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Product Liability Greatly Expanded in Wisconsin

On July 15, the Wisconsin Supreme Court significantly expanded the potential liability of product manufacturers sued in Wisconsin's courts. The controversial 4-2 ruling, rendered in a case against companies and alleged successors that long ago made lead pigment used in house paint, has drawn strong criticism from business groups inside and outside Wisconsin. *Thomas v. Mallett*, 2005 WI 129 (2005)

The seeds of the July 15 Wisconsin Supreme Court opinion were sown two decades ago. Traditionally, in the product liability context, a product manufacturer can be held responsible only for harm that its products cause, not harm from products manufactured by others.

In the mid-1980s, a handful of states' courts, including the Wisconsin Supreme Court, relaxed this "manufacturer identification" requirement for one type of case — personal injury cases against drug companies that made diethylstilbestrol ("DES"). DES is a drug taken by women to prevent miscarriage. It causes a rare form of cancer in daughters exposed to it in utero. In the DES cases, the plaintiffs could not prove who produced the drug their mothers ingested. The various drug companies made identical products, which they marketed generically. The drug created a unique or "signature" injury readily identified as having been caused by DES exposure, and the period of exposure was clear — the nine months of pregnancy. Under these facts, a handful of states' highest courts, including the Wisconsin Supreme Court, held that a plaintiff could proceed against DES manufacturers under a "collective liability" theory without having to show which company's product caused her harm. In most states, the plaintiff was permitted to sue companies composing a significant percentage of the market at the time of exposure, and each defendant could be held liable only for its market share at that time. In Wisconsin, the supreme court adopted a unique, aggressive "risk contribution" theory, which permitted the plaintiff to sue only one company and to recover 100 percent of her damages from that company — without any proof that the company's product caused her harm.

In *Thomas*, the court expanded the "risk-contribution" theory of liability, applying it to former manufacturers of lead pigment used in house paint. By way of background, the sale of lead-based paint for consumer uses has been banned since the 1970s. Most interior lead paint was applied before the 1930s. The paint companies put various types and amounts of lead pigment in paint. Most old houses have numerous layers of lead and nonlead paint on them. It is

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Recent Gay Marriage Rulings

By John Shu

Gay marriage litigation continues to occur in various forms among the several states. In the first half of 2005, state courts in New York, California and Oregon decided controversial gay marriage related cases on the basis of their respective state constitutions and laws. This article, the first in a series, will update, overview and summarize those cases.

I. New York: *Hernandes, et al. v. Robles*

On February 5, 2005, Justice Doris Ling-Cohan of the Supreme Court of New York, the trial court, held that certain provisions of New York's Domestic Relations Law ("DRL") violated the New York State Constitution's Due Process and Equal Protection clauses. This case involved five same-sex couples in New York City who sued Victor Robles in his official capacity as City Clerk of the City of New York and administrator of the New York City Marriage License Bureau. The DRL does not specifically ban or allow gay marriage, but refers to "husband," "wife," "bride," and "groom." New York interpreted the law as not allowing gay marriage.[1] The plaintiffs sought declaratory relief and an injunction requiring Robles to grant each of the couples a marriage license. The plaintiffs won on summary judgment. The court wrote that the defendant failed to "dispute the ma-

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MONTOY V. *KANSAS*: AN UPDATE

*By Megan Brown**

A recent issue of *State Court Docket Watch* profiled an education finance case pending in the state of Kansas implicating important separation of powers principles. This case has since been decided by the Supreme Court of Kansas, with the issuance of a preliminary opinion, to be followed by a full opinion at a later date. In its decision, the Supreme Court affirmed part of a lower court decision finding the state legislature had not made suitable provision for education in the state. This case is one of many in which state courts are called upon to evaluate the adequacy of educational achievement and funding, and is representative of a muscular judicial branch that does not shy away from the political fray. This decision indicates state courts are willing, perhaps increasingly, to intervene in critical public policy decisions made by state legislatures about the allocation of public funds to varying state priorities.

Background

In 1999, two school districts and approximately three dozen students filed suit in the District Court of Shawnee County, Kansas, alleging the financing system established by the state legislature does not meet the Kansas Constitution's requirement that the legislature "make suitable provision for finance of the educational interests of the state," Art. 6, § 6(b), that it runs afoul of plaintiffs' equal rights under the Kansas Bill of Rights, § 1, and violates their substantive due process rights.

The plaintiffs challenged various elements of Kansas' financing system, which, pursuant to the School District Finance and Quality Performance Act ("SDFQPA"), establishes a base rate for the minimum level of revenue a district will receive per pupil. The base rate set by the state is adjusted based on "weights" for various district and student characteristics deemed by the legislature to justify different funding levels. Examples of "weights" at issue in the case include adjustments for declining enrollment, new facility start-up costs, transportation, as well as the prevalence of students enrolled in vocational, bilingual and at-risk education programs. In addition to the "weights" that adjust per pupil revenues, the state allows districts to adopt a local option budget ("LOB") to supplement their spending through an additional tax levy. This LOB is capped and districts raising too little funds per pupil statewide receive state supplemental aid. Finally, Kansas law authorizes, but does not require, school districts to assess property taxes that are separate from state funding mechanisms for certain capital expenditures.

Plaintiffs alleged that these mechanisms resulted in unconstitutional disparities in educational expenditures per pupil between districts, and that the overall state level of funding failed to provide an adequate or suitable education for certain groups of students. The state defended the system by arguing that each category and weight was rationally related to a legitimate government purpose. The state conceded that the weights are not necessarily based on the actual costs attendant to any one particular student or district, but rather are based on legislative determinations about general characteristics and the different funding necessitated by those characteristics. The state further told the court that the LOB and local property tax mechanisms enacted by the state legislature promote the state's legitimate interest in fostering local control over various aspects of education.

The Trial Court's Decision

On September 8, 2003, Judge Terry Bullock issued a pretrial Memorandum Decision and Order laying out a series of legal conclusions that would frame the court's analysis of the plaintiffs' challenge after trial. *See Montoy v. State*, 2003 WL 23171455 (Kan. Dist. Ct., Sept 8. 2003) ("Pre-trial Order"). The Court elucidated standards for both prongs of the plaintiffs' constitutional challenge to the school finance system: (1) equity, and (2) suitability.

Critical to the equity analysis was the allocation of the burden under rational basis review. The court acknowledged that rational basis scrutiny applied to per pupil spending discrepancies, but found that that standard had been refined

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FROM THE EDITORS…

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents this second 2005 issue of *State Court Docket Watch*. This newsletter is one component of the Society's State Courts Project. *Docket Watch* presents original research on state court jurisprudence, illustrating new trends and ground-breaking decisions in the state courts. The articles and opinions reported here 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 assiduously tracking state court jurisprudential trends.

The October 2005 issue presents several case studies, including a Wisconsin Supreme Court case that greatly expanded product liability for manufacturers, an Ohio Supreme Court Case with important implications for class actions, and a South Carolina Supreme Court case in which the court limited the state's venue laws and curtailed the ability of plaintiffs to selectively file claims. This issue also features an update on an education financing case from Kansas, which we profiled in an earlier issue. Finally, an in-depth look at a flurry of state court litigation involving an issue that commands nationwide interest: gay marriage.

Mass Torts in Mississippi

*By Paige Jones and Terry Williamson**

Introduction

The landscape for the litigation of mass tort claims in Mississippi has undergone a substantial shift. Nowhere is this shift better illustrated than in the removal of all Mississippi venues from the infamous "Judicial Hellholes" annual list compiled by the American Tort Reform Association. Although tort reform by the state legislature has gotten most of the attention, action by the Mississippi Supreme Court has had a much greater effect.

The shift began with a major tremor, *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004), and amendments to Rule 20 of the Mississippi Rules of Civil Procedure, Mississippi's rule on joinder of parties in one lawsuit. The *Armond* decision and the amendments to Rule 20 were the first actions by the Mississippi Supreme Court to limit "mass actions" that were seen by some to be a threat to products liability litigation.

The Mississippi Supreme Court clarified that its recent line of decisions on joinder that began with *Armond* also applied to asbestos products liability cases in *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004). The Mississippi Supreme Court there sent its strongest signal to date that it intends to continue to limit "mass tort" actions. In addition to its holding that the joinder requirements of *Armond* applied in asbestos products liability cases, the court repudiated the manner in which "mass tort" complaints in Mississippi had been commonly pleaded.

In a recent "mass tort" ruling, the Mississippi Supreme Court reversed the $150 million verdict awarded by a Holmes County, Mississippi jury to six plaintiffs in an asbestos products liability case. *See 3M Company v. Johnson*, No. 2002-CA-01651-SCT (Miss. Jan. 20, 2005). The court reversed the verdict and rendered judgment for the sole remaining solvent defendant, 3M, which plaintiffs alleged had manufactured defective respiratory protection masks. With the decision in *3M Company v. Johnson*, the court required plaintiffs to not only plead their case in accordance with procedures, but also to prove injury caused by a defective product. The court found the six plaintiffs had proven neither defect nor causation. From *Armond* to *3M Company,* the judicial landscape of Mississippi has been significantly altered.

Background

One of the first asbestos products liability cases with connections to Mississippi appears to have been *Jackson v. Johns-Manville,* filed in 1978, and eventually considered on appeal by the United States Court of Appeals for the Fifth Circuit. *See Jackson v. Johns-Manville*, 727 F.2d 506 (5th Cir. 1984). Because the Fifth Circuit reversed the jury's award of punitive damages, plaintiffs' attorneys decided to bring future claims in state court. However, they needed some vehicle to aggregate the claims of the thousands of plaintiffs. Mississippi lacks an analog to Rule 23 of the Federal Rules of Civil Procedure, which provides for class actions, though there was limited authority for class representation in chancery court, Mississippi's equity court. *See generally Barrett v. Coullett*, 263 So. 2d 764 (Miss. 1972) (recognizing a class representation concept, but declining to allow a class action on behalf of dissatisfied viewers of closed-circuit television coverage of the first Frazier-Ali fight). What evolved as a substitute for class actions rapidly grew in size and scope, joining hundreds and even thousands of

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Recent Developments in Ohio Class Action Litigation

*By William T. Kamb**

In *Wilson v. Brush Wellman, Inc.* (2004), 103 Ohio St.3d 538, 817 N.E.2d 59, the Supreme Court of Ohio recently held that class certification was improper in an action seeking to establish a medical-monitoring fund for workers who were exposed to toxic fumes at an industrial plant near Elmore, Ohio. The court held that the complaint primarily sought damages, rather than injunctive relief as required by Civil Rule 23(B)(2), and as a matter of first impression for the court, the class certification failed for lack of cohesiveness.

Background

Plaintiffs were members of unions within the Northwestern Ohio Building and Construction Trades Council. The plaintiffs were each employed by contractors at the defendant Brush Wellman's Elmore plant at various times spanning five decades. The Elmore plant produced beryllium alloy for use in industrial applications. Plaintiffs alleged that they were exposed to beryllium dust and fumes that were generated by manufacturing the alloy. Beryllium exposure can cause a lung ailment called chronic beryllium disease and other ailments. Like asbestosis, some individuals may never show symptoms or develop any disease, while others can have serious impairments or even die as a result of their exposure.

On February 14, 2000, John Wilson and six other union members filed a claim against defendant Brush Wellman, Inc., alleging negligence, strict liability in tort, statutory product liability, and engagement in ultra-hazardous activities. Specifically within the negligence claim, plaintiffs alleged that Brush Wellman had failed to properly control and contain the beryllium, failed to train plaintiffs and proposed class members, failed to provide a safe place of employment, failed to monitor working conditions, and failed to warn plaintiffs and proposed class members of the dangers of beryllium. The complaint sought a medical-screening program to detect beryllium sensitivity as well as punitive damages.

Plaintiffs moved the trial court to certify a class that would include all Northwestern Ohio Building and Construction Trades Council union members who worked at the Elmore plant from 1953 through December 31, 1999. After a hearing, the trial court held that although the proposed class had met the prerequisites for certification under Civil Rule 23(A), it

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VENUE LAWS IN SOUTH CAROLINA

Over the past several decades, the venue laws of the State of South Carolina have been interpreted broadly. Accusations arose that plaintiffs, both residents and non-residents of the state, were able to selectively file claims in counties based upon a county's plaintiff-friendly reputation, such as Hampton County. Hampton County has a reputation of being so favorable to plaintiffs that companies such as Wal-Mart recently sold the only property it owned in the county to avoid being subject to suit there. On February 2, 2005, however, amid debate on a statutory change that sought to correct the perception that forum shopping was available in South Carolina, the South Carolina Supreme Court took the first step toward a narrower interpretation of even the existing statute.[1]

In *Whaley v. CSX Transportation, Inc.,* Op. No. 25953 (Feb. 2, 2005, S.C.), the plaintiff suffered illness or injury while working for CSX Transportation, Inc. ("CSX"). Mr. Whaley lived and worked out of an area in the upper portion of the state and operated a train route from Greenwood to Laurens. It was while operating on this route that Mr. Whaley became disoriented and began suffering a number of symptoms of illness. He has since that time been limited in his physical activities. Whaley filed a complaint against CSX in Hampton County, South Carolina. Despite the plaintiff's residence in another county some distance from Hampton and despite the fact that the plaintiff had suffered the injury/illness in this distant county, Whaley chose Hampton County as the venue for his suit. CSX moved for a change of venue, which was denied by the trial court. Ultimately, the Hampton County jury awarded Whaley a verdict in the amount of $1,000,000. CSX filed post-trial motions on a number of issues, including venue. These motions were denied. CSX appealed.

The trial court relied on prior South Carolina Supreme Court cases interpreting what the venue statute meant when it required suit to be filed against a foreign corporation, such as CSX, in the county in which it resides.

The earliest decisions interpreting the venue statute's residency requirement determined that foreign corporations resided in any county in which they had an office and agent for the transaction of business. However, in 1941, the state's supreme court reevaluated its position on venue for domestic corporations and broadened the definition of venue for those companies to include any county where the corporation owns property and transacts business. It based this expansion of venue not on the venue statute but rather on a statute that addressed service of process on such domestic corporations. Six years later the court did not apply this expansion to foreign corporations, but in 1964 the statute concerning service of process and jurisdiction upon which the court had relied in expanding venue appropriate for suits against domestic corporations was amended to include provision for service of process and jurisdiction as to foreign corporations. Now that the service statute included both types of corporations the court was prepared to apply the same expansive understanding of venue to both foreign and domestic corporations and did so in *Lott v. Claussens, Inc.*, 251 S.C. 478, 163 S.E.2d 615 (1968). The court affirmed this interpretation again in 1980 in the cases that have since been relied upon by courts such as the trial court in the *Whaley* case to permit cases against corporate defendants in any county in which they owned property and transacted business regardless whether the corporation maintained an office or agent in that county. *In re Asbestosis Case*s, 274 S.C. 421, 266 S.E.2d 773 (1980).

Soon after the *In re Asbestosis Cases* decision, however, the legislature amended the service statute, omitting the phrase "own property and transact business" from that provision. In addition, the revised version of this statute again dealt only with domestic corporations, the provision for service on a foreign corporation being moved to an entirely different section of the South Carolina Code. Though the statutory language on which the "owns property and transacts business" test relied no longer existed, courts continued to apply this test to determine venue issues. The South Carolina Supreme Court put an end to that test.

In doing so the South Carolina Supreme Court first concluded that the test was improperly created by the court in the first place, having relied on a statute that addressed a completely different concept – service of process and jurisdiction. The court observed that a court may have personal jurisdiction over a party without venue being proper in that court. The court went on to explain that even if at its creation the "owns property and transacts business" test had been proper, statutory changes to the provision upon which it was based necessitated its abolishment. Thus, finally, after decades of alleged forum shopping in the state, venue is only proper over a corporate defendant where that defendant resides; and such defendants reside only where (1) it maintains its principal place of business or (2) it maintains an office and agent for the transaction of business.

Prior to this recent decision, it was believed that corporate defendants, most notably CSX, which had railroad tracks that ran through Hampton County and had thus been deemed to own property and transact business in that forum, could be subject to suit in counties such as Hampton regardless of whether the accident or parties had any real connection with that location. The recent decision of the South Carolina Supreme Court has made venue law interpretation significantly more rigorous in that State.

Footnotes

[1] A number of tort reform measures, to include changes to the venue statute, are expected to be passed by the South Carolina General Assembly this session.

impossible to determine whose lead pigment is on the walls of any house. Further, the cause of risks from lead paint today is clear — property owners who fail to properly maintain their properties and thereby create lead paint risks for young children. In Wisconsin, landlords are required by law to address lead hazards. Given these facts, every federal court and state high court that has ruled on collective liability in lead pigment cases has rejected it. The Pennsylvania Supreme Court said, "Application of market share liability to lead paint cases . . . would lead to a distortion of liability which would be so gross as to make determinations of culpability arbitrary and unfair." *Skipworth v. Lead Industries Ass'n*, 690 A.2d 169, 172 (Pa. 1997).

In *Thomas*, the 4-2 majority (with one Justice not participating) adopted a theory never seen before in any state or federal court. According to a dissent by Justice Jon P. Wilcox, the opinion "…[w]ill ensnare numerous defendants and have drastic consequences for firms doing business in Wisconsin."[1] The opinion will have a "profound effect" on products liability law, he added: "Under the majority opinion, plaintiffs will be encouraged to sue entire industries rather than locate the defendant that manufactured the product that caused the injury."[2]

In another dissent, Justice David T. Prosser said the majority opinion "raises the very real possibility that innocent defendants will be held liable for wrongs they did not commit"[3] since "the plaintiff need not show the evidence that is normally most critical in tort cases: that the defendant's product injured the plaintiff."[4]

Thomas Case Background

The Wisconsin lead pigment case involved a plaintiff and a product separated by as much as 90 years between the date of manufacture and the date of alleged injury.

The plaintiff in *Thomas* alleged that he was injured by lead paint dust he ingested as a young child during the 1990s. The plaintiff lived in two different Milwaukee rental houses, one built in 1900 and the other in 1905, when the use of lead paint was common.

Earlier in the case, Thomas had settled for a total of about $325,000 from the insurers of the two landlords at issue, settling with one without suing and suing the other claiming that he had negligently maintained the lead paint in the home. The remaining defendants were former manufacturers of lead pigment used in paint or their alleged successors.

At issue was whether to extend the "risk-contribution" theory of *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (1984) beyond the unique situation involving DES.

Defendants in the lead pigment case said *Collins* should not be applied because it was factually dissimilar — lead pigment varied significantly from manufacturer to manufacturer and paint companies, not pigment companies, decided which pigment and how much to put in paint; it does not cause a signature injury, i.e., there are many sources of lead and many factors other than lead exposure that can cause the type of cognitive difficulties claimed by the plaintiff. The lead in the homes at issue could have been applied over nearly 100 years. The defendants would be unable to show that they did not make any lead on any of the walls. Finally, the defendants said that this radical expansion of *Collins* was not necessary — the defendant had recovered from the proper parties: the landlords who failed to comply with their statutory duty to address lead hazards in their buildings.

During the 20 years after the *Collins* case, neither the Wisconsin court nor any other court, had extended the Wisconsin "risk contribution" theory to products other than DES. The *Thomas* plaintiff's efforts to extend risk contribution to former lead pigment producers had been unsuccessful in the lower courts. The trial court concluded that the plaintiff's situation was not analogous to DES because, among other reasons, Thomas had another avenue to collect damages through the landlords, who, according to Wisconsin state law, are responsible for maintaining lead paint. The court of appeals affirmed, writing:

> Here, unlike the situation in *Collins*, Thomas had 'an already existing right'—a remedy for his injuries; as noted, he filed and then settled an action against the owner of one of the houses, and settled his claims against the other owner without filing suit. …Although undoubtedly Thomas would like to have additional 'deep pockets' to plumb, on top of the approximately $325,000 he received in settlement from both owners, he is not entitled to the 'exact remedy' he might prefer.[5]

The supreme court case drew *amicus* briefs from numerous organizations in opposition to applying the risk contribution theory to lead pigment. One brief, from the Product Liability Advisory Council, noted that industry-wide non-identification liability, as advocated by the plaintiff, had been rejected in cases involving a wide range of other products such as multi-piece wheels, vaccines, pipe, latex gloves, wire, insulation, batteries, perfume, fish, blood products, roofing materials, tape, dye and clothes.[6]

The negative effect on the Wisconsin business community of applying risk contribution theory to lead pigment was addressed in *amicus* briefs submitted by the Wisconsin Manufacturers and Commerce, and jointly by the African-American Chamber of Commerce and the Hispanic Chamber of Commerce of Wisconsin. The latter brief noted that the theory, if applied, "would have a direct and serious impact on the minority business community."[7]

Wisconsin Supreme Court Opinion

In its 4-2 ruling, the Wisconsin Supreme Court held: "Although this case is not identical to *Collins*, we conclude that it is factually similar such that the risk-contribution theory applies."[8] It found, for example, that "fungibility" did not require chemical identity. It said that

lead pigment and DES are both "in a sense on the same footing as being inherently hazardous."[9] (The court also upheld the dismissal of civil conspiracy and enterprise liability claims against the companies.)

The supreme court said that former pigment manufacturers were culpable for, at a minimum, contributing to creating a risk of injury to the public. The court added:

> …[a]s compared to Thomas, the Pigment Manufacturers are in a better position to absorb the cost of the injury. They can insure themselves against liability, absorb the damage award, or pass the cost along to the consuming public as a cost of doing business.[10]

The court then outlined five elements that the plaintiff will have to prove to apply the risk-contribution theory to Thomas's strict products liability claim: (1) white lead pigment was defective when it left the possession or control of the pigment manufacturers; (2) it was unreasonably dangerous to the user or consumer; (3) the defect was a cause of the plaintiff's injuries or damages; (4) the former pigment manufacturers engaged in the business of producing or marketing white lead carbonate; and (5) the product was "one which the company expected to reach the user or consumer without substantial change in the condition it was when sold."[11] The court added:

> The procedure is not perfect and could result in drawing in some defendants who are actually innocent, particularly given the significantly larger time span at issue in this particular case. However, *Collins* declared that 'we accept this as the price the defendants, and perhaps ultimately society, must pay to provide the plaintiff an adequate remedy under the law.[12]

Wisconsin law states that property owners are responsible for maintaining lead paint, not the former manufacturers of lead pigment, which lost control of their product once it left the factory decades ago. Chipping, flaking and peeling paint occurs when it is not properly maintained, and property owners have the responsibility of performing that maintenance. Despite the prevailing law in the state, the court said that "whoever had 'exclusive' control over the white lead carbonate is immaterial."[13]

Dissenters said the new standards would have a significant effect not only on lead paint cases, but on products liability cases broadly. Justice Jon P. Wilcox wrote that the opinion was an "unprecedented relaxation of the traditional rules governing tort liability."[14] With the expansion of the *Collins* risk-contribution theory to the *Thomas* case, plaintiffs "can now sue the entire raw material industry and place the burden on each individual defendant to disprove their presumptive liability,"[15] he said.

In another dissent, Justice David T. Prosser said:

> The white lead carbonate at issue may have been produced as much as 100 years ago. It is almost impossible to defend against alleged negligence that no living person can remember….The recent negligence of a landlord in allowing the paint to deteriorate seems greater than the negligence of the manufacturer of one of the raw materials used to make the paint perhaps a half century ago.[16]

Prosser added that "Wisconsin will be the mecca for lead paint suits….[T]his court has now created a remedy for lead paint poisoning so sweeping and draconian that it will be nearly impossible for paint companies to defend themselves, or, frankly, for plaintiffs to lose."[17]

Footnotes

[1] Thomas v. Mallett, 2005 WI 129, Wilcox dissent, page 45, paragraph 257.
[2] *Ibid.*
[3] Thomas v. Mallett, 2005 WI 129, Prosser dissent, page 12, paragraph 297.
[4] *Ibid.*, page 9, paragraph 291.
[5] Thomas v. Mallett, 275 Wis. 2d 377, Paragraph 7.
[6] Amicus Curiae Brief of Product Liability Advisory Council, Page 8.
[7] Amicus Curiae Brief of African-American Chamber of Commerce, Inc. and Hispanic Chamber of Commerce of Wisconsin, Inc., Page 6.
[8] Thomas v. Mallett, 2005 WI 129, Majority opinion, Page 70, Paragraph 131.
[9] *Ibid.*, Page 75, Paragraph 140.
[10] *Ibid.*, Page 72, Paragraph 136.
[11] *Ibid.*, Page 85, Paragraph 162.
[12] *Ibid.*, Page 87, Paragraph 164.
[13] *Ibid.*, Page 84, Paragraph 160.
[14] Thomas v. Mallett, 2005 WI 129, Wilcox dissent, Page 1, Paragraph 178.
[15] *Ibid.*, Page 46, Paragraph 259.
[16] Thomas v. Mallett, 2005 WI 129, Prosser dissent, Page 16, Paragraphs 308 and 309.
[17] *Ibid.*, Page 2, Paragraph 268.

terial facts set out by plaintiffs in their motion for summary judgment," and "[s]ince both sides agree that there are no material facts in dispute, summary judgment is appropriate."

The court ordered that (1) with respect to the DRL, the words "husband," "wife," "groom," and "bride" be construed to mean "spouse;" (2) with respect to the DRL, all personal pronouns apply equally to men or women; (3) the defendant be permanently enjoined from denying a marriage license solely on the ground that the applicants are a same-sex couple; and (4) stayed its own order pending appeal.

DUE PROCESS

Article 1, § 6 of New York's State Constitution provides, in pertinent part, that "[n]o person shall be deprived of life, liberty or property without due process of law." The court noted that the protections of New York's Constitution "extend beyond those found in the Federal Constitution." In analyzing the "fundamental right to marry," the court applied the "strict scrutiny" test, where the government bears the burden of showing that (1) it has a compelling interest which justifies the challenged law and (2) the distinctions drawn by the law are necessary to further its purpose. The court described this right as "the right to choose whom one marries" which "resides with the individual," thus falling "squarely within the contours of the right to privacy."

The city argued two interests: (1) fostering the traditional institution of marriage, and (2) avoiding the problems that might arise from other jurisdictions refusing to recognize the validity of same-sex marriages.

Tradition

The court formulated the question as whether the plaintiffs had a fundamental right to marriage, not whether they had a fundamental right to gay marriage. The court reasoned that the proper right was the right to marriage because defining marriage as the union between a man and a woman was "factually wrong." As an example, the court, citing the Books of Genesis and Deuteronomy, stated that "polygamy has been practiced in various places and at various times" though in the modern day it is outlawed nationwide.

The court found that tradition was not a sufficiently compelling state interest, pointing out that tradition was previously rejected as a reason to uphold slavery, anti-miscegenation laws, segregation, sodomy bans, divorce restrictions, the "marital rape exception," and "coverture," the ancient legal doctrine that suspends a wife's legal existence or folds it into her husband's.

As Justice Scalia feared in his *Lawrence v. Texas* dissent, 539 U.S. 558, 590, 604-05 (2003) (Scalia, J., dissenting), Justice Ling-Cohan leaned heavily on *Lawrence* to support her ruling. In an ironic twist, she also cited from Justice Scalia's dissenting opinion and *Romer v. Evans*, 517 U.S. 620 (1996) to support her finding that moral disapproval of same-sex couples or of individual homosexuals is not a legitimate state purpose or a rational reason for depriving plaintiffs of their right to choose their spouse." Justice Ling-Cohan went on to say that

> ...[t]here has been a steady evolution of the institution of marriage throughout history which belies the concept of a static traditional definition. Marriage, as it is understood today, is both a partnership of two loving equals who choose to commit themselves to each other and a State institution designed to promote stability for the couple and their children. The relationships of plaintiffs fit within this definition of marriage.

Justice Ling-Cohan also drew direct correlations between forbidding gay marriage and forbidding interracial marriage, leaning heavily on *Perez v. Sharp*, 32 Cal. 2d 711 (1948), which struck down California's anti-miscegenation law, and *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down anti-miscegenation laws nationwide. She stated that "[t]he challenges to laws banning whites and non-whites from marriage demonstrate that the fundamental right to marry the person of one's choice may not be denied based on longstanding and deeply held traditional beliefs about appropriate martial partners."

Part of New York's "tradition" argument was that marriage and procreation were traditionally linked, and that the government could deny marriage licenses to same-sex couples because it had a compelling interest to maintain procreation within the structure of marriage.

The court rejected this argument, noting that (1) the DRL does not bar women who are unable to bear to children from marrying, (2) same-sex couples are having biological children through artificial insemination or surrogate mothers, (3) New York law forbids denying adoption applications on the basis of an applicant's sexual orientation, and (4) same-sex couples may adopt jointly. The court noted that neither the defendant nor amici indicated how permitting same-sex couples to marry would either diminish the central role of marriage in human life, or adversely affect the marriages of opposite-sex couples.

Criticizing the Defense of Marriage Act ("DOMA")

The court summarily dismissed New York's second argument that it could deny gay marriage because other states and the federal government did not recognize gay marriage, describing the argument as "irrational and perverse." The court, however, specifically pointed out that the federal and various state DOMAs "may be vulnerable to legal challenge,"stating that "it is not clear on what authority Congress, let alone States, can suspend or abrogate the Full Faith and Credit Clause of the United States Constitution."

EQUAL PROTECTION

Article 1, § 11 of New York's State Constitution provides, in pertinent part, that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." The court held that the DRL discriminated against

the plaintiffs on the basis of their sexual orientation. The court did not raise sexual orientation to a heightened level of scrutiny, but, based on its due process analysis, summarily dismissed New York's reasons as not even passing the "rational basis" test, where legislative classifications are presumptively valid and upheld so long as the challenging party cannot show an absence of a rational relationship between the disparate treatment and some legitimate governmental purpose or state interest.

Legislative Analysis

Justice Ling-Cohan opined that the DRL should be read to permit same-sex marriage because New York statutorily protects gays in non-marriage contexts. For example, same-sex couples in New York may adopt children and even be considered a "family" for rent control purposes. Interestingly, the court noted that New York's Sexual Orientation Non-Discrimination Act ("SONDA") should be read as supporting gay marriage, despite acknowledging that SONDA explicitly states that it is "not to be construed to require or prohibit marriage rights for same-sex couples."

The court, citing *Loving*, summarily rejected the defendant's argument that the question of gay marriage should be answered by the legislature, rather than by the courts. The court stated that the "role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality either on their face, or as applied in accordance with their provisions." The court also summarily rejected civil unions as a possible remedy, stating that the plaintiffs sought the relief of marriage, not something marriage-like.

Current Status

New York's high court, the Court of Appeals, declined New York's request to bypass the Appellate Division and hear the case directly. As of this writing no decision has come out of the Appellate Division.

II. California: *Marriage Cases*

On March 14, 2005, Judge Richard Kramer of the San Francisco County Superior Court found unconstitutional California Family Code § 300, which provides that marriage "is a personal relation arising out of a civil contract between a man and a woman," and California Family Code § 308.5, formerly known as Proposition 22, which provides that "only marriage between a man and a woman is valid or recognized in California."

The court consolidated six cases from San Francisco and Los Angeles and held that the Family Code sections were unconstitutional under the Equal Protection and Privacy provisions of Article I of the California State Constitution. The court resolved the case on Equal Protection grounds alone, applying the "strict scrutiny" test based on gender. The court further found that the laws also failed the "rational basis" test.

Gender Discrimination

The court held that California's prohibition on gay marriage unconstitutionally discriminated on the basis of gender because (1) while men could marry women and vice versa, men could not marry men and women could not marry women, (2) it created improper same-gender versus opposite-gender classifications, and (3) the gender of the intended spouse was the sole determining factor. California argued that its same-sex marriage prohibition applied equally to males and females, and thus neither gender is segregated for discriminatory treatment. The court rejected this "gender neutral" argument, directly comparing it with the "race neutral" arguments used to support anti-miscegenation laws which were rejected in California and nationwide by the landmark cases *Perez v. Sharp*, 32 Cal. 2d 711 (1948) and *Loving v. Virginia*, 388 U.S. 1 (1967), respectively. Importantly and in contrast with Justice Ling-Cohan's decision, Judge Kramer did not analyze whether the Family Code sections discriminated on the basis of sexual orientation.

Fundamental Right to Marry

California argued that the fundamental right to marry, implying heterosexual marriage, is different from the fundamental right to homosexual marriage, which never existed in California. The state further argued that the right to marry is defined in terms of who may marry, or else a slippery-slope will open for forbidden marriages such as incest. The court quickly rejected these arguments, stating that the freedom to chose whom to marry may only be limited when there is a "legitimate governmental reason for doing so" and that prohibitions against incestuous marriages "further an important social objective by reasonable means and do not discriminate based on arbitrary classifications."

Rational Basis

The court rejected the state's three main arguments: the "tradition" argument, the "same rights but not marriage" argument, and the "procreation" argument, finding that none of them passed rational basis review. With respect to "tradition," California in essence argued that the challenged laws should be upheld because male-female marriage is deeply rooted in California's history, culture and tradition; therefore the courts should not redefine marriage to be what it has never been in the past. The court rejected this argument, stating that "same-sex marriage cannot be prohibited solely because California has always done so before." The court noted that California was the pioneer state in rejecting a similar "tradition" argument in *Perez v. Sharp*, 32 Cal. 2d 711 (1948) (stating that "the fact alone that the discrimination has been sanctioned by the state for many years does not supply such justification"), which struck down California's statutory ban on interracial marriage.[3] As Justice Scalia feared in his dissent in *Lawrence v. Texas*, 539 U.S. 558, 590, 604-05 (2003) (Scalia, J., dissenting), Judge Kramer, like Justice Ling-Cohan in New York, cited *Lawrence* to support his ruling.

In arguing "same rights but not marriage," the state argued that "it is not irrational for California to afford substantially all rights and benefits to same-sex couples while maintaining the common and traditional understanding of marriage." The court rejected this argument, finding no legitimate governmental purpose in denying same-sex couples the right to marriage itself, and holding that

creating a "marriage-like benefits superstructure is no remedy" because prohibiting gay marriage could not be justified on tradition alone. The court further found that this "superstructure" fell under the "separate but equal" principle which the U.S. Supreme struck down in *Brown v. Bd. of Ed. of Topeka, et al.*, 347 U.S. 483 (1952), and was thus invalid.[4]

In arguing "procreation," the state asserted that California courts have long recognized that the "purpose of marriage is procreation and that limiting the institution to members of the opposite sex rationally would further that purpose." The court rejected this argument, finding that the cases cited in support of prohibiting gay marriage were not applicable because those cases supported annulling marriages based on fraud or fraudulent inducement.[5] The court stated that "one does not have to be married in order to procreate, nor does one have to procreate in order to be married." Interestingly, the court analyzed the legislative history of California Family Code §§ 300, 308.5 and found that while the legislative history of § 300 was "irrelevant," the "background materials to Proposition 22 indicate that its purpose as articulated to the voters was to preclude the recognition in California of same-sex marriages consummated outside of this state," and did not control whether California should recognize California marriages of its same-sex couples.

Current Status

On March 30, 2005, Judge Kramer announced a stay that prevented same-sex couples from marrying during the appeals process, which is expected to last approximately one year. The case will go to the intermediate appellate court and almost certainly to the California Supreme Court. Interestingly, as of this writing, California Attorney General Bill Lockyer, representing the state, bowed out of a widely-expected gubernatorial run, where gay marriage would certainly be a political issue, choosing to run for state treasurer instead.

III. Oregon: *Li v. Oregon*

On April 14, 2005, the Oregon Supreme Court ruled that Multnomah County improperly issued marriage licenses to approximately 3,000 same-sex couples. The court held that Ballot Measure 36, a voter-initiated amendment to the Oregon constitution, limited marriage to opposite-sex couples.[6] The court further held that Oregon statutory law predating Ballot Measure 36 had already limited the right to obtain marriage licenses to opposite-sex couples. Finally, the court held that the abstract question of whether Oregon Revised Statutes ("ORS") chapter 106, "Marriage," conferred marriage benefits in violation of the Privileges or Immunities section of the Oregon constitution, Article I, section 20, was not properly before the court.[7]

Unlike the New York and California cases, the Oregon Supreme Court did not need to undergo a due process or equal protection analysis. The plaintiffs argued that ORS chapter 106 "violates the Fourteenth Amendment to the United States Constitution," but the court summarily rejected that argument because it "was not raised before the trial court and therefore is unpreserved."

Instead, the court began by analyzing ORS chapter 106's plain text. For example, ORS chapter 106 defines marriage as a "civil contract entered into in person by males at least 17 years of age and females at least 17 years of age" and requires the parties to a marriage to declare that "they take each other to be husband and wife."

Foretelling challenges to Ballot Measure 36, the court rejected the plaintiffs' argument that, due to the amendment's use of the word "policy," the constitutional amendment was not an operative statement of Oregon constitutional law and thus presently enforceable, but rather a mere "aspirational principle" that required further enforcement action. In analyzing the amendment's plain text, the court stated that "there is no ambiguity regarding the measure's substantive effect. Today, marriage in Oregon — an institution once limited to opposite-sex couples only by statute — now is so limited by the state constitution as well."

Perhaps because the plain text of the law and the constitution were clear, the plaintiffs also argued that Ballot Measure 36 did not explicitly refer to marriage benefits and thus did not speak to the issue of whether the Privileges or Immunities section of Oregon's constitution prohibits using gender or sexual orientation as a basis for denying marriage benefits.[8] The plaintiffs argued that the voters did not intend to hinder the courts from creating a remedy that extends such benefits to same-sex couples. The court refused to reach this issue on the merits, stating that the issue was not properly before it because the plaintiffs, at trial, "did not seek access to the benefits of marriage apart from, or as an alternative to, marriage itself. The trial court therefore improperly went beyond the pleadings in fashioning the particular remedy that it chose."

Interestingly, in swiftly rejecting the plaintiffs' argument that Multnomah County properly issued the approximately 3,000 same-sex marriage licenses, the court touched upon the almost-certain upcoming full faith & credit battles with respect to gay marriage. First, the court described the marital relationship as "one in which the state is deeply concerned and over which it exercises a jealous dominion." Second, the court stated that while marriages deemed valid in states where they are performed will generally be recognized in Oregon, there are "exceptions to the general rule where the policy of this state dictates a different result than would be reached by the state where the marriage was performed," to the point that Oregon's power is sufficiently broad to "preempt other states' contrary marriage policies."

Current Status

Although this particular litigation is over, Governor Kulongoski, along with Republican and Democratic senators, introduced a civil union bill which would give same-sex couples the same legal rights as marriage. The bill also would outlaw discrimination against gays and lesbians in housing, jobs and insurance. Also pending is a lawsuit directly challenging the legality of Ballot Measure 36, which won the support of nearly 57 percent of Oregon voters in November 2004.

Footnotes

[1] In New York City, same-sex couples may register as "domestic partners" under New York City's Administrative Code Section 3-240, et seq. However, the benefits from registering as domestic partners are somewhat less than marriage.

[2] In California, gender discrimination is analyzed under strict scrutiny. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1 (1971).

[3] The U.S. Supreme Court did not strike down anti-miscegenation laws until Loving v. Virginia, 388 U.S. 1 (1967), nineteen years after Perez.

[4] On April 4, 2005, California's 3rd District Court of Appeal denied a challenge to California's broad domestic partners benefits law, ruling that the rights conferred fell short of those offered by marriage and thus did not violate Proposition 22. For properly registered same-sex and unmarried opposite-sex couples 62 years or older, the law grants rights and obligations relating to children, community property, death and other issues. The court noted that the benefits law does not provide state joint tax filing privileges, are obtained with no ceremony or license, and are not recognized outside California.

[5] It should be noted, however, that one of the cases, Baker v. Baker, 13 Cal. 87 (1859) states that "the first purpose of marriage, by the laws of nature and society, is procreation."

[6] Multnomah County began issuing same-sex marriage licenses on March 3, 2004. Ballot Measure 36 became effective on December 2, 2004, and provides that "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."

[7] Article I, section 20 of the Oregon constitution provides that "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

[8] This argument is of some interest because pending gay marriage litigation in neighboring Washington state will almost certainly turn on interpreting the Privileges or Immunities section of Washington's state constitution, Article I, Section 12, which states that "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

Montoy v. *Kansas* (cont. from pg. 2)

in *U.S.D. No. 229 v. State*, 256 Kan. 232 (1994) and an unpublished district court case, *Mock v. State*, Case No. 91-CV-1009, 31 Washburn L.J. 475 (Kan. Dist. Ct., Oct. 14, 1991) to shift the burden. Judge Bullock interpreted precedent to mean that "if challenged, the legislature must be prepared to justify spending differentials based on *actual costs incurred* in furnishing all Kansas school children an equal education opportunity." Pre-trial Order, at Conclusion #18 (emphasis added).

With respect to suitability, Judge Bullock stated in both his Pre-trial Order and his December 2 post-trial Memorandum Decision that he found no guidance in case law, the state constitution or statutes, or even in the State Board's accreditation standards. "Accordingly, in the absence of any appellate court or even legislative suitability standard, this Court must craft one . . .." Memorandum Decision and Preliminary Interim Order, *Montoy v. Kansas*, No. 99-C-1738, 2003 WL 22902963, at Conclusion #23 (Kan. Dist. Ct. Dec. 2, 2003) ("Memorandum Decision"). The Pre-trial Order explicitly disavowed the "objective criteria" preferred by some courts for determining the adequacy of states' provision of education. Rather, the held that "a constitutionally suitable education (much like an efficient or an adequate education as provided for in the constitutions of our sister states) must provide all Kansas students, commensurate with their natural abilities, the skills necessary to understand and successfully participate in the world around them both as children and later as adults."

After an eight day trial, on December 2, 2003, Judge Bullock found Kansas' school funding system unconstitutional. He found for the plaintiffs under both of their theories: the system violated state and federal equal protection clauses because it permitted inter-district funding disparities unsupported by empirical evidence of actual differences in the cost of education in those districts; and, it violated the state constitution's education clause because it failed to provide what the court considered adequate total resources to provide all Kansas children with a suitable education, as defined by the court.

He reasoned that such disparities could pass rational basis scrutiny "only if there are rational reasons that are based on *actual increased costs* necessary to provide children, or particular children, in that district with an equal educational opportunity. Again, the increased costs must be essential in providing the students in that district with educational opportunities equal to that provided to students in that and other districts." Memorandum Decision, at Conclusion #21 (emphasis added).

As for the suitability challenge, the court concluded that the system failed to provide a constitutionally adequate education. In coming to this conclusion, Judge Bullock applied the non-objective standard he had formulated in his pre-trial order, and relied heavily on a study commissioned by the state legislature in 2001. This study was an evaluation by consultants of "the cost of a suitable education for Kansas children." K.S.A. 46-1225.

The Supreme Court's Review

The sweeping remedial order entered by the district court in May 2004 was stayed pending appellate review. In August 2004 the Supreme Court of Kansas heard oral argument. A preliminary decision was issued on January 3, 2005, in which the court affirmed in part and reversed in part the District Court's decision.

The supreme court rejected the dis-

trict court's equal protection findings, concluding that the district court had identified correctly, but misapplied the standard under rational basis scrutiny. Because the funding differentials provided by the state formula are rationally related to a legitimate purpose, the court concluded that the SDFQPA does not violate the equal protection clauses of the Kansas or federal Constitutions. With respect to the district court's conclusion that the financing formula had an unconstitutional disparate impact on minorities and/or other classes, the supreme court noted that "to establish an equal protection violation on this basis, one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose." Because no such purpose was shown, the SDFQPA could not be unconstitutionally based solely on disparate impact.

However, the supreme court affirmed the district court's conclusion that the legislature had failed to meet its burden under Art. 6, § 6 of the Kansas Constitution to "make suitable provision for finance" of the public schools. Of the many interesting things about the court's preliminary opinion, two stand out. First is the court's analysis of the language of the Constitution, on which their preliminary decision heavily rests. Second, the practical implications of this decision are deeply troubling for the separation of powers in Kansas and elsewhere.

First, the supreme court agreed with the plaintiffs that the state of Kansas does not make adequate financial provision for education. Before examining the factual record, the supreme court indicated it must first examine the standard for determining suitability: "First and perhaps foremost it must reflect a level of funding which meets the constitutional requirement that 'the legislature shall provide for intellectual, educational, vocational and scientific *improvement* by establishing and maintaining public schools…' The Kansas Constitution thus imposes a mandate that our educational system cannot be static or regressive but must be one which 'advance[s] to a better quality or state.'" (emphasis in original) (quoting Kansas Const. art. 6, § 1 and Webster's II New College Dictionary 551 (1997) (defining "improve")). Thus, the supreme court interpreted the language of the state Constitution to require improvement in the *system*, rather than improvement of individual student's intellectual, educational, vocational and scientific abilities, or the abilities of Kansas schoolchildren or residents as a whole. Using that standard, the supreme court then relied on the study commissioned by the legislature, which found that current funding levels were inadequate to meet legislatively-determined standards for suitability in the state. It is notable that the state maintained throughout the litigation that this standard, and the study performed to evaluate it, were never explicitly adopted by the legislature, but were merely meant to be advisory in assisting the legislature make policy determinations.The implications of the supreme court's reasoning and decision are important beyond the obvious implications for separation of powers in Kansas. This decision will no doubt be studied and interpreted in the ongoing debate over both the adequacy of education financing in states across the country, and which branch of government is the most appropriate arbiter of that adequacy. As noted in the previous article on this case, state courts increasingly are called upon to evaluate the equality and adequacy of the education financing systems adopted by state legislatures, with results that carry weighty implications for the separation of powers – between branches of government as well as political subdivisions – within the states. In *Montoy v. Kansas*, the Kansas Supreme Court has indicated its willingness to become involved in these disputes, effectively predetermining legislative priorities for the use of taxpayer money and invalidating or modifying the state's internal organization and distribution of power between localities and the statehouse. As more such education litigation is filed, litigated, and appealed, other state courts will take note of Kansas' decision, and may follow suit.

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Mass Tort in Mississippi (cont. from pg. 3)

plaintiffs in one lawsuit against hundreds of defendants. These "mass actions," as they became known, developed first in Jackson County, the home of Ingalls Shipyard, in the mid-1980s. However, the use of "mass actions" spread to other Mississippi venues such as Holmes County and Jefferson County. The Manhattan Institute's Civil Justice Report, No. 7 from 2003, documents this evolution in Jefferson County, which developed a reputation for alleged lawsuit abuse.

The other component that allowed for mass actions was the combination of Mississippi's venue rules with its routine acceptance of the claims of non-resident plaintiffs having no relationship to Mississippi. Rule 82 of the Mississippi Rules of Civil Procedure provided that, where venue was proper as to at least one of the parties and one of the claims, venue was proper for all additional parties and claims properly joined under the Mississippi Rules of Civil Procedure. *See also Gillard v. Great Southern Mtg. & Loan Corp.*, 354 So.2d 794 (Miss. 1978) (venue proper for one defendant is proper for all other properly joined defendants); *Wofford v. Cities Service Oil Company*, 236 So.2d 743 (Miss. 1970) (same).

Shewbrooks v. A.C. and S., Inc., 529 So. 2d 557 (Miss. 1988) established the open door policy of Mississippi courts toward non-resident defendants. In *Shewbrooks*, the Mississippi Supreme Court faced a lawsuit brought by residents of Delaware for injuries from exposure to asbestos in Delaware, New Jersey, and Pennsylvania against defendants engaged in business in Mississippi. *Shewbrooks*, 529 So. 2d at 559. Though faced with these plaintiffs who had no discernible relationship to Mississippi, the Mississippi Supreme Court felt bound to follow its precedent, which held that, where the courts of this state

had personal jurisdiction over the defendant and subject matter jurisdiction over the claims, there was no basis to reject lawsuits by non-resident plaintiffs. The courts of Mississippi were equally open to all residents and non-residents alike. *Shewbrooks*, 529 So. 2d at 560-61. The court did leave open the issue of a dismissal under the doctrine of forum non conveniens. But the court also stated that, in the interest of assuring that a plaintiff would have an alternative forum for its claim, dismissal must be conditioned upon a waiver of any statute of limitations bar. Id. at 561-63. For a time, *Shewbrooks* allowed plaintiffs to use Mississippi's 6-year statute of limitations that applied to products liability actions to revive claims that would be barred in most other jurisdictions.

It took 14 years after *Shewbrooks* before the legitimacy of "mass actions" was finally reviewed by two decisions of the Mississippi Supreme Court, *Illinois Central Railroad Co. v. Travis*, 808 So. 2d 928 (Miss. 2002), and *American Bankers Insurance Co. v. Alexander*, 818 So. 2d 1073 (Miss. 2001). Both of these cases found in Rule 20 of the Mississippi Rules of Civil Procedure the legal basis for the mass actions that had already become a fixture of mass tort litigation in the state.

In *American Bankers Insurance Co*,. the court allowed the joinder of as many as 387 individual claims relating to collateral protection insurance. In authorizing the joinder, the court noted Mississippi's lack of any class action procedural rule, and the official comment to Rule 20 of the Mississippi Rules of Civil Procedure indicated an intent that the Rule 20 joinder provision allow liberal joinder of parties:

> The general philosophy of the joinder provisions of these Rules is to allow virtually unlimited joinder at the pleading stage but to give the Court discretion to shape the trial to the necessities of the particular case.

Travis involved the asbestos exposure claims of 99 railroad workers against Illinois Central Railroad. Mr. Travis, the lead plaintiff, had been a resident of Tennessee at the time of his death and his wife remained a Tennessee resident. Mr. Travis worked in Tennessee and Kentucky, but did not appear to have ever worked in Mississippi. Illinois Central Railroad sought to have Mr. Travis' claims dismissed based on improper venue, improper joinder and forum non conveniens. The court reviewed its own cases and a number of federal cases applying the analogous Rule 20(a) of the Federal Rules of Civil Procedure in denying the defendants' objection to joinder. Once again, the court looked to the comments to Rule 20 of the Mississippi Rules of Civil Procedure and its recent decision in *American Bankers* to sanction the joinder of the railroad workers' claims.

The mass action phenomenon, finally approved by the Mississippi Supreme Court, had particular consequences for asbestos litigation. Two large jury verdicts fueled the filing of mass actions in two Mississippi counties in particular: Jefferson County and Holmes County. First was the verdict in *Cosey v. Bullard*, No. 95-0069, Cir. Ct., Jefferson County, Mississippi, where twelve plaintiffs were awarded a total of $48.5 million in compensatory damages; the case settled without an appeal when the court threatened to let the same jury consider punitive damages. In 2001 came the surprising verdict from a Holmes County jury that awarded six plaintiffs the identical amount of $25 million each in compensatory damages. *See 3M Company v. Johnson, supra.* This verdict in *3M Company* raised concerns in both the business and legal communities.

The reaction of the legal system was not immediate, but through the prodding of the medical and business communities, the Mississippi legislature enacted some reforms during contentious special sessions in 2002 and 2004. The real reform, however, came from the Mississippi Supreme Court.

Back from the Brink

On February 19, 2004, the Mississippi Supreme Court began what was to become a series of opinions which redefined joinder under Rule 20 and signaled the beginning of the end of mass actions in Mississippi. *See Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004) (Janssen I); *Janssen Pharmaceutica v. Inc. v. Bailey*, 878 So. 2d 31 (Miss. 2004) (Janssen II)*; Janssen Pharmaceutica, Inc. v. Grant,* 873 So. 2d 100 (Miss. 2004) (Janssen III*); and Janssen Pharmaceutica, Inc. v. Keys*, 879 So. 2d 446 (Miss. 2004) (Janssen IV*).*

In the *Janssen* cases, the Supreme Court analyzed the joinder of multiple plaintiffs and defendants in the context of claims for injuries allegedly caused by the drug Propulsid. The *Janssen* decisions make clear that severance is mandated in cases in which multiple plaintiffs attempt to assert individualized personal injury claims against multiple, unrelated defendants:

> Each plaintiff has a unique medical history, and during the time frame involved in the 56 claims, there were five different warning inserts. . . .. The present case requires there to be a judgment of liability with respect to each of the 42 defendants, and this determination of liability will turn on, among other things, each plaintiff's own distinct medical history, injuries and damages, the adequacy of the warning labels. . . as well as . . . the question of whether each prescribing physician would have prescribed Propulsid even with an adequate warning. No jury can be expected to reach a fair result under these circumstances.

Janssen I, 866 So. 2d at 1101. Based on the individual characteristics of the plaintiffs* claims, the *Janssen I* court concluded that joinder was improper because "no single transaction or occurrence or series of transactions or occurrences connect[ed] all 56 plaintiffs and 42 physician defendants." Id. at 1102. The day following the decision in *Janssen I*, the Mississippi Supreme Court published its amendments to Rule 20 of the Mississippi Rules of Civil Procedure. The

amendments removed from the comments the language cited by the court in its opinions in *Travis and American Bankers Insurance Co.* as authorizing mass actions. In its place the comment to Rule 20 stressed that there must be a "distinct litigable event linking the parties" as one of the prerequisites for joinder of parties in a single civil action.

The *Janssen* cases left it unclear whether the new limitations on joinder would also apply to asbestos products liability litigation. In August 2004, the Mississippi Supreme Court handed down its opinion in *Harold's Auto Parts v. Mangialardi*, 889 So. 2d 493 (Miss. 2004), which not only demonstrated that the *Jannsen* decisions applied in asbestos cases, but also strengthened the requirements for notice pleadings. Before *Mangialardi*, mass tort complaints filed in Mississippi were not required, in practice, at least, to include any specific allegations as to how, when, and where a plaintiff alleged exposure, much less to identify the specific products to which plaintiffs claimed exposure. Plaintiffs were not even required to identify which of the hundreds of defendants they had claims against, until individual claims were set for trial. Because of these "relaxed" pleading requirements, plaintiffs' lawyers were able to join hundreds, and often thousands, of plaintiffs in a single action, and were able to use the discovery process as a means to determine whether a plaintiff had a claim against a specific defendant.

Mangialardi reversed that trend. As the court stated, "[c]omplaints should not be filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action. . . . To do so otherwise is an abuse of the system, and is sanctionable." The court, noting that the subject complaint "provide[d] virtually no helpful information with respect to the claims asserted by the individual plaintiffs," ordered that the plaintiffs, individually, provide information including the defendants against whom each plaintiff was making a claim, and the time period and location of exposure, lest their claims be subject to dismissal.

Under *Mangialardi*, Mississippi law now appears to require, at a minimum, that plaintiffs allege the following facts in their complaints: (1) specific defendants against which each plaintiff claims a cause of action, and the nature of the claim(s); (2) the time period(s) of each plaintiff's alleged exposure to asbestos; (3) the time period(s) of each plaintiff's alleged use of each subject product; (4) each employer and location of each plaintiff's alleged exposure to asbestos; (5) which of the allegedly defective products were used at each location or employer; (6) the specific physical injury or medical condition alleged by each plaintiff; and (7) information sufficient to establish whether joinder is appropriate under Rule 20.

On February 3, 2005, the supreme court extended its decisions in the *Janssen* and *Mangialardi* cases when it rendered its decision in *Crossfield Products Corp.* v. *Charles W. Irby,* et al., No. 2003-IA-02378-SCT (Miss., Feb. 3, 2005), by holding that the existence of a common worksite in an asbestos action is insufficient to establish joinder under Rule 20. In *Irby,* nine plaintiffs filed suit against 258 defendants and 200 "John Doe" defendants. *Irby* at ¶ 2. Each plaintiff alleged exposure to asbestos while employed at Ingalls Shipyard from 1930 - present. Finding the existence of a common worksite insufficient to establish joinder under Rule 20, the court reasoned:

> All plaintiffs allege that they suffer from asbestosis in varying degrees. They claim exposure while working at a common employment, Ingalls Shipyard. During the span of 24 years where the plaintiffs claim a common worksite. . . they were all employed at different times and dates. In addition . . . the plaintiffs had different job descriptions, different work-stations and different duties at each work site. Some plaintiffs may have worked on the same ships but they all had different job descriptions and the dates of employment differ as to each plaintiff. . . . Each plaintiff allegedly worked around different products made by numerous manufacturers for varying lengths of time. . . Some plaintiffs could have been exposed to asbestos at other jobs they held prior to or after working at Ingalls Shipyard. . . In addition to this each plaintiff has a different medical history, which may or may not have an affect on their medical condition. Only one out of the nine plaintiffs has cancer. Five out of the nine has had some type of heart attack/stroke or heart surgery. All nine plaintiffs have smoked at some time in their lives for varying lengths, which could be very important to the causation issue.

Id. at ¶ 4. The Mississippi Supreme Court held that, under these circumstances, the plaintiffs' right to relief does not relate to or arise out of the same transaction or occurrence [and that]. . . "[t]here is no single transaction or occurrence connecting all of [the] plaintiffs to justify joinder..." . *Id.* at ¶ 10.

Finally, the Mississippi Supreme Court further limited mass actions in its opinion in *3M Company.* It was the $150 million verdict for compensatory damages in this case in 2001 that raised public awareness of the problems allegedly created by mass actions. This asbestos products liability action was brought by over 150 plaintiffs against approximately 62 defendants. The trial court allowed plaintiffs' counsel to hand-pick a trial group of ten plaintiffs whose claims would be tried together. When the trial began, seven defendants remained against whom the claims were to be tried. Following three weeks of trial, the jury returned identical $25 million compensatory damages verdicts for each of the six remaining trial group plaintiffs.

3M Company, one of the seven trial defendants, appealed from the jury verdicts. In an opinion supported by five members of the court, each of the six ver-

dicts against 3M was reversed and rendered. The opinion highlights the numerous issues with the litigation and trial of the case. The court first held that, consistent with *Mangialardi* and the *Janssen* cases, the claims of all the plaintiffs in the case, including those not a part of the trial group, should have been severed. The court likewise suggested that the joinder of the defendants may have been improper as well. Based on the joinder issue alone, the court reversed the verdicts. However, the court then reviewed the record, first noting problems with the impartiality of the jury venire because of a "widespread asbestos campaign" in Holmes County. The venire members disclosed meetings held throughout the county including meetings held in the courtroom where the trial was being conducted and in which attendees were encouraged to bring asbestos claims and become "educated" about the dangers of asbestos.

Ultimately, the court rendered a verdict for 3M "due to the lack of evidence presented by the plaintiffs to support recoverable damages," finding that the plaintiffs failed to meet their burden of proof that the 3M product was defective when manufactured or that there was a feasible alternative design available that would have prevented the harm without impairing the usefulness of the product.

What's Next for Mass Tort Litigation?

The effects of the recent amendments to Rule 20 and Mississippi Supreme Court decisions are already being seen throughout the state. With few exceptions, pending mass tort actions are being severed into individual actions and transferred to a proper venue, when appropriate. Plaintiffs are also being required to comply with the notice pleading provisions contained in the Mississippi Rules of Civil Procedure. Courts, even in what were traditionally seen as plaintiff-friendly venues such as Jefferson and Holmes counties, are "encouraging" the prompt dismissal of defendants against whom the plaintiff has no cause of action and have strongly suggested that any new mass tort actions be filed in accordance with *Mangialardi*, *Janssen*, and Rules 8, 9, 10, and 11 of the Mississippi Rules of Civil Procedure. Due to the supreme court's strong language in *Johnson,* there is every reason to believe that plaintiffs now will be required to prove not only product usage, but also defect, proximate causation, and injury. These changes alone significantly alter the playing field, and the Mississippi Supreme Court has given every indication that it will continue to strictly enforce the provisions of the Mississippi Rules of Civil Procedure in the future.

All of these developments dovetail with the Class Action Fairness Act of 2005 enacted on February 18, 2005. Though not applicable to pending litigation, its "mass action" provisions should prevent plaintiffs from litigating cases like *Cosey* and *Johnson* in Mississippi's state courts. While the mass action phenomenon has not disappeared in Mississippi, it has been substantially limited.

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Recent Developments in Ohio Class Action Litigation (Cont. From Pg. 3)

failed to satisfy any of the requirements to maintain a class action under Civil Rule 23(B). The court examined Rules 23(B)(1)(a), 23(B)(2) and 23(B)(3), finding that plaintiffs' claims failed each. Under a class action, separate actions would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." In reaching its decision, the court stated: "Subsection (B)(1)(a) does not lend itself to mass tort claims, such as the one before us. Pursuant to this subsection, certification is permissible if separate actions could lead to incompatible standards of *conduct."* The court concluded that differing standards of conduct were not likely to appear in the case if separate actions were pursued.

The trial court held that Civil Rule 23(B)(2) certification was inappropriate because said subsection did not apply when a class is primarily seeking damages. Rule 23(B)(2) applies when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

The trial court held that medical-monitoring damages, in addition to the punitive damages sought, do not constitute injunctive relief. The trial court went on to recognize that Rule 23(B)(2) requires a showing that Brush Wellman acted or refused to act *with respect to the class as a whole*, commonly referred to as the cohesiveness requirement. The court found that there were disparate factual circumstances in the class that precluded certification.

Plaintiffs also failed to satisfy Civil Rule 23(B)(3), according to the trial court. Under 23(B)(3) an action may be maintained as a class action if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The court held that "individual questions in this case not only outnumber, but most importantly, outweigh any questions that are common to the class." Having determined that plaintiffs failed to meet the requirements of Civil Rule 23(B), the court denied class certification.

The plaintiffs appealed the denial of class certification to the court of appeals, which considered certification under Civil Rule 23(B)(2) exclusively and held that "the trial court erred by finding this criteri[on] absent." The court reasoned that because plaintiffs primarily sought medical surveillance and screening, which it determined were in-

junctive in nature, certification under Civ.R. 23(B)(2) was appropriate. The appellate court held that the request for damages was incidental to the request for medical monitoring and that the trial court failed to examine the cohesiveness of the suggested class. The defendant appealed the appellate court's determination.

The Supreme Court's Analysis

The issue before the Supreme Court of Ohio was whether the appellate court properly reversed the trial court's finding that the requirements of Civil Rule 23(B)(2) were not met. The supreme court pointed out that Rule 23(B)(2) entails two requirements: (1) the action must seek primarily injunctive relief, and (2) the class must be cohesive. The first step in the court's inquiry was to determine whether the relief sought by the plaintiffs—medical monitoring—was injunctive or compensatory in nature. Because Ohio case law provided little guidance on this question, the court looked to the federal courts, which had split on this issue. The court borrowed the reasoning of the Federal District Court for the Southern District of Ohio, which demarcated injunctive versus compensatory relief as follows:

> Relief in the form of medical monitoring may be by a number of means. First, a court may simply order a defendant to pay a plaintiff a certain sum of money. The plaintiff may or may not choose to use that money to have his medical condition monitored. Second, a court may order the defendants to pay the plaintiffs' medical expenses directly so that a plaintiff may be monitored by the physician of his choice. Neither of these forms of relief constitute[s] injunctive relief as required by rule 23(b)(2). However, a court may also establish an elaborate medical monitoring program of its own, managed by court-appointed, court-supervised trustees, pursuant to which a plaintiff is monitored by particular physicians and the medical data produced is utilized for group studies. In this situation, a defendant, of course, would finance the program as well as being required by the court to address issues as they develop during program administration. Under these circumstances, the relief constitutes injunctive relief as required by rule 23(b)(2). *Day v. NLO, Inc.* (S.D.Ohio 1992), 144 F.R.D. 330, at 335-336.

Based on the reasoning of *Day*, the court held that court supervision and participation in medical-monitoring cases was a logical and sound basis on which to determine whether an action is injunctive, and has the added advantage of being a bright-line test, which could be readily and consistently applied. The court noted that the plaintiffs sought an order for Brush Wellman to "pay for a reasonable medical surveillance and screening program," punitive damages in excess of $25,000, and "[i]nterest, costs, attorney fees and such other and further relief as the Court may deem just and proper." Based on the foregoing, the court found that the trial court did not abuse its discretion by concluding that plaintiffs' complaint primarily sought damages. The court noted that a request for court supervision could be easily added by an amended complaint. Even with an amended complaint, however, the court found plaintiffs' lack of cohesiveness to be decisive.

According to the court, plaintiffs' class certification under Civil Rule 23(B)(2) failed for lack of cohesiveness. To construe this requirement, the court looked to the similar "predominance" test under Civil Rule 23(B)(3), which also requires a certain level of cohesion. Under 23(B)(3), an action may be maintained as a class action if the court finds that the questions of law or fact common to the members of the class *predominate* over questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The court cited two federal cases for guidance in construing 23(B)(3): *Amchem Products, Inc. v. Windsor* (1997), 521 U.S. 591 and *Barnes v. Am. Tobacco Co.* (C.A.3, 1998), 161 F.3d 127, 142-143.

The *Amchem* plaintiffs sought certification for a class of thousands seeking recovery for asbestos-related claims. The United States Supreme Court heeded a "call for caution when individual stakes are high and disparities among class members great…. [A] certification cannot be upheld, [where] it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design." *Id.* at 625. The Supreme Court cited as impediments to the *Amchem* class's cohesiveness: 1) the large number of individuals, 2) their varying medical expenses, 3) the disparate claims of those currently injured individuals versus those who had not yet suffered injury, 4) the plaintiffs' smoking histories, and 5) family situations. *Id.* at 623-625.

In *Barnes,* the court extended the cohesiveness requirement beyond a Rule 23(b)(3) class to a Rule 23(b)(2) class "because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out." The court's concern was that unnamed members with valid individual claims might be prejudiced by a negative judgment in a class action. In addition, the suit could become unmanageable if significant individual issues were to arise consistently.

In applying the holdings of these cases to the findings of the trial court, the Ohio Supreme Court held that the trial court had found sufficient disparate factual circumstances to preclude a Rule 23(B)(2) class action. The court stated that "[a]lthough the court did not specifically address those disparate circumstances in the same breath as examining Civ.R. 23(B)(2), the court did go into much detail in its Civ.R. 23(B)(3) predominance analysis, citing multiple individual questions of fact requiring examination for different plaintiffs within the proposed class. Individual questions identified by the trial court include whether Brush Wellman

owed a duty, whether there was a breach of that duty, whether the statute-of-limitations defense applies, and questions of contributory negligence. The members of the proposed class span 46 years, multiple contractors, and multiple locations within the plant, and are estimated by the parties to number between 4,000 and 7,000."

> The court held that ...[g]iven the depth of the trial court's predominance analysis and its reasoned conclusion that individual questions outweigh questions common to the class, we cannot hold that the trial court abused its discretion. Rather than addressing the proposed class's cohesiveness, the appellate court summarily determined that the class could be certified under Civ.R. 23(B)(2). Because we have today determined that the trial court did not abuse its discretion in determining that the proposed class in this suit fails the cohesiveness requirement, we reverse the appellate court judgment and reinstate the trial court's order denying class certification.

The conclusion of *Wilson v. Brush Wellman, Inc.* indicates that state courts such as Ohio are attempting to limit class action litigation by narrowing certification of such claims under Civil Rule 23(B)(2) to those actions that are truly injunctive in nature and where the significant questions in the case affect individual class members in a cohesive rather than a disparate fashion.

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STATE COURT

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Product Liability Greatly Expanded in Wisconsin

On July 15, the Wisconsin Supreme Court significantly expanded the potential liability of product manufacturers sued in Wisconsin's courts. The controversial 4-2 ruling, rendered in a case against companies and alleged successors that long ago made lead pigment used in house paint, has drawn strong criticism from business groups inside and outside Wisconsin. *Thomas v. Mallett*, 2005 WI 129 (2005)

The seeds of the July 15 Wisconsin Supreme Court opinion were sown two decades ago. Traditionally, in the product liability context, a product manufacturer can be held responsible only for harm that its products cause, not harm from products manufactured by others.

In the mid-1980s, a handful of states' courts, including the Wisconsin Supreme Court, relaxed this "manufacturer identification" requirement for one type of case — personal injury cases against drug companies that made diethylstilbestrol ("DES"). DES is a drug taken by women to prevent miscarriage. It causes a rare form of cancer in daughters exposed to it in utero. In the DES cases, the plaintiffs could not prove who produced the drug their mothers ingested. The various drug companies made identical products, which they marketed generically. The drug created a unique or "signature" injury readily identified as having been caused by DES exposure, and the period of exposure was clear — the nine months of pregnancy. Under these facts, a handful of states' highest courts, including the Wisconsin Supreme Court, held that a plaintiff could proceed against DES manufacturers under a "collective liability" theory without having to show which company's product caused her harm. In most states, the plaintiff was permitted to sue companies composing a significant percentage of the market at the time of exposure, and each defendant could be held liable only for its market share at that time. In Wisconsin, the supreme court adopted a unique, aggressive "risk contribution" theory, which permitted the plaintiff to sue only one company and to recover 100 percent of her damages from that company — without any proof that the company's product caused her harm.

In *Thomas*, the court expanded the "risk-contribution" theory of liability, applying it to former manufacturers of lead pigment used in house paint. By way of background, the sale of lead-based paint for consumer uses has been banned since the 1970s. Most interior lead paint was applied before the 1930s. The paint companies put various types and amounts of lead pigment in paint. Most old houses have numerous layers of lead and nonlead paint on them. It is

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Recent Gay Marriage Rulings

By John Shu

Gay marriage litigation continues to occur in various forms among the several states. In the first half of 2005, state courts in New York, California and Oregon decided controversial gay marriage related cases on the basis of their respective state constitutions and laws. This article, the first in a series, will update, overview and summarize those cases.

I. New York: *Hernandes, et al. v. Robles*

On February 5, 2005, Justice Doris Ling-Cohan of the Supreme Court of New York, the trial court, held that certain provisions of New York's Domestic Relations Law ("DRL") violated the New York State Constitution's Due Process and Equal Protection clauses. This case involved five same-sex couples in New York City who sued Victor Robles in his official capacity as City Clerk of the City of New York and administrator of the New York City Marriage License Bureau. The DRL does not specifically ban or allow gay marriage, but refers to "husband," "wife," "bride," and "groom." New York interpreted the law as not allowing gay marriage.[1] The plaintiffs sought declaratory relief and an injunction requiring Robles to grant each of the couples a marriage license. The plaintiffs won on summary judgment. The court wrote that the defendant failed to "dispute the ma-

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Venue Laws in South Carolina

Over the past several decades, the venue laws of the State of South Carolina have been interpreted broadly. Accusations arose that plaintiffs, both residents and non-residents of the state, were able to selectively file claims in counties based upon a county's plaintiff-friendly reputation, such as Hampton County. Hampton County has a reputation of being so favorable to plaintiffs that companies such as Wal-Mart recently sold the only property it owned in the county to avoid being subject to suit there. On February 2, 2005, however, amid debate on a statutory change that sought to correct the perception that forum shopping was available in South Carolina, the South Carolina Supreme Court took the first step toward a narrower interpretation of even the existing statute.[1]

In *Whaley v. CSX Transportation, Inc.,* Op. No. 25953 (Feb. 2, 2005, S.C.), the plaintiff suffered illness or injury while working for CSX Transportation, Inc. ("CSX"). Mr. Whaley lived and worked out of an area in the upper portion of the state and operated a train route from Greenwood to Laurens. It was while operating on this route that Mr. Whaley became disoriented and began suffering a number of symptoms of illness. He has since that time been limited in his physical activities. Whaley filed a complaint against CSX in Hampton County, South Carolina. Despite the plaintiff's residence in another county some distance from Hampton and despite the fact that the plaintiff had suffered the injury/illness in this distant county, Whaley chose Hampton County as the venue for his suit. CSX moved for a change of venue, which was denied by the trial court. Ultimately, the Hampton County jury awarded Whaley a verdict in the amount of $1,000,000. CSX filed post-trial motions on a number of issues, including venue. These motions were denied. CSX appealed.

The trial court relied on prior South Carolina Supreme Court cases interpreting what the venue statute meant when it required suit to be filed against a foreign corporation, such as CSX, in the county in which it resides.

The earliest decisions interpreting the venue statute's residency requirement determined that foreign corporations resided in any county in which they had an office and agent for the transaction of business. However, in 1941, the state's supreme court reevaluated its position on venue for domestic corporations and broadened the definition of venue for those companies to include any county where the corporation owns property and transacts business. It based this expansion of venue not on the venue statute but rather on a statute that addressed service of process on such domestic corporations. Six years later the court did not apply this expansion to foreign corporations, but in 1964 the statute concerning service of process and jurisdiction upon which the court had relied in expanding venue appropriate for suits against domestic corporations was amended to include provision for service of process and jurisdiction as to foreign corporations. Now that the service statute included both types of corporations the court was prepared to apply the same expansive understanding of venue to both foreign and domestic corporations and did so in *Lott v. Claussens, Inc.*, 251 S.C. 478, 163 S.E.2d 615 (1968). The court affirmed this interpretation again in 1980 in the cases that have since been relied upon by courts such as the trial court in the *Whaley* case to permit cases against corporate defendants in any county in which they owned property and transacted business regardless whether the corporation maintained an office or agent in that county. *In re Asbestosis Cases*, 274 S.C. 421, 266 S.E.2d 773 (1980).

Soon after the *In re Asbestosis Cases* decision, however, the legislature amended the service statute, omitting the phrase "own property and transact business" from that provision. In addition, the revised version of this statute again dealt only with domestic corporations, the provision for service on a foreign corporation being moved to an entirely different section of the South Carolina Code. Though the statutory language on which the "owns property and transacts business" test relied no longer existed, courts continued to apply this test to determine venue issues. The South Carolina Supreme Court put an end to that test.

In doing so the South Carolina Supreme Court first concluded that the test was improperly created by the court in the first place, having relied on a statute that addressed a completely different concept – service of process and jurisdiction. The court observed that a court may have personal jurisdiction over a party without venue being proper in that court. The court went on to explain that even if at its creation the "owns property and transacts business" test had been proper, statutory changes to the provision upon which it was based necessitated its abolishment. Thus, finally, after decades of alleged forum shopping in the state, venue is only proper over a corporate defendant where that defendant resides; and such defendants reside only where (1) it maintains its principal place of business or (2) it maintains an office and agent for the transaction of business.

Prior to this recent decision, it was believed that corporate defendants, most notably CSX, which had railroad tracks that ran through Hampton County and had thus been deemed to own property and transact business in that forum, could be subject to suit in counties such as Hampton regardless of whether the accident or parties had any real connection with that location. The recent decision of the South Carolina Supreme Court has made venue law interpretation significantly more rigorous in that State.

Footnotes

[1] A number of tort reform measures, to include changes to the venue statute, are expected to be passed by the South Carolina General Assembly this session.

Footnotes

[1] In New York City, same-sex couples may register as "domestic partners" under New York City's Administrative Code Section 3-240, et seq. However, the benefits from registering as domestic partners are somewhat less than marriage.

[2] In California, gender discrimination is analyzed under strict scrutiny. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1 (1971).

[3] The U.S. Supreme Court did not strike down anti-miscegenation laws until Loving v. Virginia, 388 U.S. 1 (1967), nineteen years after Perez.

[4] On April 4, 2005, California's 3rd District Court of Appeal denied a challenge to California's broad domestic partners benefits law, ruling that the rights conferred fell short of those offered by marriage and thus did not violate Proposition 22. For properly registered same-sex and unmarried opposite-sex couples 62 years or older, the law grants rights and obligations relating to children, community property, death and other issues. The court noted that the benefits law does not provide state joint tax filing privileges, are obtained with no ceremony or license, and are not recognized outside California.

[5] It should be noted, however, that one of the cases, *Baker v. Baker*, 13 Cal. 87 (1859) states that "the first purpose of marriage, by the laws of nature and society, is procreation."

[6] Multnomah County began issuing same-sex marriage licenses on March 3, 2004. Ballot Measure 36 became effective on December 2, 2004, and provides that "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."

[7] Article I, section 20 of the Oregon constitution provides that "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

[8] This argument is of some interest because pending gay marriage litigation in neighboring Washington state will almost certainly turn on interpreting the Privileges or Immunities section of Washington's state constitution, Article I, Section 12, which states that "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

Montoy v. *Kansas* (cont. from pg. 2)

in *U.S.D. No. 229 v. State*, 256 Kan. 232 (1994) and an unpublished district court case, *Mock v. State*, Case No. 91-CV-1009, 31 Washburn L.J. 475 (Kan. Dist. Ct., Oct. 14, 1991) to shift the burden. Judge Bullock interpreted precedent to mean that "if challenged, the legislature must be prepared to justify spending differentials based on *actual costs incurred* in furnishing all Kansas school children an equal education opportunity." Pre-trial Order, at Conclusion #18 (emphasis added).

With respect to suitability, Judge Bullock stated in both his Pre-trial Order and his December 2 post-trial Memorandum Decision that he found no guidance in case law, the state constitution or statutes, or even in the State Board's accreditation standards. "Accordingly, in the absence of any appellate court or even legislative suitability standard, this Court must craft one . . .." Memorandum Decision and Preliminary Interim Order, *Montoy v. Kansas*, No. 99-C-1738, 2003 WL 22902963, at Conclusion #23 (Kan. Dist. Ct. Dec. 2, 2003) ("Memorandum Decision"). The Pre-trial Order explicitly disavowed the "objective criteria" preferred by some courts for determining the adequacy of states' provision of education. Rather, the held that "a constitutionally suitable education (much like an efficient or an adequate education as provided for in the constitutions of our sister states) must provide all Kansas students, commensurate with their natural abilities, the skills necessary to understand and successfully participate in the world around them both as children and later as adults."

After an eight day trial, on December 2, 2003, Judge Bullock found Kansas' school funding system unconstitutional. He found for the plaintiffs under both of their theories: the system violated state and federal equal protection clauses because it permitted inter-district funding disparities unsupported by empirical evidence of actual differences in the cost of education in those districts; and, it violated the state constitution's education clause because it failed to provide what the court considered adequate total resources to provide all Kansas children with a suitable education, as defined by the court.

He reasoned that such disparities could pass rational basis scrutiny "only if there are rational reasons that are based on *actual increased costs* necessary to provide children, or particular children, in that district with an equal educational opportunity. Again, the increased costs must be essential in providing the students in that district with educational opportunities equal to that provided to students in that and other districts." Memorandum Decision, at Conclusion #21 (emphasis added).

As for the suitability challenge, the court concluded that the system failed to provide a constitutionally adequate education. In coming to this conclusion, Judge Bullock applied the non-objective standard he had formulated in his pre-trial order, and relied heavily on a study commissioned by the state legislature in 2001. This study was an evaluation by consultants of "the cost of a suitable education for Kansas children." K.S.A. 46-1225.

The Supreme Court's Review

The sweeping remedial order entered by the district court in May 2004 was stayed pending appellate review. In August 2004 the Supreme Court of Kansas heard oral argument. A preliminary decision was issued on January 3, 2005, in which the court affirmed in part and reversed in part the District Court's decision.

The supreme court rejected the dis-

junctive in nature, certification under Civ.R. 23(B)(2) was appropriate. The appellate court held that the request for damages was incidental to the request for medical monitoring and that the trial court failed to examine the cohesiveness of the suggested class. The defendant appealed the appellate court's determination.

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