Supreme Court adopted the Restatement (Third) of Torts' approach to duty.[33] It also opened a new chapter in the long-standing debate over foreseeability traceable to Justice Cardozo's 1928 decision in *Palsgraf v. Long Island Railroad Company.*[34] There, Cardozo's ruling—that the railroad owed no duty to Mrs. Palsgraf to protect her from falling scales because she was not a reasonably foreseeable plaintiff—prompted Justice Andrews to decry the majority's use of foreseeability as inherently arbitrary.[35] He noted in dissent: "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[36] More recently, the U.S. Court of Appeals for the Sixth Circuit criticized Cardozo's approach in *Palsgraf* for failing to articulate "any clear standard regarding what makes a projected harm too improbable to be foreseeable."[37] As a result, "[c]ourts often end up merely listing factual reasons why a particular harm, although having materialized, would have appeared particularly unlikely in advance and then simply asserting that the harm was too unlikely to be foreseeable . . ."[38] Others have criticized courts' use of foreseeability in determining duty for obscuring value judgments based on policy considerations.[39]

But in spite of these critiques, most jurisdictions continue to recognize that foreseeability plays some role, even if a limited one, in defining tort duties.[40] And every jurisdiction, except one, to consider premises liability under facts similar to *Rodriguez*, found that defendant business owners owed no duty to plaintiffs to prevent harm caused by runaway third-party vehicles crashing into buildings.[41] Hence, *Rodriguez* represents a significant departure from traditional tort duty jurisprudence. Its practical effect will be to limit courts' ability to make no duty determinations as a matter of law, and to increase the number of tort liability cases that reach New Mexico juries.

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Endnotes

1 Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., Nos. 33,896, 33,949, 2014 WL 1831148 (N.M. May 8, 2014)

2 *Id.* at *1, ¶ 1.

3 *Id.*

4 Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2013-NMCA-020, ¶¶ 1, 3, 297 P.3d 334 (2012), *rev'd* Nos. 33,896, 33,949, 2014 WL 1831148 (N.M. May 8, 2014).

5 *Id.* ¶ 3.

6 *Id.*

7 *Id.* ¶¶ 3-4.

8 *Id.* ¶ 4.

9 *Id.*

10 Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2013-NMCA-020, ¶ 5, 297 P.3d 334 (2012), *rev'd* Nos. 33,896, 33,949, 2014 WL 1831148 (N.M. May 8, 2014).

11 Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., Nos. 33,896, 33,949, 2014 WL 1831148, at *1, ¶ 2 (N.M. May 8, 2014).

12 *Id.*

13 Rodriguez, 2013-NMCA-020, ¶ 1.

14 *Id.* Edward C. v. City of Albuquerque, 2010-NMSC-043, 241 P.3d 1086 (N.M. 2010), *overruled by* Rodriguez, Nos. 33,896, 33,949, 2014 WL 1831148, at *1, ¶ 3.

15 Edward C., 2010-NMSC-043, ¶ 18.

16 Rodriguez, 2013-NMCA-020, ¶ 10 (quoting Edward C. 2010-NMSC-043, ¶ 14).

17 *Id.* ¶¶ 14-21, 29.

18 *Id.* ¶¶ 15-17.

19 *Id.* ¶¶ 18-22.

20 Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., Nos. 33,896, 33,949, 2014 WL 1831148, at * 9, ¶ 24 (N.M. May 8, 2014).

21 *Id.* * 1, ¶ 1.

22 *Id.*

23 *Id.* The Court noted that courts may consider foreseeability, but only when ruling as a matter of law on breach or causation because no reasonable jury could have found either that the defendant breached his or her duty, or that the breach caused the plaintiff's damages. *Id.* * 9, ¶ 24.

24 Rodriguez, Nos. 33,896, 33,949, 2014 WL 1831148, at *3, ¶¶ 8-11 (comparing the foreseeability-driven approach of Chavez v. Desert Eagle Distributing Co., 2007-NMCA-018, 151 P.3d 77, with the Restatement-approved policy-driven approach in Gabaldon v. Erisa Mortgage Co., 1997-NMCA-120, 949 P.2d 1193).

25 *Id.* *3, ¶ 9.

26 *See id.* *4, ¶ 11.

27 *Id.* *7, ¶ 19.

28 *See id.* *4, ¶ 12.

29 *Id.*

30 *Id.* *5, ¶ 13. The Court explained:

> Since remoteness [of the incident] invites a discussion of particularized facts, we do not approve of using remoteness as the basis for a policy determination. A determination of no duty based upon the foreseeability, improbability, or remote nature of the risk is inconsistent with the Restatement approach, which provides that only "[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." *Id.*

31 *Id.* *5, ¶ 15.

32 Rodriguez, Nos. 33,896, 33,949, 2014 WL 1831148, at *6, ¶ 17; *id.* *7, ¶ 19.

33 *See* Restatement (Third) of Torts: Physical & Emotional Harm, § 7, comment j ("Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.").

34 *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

35 *Id.* at 340-41, 344-45. *Id.* at 352 (Andrews, J., dissenting).

36 *Id.* at 352 (Andrews, J., dissenting).

37 James v. Meow Media, Inc., 300 F. 3d 683, 691 (6th Cir. 2002).

38 *Id.*

39 *See*, *e.g.*, J. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. Rev. 921, 938 (2005) ("Foreseeability often operates as a proxy for decisions of policy that have little to do with foreseeability's other conceptual purposes [which include] moral responsibility . . . behavioral modification and economic efficiency.").

40 According to the California Supreme Court, for example, the determination of whether a duty exists, involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. Wiener v. Southcoast Childcare Ctrs., Inc., 32 Cal. 4th 1138, 1145, 12 Cal. Rptr. 3d 615, 620 (2004) (quoting Rowland v. Christian, 69 Cal. 2d 108, 112-13, 70 Cal. Rptr. 97, 100 (1968)); *see also* Ostrovitz & Gwinn, LLC v. First Specialty Ins. Co., 393 S.W.3d 379, 399 (Tex. Ct. App. 2012) ("We consider several related factors, including the risk, foreseeability, and likelihood of injury, weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant."); Simpkins v. CSX Transp., Inc., 965 N.E.2d 1092, 1101 (Ill. 2012) ("[W]e have repeatedly stressed that the existence of a duty turns, not only on foreseeability alone, but in large part on public policy considerations.").

41 *See* Rodriguez, 2013-NMCA-020, ¶ 28. The only state supreme court to rule otherwise is Illinois. *See* Marshall v. Burger King, 856 N.E. 2d 1048, 1051, 1065 (2006).

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ernmental regulations that can change overnight."[23] Such a result "would eliminate the constitutional protections that people must be afforded…."[24] The appellate court's decision to the contrary had thus "ignore[d] well-settled land-ownership rights in this country."[25]

III. Dissenting Opinion

Had the appellate court ignored well-settled law? Not according to the dissent, which emphasized that (until now), a nonconforming use could be established only if "the property [was] actually . . . *used in that [nonconforming] manner*" at the time the zoning restriction was put in place.[26] Here, the Boices had *used* the vacant lot only as a side yard to their residential lot; they had never begun construction, and they had not even requested a variance until 26 years after the zoning ordinance was enacted.[27] The Boices' expectation that their property would always remain buildable was just that—an expectation, not a vested right.[28]

IV. Conclusion

The crux of this dispute is the interpretation of "use." As noted above, the majority rejected the notion that construction must begin before property owners may obtain a vested right in a "legal use."[29] The dissent disagreed with what it described as the "majority's transformation of 'expectations' into a legally cognizable 'use[,]' "[30] and argued that the majority's rationale marks a "drastic change" in

Ohio's zoning law.[31] Perhaps it will.

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Endnotes

1 City of Akron v. Chapman, 116 N.E.2d 697 (Ohio 1953).

2 *See, e.g.*, O.R.C. § 713.15 ("The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or an amendment to the ordinance, may be continued, although such use does not conform with the provisions of such ordinance or amendment ….").

3 Boice v. Vill. of Ottawa Hills, 999 N.E.2d 649 (Ohio 2013).

4 *Id.* at 650.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 Boice v. Vill. of Ottawa Hills, 2011 Ohio 5681, at ¶¶7, 45.

10 *Id.* at ¶48.

11 *Id.*

12 *Id.* at ¶49 (emphasis sic).

13 *Boice*, 999 N.E.2d at 651.

14 *Id.* at 651-52 (internal quotation marks and citation omitted).

15 *Id.* at 652 (internal quotation marks and citation omitted).

16 *See* Kisil v. City of Sandusky, 465 N.E.2d 848 (Ohio 1984), syllabus ("The standard for granting a variance which relates solely to area requirements should be a lesser standard than that applied to variances which relate to use." A successful application need show only "practical difficulties.").

17 *Boice*, 999 N.E.2d at 652-53. See *id.* (" '[T]he factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (*e.g.*, water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.' ") (quoting Duncan v. Middlefield, 491 N.E.2d 692 (Ohio 1986), syllabus).

18 *Id.* at 653-54.

19 110 Ohio St.3d 353, 2006 Ohio 3799, 853 N.E.2d 1115.

20 *See Boice* at 654, citing *Norwood*, 2006 Ohio 3799, at ¶¶34-38.

21 *Norwood* at ¶37, quoting Ohio Const., Art. I, §§ 1, 19.

22 *Boice*, 999 N.E.2d at 653.

23 *Id.* at 653-54.

24 *Id.* at 654.

25 *Id.*

26 *Id.* at 656 (Lanzinger, J., dissenting) (emphasis in the original) (citations omitted).

27 *Id.* at 657 (Lanzinger, J., dissenting).

28 *Id.* (Lanzinger, J., dissenting).

29 *Id.* at 653.

30 *Id.* at 657 (Lanzinger, J., dissenting).

31 *Id.* at 656 (Lanzinger, J., dissenting).

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1820 is unconstitutional."[10] In other words, the *Lewellen* court found its controversial *Watts* decision controlling on the issue of whether application of § 510.265's statutory cap on punitive damages to a cause of action that existed in 1820 violates the right to a jury trial (as it existed in 1820 when the right to a jury trial became a state constitutional right).

Reviewing established cases, the Missouri Supreme Court determined that "there existed a right to a jury determination of the amount of punitive damages in a fraud cause of action in 1820" and that "imposing punitive damages [has been] a peculiar function of the jury" since at least 1820.[11] The *Lewellen* court concluded that § 510.265's cap on punitive damages "necessarily changes and impairs the right of a trial by jury 'as heretofore enjoyed.'"[12] Accordingly, the court held that "because section 510.265 changes the right to a jury determination of punitive damages as it existed in 1820, it unconstitutionally infringes on [a plaintiff's] right to a trial by jury protected by article I, section 22(a) of the Missouri Constitution."[13]

In finding the constitutional infirmity of § 510.265's punitive damages cap, the Missouri Supreme Court rejected the defendant's argument that because the Due Process Clause of the United States Constitution limits punitive damages (by prohibiting "the imposition of grossly excessive or arbitrary punishments on a

tortfeasor"),[14] the state legislature may also limit punitive damages via a statutory cap.[15] Noting that due-process limitations require a punitive damages award to "be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff,"[16] the Missouri Supreme Court explained that "[S]ection 510.265 is not based on the facts or circumstances of the case; it caps the punitive damages award at $500,000 or five times the judgment *regardless* of the facts and circumstances of the particular case."[17] "Bound by *Watts*," the Missouri Supreme Court held that § 510.265's punitive damages cap "curtails the jury's determination of damages and, as a result, necessarily infringes on the right to a trial by jury when applied to a cause of action to which the right to jury trial attaches at common law."[18] "Because a party seeking punitive damages for fraud in 1820 would have had the right to have a jury try the issue of punitive damages, the statutory reduction of [the plaintiff's] punitive damages award against [the defendant] . . . was unconstitutional. "[19]

III. Implications of the Case

In making its ruling, the court rejected the reasoning of other state supreme courts. As Mark Behrens points out, "[t]his ruling is an extreme outlier. Virtually every other state that has considered the constitutionality of punitive damages caps has held that such laws do not violate the jury trial right because the jury's fact-finding function is preserved."[20] These states include Alaska, Kansas North Carolina, Ohio, Texas, and Virginia.

Unlike its recent *Watts* decision, which was split 4-3 with a swing vote, the Missouri Supreme Court reached an undivided decision in *Lewellen*. Although the composition of the *Watts* court differs from that of the *Lewellen* court, that difference does not explain the shift from a 4-3 split decision to a unanimous decision regarding statutory caps on damages.

For the *Watts* decision, Judge Zel Fischer recused himself for unknown reasons. How *Watts* would have come out had Judge Fischer not recused himself remains an open question. While his joining in the *Lewellen* majority may signal he would have voted with the *Watts* majority, it may also signal that *stare decisis* bound him to vote with the majority in *Lewellen*, regardless of how he would have voted in *Watts*.

Having invalidated statutory caps on both noneconomic damages (in *Watts*) and punitive damages (in *Lewellen*), the Missouri Supreme Court has called into question whether the Missouri Constitution permits *any* legislative attempt to reign in damage awards in common-law causes of action, despite public support for such tort-reform measures.

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Endnotes

1 Lewellen v. Franklin, No. SC 92871, 2014 Mo. LEXIS 211 (Mo. banc Sept. 9, 2014).

2 Mo. Rev. Stat. § 510.265.1 states: "No award of punitive damages against any defendant shall exceed the greater of: (1) Five hundred thousand dollars; or (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant."

3 376 S.W.3d 633 (Mo. banc 2012).

4 Lewellen, slip op. at 3-5.

5 *Id.* at 1.

6 *Id.* at 7. The plaintiff did not challenge the application of the punitive-damages cap to the punitive award on her MMPA claim ($539,050.00), likely because the Missouri Supreme Court previously held that § 510.265's cap on punitive damages was constitutionally valid as to MMPA claims. *See* Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC, 361 S.W.3d 364, 375-81 (Mo. banc 2012). In Estate of Overbey, the court reasoned that because MMPA claims did not exist in 1820 when the Missouri Constitution first provided a right to a jury trial, the MMPA damages cap did not diminish any rights existing at that time. *Id.*

7 *Lewellen*, slip op. at 7-8.

8 *Id.* at 8.

9 In *Watts*, the plaintiff alleged that the defendants' medical negligence caused brain injuries to a newborn, and the plaintiff received an award of $1,450,000.00 in noneconomic damages, which the trial court reduced pursuant to Mo. Rev. Stat. § 538.210's $350,000.00 cap on noneconomic damages. The *Watts* Court, in a split decision, held that the noneconomic-damages cap violated a plaintiff's right to a jury trial because a plaintiff had a cause of action for non-economic damages in medical negligence cases in 1820. *See Watts*, 376 S.W.3d at 640-41.

10 *Lewellen*, slip op. at 9 (*citing* Watts ex rel. v. Lester E. Cox Medical Centers, 376 S.W.3d 633, 638 (Mo. banc 2012)).

11 *Id.* at 10.

12 *Id.* at 11 (quoting *Watts*, 376 S.W.3d at 640).

13 *Id.* at 11.

14 *Id.* at 11 (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 409 (2003)).

15 *Id.* at 12.

16 *Id.* (quoting *State Farm*, 538 U.S. at 425).

17 *Id.* (emphasis added).

18 *Id.* at 13 (quoting *Watts*, 376 S.W.3d at 640).

19 *Id.*

20 Mark A. Behrens, *Missouri Supreme Court Invalidates State's Legislative Cap on Punitive Damages*, The Legal Pulse (Sept. 11, 2014), http://wlflegalpulse.com/2014/09/11/missouri-supreme-court-invalidates-states-legislative-cap-on-punitive-damages/

Minnesota Supreme Court Holds Municipality Cannont Revoke Right to Maintain an Existing Commercial Land Use

Continued from front cover...

extent permitted at common law. This is especially true with regard to existing and long-standing uses that are called into question by recently enacted zoning regimes.

These questions and policy concerns were addressed by the Minnesota Supreme Court in *White, Trustee for Lorraine M. White, Trust Fund, et. al. v. City of Elk River*.[1] The case concerned the right of the White family (the Family) to continue lawfully operating a commercial campground on their land—an ongoing use that had continued since they acquired their property in 1973.[2] The Respondent, City of Elk River (the City), argued that—pursuant to its local zoning regime—it had the power to revoke the Family's right to maintain their campground. But in December, the Minnesota Supreme Court definitively rejected the City's argument—holding that enactment of new zoning restrictions cannot take away the right to maintain an existing use, and that a newly adopted zoning regime cannot require a landowner to waive the right to continue with such uses.

By way of background, the City adopted its first zoning code in 1980. Prior to 1980, the permitted uses of the property would have been defined by common law principles and any state enacted regulations governing the operation and maintenance of campground facilities.[3] But with enactment of the City's new zoning code, only "agricultural" uses were permitted. As such, the campground was technically out-of-compliance under the 1980 code.

This might have arguably subjected the Family to a threat of legal sanctions if the City had sought to strictly enforce the zoning code.[4] Thus, in apparent recognition of this problem, the City amended its zoning code in 1983, so as to allow for commercial campgrounds. But, the amended code required the Family to obtain a "conditional use permit" in order to continue campground operations. Thereafter, in 1984, the Family applied for—and was granted—a conditional use permit. But the question that the Minnesota courts struggled with in *White Trust* was whether the Family's right to continue its campground operations was thereafter contingent upon the continued validity of the 1984 conditional use permit?

The dispute attracted the attention of several *amici*. In support of the Family, the Minnesota Vacation Rental Association and the National Federation of Independent Business Small Business Legal Center (MVRA and NFIB) filed an *amici* brief arguing that the Family's property rights should not be viewed as contingent upon the 1984 permit because such an approach would open the door for municipalities to coerce landowners into waiving protected common law rights in order to avoid the threat of enforcement actions.[5] The Minnesota League of Cities filed an *amicus* brief arguing that a municipality must be understood to have the power to revoke the right to maintain an existing use—if conditions imposed on a permit have been violated—because the threat of revocation serves as an effective enforcement tool that furthers public policy goals in discontinuing non-conforming uses.[6] The dispute came to a head in 2011 when the City Council voted to revoke the Family's right to continue their campground operations because they had failed to abide by conditions imposed on their 1984 permit. Specifically, the record indicates that the City was concerned about campers establishing permanent homes in the park. Accordingly, the 1984 permit was conditioned on the requirement that the campground must prohibit patrons from living on the premises year-round. Decades later, when the property came under scrutiny in 2010, it appeared that this condition had been violated.[7] The City then decided to revoke the 1984 permit after the Family failed to come into compliance within a reasonable timeframe.

With revocation, the City maintained that the Family could no longer operate its campground. But, this assumed that the Family's right to continue lawful operations was made contingent upon the 1984 permit at the time it was issued and accepted.[8] This raised an important question of the background principles of property law in Minnesota, which will affect the way municipalities approach land-use planning in the future. For this reason, the case was also important to landowners throughout the state.[9]

The Family and their *amici* relied on a line cases recognizing that the Minnesota Constitution protects the right of a landowner to continue with an existing use, so long as that use does not constitute a nuisance and is not discontinued.[10] This constitutional standard was codified under Minn. Stat. § 4623.357, subd. 1e (a), which protects "lawful non-conforming uses" until they are abandoned. Thus the Family and *amici* argued that the City never had the power to force the Family to acquire a permit to continue their on-going campground operations because the Family had a constitutional right to maintain the property's preexisting use once the zoning code came into effect. Henceforth, the Family maintained that the City lacked the power to revoke their right to continue lawful operations.

In response, the City argued that the Family voluntarily applied for the permit, so as to obtain its benefits.[11] As such, the City maintained that the Family waived any underlying property rights in accepting the 1984 permit and was therein foreclosed from contesting its validity today—having enjoyed its benefits for nearly thirty years.[12] But as MVRA and NFIB addressed in their *amici*, this argument runs into the doctrine of unconstitutional conditions doctrine, which generally holds that government cannot condition the receipt of discretionary benefits on the waiver of constitutional rights.[13]

The court might have been hesitant to call into question the power of a municipality to require landowners to obtain permits in order to continue lawful uses.[14] Indeed, a rule preventing municipalities from requiring grandfathered landowners to obtain conditional use permits would severely impede the ability of a municipality to regulate uses that have become disfavored over time. But, that is precisely what the Minnesota Supreme Court did in *White Trust*.

The opinion emphasized that constitutional principles—as well as enacted statutes—protect the right of Minnesota landowners to continue with a nonconforming use that was lawful at the time a new restriction came into effect.[15] Starting with that premise, the court recognized that the Family was under no obligation to discontinue their longstanding use when the City adopted its zoning restrictions in the 1980s. Turning then to the legal effect of the Family's acceptance of a conditional use permit in 1984, the court said that it could not be assumed that the Family waived its constitutionally protected property rights by accepting the permit.[16] This is because, under Minnesota law, a waiver of rights requires both (a) knowledge of the right and (b) an intent to waive it.[17]

In some respects the decision simply reaffirmed well established constitutional principles protecting grandfathered rights. But, this was a notable win for property rights because the decision stands for the proposition that a municipality may not force a landowner to waive constitutional rights by requiring the owner to obtain a permit for an existing use. This makes clear that the only legitimate way to enjoin an existing use would be to either bring a nuisance action, or an eminent domain proceeding through which the landowner will be compensated for the loss of grandfather rights.[18]

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Endnotes

1 840 N.W.2d 43, 49 (Minn. 2013).

2 The record indicates that the land had been used as a commercial campground before the family acquired the property. *Id*. 46-47.

3 The City noted that state regulations may call into question the legality the campground's operations even before the property was subjected to the 1980 zoning code; however, neither the record nor the briefing before the Supreme Court focus on this issue.

4 If this had happened, the Family might have argued that the campground was a protected grandfathered use. *See* Cnty. of Freeborn v. Claussen, 295 Minn. 96, 99 (1972); Hooper v. City of St. Paul, 353 N.W.2d 138, 140 (Minn.1984) (recognizing the "fundamental principle" that uses of land that are "lawfully existing at the time of an adverse zoning change may continue to exist until they are removed or otherwise discontinued").

5 White Trust v. City of Elk River, Amici Curiae Br. of the National Federation of Independent Business Small Business Legal Center and the Minnesota Vacation Rental Association, Case No. A120681 (2013). In the interest of full disclosure, I was the principal author of this brief.

6 White v. City of Elk River, Amicus Curiae Br. of the Minn. League of Cities, Case No. A120681 (2013).

7 This dispute arose after an essential structure on the property burned in a 1999 fire. The Family applied for a permit to rebuild this structure, and was granted an interim permit in 2010. Pursuant to the terms of the interim permit, the Family would have to apply for a new permit to continue using the newly constructive facility in 2010. And it was during the course of reviewing this new permit application, in 2010, that the City raised its concerns about year-round residents in the park. This eventually led the City Council to revoke the 1984 conditional use permit. *White*, 840 N.W.2d at 47-48.

8 The Family also asserts that—even assuming that the 1984 permit altered their rights—the campground became a lawful non-conforming use in 1988 when the City amended its zoning code so as to prohibit all campgrounds, without regard to previously issued permits. By statute, *lawful* non-conforming uses are protected in

Minnesota. MINN. STAT. § 4623.357, subd. 1e (a). But, the City contends that the campground only remained a "lawful" non-conforming use to the extent it remained in compliance with the 1984 permit—without which the City contends the campground would have been *illegal*. White v. City of Elk River, 822 N.W.2d 320, 324 (Minn. Ct. App. 2012), *review granted* (Jan. 15, 2013), *rev'd*, 840 N.W.2d 43 (Minn. 2013).Yet this seems to beg the question of what legal effect the 1984 permit had in the first place?

9 In addition to addressing the City's authority to revoke the Family's right to continue campground operations on their land, the Supreme Court also addressed the Family's asserted statutory right to rebuild and maintain an essential facility that burned in a 1999 fire. That issue—though an interesting question of land-use law as well—is beyond the scope of this article.

10 *See Hooper*, 353 N.W. 2d at 140; *Freeborn Cnty.*, 295 Minn. at 99.

11 The record is unclear as to whether the Family was prompted to do so at the behest of city officials.

12 The City argued that the Family was foreclosed from contesting the validity of the 1984 permit at this juncture because it failed to prosecute this argument in the lower court; however, the Supreme Court dismissed that argument because it was set forth in the Family's early pleadings. *White*, 840 N.W.2d at 50.

13 *See* Cnty. of Morrison v. Wheeler, 722 N.W. 329, 334 (Minn.App., 2006) (noting municipalities have broad discretion to make zoning decisions); *but see* Koontz v. St. Johns River Management Dist., 2013 WL 3184628, 7 (U.S., 2013) (applying heightened scrutiny where the exercise of constitutional rights are conditioned on the receipt of discretionary land use approvals).

14 *See White*, 822 N.W.2d at 325 (the court of appeal interpreted Minnesota law to allow for revocation of non-conforming uses in order further the legislative purposes in advancing the general welfare of the public).

15 *White*, 840 N.W.2d at 49.

16 *White*, 840 N.W.2d at 51.

17 The Court refused to accept the City's assertion that intent can be inferred by acquiescence to the City's requirement to obtain a permit. This makes sense because, as *amici* MVRA and NFIB pointed out, a landowner might accept such a permit to avoid the threat of enforcement actions without intent to actually waive any preexisting property rights.

18 *Id*. at 51 (also noting that it is possible for a landowner to freely waive property rights in entering an agreement with a land use authority).

Powers v. State of Wyoming: Separation of Powers and the Role of the Judiciary

Continued from page 4...

controlling language of the section, with the State arguing that the Wyoming Legislature may proscribe or remove duties at will, while Hill argued that the powers to generally supervise the public schools must have some limiting effect and that the duty could not be transferred to an appointee of the governor. Reviewing the section's language, the court's majority first compared it to provisions in other state constitutions as interpreted in their respective high courts. Specifically, these interpretations arose in cases from Arizona, Idaho, Minnesota, and New Mexico.[8] The majority also distinguished a case from North Dakota that the state relied upon in its arguments.[9] All of these cases supported Hill's contention that, "[w]hile the legislature can prescribe powers and duties of the superintendent, it cannot eliminate or transfer powers and duties to such an extent that the Superintendent no longer maintains the power of 'general supervision of the public schools.'"[10]

The majority also looked at constitutional history, specifically the minutes of the Wyoming constitutional convention. "The delegates envisioned that the scope of the Superintendent's duties would be statewide and would involve a broad array of concerns."[11] From there, the majority examined legislative history, or how the superintendent's duties had changed since 1889. Of particular importance was a law passed in 1917 that "transferred nearly all of the powers and duties of the Superintendent to a Commissioner of Education and the Board of Education."[12] After examination by the state attorney general, "[t]he legislation was repealed two years later amid concerns about its constitutionality."[13] The majority concluded that "[i]f legislative history is a relevant consideration in constitutional interpretation, it reflects legislative action consistent with our interpretation of the plain language of Article 7, Section 14 . . . ."[14]

After determining that the Wyoming Constitution reserves responsibilities to the superintendent, the court then considered whether SEA 1 violated this edict. In a cut-and-dry fashion, the majority said that SEA 1 is unconstitutional. "The 2013 Act relegates the Superintendent to the role of general observer with limited and discrete powers and duties."[15] With limited exceptions, SEA 1 stripped the superintendent of nearly all of her powers and duties under the law. "In the Act,

'director' is substituted for 'superintendent' in nearly every statutory provision in which the word 'superintendent' previously appeared."[16] In short, though SEA 1 made a nod to the Wyoming Constitution by claiming the superintendent would have general supervision of schools, the court concluded that "[t]he reservation of the power of 'general supervision' . . . is illusory."[17]

The dissent, nearly as long as the majority opinion,[18] largely relies on previous legislation to illustrate the varying nature of the superintendent's duties throughout the history of Wyoming and to conclude SEA 1 is constitutional.[19] Of particular concern to the two dissenting judges is the sweeping nature of the majority's ruling, and its impact on current and future educational efforts.[20] "If the legislature cannot validly transfer 68 duties from the superintendent to the director of education, can it constitutionally transfer 45 duties? Or can it only properly transfer two?"[21] The majority responds by reserving this question for another day: "The certified questions addressed to this Court involved the constitutionality of SEA [1], not the constitutionality of any other legislation or potential legislation."[22] Following the *Powers* decision, though the court overturned the law in its entirety the lower court ruled that five minor portions of the law assigning new duties to the superintendent were constitutional.[23]

The lynchpin of the *Powers* decision rests on separation of powers between the executive and legislative branch and also within the executive branch. Although the majority opinion in *Powers* alludes to the lynchpin of SEA 1's unconstitutionality, it is the short concurrence[24] by two of the three justices in the majority that emphasizes "the constitutional convention delegates' decision to fragment executive power[.]"[25] With five elected executives in Wyoming, and so much power already concentrated in the position of the governor, the entire structure of the executive branch in the Wyoming Constitution would be undermined if SEA 1 withstood the challenge. The majority may have upheld SEA 1 if it had simply removed numerous duties from the superintendent instead of reassigning them to the appointed director of education, which in fact placed them under the control of the governor.[26] Even then, respecting traditional separation of powers between the legislative and executive branch, the majority is clear that the superintendent must have some duties under the law.

"We must attempt to give meaning to all words and phrases so that no part [of the Wyoming Constitution] 'will be inoperative or superfluous.'"[27] *Powers v. State* is a lengthy decision that overturned an omnibus law. Its ruling is narrow yet far-reaching, and will likely be considered in not only future legislation regarding the responsibilities of the state superintendent but of the four other elected executive offices in Wyoming. The opinion may also provide valuable insight to other states with numerous elected executive offices and re-affirms that in our federalist system our state constitutions matter.

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Endnotes

1 http://legisweb.state.wy.us/2013/Enroll/SF0104.pdf; *see also* http://legisweb.state.wy.us/2013/Digest/SF0104.htm

2 *See generally* SEA 1.

3 *Wyoming Gov. Mead signs superintendent bill into law; Hill sues*, Casper Star Trib., Jan. 29, 2013, *available at* http://trib.com/news/state-and-regional/govt-and-politics/wyoming-gov-mead-signs-superintendent-bill-into-law-hill-sues/article_82f29db5-e566-504a-b70a-7fcfe7f60b94.html.

4 Powers v. State of Wyoming, 318 P.3d 300 (Wyo. 2014). Hill sued along with Wyoming residents Kerry and Clara Powers.

5 *Id.* at 302.

6 *Id.* at 302–03.

7 Wyo. Const. art. 7, § 14.

8 *Id.* at 308–10.

9 *Id.* at 311–12.

10 *Id.* at 313.

11 *Id.* at 316.

12 *Id.* at 317.

13 *Id.* at 318.

14 *Id.* at 319.

15 *Id.* at 321.

16 *Id.* at 320.

17 *Id.* at 320.

18 *Id.* at. 326–51.

19 *Id.* at 332–342.

20 *Id.* at 350.

21 *Id.*

22 *Id.* at 323.

23 Ben Neary, *Judge's order: Most of Hill bill is unconstitutional*, Casper Star Trib., Apr. 18, 2014, *available at* http://trib.com/news/state-and-regional/judge-s-order-most-of-hill-bill-is-unconstitutional/article_a3a0de9f-b9b0-5d7b-bdc4-539eca6c7c66.html.

24 *Powers*, 318 P.3d at 323–36.

25 *Id.* at 325.

26 This scenario is unlikely, however, as it would have probably entailed eliminating the state department of education, an action that might implicate other provisions of the Wyoming Constitution. *See generally* Wyo. Const. art. 7.

27 *Powers*, 318 P.3d at 313 (citing Geringer v. Bebout, 10 P.3d 514, 520 (Wyo. 2000)).

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