STATE COURT
DocketWatch®

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New Jersey Demands More from Eyewitnesses

State v. Henderson[1]

by Shyler Engel

On November 2, 2011, the Supreme Court of the United States heard arguments in *Perry v. New Hampshire*, where it will determine whether a court is required to exclude eyewitness identification evidence whenever the identification was made under circumstances that make the identification unreliable because they tended to suggest that the defendant was responsible for the crime, or only when the police are responsible for the circumstances that make the identification unreliable.

Court watchers need look no further than the New Jersey Supreme Court for hints on where eyewitness jurisprudence is headed. In *State v. Henderson*, New Jersey's highest court unanimously revised its thirty-four-year-old legal standard for assessing eyewitness identification evidence, citing a disconnect between eyewitness jurisprudence and modern scientific studies and empirical research.[2] The court concluded that the old standard, the *Manson/Madison* test, did not offer an adequate measure of reliability, did not sufficiently deter inappropriate police conduct, and relied too heavily on the jury's ability to evaluate identification evidence.[3]

The decision involved the murder of Rodney Harper on January 1, 2003. Mr. Harper and James Womble had been drinking champagne and smoking crack cocaine before two men forcibly entered the apartment. Womble knew one of the intruders as George Clark, but the other man was a stranger. While Harper and Clark went to a different room, the stranger pointed a gun at Womble and told him not to move. Meanwhile, Womble overheard Clark and Harper argue and eventually heard a gunshot. As he left, Clark warned Womble that if he were to talk to the police there would be repercussions. Harper would die from the gunshot wound to his chest ten days later. Fearing retaliation, Womble fabricated the details of the evening in his first interview with investigators. After the investigators pressed Womble further, he led the investigators to Clark, who would identify his accomplice as Larry Henderson.

Thirteen days after the incident, investigators had Womble sit down to perform an identification through a

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Duties to the Unborn: Alabama Supreme Court Deems Viability Irrelevant to Fetal Wrongful-Death Actions

by Jonathan Berry

April Mack sued to recover for the wrongful death of her unborn child, who miscarried after a car accident. The Alabama Supreme Court ultimately vindicated her right to recovery, despite her having miscarried her child before the point of viability. In order to do so, the court found that viability made no sense as a prerequisite to wrongful-death recovery, holding an unborn child's gestational age irrelevant as a matter of law. Conspicuously, the court never saw fit to even mention

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FROM THE EDITOR

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

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

CASE IN FOCUS

Washington Supreme Court Rules on Attorney General's Discretion to Enter Litigation in Two Landmark Cases

by Seth Cooper

The Washington Supreme Court in September issued two of its most highly-anticipated rulings in recent years. Continuing public controversy over federal health care law and the attorney general's authority to join the states in a multi-state lawsuit challenging the law provided the backdrop to *City of Seattle v. McKenna*.[1] The exercise of the eminent domain power and the attorney general's discretion in representing state agencies is at issue in *Goldmark v. McKenna*.[2] The pair of rulings addresses the Washington attorney general's powers under the constitution and laws of Washington State—although opinions written by justices of the court raise their own questions about whether the scope of the attorney general's powers were addressed consistently.

The primary focus of this article is on the Washington Supreme Court's ruling in *City of Seattle v. McKenna*. At issue in the case was whether Washington's attorney general has the authority to join the state in a lawsuit challenging the individual mandate in the recently-enacted federal health care law.

City of Seattle v. McKenna

The attorneys general of thirteen states, including the State of Washington, filed a complaint challenging the constitutionality of the federal health care legislation under the Commerce Clause of the U.S. Constitution. The complaint was filed in the U.S. District Court for the Northern District of Florida on March 23, 2010, the same day the federal health care legislation was signed by President Barack Obama.[3]

On April 10, the City of Seattle filed a petition requesting the Washington Supreme Court to issue a writ of mandamus to compel Washington Attorney General Rob McKenna to withdraw the State of Washington from the litigation.[4] The court heard oral arguments in the case on November 18, 2010. It heard oral arguments in *Goldmark v. McKenna* on the same day.

While the Washington Supreme Court's decision in *City of Seattle v. McKenna* was pending, the U.S. district court held that the individual mandate provision in federal health care law was unconstitutional and not severable from the rest of the act.[5] On August 12, the U.S. Court of Appeals for the Eleventh Circuit issued its ruling affirming in part and reversing in part the U.S. district court's ruling.[6] In particular, the Eleventh Circuit likewise concluded that the individual mandate was unconstitutional, although severable.[7]

The Washington Supreme Court issued rulings in both *City of Seattle v. McKenna* and *Goldmark v. McKenna* on September 1, 2011.

Opinion of the Court

The Washington Supreme Court was unanimous in rejecting the city's request for a writ requiring Attorney General McKenna to withdraw the state from the ongoing federal health care litigation. Justice Susan Owens delivered the opinion of the court.[8] Mandamus is not available, Justice Owens' opinion for the court concluded, because the attorney general had no clear duty to withdraw the state from the litigation. Rather, "[s]tatutory authority

vests the attorney general with the discretionary authority to participate in the litigation at issue."[9]

The office of the Washington Attorney General is addressed in six provisions in the Washington Constitution.[10] In particular, article III, section 21 reads that "[t]he attorney general shall be the legal adviser of the state officers and shall perform such duties as may be prescribed by law." According to the court, by that section's plain meaning "'duties as may be prescribed by law' refers to those duties created by statute."[11] Consequently, "there are no common law or implied powers of the attorney general under our constitution." Rather, the court characterized its precedents as insisting on "an enumerated constitutional or statutory basis for the powers of executive officers, including the attorney general."[12]

In the opinion of the court, "[t]he Washington Constitution does not directly give the attorney general the authority to sue on behalf of the State of Washington, at least when not done on behalf of another state officer."[13] Attorney General McKenna did not claim to be acting as legal adviser in joining the State of Washington in the multistate litigation. So the court proceeded to examine whether Attorney General McKenna's action was authorized by statute. It found RCW 43.10.030 dispositive. The statute reads: "The attorney general shall . . . [a]ppear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested."[14]

The court's opinion explained that "[p]recedent establishes that this statute confers broader authority than the plain text indicates."[15] It therefore concluded that the statute "grants the attorney general discretionary authority to act in any court, state or federal, trial or appellate on 'a matter of public concern,' . . . provided there is a 'cognizable common law or statutory cause of action.'"[16]

While at the outset the court asserted that it "need not and do[es] not express any opinion on the constitutionality or wisdom of the health care reform legislation,"[17] the court nonetheless maintained that the federal health care law "is unquestionably a matter of public concern in which the State has an interest; its provisions directly affect residents of the state in numerous ways."[18] "It is also undisputed," the court explained, "that there is a cognizable statutory cause of action to enjoin enforcement of unconstitutional

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Nebraska High Court Applies Common Law Doctrine of *In Loco Parentis* to Confer Standing on Former Same-Sex Domestic Partner in Child Custody Dispute

by Megan T.R. Hitchens

With the use of surrogates, in-vitro fertilization, adoption, and egg and sperm donation, same-sex couples are increasingly able to have children. However, when these relationships sour, separation and divorce of gay and lesbian couples gives rise to complex issues of child custody and visitation. In *Latham v. Schwerdtfeger*,[1] the Nebraska Supreme Court was faced with the issue of whether the doctrine of *in loco parentis* granted a former same-sex domestic partner standing to sue for child custody and visitation for her non-biological child. Nebraska, like most states, does not have specific statutes to address same-sex couple unions, dissolution of marriage, and child custody disputes. Courts therefore turn to common law principles to fashion a remedy when such disputes arise.

Background

Appellant Teri Latham and appellee, Susan Schwerdtfeger met in college and moved in together in 1985.[2] After living together for a number of years, the couple desired to have a child. The women decided against adoption, and in 2001 Schwerdtfeger became pregnant through in-vitro fertilization, for which both parties shared the cost.[3] Latham accompanied Schwerdtfeger to doctors' appointments, was present at the birth of the child, P.S., and took maternity leave to care for Schwerdtfeger and the baby.[4] Latham maintained that she supported the child financially and emotionally and assumed a parental role by disciplining the child. She took the child to school and medical appointments, and was identified as "Mom."[5] By all accounts Latham and Schwerdtfeger lived together with the child as a family unit until 2006, when Latham and Schwerdtfeger separated. At this point, Latham saw the child three to five times per week.[6]

Latham and Schwerdtfeger shared finances through the summer of 2007, at which time Latham claimed that Schwerdtfeger began to reduce Latham's visitation with P.S. to only twice a week.[7] Schwerdtfeger

claimed that after the couple separated their finances, Latham discontinued financial support of the child.[8] Between October and December of 2009, Latham claimed that she was only allowed to spend a total of three days with the child.[9]

Procedural History

In December 2009, Latham filed a complaint for custody and visitation of P.S. in the district court for Douglas County in which she claimed she had standing to bring the action under the doctrine of *in loco parentis*.[10] In February 2010, Schwerdtfeger filed a motion for summary judgment.[11] The court then ordered the parties to submit briefs on Latham's *in loco parentis* status.[12] On July 2, 2010, the district court ruled that the doctrine of *in loco parentis* did not apply and dismissed Latham's claim with prejudice and granted Schwerdtfeger's motion for summary judgment.[13]

Latham appealed and claimed that the district court erred when it concluded that "the doctrine of *in loco parentis* did not apply," that "there were no genuine issues [as] to a material fact," and that she "lacked standing to seek for custody and visitation of the minor child."[14]

When the Nebraska Supreme Court reviewed the case, it did not make a final determination of whether to grant Latham custody and visitation. The court reversed and remanded, holding that 1) the district court erred when it concluded that the doctrine of *in loco parentis* did not apply and 2) there were genuine issues of material fact as to whether Latham was entitled to custody and visitation of the minor child.[15]

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Arkansas Supreme Court Strikes Down Ban on Adoption by Unmarried Cohabitating Couples

by Jordan E. Pratt

In a unanimous opinion handed down on April 7, 2011, the Arkansas Supreme Court invalidated—on state constitutional right-to-privacy grounds—a ban on adoption and foster parenting by unmarried adults who cohabitate with sexual partners.[1] Although the law applied to both heterosexual and homosexual couples, the decision has captured public attention largely because of its implications for the latter group.[2] This article briefly describes the law, the suit leveled against it, and the Arkansas Supreme Court's decision in *Arkansas Dep't of Human Services v. Cole*.

A. The Law

In November 2008, the voters of Arkansas approved a ballot initiative known as the Arkansas Adoption and Foster Care Act of 2008.[3] Taking effect on January 1, 2009, the Act prohibited individuals who cohabitate with a sexual partner outside of marriage from adopting or foster parenting minor children.[4] Noting the state's public policy of promoting marriage, and declaring that "it is in the best interest of children in need of adoption or foster care to be reared in homes in which adoptive or foster parents are not cohabitating outside of marriage," the Act applied equally to heterosexual and homosexual couples.[5]

B. The Litigation

Two days before the Adoption and Foster Care Act became effective, a group of plaintiffs filed suit in state court for injunctive relief.[6] The group included a lesbian grandmother wishing to adopt her granddaughter (Sheila Cole),[7] unmarried couples who wanted to foster or adopt children, adult parents who wanted to designate unmarried couples as the adoptive parents of their children in the event of their death or incapacity, and the biological children of those parents.[8] In a thirteen-count complaint, the plaintiffs alleged multiple violations of the federal and Arkansas constitutions. In Count 10, the plaintiffs alleged that the Act violated, among other things, federal and state constitutional rights to privacy by placing an impermissible burden on intimate relationships.[9]

The State moved to dismiss the complaint, and the Family Council Action Committee (FCAC), an intervening party in support of the Act, filed its own motion to dismiss.[10] After discovery, the State, FCAC, and the plaintiffs moved for summary judgment.[11] The trial court granted the plaintiffs' motion on Count 10 and determined that the Act violated the Arkansas Constitution. The court found that the Act "infringes upon the fundamental right to privacy guaranteed to all citizens of Arkansas" because it "significantly burdens non-marital relationships and acts of sexual intimacy

between adults" and was not narrowly tailored to the State's goal of protecting the best interests of children.[12] The trial court granted the State's and FCAC's motions for summary judgment and motions to dismiss on the federal constitutional claims, and it dismissed the plaintiffs' remaining state constitutional claims because it did not need to decide them.[13] The State and FCAC appealed the court's grant of summary judgment to the plaintiffs on Count 10, and the plaintiffs cross-appealed the court's grant of summary judgment to the State on the federal constitutional claims.[14]

C. The Arkansas Supreme Court's Decision

On direct appeal, the Arkansas Supreme Court affirmed the trial court's decision in a unanimous opinion.[15] Writing for the court, Justice Robert Brown began by briefly acknowledging the presumption of constitutionality accorded the statute.[16] In the remainder of his opinion, Justice Brown explained why, in the court's view, the plaintiffs had rebutted that presumption.

The lynchpin of the court's decision was *Jegley v. Picado*,[17] a 2002 case in which the Arkansas Supreme Court held that the state's constitution implicitly guarantees a fundamental right to privacy. The *Jegley* court invalidated an Arkansas statute that criminalized homosexual sodomy. Although the Arkansas Constitution contains no explicit right to privacy, the *Jegley* court found that it does guarantee one implicitly and that this fundamental right embraces "all private, consensual, noncommercial acts of sexual intimacy between adults."[18] *Jegley* directed that laws burdening this fundamental right to privacy receive strict scrutiny, and it found that a ban on homosexual sodomy could not meet that test.[19]

In the present case, the State contended that the Arkansas Adoption and Foster Care Act did not implicate *Jegley*'s right to privacy because it related to cohabitation, not sexual intimacy. The State further argued that the Act did not burden the right to engage in sexual intimacy because individuals who cohabitate with a sexual partner outside of marriage remained free under the Act to continue their lifestyle as long as they did not wish to adopt or foster children.[20] The court rejected these contentions, observing that the Act did not concern individuals who merely cohabitate, but rather individuals who cohabitate with a *sexual partner*. The court further reasoned that forcing a choice between the exercise of

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North Carolina Appellate Court Decides when Municipality May Be Held Liable in Public Park Case

by Jonathan Y. Ellis

In June 2007, seventeen-year-old Eric Williams died tragically at a public park in Elizabeth City, North Carolina. Eric was attending a high school graduation party when he drowned in a "swimming hole" in Fun Junktion Park, which a friend's parents had rented out from the Pasquotank County Parks and Recreation Department. In the ensuing lawsuit, *Williams v. Pasquotank County*,[1] Eric's estate sued the county and the department for the young man's wrongful death, alleging that the "swimming hole" was unsafe.

In their answer, the county and department asserted governmental and sovereign immunity. In a motion for summary judgment, they argued that they were immune from tort liability because the operation of the public park was a governmental function. The trial court denied the motion, and the county appealed. In a unanimous opinion issued in May, the North Carolina Court of Appeals affirmed.[2]

The issue presented was one that has vexed North Carolina courts for decades: When is a municipality liable for the negligence of its officers and employees? The court of appeals confronted the question head-on. Rather than confine itself to simply categorizing the county's conduct in the case before it, the panel went out of its way to "distill the controlling law . . . and provide a coherent framework for future application."[3]

Background Law

In North Carolina and many other state courts, governmental immunity shields municipalities from negligence suits for the actions of their employees. The North Carolina Supreme Court explained long ago that "a municipal corporation may not be held civilly liable to individuals for the negligence of its agents in performing duties which are governmental in their nature and solely for the public benefit."[4] And despite the expansion of municipal activities, the availability of liability insurance, and the injustice the doctrine can affect in individual cases, the North Carolina Supreme Court has made clear that the abrogation of this doctrine must come—if it is to come at all—from

the state legislature.[5]

But unlike the state's immunity under the related sovereign immunity doctrine, a municipality's immunity is not absolute. While sovereign immunity covers every act of the state, "[t]he more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions."[6] When a municipality exercises "the judicial, discretionary, or legislative authority conferred by its charter," or "is discharging a duty imposed solely for the benefit of the public," it performs its governmental functions and thus cannot be held liable for the negligence of its officers or employees.[7] But when a municipality acts in its "ministerial or corporate character in the management of property for [its] own benefit, or in the exercise of powers, assumed voluntarily for [its] own advantage," it performs proprietary functions and thus may be held liable for the damages caused by the negligence of its officers and agents.[8] As the North Carolina Supreme Court succinctly explained in *Britt v. City of Wilmington*,

> When a municipality is acting "in behalf of the State" in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers.[9]

The governmental-proprietary function doctrine, so stated, is well-settled and easily ascertained from North Carolina case law. It is in applying the doctrine to

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New York State's Highest Court Reverses Major Tort Award in World Trade Center Bombing Litigation

by Craig Mausler

On September 22, 2011, the New York State Court of Appeals issued a decision reversing a major tort award. In *In re World Trade Center Bombing Litigation Steering Committee v. Port Authority of New York and New Jersey*,[1] the basic underlying facts were not in dispute. The Port Authority was a public entity created in a 1921 compact between New York and New Jersey to oversee critical centers of commerce, trade, and transportation hubs (e.g., airports, bridges, tunnels, etc). It is a financially self-reliant public entity.[2] One of the properties it developed, constructed, and operated was the World Trade Center. The Port Authority operated a security force of forty police officers within the confines of the World Trade Center.

On numerous occasions during the decade of the 1980s internal security reports indicated that the World Trade Center was highly vulnerable to terrorist attack. The underground security garage was deemed vulnerable to car bombs, but the Port Authority never undertook any action as to the parking garage in response to the warnings in the reports.

In February 1993 terrorists drove a van containing a fertilizer bomb into the B-2 level of the parking garage and parked on the side of one of the access ramps.[3] They then detonated the bomb, which created a blast crater six stories deep and killed six people. 648 plaintiffs commenced 174 actions against the Port Authority for injuries due to the bombing.[4] The gravamen of the plaintiffs' claims was that the Port Authority was negligent in providing security because it failed to take action in response to its own internal reports warning of this possible threat. The Port Authority claimed it was entitled to the defense of governmental immunity.[5] The lower court held that the Port Authority was acting in a proprietary capacity, and as such was not entitled to the governmental immunity defense.[6] A jury found that the Port Authority was 68% liable for failing to maintain the parking garage in a reasonably safe condition, and the terrorists were 32% liable.[7]

The two main issues raised on appeal were whether the Port Authority's decision as to where to allocate its police resources was the performance of a governmental function, thus meriting immunity, or more similar to that of a commercial landlord, thus implementing a proprietary function that does not receive tort immunity.[8] If the latter view is adopted, then another issue raised would be whether the allocation of fault between the Port Authority and the terrorists established by the jury was incorrect.

The New York Court of Appeals reversed the lower-court decision on the immunity issue.[9] Both the majority and the dissent agreed that the difficulty in this matter was

the governmental entity's performance of dual proprietary and governmental functions. The majority held that the alleged security lapse involved in a significant way the assignment of its police officers to various security risks—which is a policy decision. The assignment of police is a discretionary decision-making governmental function, and thus merits governmental immunity, as discretionary governmental acts may not be a basis for liability.[10] Given this holding, the majority did not reach the issue of fault allocation.

The dissent maintained that the alleged negligence stemmed from a proprietary function as a commercial landlord, as the decisions the Port Authority made were not uncommon to those of any commercial landlord.[11] The dissent stated that the Port Authority failed its duty to tenants and invitees as a the landlord of a commercial office complex, and found that the World Trade Center was a predominantly commercial venture.[12] The dissent agreed that there could be no liability for the Port Authority's decision where to deploy police personnel, but the Authority could be liable for failing to take security measures that a private landlord would take.[13] The dissent also stated that the jury's allocation of fault (68% to the Port Authority, and 32% to the terrorists) was permissible on the evidence presented and was not a basis for reversal.[14]

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Endnotes

1 *In re* World Trade Ctr. Bombing Litigation, No. 217 (N.Y. Sept. 22, 2011).

2 *Id.*, slip op. at 2.

3 *Id.* at 7.

4 *Id.*

5 *Id.* at 8.

6 Other smaller, side issues not relevant to the issues discussed in this article are not reviewed here.

7 *In re* World Trade Ctr. Bombing Litigation, No. 217, at 8.

8 *Id.*

9 *Id.* at 29.

10 *Id.* at 18.

11 *Id.* at 21.

12 *Id.* at 27.

13 *Id.* at 28.

14 *Id.* at 30.

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actions by the United States Government"[19] Thus, Attorney General McKenna acted within the authority granted to him by the statute when joining the state as a party to the multistate litigation.

The court also examined the question whether the Attorney General properly made the state a party to the multistate litigation, as opposed to acting in his individual, official capacity. Citing prior precedents the court answered the question by observing that "[t]he general rule is that where the attorney general is authorized to bring an action, he or she is authorized to do so in the name of the state."[20]

The court rejected the argument advanced by Washington Governor Christine Gregoire in an amicus brief that if the governor disagrees with a litigation decision, the attorney general cannot proceed in the state's name. The court acknowledged that Washington Constitution article III, section 2 vests "[t]he supreme executive power of this state" in the governor, and that the governor's superior authority may require accommodation in certain matters. As Justice Owens' opinion for the court put it, however, "the governor is not a party to the present action; Governor Gregoire neither initiated this petition for mandamus nor has she intervened."[21] The court asserted that it would therefore "leave for the appropriate case the issue of what result the Washington Constitution compels where the governor disagrees with the attorney general's discretionary decision to initiate litigation and seeks to preclude the attorney general's action."[22]

Concurring Opinions

Justice Gerry Alexander authored a concurring opinion that briefly addressed the issue of standing. Wrote Justice Alexander, "I am doubtful that Seattle could have established standing to maintain this action under any of the four doctrines that could have provided it with authority to bring this suit: traditional, representational, liberalized, or taxpayer."[23] Moreover, Justice Alexander characterized Seattle's assertion of taxpayer standing as "a particular stretch" for four reasons: (1) Seattle did not plead taxpayer status; (2) its submitted documents

provided no such support; (3) "it is questionable if a municipal corporation, like Seattle, can claim taxpayer status"; and (4) Seattle failed to make a demand on the Attorney General to cease representation, which is a "condition precedent" to a taxpayer's suit.[24] Justice James Johnson joined Justice Alexander's concurrence.

Justice Pro Tem Richard Sanders also wrote a concurring opinion.[25] While agreeing with the result based on the Washington Constitution and statute, Justice Sanders concluded that the result required the court to expressly overrule two of its prior decisions. Justice Sanders interpreted those decisions as recognizing common-law powers in the attorney general in cases involving the attorney general's enforcement of charitable trusts and the filing of an amicus brief on behalf of the state of Washington, respectively.[26] Justice Pro Tem Sanders wrote that since those cases "necessarily rely on a mistaken common-law authority in the office of the attorney general, they must be overruled."[27] Justice Debra Stephens concurred with Justice Pro Tem Sanders.

Goldmark v. McKenna

On the same day it issued its opinion in *City of Seattle v. McKenna*, the Washington Supreme Court also handed down its decision in *Goldmark v. McKenna*.[28] The case is also a mandamus action against the attorney general with significant implications for the scope of the office's constitutional and statutory authority. *Goldmark v. McKenna* raises questions regarding the authority of the attorney general to represent state agencies and to exercise discretion in his or her representation in order to reconcile possibly antagonistic interests of state officers and to protect the interests of the people.

The Commissioner of Public Lands Peter Goldmark sought a writ of mandamus compelling Attorney General McKenna to pursue an appeal from an adverse trial court decision in a condemnation action. The attorney general represented the commissioner before the trial court but chose not to pursue an appeal or to appoint a special assistant attorney general to pursue the appeal on behalf of the commissioner.

In a 7-2 ruling, the court concluded: "RCW 43.12.075 expressly requires the attorney general to represent the commissioner in any court when requested by the commissioner. This duty is mandatory, and the attorney general has no discretion to deny the commissioner legal representation." That statutory provision sets out duties of the attorney general in representing the Commissioner of Public Lands or Board of Natural Resources. However, the court's ruling also rested its decision, in part, on RCW 43.10.040—a statutory provision regarding the attorney general's duties regarding representation of state boards, commissions, and agencies in general. It also rested on RCW 43.10.067—a provision generally restricting state boards, commissions, and agencies from appointing or retaining their own, separate counsel and requiring representation by the attorney general.

Justice Charles Johnson wrote the opinion for the court.[29] The court's majority concluded that there is "nothing inherent in [the Washington Constitution's] structure that permits the attorney general to refuse to represent state officers when statutorily required to do so."[30] In the course of its ruling, the majority rejected the attorney general's argument that his statutory authority to initiate litigation on his own initiative gave him discretion to act contrary to the commissioner's objection and decline requested representation. Any such initiative, the majority concluded, extends to cases where neither the commission nor the Department of Natural Resources is a party but where the interests of the state are involved.[31] In addition, the majority maintained that "this case is consistent with *City of Seattle v. McKenna* because here, in addition to the attorney general's broad constitutional and statutory authority, there is a statute specifically directed to the situation before us."[32]

Justice Alexander issued a short concurring opinion. He insisted that the attorney general retains "discretion to decline such representation if the appeal is frivolous," in light of the attorney general's oath as a member of the Washington State Bar Association, officer of the courts of the state, and as a separate branch of the state government.[33] But Justice Alexander pointed out that Attorney General McKenna did not assert that such an appeal would be frivolous.

Justice Stephens wrote a dissenting opinion, joined by Justice Pro Tem Sanders. Justice Stephens insisted that the majority's opinion "fundamentally misunderstands the authority and duty of the attorney general under our constitution and relevant statutes," and that "it vastly expands the circumstances under which this court will grant a writ of mandamus."[34] Justice Stephens also offered a third reason for disagreeing with the majority: "I find it impossible to reconcile the majority's analysis here with our decision in *McKenna*."[35] In particular, Justice Stephens contended that the majority's understanding of the representational duties that the attorney general "shall" provide pursuant to RCW 43.10.030 is inconsistent with the discretion it recognized in *City of Seattle v. McKenna*. Justice Stephens also concluded that the majority's opinion granting a writ of mandamus on behalf of one constitutional officer was inconsistent with *City of Seattle v. McKenna*'s

rejection of the argument that "where the governor and attorney general disagree, the attorney general may not proceed in the name of the state." "Reading the two cases together," wrote Justice Stephens, "it is unclear why a writ of mandamus is appropriate to force the attorney general to follow the commissioner's wishes in this litigation but it is inappropriate in *McKenna*."

Goldmark Reconsidered?

On September 21, Attorney General McKenna filed a motion for reconsideration in *Goldmark v. McKenna*. In addition to offering several arguments that "the majority has misapprehended law and overlooked fact," the attorney general's motion alternatively requests that the court "modify the majority opinion to rest its opinion unambiguously on RCW 43.12.075 and remove references to RCW 43.10.040 and RCW 43.10.067."[36]

It is a rare occurrence for the Washington Supreme Court to reverse itself in the same proceeding.[37] However, the Court did withdraw and significantly modify one of its opinions in April, 2011.[38] The Attorney General's motion to reconsider in *Goldmark v. McKenna* is pending as of this writing.

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Endnotes

1 City of Seattle v. McKenna, 2011 Wash. LEXIS 666 (2011).

2 Goldmark v. McKenna, 2011 Wash. LEXIS 668 (2011).

3 *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

4 *City of Seattle*, 2011 Wash. LEXIS 666, at *3 (2011).

5 Florida v. U.S. Health & Human Servs., 2011 U.S. Dist. LEXIS 8822 (N.D. Fla., 2011).

6 Florida v. U.S. Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011).

7 On November 14, 2011, the U.S. Supreme Court granted certiorari in the case. U.S. Supreme Court, Certiorari—Summary Dispositions 3 (Nov. 14, 2011), *available at* http://www.supremecourt.gov/orders/courtorders/111411zor.pdf.

8 According to the LEXIS reported version, the court's opinion was joined by Chief Justice Barbara Madsen, Justice Charles W. Johnson, Justice Gerry L. Alexander, Justice Tom Chambers, Justice Mary E. Fairhurst, and Justice James M. Johnson. *See City of Seattle*, 2011 Wash. LEXIS 666, at *1. Justice Pro Tem Richard Sanders issued a concurring opinion that was joined by Justice Debra L. Stephens, but neither is listed as specifically joining the court's opinion. *See id.*

Justice Owens wrote the opinion for the court in its unanimous ruling in *Brown v. Owen*, 206 P.3d 310 (Wash. 2009). Prior to *City of Seattle* and *Goldmark v. McKenna*, 2011 Wash. LEXIS 668 (2011), the Washington Supreme Court's most recent mandamus case involving a request for a writ of mandamus to be issued against a state executive branch officer and raising significant separation of powers issues was in *SEIU Healthcare 775NW v. Gregoire*, 229 P.3d 774 (2010) (dismissing a petition for a writ of mandamus compelling the governor to revise the budget submitted to the legislature to implement pay increases as inappropriate since redistributive budgetary decisions require the governor's discretion as a constitutional officer).

9 *City of Seattle*, 2011 Wash. LEXIS, at *2.

10 *See id.* at *6-7 (discussing Wash. Const. art III, secs. 1, 3, 10, 21, 24, art. IV, sec. 9).

11 *City of Seattle*, 2011 Wash. LEXIS, at *5.

12 *Id.* at *6-*7 (citing State *ex rel.* Attorney Gen. v. Seattle Gas & Electric Co. 28 Wash. 2d 488, 495-496 (1902) ("The attorney general of the state . . . is not a common-law officer. . . . Every office under our system of government, from the governor down, is one of delegated powers.")); *see also id.* at *9 (citing three additional cases relying on *Seattle Gas & Electric Co.*, 28 Wash. 2d 488).

13 *City of Seattle*, 2011 Wash. LEXIS at *11-*12.

14 RCW 43.10.030.

15 *City of Seattle*, 2011 Wash. LEXIS at *12.

16 *Id.* at *15-16 (quoting State v. Taylor, 58 Wash. 2d 252, 256, 257, (1961); citing Taylor, Young Ams. for Freedom v. Gorton, 588 P.2d 195 (Wash. 1978); RCW 40.10.030(1)).

17 *City of Seattle*, 2011 Wash. LEXIS at *1.

18 *Id.* at *17.

19 *Id.* (citing 28 U.S.C. § 2201(a)).

20 *City of Seattle*, 2011 Wash. LEXIS at *17 (citing Sate v. Asotin County, 79 Wash. 2d 634, 638 (1914)).

21 *City of Seattle*, 2011 Wash. LEXIS at *18.

22 *Id.* at *19.

23 *Id.* at *20-21 (Alexander, J., concurring).

24 *Id.*

25 *Id.* at *21-23 (Sanders, J., concurring).

26 *Id.* at *22-23 (discussing State v. Taylor, 362 P.2d 247 (Wash. 1961); Young Ams. for Freedom v. Gorton, 588 P.2d 195 (1978)).

27 *City of Seattle*, 2011 Wash. LEXIS at *24 (Sanders, J., concurring).

28 Goldmark v. McKenna, 2011 Wash. LEXIS 668 (2011).

29 The composition of the court's personnel in *Goldmark v. McKenna* differed slightly from *City of Seattle v. McKenna*. In *Goldmark*, Justice James M. Johnson recused and was replaced by Justice Pro Tem Anne L. Ellington, a member of Division One of the Washington Court of Appeals. According to the LEXIS reported version, the court's opinion was joined by Chief Justice Barbara Madsen, Justice Tom Chambers, Justice Susan Owens, Justice Mary E. Fairhurst, and Justice Pro Tem Anne L. Ellington. *See Goldmark,* 2011 Wash. LEXIS 668.

30 *Id.* at *17.

31 *See id.* at *9.

32 *Id.* at *16 n.4.

33 *Id.* at *24 (Alexander, J., concurring).

34 *Id.* at *26, (Stephens, J., dissenting).

35 *Id.* at *37.

36 Motion for Reconsideration at 22, Goldmark v. McKenna, No. 84704-5 (Wash. Sept. 21, 2011).

37 *See, e.g.*, Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 83 P.3d 419 (Wash. 2004) (on rehearing, vacating, in part, its prior ruling).

38 Schnall v. AT&T Wireless Servs., Inc., 259 P.3d 129 (2011) (substituting previously withdrawn opinion on reconsideration).

Nebraska High Court Applies Common Law Doctrine of *In Loco Parentis* to Confer Standing on Former Same-Sex Domestic Partner in Child Custody Dispute

Continued from page 4...

Bases for Standing

The primary issue before the court was the issue of Latham's standing to seek custody and visitation. "Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process."[16] In Nebraska, courts have held that both biological and adoptive parents have a statutory basis for standing to seek custody and visitation of a minor child.[17] Because same-sex marriage and civil unions are invalid and unrecognized in Nebraska, Latham was neither eligible to marry Schwerdtfeger nor eligible to adopt P.S.[18] Complicating the matter further, existing statutes addressing child custody matters failed to confer standing on Latham.[19] On appeal, Latham conceded that she had no statutory basis for standing.[20] The court then looked to Nebraska common law and other jurisdictions for guidance as to whether the common law doctrine of *in loco parentis* granted Latham standing to seek custody and visitation of the child.[21]

"The *in loco parentis* basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest."[22]

> [A] person standing *in loco parentis* to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.[23]

Nebraska recognized in *Hickenbottom v. Hickenbottom* that the doctrine of *in loco parentis* was applicable to determine stepparent visitation rights with the best interest of the child in mind. [24] Likewise, in *Weinand v. Weinand*, the Nebraska Supreme Court held "in the absence of a statute, child support may properly be imposed in cases where a stepparent has voluntarily taken the child into his or her home and acted *in loco parentis*."[25] Prior to this case, Nebraska had only applied the doctrine in cases of stepparents and grandparents, so the court looked to other jurisdictions for guidance on the issue of whether non-biological parents may seek custody using the doctrine.[26]

In Kentucky, "[a] nonparent has standing to seek custody and visitation of the child when the child was conceived by artificial insemination with the intent that the child would be co-parented by the parent and her partner."[27]

In *J.A.L. v. E.P.H.*, a Pennsylvania Superior Court explained that "the doctrine of *in loco parentis* is viewed in the context of standing principles in general, its purpose is to ensure that actions are brought only by those with a genuine substantial interest," and because "a wide spectrum of arrangements [have filled] the role of the traditional nuclear family, flexibility in the application of standing principles is required. . . ."[28] In that case, the Pennsylvania court ruled that a non-biological parent seeking partial custody had standing under the doctrine of *in loco parentis*.[29]

The Wisconsin Supreme Court explained that "the legislature did not intend the visitation statutes to bar the courts from exercising their equitable power to order visitation in circumstances not included within the statutes but in conformity with the policy directives set forth in the statutes."[30]

The Nebraska Supreme Court reversed the district court ruling, concluding that the common law doctrine of *in loco parentis* applied to the standing analysis of Latham's case.[31] The court explained,

> Because the purpose of the doctrine of *in loco parentis* is to serve the best interest of the child, it is necessary to assess the relationship established between the child and the individual seeking *in loco*

> *parentis* status. The primary determination in an *in loco parentis* analysis is whether the person seeking *in loco parentis* status assumed the obligations incident to a parental relationship.[32]

Satisfied with the reasoning of other jurisdictions on the threshold question of standing, the court then addressed the issue of summary judgment.

Summary Judgment

"In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence."[33] In its reversal, the court stated,

> The facts taken in light most favorable to Latham show that she was involved in the decision to conceive the minor child, was present at his birth, spent the first four years of his life in the home with him, and took part in parental duties such as feeding, clothing, and disciplining him.[34]

The court was "persuaded that Latham had raised genuine issues of material fact for trial concerning her continuing relationship with the minor child and what outcome will best serve the child's interests.[35]

The Nebraska Supreme Court placed the emphasis on the relationship between Latham and the child, asserting that the district court erred when it placed the emphasis on the relationship between Latham and Schwerdtfeger at the time of the hearing.[36] The Nebraska Supreme Court determined that the district court erred when it determined that the doctrine of *in loco parentis* did not apply and dismissed the case.[37] While the decision granted Latham standing to seek custody and visitation, the court concluded,

> There are material questions of fact concerning the amount of time Latham spent with P.S. and the nature and extent of the relationship between Latham and P.S. after Latham and Schwerdtfeger separated. Whether and to what extent Latham's participation in P.S.'s life are in his best interests must await trial.[38]

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Endnotes

1 Latham v. Schwerdtfeger, 282 Neb. 121 (2011).

2 *Id.* at 123.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 124.

8 *Id.*

9 *Id.*

10 *Id.* at 122.

11 *Id.* at 124.

12 *Id.*

13 *Id.* at 125.

14 *Id.* at 125-126.

15 *Id.* at 123.

16 *Id.* at 126. (citation omitted).

17 *Id.* at 126.

18 *See* Neb. Const. art. I, § 29 (2000) ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.").

19 *Latham*, 282 Neb. at 128.

20 *See, e.g.*, Neb. Rev. Stat. §§ 42-341 to 42-381 (2008) (dissolution actions); Neb. Rev. Stat. §§ 43-1401 to 43-1418 (2008) (paternity actions); Neb. Rev. Stat. §§ 43-245 to 43-2,130 (2008) (juvenile proceedings); Neb. Rev. Stat. §§ 30-2601 to 30-2616 (2008) (guardianship proceedings); Neb. Rev. Stat. §§ 43-101 to 43-165 (2008) (adoption proceedings); Neb. Rev. Stat. §§ 43-1226 to 43-1266 (2008) (Uniform Child Custody Jurisdiction and Enforcement Act).

21 *Latham,* 282 Neb. at 127-128.

22 *Id.* at 126 (citation omitted).

23 *Id.* at 128 (citation omitted).

24 *Id.*

25 *Id.* (citation omitted).

26 *Id.* at 129.

27 *Id.* (quoting Mullins v. Picklesimer, 317 S.W.2d 569, 575 (Ky. 2010)).

28 *Id.* (citation omitted).

29 *Id.* at 130-131.

30 *Id.* at 131 (quoting Custody of H.S.H.-K, 193 Wis. 2d 649, 533 N.W.2d 419 (1995)).

31 *Id.* at 132.

32 *Id.* at 131.

33 *Id.* at 122.

34 *Id.* at 133.

35 *Id.*

36 *Id.*

37 *Id.* at 135.

38 *Id.*

Arkansas Supreme Court Strikes Down Ban on Adoption by Unmarried Cohabitating Couples

Continued from page 5...

a fundamental right and a statutory privilege—in this case, sexual intimacy and adoption, respectively—can constitute a burden on the right.[21] As its chief support for this proposition, the court enlisted the United States Supreme Court's decision in *Sherbert v. Verner*,[22] a well-known free exercise case that shielded a Seventh-Day Adventist from a state welfare benefits regime requiring availability to work on Saturdays. The Arkansas Supreme Court analogized the Adoption and Foster Care Act, which required a choice between sexual intimacy and adoption, to the welfare benefits regime in *Sherbert*, which required a choice between worshiping God according to the dictates of conscience and receiving welfare benefits. The court reasoned that the Act, by forcing such a choice, burdened the right to privacy implicitly protected by the Arkansas Constitution.[23]

Before deciding whether the burden imposed on the right to privacy was sufficient to trigger heightened scrutiny, the court set out to distinguish the Act from non-cohabitation orders historically permitted in divorce and child custody cases. The court cited two important distinctions. First, cohabitation orders are more narrowly directed toward the state's interest in promoting the best interest of children because they result from case-by-case determinations, not simply a blanket prohibition.[24] Second, the state has a much greater need to shield children from third-party "strangers" who live with divorced parents than it does to shield children from individuals who presumably must undergo extensive pre-adoption and pre-fostering screening.[25]

Having determined that the Adoption and Foster Care Act burdened the right to privacy implicit in the state constitution, the Arkansas Supreme Court found that the burden was severe enough to trigger the strict scrutiny test mandated by *Jegley*. The court reasoned that forcing a choice between sexual intimacy and adoption or fostering "is not appreciably different from [the burden] imposed by the criminal [sodomy] statute in *Jegley*," as both laws would ultimately require state investigations in the bedroom.[26] According to the court, forcing the plaintiffs to choose between their fundamental right to extramarital sexual intimacy and the privilege of having children by adoption or fostering was enough of a burden to trigger *Jegley*'s heightened scrutiny test.

The court concluded that the Arkansas Adoption and Foster Care Act could not meet the rigorous narrow-tailoring requirement of strict scrutiny. The court acknowledged that Arkansas' goal in enacting the statute—protecting the state's children and their best interests—was compelling.[27] But the Act's blanket ban cast too wide a net, the court explained. The court began by noting that several state officials had asserted in their depositions that a categorical prohibition on adoption and fostering by unmarried cohabitating couples would not serve the best interests of children.[28] And counsel for the state had conceded at oral argument that some individuals cohabitating with sexual partners could provide suitable homes for children.[29] Additionally, the state's concerns that unmarried cohabitating relationships are unstable and put children at higher risk than marital relationships "can . . . be addressed by the individualized screening process currently in place in foster and adoption cases."[30] The court described this screening process in detail, concluding that "[w]e have no doubt that this individualized assessment process is a thorough and effective means to screen out unsuitable applicants . . . ."[31]

Having determined that the Arkansas Adoption and Foster Care Act directly and substantially burdened the fundamental right to privacy implicit in the state's constitution and that the Act was not the least restrictive means of protecting the state's children from unstable homes, the Arkansas Supreme Court invalidated the Act and affirmed the decision below.[32] Accordingly, the court refused to address the federal constitutional claims and remaining state constitutional claims that the plaintiffs advanced on cross-appeal.[33] Although limited in its immediate effect to Arkansas, this decision will certainly add to the ongoing national dialogue concerning the ability of the several states to prohibit gay couples from adopting children or serving as foster parents.

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Endnotes

1 Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145 (2011).

2 *See, e.g.*, Nathan Koppel, *Arkansas Supreme Court Expands Gay Adoption Rights*, Wall St. J. (Apr. 7, 2011, 3:30 PM), http://blogs.wsj.com/law/2011/04/07/arkansas-supreme-court-expands-gay-adoption-rights/?mod=WSJBlog (last visited Oct. 10, 2011); Amanda Terkel, *Arkansas Supreme Court Strikes Down Ban on Gay Adoptions*, Huffington Post (Apr. 7, 2011, 2:51 PM), http://www.huffingtonpost.com/2011/04/07/arkansas-supreme-court-ban-gay-adoption_n_846174.html (last updated June 7, 2011).

3 *Cole*, 2011 Ark. at 2.

4 *Id.* at 2-3.

5 *Id.* at 3.

6 *Id.*

7 *See Cole v. Arkansas—About Our Plaintiffs and Their Families*, ACLU.org (Dec. 30, 2008), http://www.aclu.org/lgbt-rights_hiv-aids/cole-v-arkansas-profiles-our-plaintiffs-and-their-families (last updated Oct. 27, 2010).

8 *Cole*, 2011 Ark. at 3.

9 *Id.* at 4-5.

10 *Id.* at 5-6.

11 *Id.* at 6.

12 *Id.* at 5-7.

13 *Id.* at 6.

14 *Id.* at 7.

15 *Id.* at 2.

16 *Id.* at 8.

17 Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002).

18 *Id.* at 350.

19 *Id.*

20 *Cole*, 2011 Ark. at 10, 11.

21 *Id.*

22 374 U.S. 398 (1963).

23 *Cole*, 2011 Ark. at 12-14.

24 *Id.* at 16.

25 *Id.* at 16-17.

26 *Id.* at 17-18.

27 *Id.* at 21.

28 *Id.* at 21-22.

29 *Id.* at 22.

30 *Id.* at 23.

31 *Id.* at 23–24.

32 *Id.* at 25.

33 *Id.*

North Carolina Appellate Court Decides when Municipality May Be Held Liable in Public Park Case

Continued from page 6...

individual cases that courts often find that "making this distinction proves difficult."[10]

North Carolina courts have highlighted a number of different factors that might be used to distinguish between governmental and propriety functions, any one of which might seem decisive. Some opinions have emphasized the function's historical pedigree: Is the function one "traditionally provided by the local governmental units"?[11] Others have asked the similar but distinct question whether a private corporation could perform the same task.[12] Decisions have relied upon the characterization of a function as "governmental" by state statute[13] or by prior judicial opinions that declare the function is directed at a public purpose.[14] Yet others have explained that such labels are not controlling.[15] Some decisions have found the collection of revenue to be "a crucial factor" in withholding governmental immunity.[16] And still others have held that a fee that covers only the municipality's costs will not transform a governmental function into a proprietary one.[17] The result, as the North Carolina Supreme Court has itself recognized, is a doctrine consisting of "irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary."[18]

Fun Junktion Park

And so the law stood when the North Carolina Court of Appeals was asked to determine whether Pasquotank County performed a governmental or proprietary function in its operation of Fun Junktion public park. Faced with such confused precedents, the court might have elected to follow one line of cases and issued a narrow decision that could have been embraced or distinguished by any future court.

For example, the court might have relied on the North Carolina General Assembly's declaration that "the public good and the general welfare of the citizens of this State require adequate recreation programs," and that "the creation, establishment, and operation of parks and recreation programs is a proper governmental function."[19] It might have emphasized the court of appeals' earlier statement in *Hare v. Butler* that "[c]ertain activities are clearly governmental such as law enforcement operations

and the operation of jails, public libraries, county fire departments, *public parks* and city garbage services."[20] Or it could have supported a conclusion that the park's operation was proprietary or governmental by relying on either of two conflicting opinions of the North Carolina Supreme Court categorizing the operation of other public parks.[21]

But the court did none of these things. Instead, it attempted to do what previous courts had not: harmonize the controlling law and provide "a coherent framework for future application" of the governmental-proprietary function distinction.[22]

The court's new framework, derived from many of the cases discussed above, is a four-part test that instructs courts to consider:

> (1) whether an undertaking is one traditionally provided by the local governmental units;
>
> (2) if the undertaking of the municipality is one in which only a governmental agency could engage or if any corporation, individual, or group of individuals could do the same thing;
>
> (3) whether the county charged a substantial fee; and
>
> (4) if a fee was charged, whether a profit was made.[23]

Not all factors must be present; nor is any factor dispositive. But the second factor provides the "guiding principle."[24]

As applied to Pasquotank's operation of Fun Junktion, the court determined that the operation of a public park is "certainly . . . a function traditionally provided by the government."[25] However, the court continued, "it is equally clear that not all parks are operated by governmental units."[26] With respect to the fee, the court considered the $75 fee charged to the hosts of graduation party to be substantial.[27] But, it noted, the $2,052 collected from such fees in the previous year was enough to recoup just 1.3% of the country's operating costs for the park.[28]

After weighing each factor, mindful that the second consideration is most important, the court concluded that Pasquotank County was engaged in a proprietary function when it operated the party facilities at Fun Junktion.[29] Accordingly, the defendants could not rely on governmental immunity to escape liability for the alleged negligence of its employees that led to the death of Eric Williams. The court of appeals thus affirmed the trial court's denial of summary judgment.[30]

Conclusion

The North Carolina Court of Appeals' decision in *Williams* was undoubtedly a significant one for the Williams family and Pasquotank County. But if the decision attains greater long-term significance, it will be found in the guidance the opinion provides to future courts and the clarity the court attempted to bring to an important but confused area of the law. Whether it will ever achieve that significance is—for now—up to the North Carolina Supreme Court. A petition for discretionary review is pending.[31]

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Endnotes

1 Estate of Williams v. Pasquotank County Parks & Recreation Dep't, 711 S.E.2d 450 (N.C. Ct. App. 2011).

2 *Id.*

3 *Id.* at 453.

4 Broome v. City of Charlotte, 182 S.E. 325, 326 (N.C. 1935).

5 Koontz v. City of Winston-Salem, 186 S.E.2d 897, 908 (N.C. 1972); *see also* Hodges v. City of Charlotte, 200 S.E. 889, 892 (1939) (Barnhill, J., concurring).

6 Evans v. Housing Auth. of Raleigh, 602 S.E.2d 668, 670 (N.C. 2004).

7 Moffit v. City of Asheville, 9 S.E. 695, 697 (N.C. 1889).

8 *Id*.

9 73 S.E.2d 289, 293 (N.C. 1952).

10 Hare v. Butler, 394 S.E.2d 231, 235 (N.C. Ct. App. 1990).

11 Willett v. Chatham County Bd. of Educ., 625 S.E.2d 900, 902 (N.C. Ct. App. 2006) (internal quotation marks omitted).

12 *Britt*, 73 S.E.2d at 293 ("[An undertaking] is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing.").

13 Hickman v. Fuqua, 422 S.E.2d 449, 452 (N.C. Ct. App. 1992).

14 *Evans*, 602 S.E.2d at 671-72.

15 Rhodes v. City of Asheville, 52 S.E.2d 371, 373-74 (N.C. 1949).

16 Sides v. Cabarrus Mem'l Hosp., Inc., 213 S.E.2d 297, 303 (N.C. 1975); *see also* Glenn v. City of Raleigh, 98 S.E.2d 913, 919 (N.C. 1957).

17 James v. City of Charlotte, 112 S.E. 423, 424 (N.C. 1922); *see also Evans*, 602 S.E.2d at 671; Rich v. City of Goldsboro, 192 S.E.2d 824, 827 (N.C. 1972).

18 Koontz v. City of Winston-Salem, 186 S.E.2d 897, 907 (N.C. 1972).

19 NCGSA § 160A-351.

20 Hare v. Butler, 394 S.E.2d 231, 395 (N.C. Ct. App. 1990) (emphasis added).

21 *Compare Glenn*, 98 S.E.2d at 919 (proprietary), with *Rich*, 192 S.E.2d at 827 (governmental).

22 Estate of Williams v. Pasquotank County Parks & Recreation Dep't, 711 S.E.2d 450, 453 (N.C. Ct. App. 2011).

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 454.

28 *Id.*

29 *Id.*

30 *Id.*

31 Supreme Court of North Carolina, Docket Sheet, Estate of Erik Dominic Williams v Pasquotank County Parks & Recreation Department, et al, No. 231PA11-1 (Nov. 14, 2011), *available at* http://appellate.nccourts.org/dockets.php?court=1?court=1&docket=1-2011-0231-001&pdf=1&a=0&dev=1.

New Jersey Demands More from Eyewitnesses

Continued from front cover...

photographic array. A non-lead investigator showed Womble eight photos one at a time of headshots of African-American men between the ages of twenty-eight and thirty-five, with short hair, goatees, and similar facial features. Womble quickly eliminated five of the photos. He then reviewed the remaining three, discounted one more, and said he wasn't sure of the final two pictures. At this time two investigators came into the room and accused Womble of holding back as he had before based on fear of retaliation. Another investigator advised Womble that any protection that Womble needed would be provided by the police department. The first investigator advised Womble to just do what he was there to do. After the two investigators left the room, Womble quickly identified the photo of Larry Henderson.

The trial court applied the *Manson/Madison* test to determine whether the eyewitness evidence could be used against the defendant at trial. The test requires that a determination be made whether the identification procedure was impermissibly suggestive, and if so, whether the procedure was so suggestive as to result in a very substantial likelihood of irreparable misidentification.[4] The second prong requires consideration of five factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.[5]

The trial court determined that Womble's identification could be presented to a jury. The case went to trial, and the evidence of the identification was presented to a jury along with the facts that Womble had ingested crack cocaine and alcohol on the night of the shooting and smoked about two bags of crack cocaine each day after the shooting until police contacted him ten days later. Furthermore, Womble told the jury that he spent most of the time during the incident in a dark hallway looking at the gun pointed into his chest. As for the photo array, he told the jury that he did not see anyone he recognized when he first looked at the photo array, but was sure of his identification and identified the defendant from the stand. As neither Clark nor the defendant Henderson testified at trial and no guns or other physical evidence were introduced linking the defendant to the crime scene, the primary evidence

against the defendant at trial was Womble's identification. The jury convicted Henderson of reckless manslaughter, aggravated assault, and three weapons charges, and the court sentenced him to an aggregate eleven-year term of imprisonment.

Henderson appealed. Contrary to the determination of the trial court, the appellate division presumed that the identification procedure in this case was impermissibly suggestive under the first prong of the *Manson/Madison* test.[6] The appellate court reversed and remanded for a new *Wade* hearing to determine whether the identification was nonetheless reliable under the test's second prong.[7] At this point, the State sought review by the New Jersey Supreme Court. The Supreme Court of New Jersey granted the State's petition for certification and also granted leave to appear as amicus curiae to the Association of Criminal Defense Lawyers of New Jersey and the Innocence Project. In their briefs and at oral argument, the parties and amici raised questions about possible shortcomings in the *Manson/Madison* test in light of recent scientific research. In response, the court remanded the matter summarily to the trial court for a plenary hearing to consider and decide whether the assumptions and other factors reflected in the two-part *Manson/Madison* test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence. The parties and amici collectively produced more than 360 exhibits, which included more than 200 published scientific studies on human memory and eyewitness identification. During the ten-day remand hearing, the special master heard expert witness testimony from the defendant's law professors and psychology professors and the State's career investigator and trainer of law enforcement.

The New Jersey Supreme Court began by laying an empirical foundation for its decision by citing many studies that credit eyewitness misidentification as one of the greatest causes of wrongful convictions in the United States and other countries.[8] The court considered psychology and medical journals and studies and reports pertaining to DNA exonerations, police lineups, and even social science field experiments of many different variations generally involving an unassuming clerk or counter attendant.[9] The court then considered the research and special master's findings on system variables (factors which the state can control) and estimator variables (factors which are generally out of the state's control but related to the individual or event) that influence the reliability of eyewitness identifications. While it did not rely on one study or one article as an absolute authority, the court held that "[w]hen social scientific experiments in the field of eyewitness identification produce an impressive consistency in results, those results can constitute adequate data on which to base a ruling."[10]

The court found many faults with the *Manson/Madison* test. For instance, it found that defendants must show that police procedures were "impermissibly suggestive" before courts can consider estimator variables that also bear on reliability, and that in the case of impermissibly suggestive identification procedures, there may be a greater chance eyewitnesses will seem confident and report better viewing conditions, and thus courts in turn are encouraged to admit such identifications, despite the fact that the confidence was due to police action.[11] The court concluded that the *Manson/Madison* test needed to be revised because it rested on three invalid assumptions that caused it not to meet the goals of the *Manson* Court's two-part test: (1) that it would adequately measure the reliability of eyewitness testimony; (2) that the test's focus on suggestive police procedure would deter improper practices; and (3) that jurors would recognize and discount untrustworthy eyewitness testimony.[12] Instead, the court concluded that the *Manson/Madison* test did not offer an adequate measure of reliability, did not sufficiently deter inappropriate police conduct, and relied too heavily on the jury's ability to evaluate identification evidence.[13]

In replacing the *Manson/Madison* test, the court provided that the replacement test should allow all relevant system and estimator variables at a pretrial hearing when there is evidence of suggestiveness, and courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence, in order to guarantee fair trials to defendants, who must have the tools necessary to defend themselves, and to protect the state's interest in presenting critical evidence at trial.[14] Among the many system variables, often citing intuition or common sense among the numerous and voluminous journals, articles, reports, and studies, the court found that:

1. the failure to perform blind lineup procedures can increase the likelihood of misidentification,

2. the failure to give proper pre-lineup instructions can increase the risk of misidentification,

3. courts should consider whether a lineup is poorly constructed when evaluating the admissibility of an identification,

4. feedback as to an identification affects the reliability

of an identification in that it can distort memory, create a false sense of confidence, and alter a witness's report of how he or she viewed an event, and

5. both mugshot exposure and mugshot commitment can affect the reliability of the witness' ultimate identification and create a greater risk of misidentification.[15]

Of the many estimator variables, again, often citing intuition or common sense among the numerous and voluminous journals, articles, reports, and studies, the court found that:

1. high levels of stress are likely to affect the reliability of eyewitness identifications;

2. when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness's description of the perpetrator;

3. the amount of time an eyewitness has to observe an event may affect the reliability of an identification;

4. a greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification;

5. characteristics like age and level of intoxication can affect reliability;

6. disguises and changes in facial features can affect a witness's ability to remember and identify a perpetrator; and

7. there is a greater possibility that a witness's memory of the perpetrator will weaken as time passes, and the witness may have more difficulty making a cross-racial identification.[16]

The court then provided that in order to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence, generally tied to a system variable, of suggestiveness that could lead to a mistaken identification.[17] The State must then offer proof to show that the proffered eyewitness identification is reliable, generally tied to accounting for system and estimator variables.[18] And if after weighing the evidence presented a court finds from the totality of the circumstances, or more appropriately stated, from the non-exhaustive list of system variables, that the defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence.[19] The court stated that the factors that both judges and juries will consider are not etched in stone, as the scientific research underlying them will continue to evolve.[20] The court reinforced that the ultimate burden still remains on the defendant to prove a very substantial likelihood of irreparable misidentification.[21] If the evidence is admitted, the court should provide appropriate, tailored jury instructions.[22] For instance, if at trial evidence of heightened stress emerges during important testimony, a party may ask the court to instruct the jury midtrial about that variable and its effect on memory.[23]

The New Jersey Supreme Court remanded the case to the trial court to determine whether the identification would have been admitted under the new standard, and if the identification would have been admitted, Henderson's conviction will be affirmed.

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Endnotes

1 WL 3715028 (2011).

2 *Id.* at 43.

3 *Id.* at 2.

4 Manson v. Brathwaite, 432 U.S. 98 (1977).

5 State v. Madison, 109 N.J. 223, 239-240 (1988).

6 State v. Henderson, 397 N.J. Super. 398 (N.J. Super. Ct. App. Div. 2008).

7 *Id.* at 400, 414-15.

8 New Jersey v. Henderson, WL 3715028, at 9-36.

9 *Id.*

10 *Id.* at 43.

11 *Id.* at 44.

12 *Id.*

13 *Id.* at 2.

14 *Id.* at 45.

15 *Id.* 20-28.

16 *Id.* 28-35.

17 *Id.* at 48.

18 *Id.*

19 *Id.*

20 *Id* at 2.

21 *Id.* at 45.

22 *Id.* at 51.

23 *Id.* at 50.

Duties to the Unborn: Alabama Supreme Court Deems Viability Irrelevant to Fetal Wrongful-Death Actions

Continued from front cover...

the U.S. Supreme Court's abortion jurisprudence and its treatment of viability.

The Story

On September 13, 2007, April Mack was twelve weeks pregnant with "Baby Mack," her unborn child.[1] That day, Mack and her fiancé, Baby Mack's father, paid Thomas Carmack to drive them to a grocery store in Birmingham, Alabama. On the way, Carmack made an illegal left turn at a red light, on the belief that he could do so safely. Another driver struck their car on the passenger side, sending Mack and her fiancé to the hospital. Five days later, while recovering from her injuries in the hospital, Mack suffered a miscarriage that resulted in Baby Mack's death.

Two months later, Mack and her fiancé sued Carmack and the other driver, alleging negligence and wantonness. Mack also filed a wrongful-death claim on behalf of Baby Mack. The parties settled all claims, save the wrongful-death claim. The trial court granted Carmack's motion for summary judgment on that claim, finding that the Alabama Wrongful Death Act does not allow claims on behalf of a nonviable fetus. Mack appealed to the Alabama Supreme Court.

Fetal Wrongful-Death Actions

The court began its analysis by reviewing three cases it decided in the 1970s involving fetal injuries that ended in the child's death. In *Huskey v. Smith*,[2] the Alabama Supreme Court considered the case of a woman who was seven-and-a-half months pregnant when her car was struck by another. Her child was born alive five days later but died a few days after. The *Huskey* court held that Alabama's wrongful-death statute's reference to a "minor child" included an unborn child "who was viable at the time of a prenatal injury, who thereafter was born alive, but who later died."[3] In reaching that holding, the court expressly overruled its earlier ruling in *Stanford v. St. Louis-San Francisco Railway*, where it had barred recovery for all prenatal injuries on the belief that "a child before birth is, in fact, a part of the mother and is only severed from her at birth,"[4] observing that *Stanford* was grounded in "outdated medical opinion."[5] The *Huskey* opinion noted that the facts before it did not necessitate a ruling on whether personal-injury or wrongful-death actions were available for a child injured before viability.[6]

The Alabama Supreme Court took the next step a year after *Huskey*, when it ruled in *Wolfe v. Isbell*[7] that a father could maintain a wrongful-death action for his child who "sustained injuries in the accident before he was viable, and . . . died as a result of those injuries shortly after being born three months later, postviability."[8] Against the defendants' contention that they owed no duty to a previability fetus under the wrongful-death statute, the court responded: "[M]edical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law."[9] Medicine also gave no support to viability as a legally-meaningful distinction:

> [T]he more recent authorities emphasize that there is no valid medical basis for a distinction based on viability, especially where the child has been born alive. These proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.[10]

For the court, "the important fact was that the child was born alive, not the point in the pregnancy at which the fetus was injured."[11]

The next year, the Alabama Supreme Court extended wrongful-death actions further with its *Eich v. Town of Gulf Shores* decision.[12] There, a woman eight-and-a-half months pregnant gave birth to a stillborn child due to a car accident. The *Eich* court rejected the position that the wrongful-death statute requires a live birth, on two related grounds, even though the position "provides a bright line for matters of proof of causation."[13] First, a live-birth rule would frustrate "the pervading public purpose of our wrongful death statute, which is to prevent homicide through punishment of the culpable party and the determination of damages."[14] Second, a live-birth rule would defy the logic of tort law: "To deny recovery where the injury is so severe as to cause the death of a fetus subsequently stillborn, and to allow recovery where injury occurs during pregnancy and death results therefrom after a live birth, would only serve the tortfeasor by rewarding him for his severity in inflicting the injury."[15] (On the question of proof of causation, the *Wolfe* court had earlier dismissed the issue: "[I]f, as is undoubtedly the case there are injuries as to which reliable medical proof is possible,

it makes no sense to deny recovery on any such arbitrary basis.")[16]

While each of these cases removed an obstacle to recovery, the children in each all died post-viability. That common fact proved critical in *Gentry v. Gilmore*[17] and *Lollar v. Tankersley*,[18] decided together twenty years later. In both cases, a doctor's alleged malpractice caused women to miscarry at the end of the first trimester, before viability. The *Lollar* opinion read the *Huskey-Wolfe-Eich* trilogy as treating fetal viability as "decisive."[19] The *Gentry-Lollar* rule thus held that "a cause of action for death resulting from a pre-natal injury requires that the fetus attain viability either before the injury or before death results from the injury."[20]

Viability and Legal Change

Having reviewed its modern jurisprudence on fetal wrongful death, the Alabama Supreme Court next gave two grounds for its decision to overrule *Gentry-Lollar* and extend *Huskey-Wolfe-Eich*: the legal irrelevance of viability and the trend toward wrongful-death coverage for the previable unborn, in Alabama and beyond.

As a descriptive matter, viability simply was not a controlling issue in the *Huskey-Wolfe-Eich* cases, whose "principles established . . . [that] neither viability at the time of injury, nor live birth, is a prerequisite to recovery for the wrongful death of a fetus."[21] More importantly, as a legal matter, "[t]hese same principles are no less compelling when both the injury and the death occurred before viability . . . . [V]iability is an arbitrary, artificial, and varying standard that is illogical when considered against this Court's recognition in *Wolfe* of the biological separateness of mother and child from the moment of conception."[22] Biological separateness entails legal existence for the unborn child, the court reasoned, and

> [v]iability of course does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and logic is in favor of ignoring the stage at which the injury occurs. With the recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether.[23]

Having found viability irrelevant to wrongful-death actions, the court examined the *Gentry-Lollar* cases' sole remaining support: at the time, "Alabama's homicide statutes applied only to persons 'who had been born and [were] alive at the time of the homicidal act.'"[24] Since the legislature passed a fetal homicide law in the interim, however, the case for *Gentry-Lollar* thus collapsed completely. While the fetal homicide law[25] is a criminal statute, the court found its inclusion of unborn life properly applicable to wrongful-death actions, as "it would be 'incongruous' if 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.'"[26]

The Alabama Supreme Court found it "unfair and arbitrary" to draw a line between unborn children who die before and after viability.[27] The viability criterion, it held, "unfairly distracts from the well established fundamental concerns of this State's wrongful-death jurisprudence, *i.e.*, whether there exists a duty of care and the punishment of the wrongdoer who breaches that duty."[28]

With viability rejected as an "unfair and arbitrary" distinction, the Alabama Supreme Court reversed the summary judgment in favor of Carmack and remanded to the lower court.

Conclusion

Perhaps the most striking aspect of the Alabama Supreme Court's thoroughly researched opinion was the viability jurisprudence it never mentioned: the United States Supreme Court's abortion cases, especially *Roe v. Wade*[29]/*Doe v. Bolton*[30] and *Planned Parenthood v. Casey*.[31] *Casey* in particular made much of viability's significance as the point at which a woman must be allowed to obtain an abortion "without undue interference from the State."[32] Since this case did not implicate the abortion right, of course, the Alabama Supreme Court was not required to follow *Casey* et al. But the fact that the court did not feel compelled to even mention such well-known and controversial case law suggests that those cases have not been influential in their adoption of viability.[33] *Mack v. Carmack* reflects one more state supreme court's decision to discard viability as medically or legally relevant to the treatment of the unborn child, in criminal and tort law unshaped by the U.S. Supreme Court.

** Jonathan Berry is a law clerk to the Hon. Jerry E. Smith, U.S. Court of Appeals for the Fifth Circuit. All views expressed herein are his alone.*

Endnotes

1 All facts in the case are taken from Mack v. Carmack, No.

1091040, 2011 Ala. LEXIS 141, at *1-*4 (Ala. Sept. 9, 2011) (per curiam).

2 265 So. 2d 596 (Ala. 1972).

3 *Mack*, 2011 Ala. LEXIS 141, at *11 (quoting *Huskey*, 265 So. 2d at 596).

4 Stanford v. St. Louis-S.F. Ry., 108 So. 566, 567 (Ala. 1926) (citation omitted).

5 *Mack*, 2011 Ala. LEXIS 141, at *12 (citation and internal quotation mark omitted).

6 *See id.*, n.5 at *11-*12.

7 280 So. 2d 758 (Ala. 1973).

8 *Mack*, 2011 Ala. LEXIS 141, at *14.

9 *Wolfe*, 280 So. 2d at 760 (citations to medical jurisprudence treatises omitted).

10 *Id.* at 760-61.

11 *Mack*, 2011 Ala. LEXIS 141, at *20.

12 300 So. 2d 354 (Ala. 1974).

13 *Mack*, 2011 Ala. LEXIS 141, at *21.

14 *Eich*, 300 So. 2d at 358.

15 *Id.* at 355.

16 Wolfe v. Isbell, 280 So. 2d 758, 761 (Ala. 1973) (citation omitted).

17 613 So. 2d 1241 (Ala. 1993).

18 613 So. 2d 1249 (Ala. 1993).

19 *Id.* at 1252.

20 *Id.*

21 Mack v. Carmack, 2011 Ala. LEXIS 141, at *28 (quoting 613 So. 2d at 1249 (Maddox, J., dissenting)).

22 *Mack*, 2011 Ala. LEXIS 141, at *28 (quoting 613 So. 2d at 1249 (Maddox, J., dissenting)).

23 *Mack*, 2011 Ala. LEXIS 141, at *32 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 55, at 369 (5th ed. 1984)).

24 *Mack*, 2011 Ala. LEXIS 141, at *38 (quoting Ala. Code § 13A-6-1(2) (1975)).

25 Ala. Code § 13A-6-1(3) (2011).

26 *Mack*, 2011 Ala. LEXIS 141, at *41 (quoting Huskey v. Smith, 265 So. 2d 596, 597-98 (Ala. 1972)).

27 *Mack*, 2011 Ala. LEXIS 141, at *41.

28 *Id.* at *42.

29 410 U.S. 113 (1973).

30 410 U.S. 179 (1973).

31 505 U.S. 833 (1992).

32 *Id.* at 846.

33 *See, e.g.*, Randy Beck, Gonzales, Casey *and the Viability Rule*, 103 Nw. U.L. Rev. 249, 251 (2009) ("The continuing discord over viability reflected in *Gonzales* highlights an issue that remains unsettled thirty-six years after *Roe*: Why a state may protect the life of a fetus after it reaches viability, but not before.").

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