STATE COURT
DocketWatch®

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Wisconsin Supreme Court Rules Plaintiffs Entitled to Receive "Phantom Damages"

by Andrew C. Cook

In a recent decision, the Wisconsin Supreme Court has added to the growing list of cases that allow plaintiffs to recover "phantom damages" in personal injury actions for past medical expenses that were written off by the medical provider and never paid by the plaintiff or his or her insurer.

In a unanimous decision, *Orlowski v. State Farm Mutual Auto. Ins. Co.*[1] held that the collateral source rule precludes the defendant from introducing evidence of the amount actually paid for medical services in cases involving an underinsured motorist claim.

Based on the *Orlowski* decision, and the previous line of Wisconsin Supreme Court cases, plaintiffs in personal injury cases are entitled to the full amount of past medical expenses—even those amounts that were written off by the medical provider as a result of contractual agreements between medical providers and health insurers. These damages are often referred to by courts as "phantom damages"[2] because no one ever paid the medical expenses, yet the plaintiff receives the full price billed by the medical provider.

Typically, a plaintiff's health insurer has negotiated rates with the health care provider. The health care provider submits a bill for the full price, but due to these reduced contractual rates, the health insurer pays less than the full price originally billed by the medical provider. However, as the court held in *Orlowski*, the defendant must pay the full sticker price even though it was not the amount actually paid to the medical provider.

Part I begins with a discussion of previous Wisconsin Supreme Court decisions applying the collateral source rule in personal injury cases where the plaintiff's medical expenses were written off by the medical provider. Part II concludes by discussing the Wisconsin Supreme Court's latest decision in *Orlowski*, which extends the collateral source rule to underinsured motorist claims.

I. Previous Wisconsin Supreme Court Decisions Establishing Phantom Damages

A. *Ellsworth v. Schelbrock* (2000)—Medical Assistance

The first of the cases allowing plaintiffs to recover the full amount of medical

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Arkansas Supreme Court Clarifies Standard for Awarding Punitive Damages

by William S.W. Chang

On December 8, 2011, the Supreme Court of Arkansas affirmed a jury's award of approximately $5.98 million in compensatory damages and $42 million in punitive damages against a developer of genetically modified rice found to have negligently allowed the rice to contaminate the national rice supply.[1] Specifically, the court held that (1) the statutory cap on punitive damages was unconstitutional under the state constitution, (2) the economic-loss doctrine did not bar the claims,

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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

Pennsylvania Supreme Court Vacates Trial Court's Denial of a Minor's Application to Obtain an Abortion

by Steven J. Willis and Jordan E. Pratt

On December 22, 2011, in a case of first impression,[1] the Pennsylvania Supreme Court vacated a trial court's denial of a minor's judicial bypass application—an application to obtain an abortion without parental consent. In so doing, the court decided two issues of significance to both sides of the abortion debate: the standard of review on appeal and the relevance of a minor's failure to seek parental consent in determining whether to grant a judicial bypass. First, the court held that appellate courts must deferentially review—under an abuse of discretion standard—a trial court's denial of a minor's petition for judicial bypass. Second, the court held that a trial court may not rely on a minor's failure to seek her parents' consent when determining whether she has the requisite maturity and capacity to consent to an abortion.

This article provides background information on Pennsylvania's judicial bypass statute and summarizes both the trial court's order and the Pennsylvania Supreme Court's decision that vacated it in *In re Jane Doe*.[2] It concludes with an assessment of the case's significance.

I. Pennsylvania's Judicial Bypass Statute

The United States Supreme Court has interpreted the Fourteenth Amendment's Due Process Clause to require that states allow "mature" minors "capable" of giving informed consent the opportunity to terminate their pre-viability pregnancies without parental permission.[3] Like many states wishing to protect pre-born life to the fullest extent permitted by the Court, Pennsylvania generally requires minors seeking an abortion to obtain the consent of a parent,[4] but allows for "judicial bypass" of the parental consent requirement for minors found to be both mature and capable of consenting to an abortion.[5]

Pennsylvania's judicial bypass statute allows a minor to petition a court for an abortion when both her parents refuse consent, or when she chooses not to seek parental consent. To obtain judicial authorization for the abortion, she must demonstrate two things: the maturity and capacity to give informed consent to the abortion, and actual informed consent.[6] Notwithstanding a finding of immaturity, the statute directs trial courts to grant petitions if they are in the "best interests" of the minors.[7] To make these determinations, the statute directs trial courts to consider evidence regarding "the emotional development, maturity, intellect and understanding of the pregnant [minor], the fact and duration of her pregnancy, the nature, possible consequences and alternatives to the abortion and any other evidence that the court may find useful in determining whether the pregnant [minor] should be granted full capacity for the purpose of consenting to the abortion or whether the abortion is in the best interest of the pregnant [minor]."[8] The statute permits appeals when petitions are denied but does not specify what standard of review appellate courts should exercise.[9]

II. The Trial Court's Order

On or about March 19, 2010, a 17-year-old Pennsylvania girl filed an application for judicial

authorization of an abortion pursuant to Pennsylvania's judicial bypass statute.[10] The trial court held a confidential hearing regarding the application on the same day, and the girl testified she had been pregnant for ten weeks.[11] She testified that she had seen a physician who had explained the abortion procedure, the risks associated with it, and the available alternatives of adoption and raising the child herself. The girl testified that, having considered this information, she desired to proceed with an abortion.[12]

A high school senior with average grades, the girl informed the court that she planned to attend college and hoped to become a lawyer.[13] The girl still lived with her mother, on whom she depended for financial support.[14] According to her testimony, she lacked the fiscal means to support a child, and having to care for one would frustrate her educational plans.[15] In her own words, she was simply "not physically, mentally[,] or emotionally ready for this baby."[16]

The minor further testified that she had not attempted to procure her mother's consent for the abortion because she feared that her mother would "throw her out."[17] On further questioning, she revealed that both her brother and her sister had children through unplanned pregnancies and were struggling financially to provide for those children. Her mother was "happy" about those children, she explained, because unlike her, her siblings "were old enough and actually on their own already to have children."[18] Finally, the girl testified that although she knew that agencies could assist her in locating adoptive parents for the child, the abortion provider had not offered her printed materials listing such agencies.[19]

The trial court initially reserved judgment because of the provider's failure to give the girl printed materials regarding adoption agencies, which the court thought Pennsylvania law required.[20] But after the girl reviewed those materials during a recess, the court denied her application, finding that she lacked the requisite maturity and capacity to consent to an abortion, and that an abortion would not be in her best interests.[21]

In its order, the court cited several reasons for its findings. As to the girl's intelligence and experience, the court noted her average high school grades, improper use of English at the hearing, lack of work experience, unfamiliarity with personal finances, and lack of prior significant decision-making.[22] The court further found that the provider's failure to timely furnish printed

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Montana Takes on *Citizens United*

by Edward Greim and Justin Whitworth

From the Montana Supreme Court comes a potential challenge to the United States Supreme Court's landmark decision in *Citizens United v. Federal Election Commission* ("*Citizens United*"). The Supreme Court's 2010 decision ruled, 5-4, that corporations' and labor unions' independent spending in elections is political speech and does not corrupt the political process; therefore, a ban on such spending included in section 203 of the 2002 Bipartisan Campaign Reform Act ("BCRA") could not survive strict scrutiny under the First Amendment.[1]

Relying largely on Montana history, the majority of a divided Montana Supreme Court attempted to distinguish *Citizens United* in rejecting a similar challenge to the Montana Corrupt Practices Act of 1912 (the "MCPA"). The MCPA, the first ballot measure passed in Montana,[2] was characterized by the Montana court's majority as a reaction by the state's small residential population against out-of-state corporations that had historically controlled the state's natural resources, using corporate funds to elect compliant state legislators.[3] Among these natural resources were mining interests, which were controlled by what the court called "Copper Kings." For this reason, the court said, the MCPA requires corporations to make contributions and expenditures through a separate, segregated fund of voluntary contributions from shareholders, employees, and members.[4] Otherwise, corporations are absolutely prohibited from making expenditures or contributions "in connection with a candidate or a political committee that supports or opposes a candidate or a political party."[5] Like the federal independent expenditure ban invalidated in *Citizens United*, Montana's law prohibits corporations from using their own funds to make independent expenditures in candidate elections.

Constitutionality of Montana's Act Challenged

The case, originally styled *Western Tradition Partnership, Inc. v. Attorney General*,[6] was filed in a Montana District Court by three separate corporations operating in the state. The plaintiffs argued that the MCPA violated their free speech rights under the First Amendment and the Montana Constitution.[7] Western Tradition Partnership, Inc., is a "nonprofit ideological corporation,"[8] the Montana Shooting

Sports Association, Inc., is a "nonprofit corporation promoting issues relating to sports,"[9] and Champion Painting, Inc. is a "small, family-owned painting and drywall business."[10] All three corporations sought to make independent expenditures in candidate elections, a category of speech that is prohibited by the MCPA.

These diverse corporate plaintiffs argued that the MCPA presents precisely the sort of corporate independent expenditure ban invalidated by the United States Supreme Court in *Citizens United*.[11] Montana Attorney General Steve Bullock and the Commissioner of Political Practices, on the other hand, argued that the statute was distinguishable from the federal ban at issue in *Citizens United*.[12] The most important distinction, Montana argued, was that *Citizens United* interpreted a federal statute that applied to federal elections, not a Montana statute governing Montana elections.[13] Therefore, they contended, while the *Citizens United* Court might have found a dearth of evidence linking independent corporate expenditures and corruption in federal elections, Montana had an extensive history demonstrating a causal connection between campaign expenditures and wide-sweeping corruption prior to the MCPA's enactment in 1912.[14]

In October 2010, District Court Judge Jeffery Sherlock of Lewis and Clark County granted the plaintiff corporations' joint motion for summary judgment.[15] Observing that "the Copper Kings are a long time gone to their tombs," Judge Sherlock ruled that Montana's ban on corporate expenditures fell under the umbrella of *Citizens United,* failed to pass strict scrutiny, and violated both the federal and Montana constitutions.[16]

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Georgia Supreme Court Strikes Down Ban on Assisted Suicide Advertisements

by Jack Park

In *Final Exit Network, Inc. v. Georgia*,[1] the Georgia Supreme Court unanimously[2] concluded that Georgia's statutory prohibition on advertising or offering to assist in the commission of a suicide was an unconstitutional restriction on free speech protected by both the United States and Georgia Constitutions. The court suggested that the state could have prohibited all assisted suicides instead of just public offers of assistance, leaving a potential opening for the State Legislature to pass a different law.[3]

In 1994, prompted by the activities of Dr. Jack Kevorkian in Michigan, the Georgia Legislature enacted a statute which provides that any person who "publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony."[4] The statute does not affect laws that "may be applicable to the withholding or withdrawal of medical or health care treatment," or laws related to "a living will, a durable power of attorney for health care, an advance directive for medical care, or a written order not to resuscitate."[5]

Issues relating to natural death and the practice of assisted suicide have been the subject of many court decisions both before and after the Georgia Legislature acted in 1994. In 1990, for example, the United States Supreme Court held that the Due Process Clause of the Fifth and Fourteenth Amendments protects the right to refuse unwanted lifesaving medical treatment.[6] The Michigan Supreme Court rejected challenges to the constitutionality of the Michigan assisted suicide law in 1994, opening the door to the prosecution of Dr. Kevorkian for assisting in three suicides.[7] In 1997, the United States Supreme Court held that a Washington state statute that prohibited "caus[ing]" or "aid[ing]" in the commission of a suicide did not violate the Due Process Clause.[8] Then, in 2006, the Court held that an interpretive rule promulgated by the Attorney General of the United States that made it a violation of the Controlled Substances Act for a physician to assist in a suicide by dispensing or prescribing drugs was not entitled to administrative law deference and, therefore, could not override the Oregon Death with Dignity Act.[9]

The Georgia case arose after the 2008 suicide of a fifty-eight-year-old Georgian named John Celmer. According to the indictment, the Final Exit Network is a Georgia corporation that offers "exit guide" services through an internet site and by mail. Celmer, who had cancer but was in remission, contacted the Network by telephone and sent them certain parts of his medical records and a written statement expressing his wish to die. After a review of his case, the Network agreed to assist him. Celmer bought an "exit hood" and, after meeting with one of the defendants, ordered two helium tanks. At the meeting the discussion included "security concerns

relating to potential interference from Mr. Celmer's wife with the suicide."

On June 19, 2008, two of the defendants went to Celmer's house, where the "exit hood" was connected to one of the helium tanks and the tank turned on. The defendants "held [Celmer's] hands while he inhaled helium through the hood." After Celmer died, the defendants left, taking the hood, the helium tanks, and Network documents. One of the defendants "disposed of the tanks and hood in a dumpster."

A grand jury sitting in Forsyth County indicted four members of the Final Exit Network on charges of assisting in Celmer's suicide, racketeering, and tampering with evidence. The defendants moved to dismiss the indictment, arguing that it violated their right to equal protection under the Fourteenth Amendment to the United States Constitution and the parallel provision of the 1983 Georgia Constitution. They also contended that the law was unconstitutionally vague.

The trial court denied motions to dismiss, rejecting the contention that the law regulated speech and, instead, finding that the law criminalized some combinations of speech and conduct. The trial court further concluded that the law served a compelling public purpose and that it was narrowly tailored.

The trial court then granted a certificate of immediate review. The Georgia Supreme Court allowed the interlocutory appeal.

In a unanimous decision[10] written by Associate Justice Hugh Thompson, the court sustained a facial challenge to the assisted suicide statute, finding that it violated the free speech provisions of both the U.S. and Georgia Constitutions.[11] The court concluded that because the statute prohibited advertisements and public offers to assist in suicide, but not all assisted suicides, it created a content-based restriction on speech. As such, the statute was subject to strict scrutiny, requiring the state to show that the statute serves a compelling interest and is narrowly drawn.

Acknowledging the state's argument that its interest in preserving life is a compelling interest, the court nonetheless concluded that the statute was not narrowly tailored. In the court's view the statute was "wildly underinclusive."[12] It did not prohibit all suicides or nonpublic advertisements or offers of assistance. "Many assisted suicides are either not prohibited or are expressly exempted from the ambit of § 16-5-5(b)'s criminal sanctions."[13] Targeting actors like Dr. Kevorkian, as the state tried to do, left others "free" to make such nonpublic offers.[14]

The court rejected the contention that the requirement for an overt act provided the necessary narrow tailoring. It explained that the state could have "imposed a ban on all assisted suicides with no restriction on protected speech whatsoever," or it could have "sought to prohibit

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California Supreme Court Upholds Law Dissolving Redevelopment Agencies

by Angela Kopolovich

In *California Redevelopment Assn. v. Matosantos*[1] the California Supreme Court upheld a law dissolving the state's redevelopment agencies, while simultaneously striking down the agencies' last vestige of hope, a pay-to-play companion bill. The court's December 2011 decision thereby eliminated the state's redevelopment agencies entirely.[2]

By way of background, over the last several decades California's property tax revenue allocation system has been subject to a tug of war between local interests and the state's obligation to achieve equality in school funding. As a result of multiple constitutional amendments and judicial decisions, and through a rather complex system of transfers, the state essentially collects all property tax revenue and then redistributes that revenue back to the schools and other local governments.[3] Enter redevelopment agencies. Created after World War II and tasked with remediating urban decay, the agencies, in and of themselves, do not have the power to levy taxes. However, they are a powerful tool used (and sometimes abused[4]) by local governments to fund economic development (arguably, at the expense of other governmental agencies). Redevelopment agencies operate on a tax increment financing basis.

> *Under this method, those public entities entitled to receive property tax revenue in a redevelopment project area (the cities, counties, special districts, and school districts containing territory in the area) are allocated a portion based on the assessed value of the property prior to the effective date of the redevelopment plan. Any tax revenue in excess of that amount—the tax increment created by the increased value of project area property—goes to the redevelopment agency for repayment of debt incurred to finance the project.*[5]

Because the redevelopment law does not really limit the amount of revenue the agencies can collect per year (so long as it does not exceed the given agency's total debt), some blighted municipalities have been able to shield all of their property tax revenue.[6] In an attempt to remedy the inequity, the Legislature has put certain tax transfer obligations on redevelopment agencies.[7] Some of these obligations have been more successful than others,[8] but the tax increment financing remains controversial. It gives the redevelopment agencies and their sponsoring municipalities a great advantage over school districts and other entities that rely on tax revenues, subsequently burdening the state, which scrambles to fill in the budgetary gaps. As a result of one of the most recent skirmishes between state and local interests (and pertinent to this case), in 2010, voters passed Proposition 22, which amended California's state constitution in order to limit the state's ability to require payments from redevelopment agencies for the state's benefit.[9]

Last summer California's Governor, Jerry Brown, responding to a declared state fiscal emergency and a $25 billion operating deficit, proposed the elimination of redevelopment agencies to redirect property tax revenues back to state and local governmental units. At the time, *four hundred* redevelopment agencies were receiving 12% of all property tax revenues in California.[10] The Legislature, employing a slightly different approach, enacted Assembly Bill 26[11] and Assembly Bill 27,[12] two measures intended to stabilize school funding (thereby easing the deficit) by reducing or eliminating the diversion of property tax revenues to community redevelopment agencies. AB26 provided

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California: Traditional Marriage Proponents Have Standing When Public Officials Refuse to Defend It

by Jonathan Berry

The U.S. Court of Appeals for the Ninth Circuit made headlines recently when a divided panel declared unconstitutional California's Proposition 8, which affirmed that the state would recognize marriages only between one man and one woman.[1] Before the Ninth Circuit could decide the merits, however, it had to deal with the fact that state officials had all declined to defend the law.[2] In the district court below, the law was defended by the official proponents of Proposition 8, the organizers who put it on the 2008 ballot. On appeal, the plaintiffs attacking the law argued that its proponents lacked standing to defend it in court; to resolve any doubts about its jurisdiction, then, the Ninth Circuit certified the following question to the California Supreme Court:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.[3]

By a unanimous vote, the seven justices of the California Supreme Court agreed that Proposition 8's official proponents had standing to defend the initiative in court, by the proponents' authority to assert the state's own interest in the law's validity.[4] Having thus affirmed the proponents' standing, the court did not reach the question whether they possessed a particularized interest in the initiative's validity.[5]

Federal Courts Look to State Law

To properly frame its response to the Ninth Circuit, the California court first examined the U.S. Supreme Court's two most relevant cases on standing. The earlier case, *Karcher v. May*,[6] considered the standing of New Jersey legislators who had intervened before the district court to defend a state statute's constitutionality when neither the state attorney general nor any of the named government defendants were willing to defend it.[7] When they originally intervened, the lawmakers did so in their official capacities as Speaker of the state General Assembly and President of the state Senate, but after the Third Circuit held the statute unconstitutional, they lost their posts as presiding legislative officers, and their successors chose not to continue defending the statute.[8] When the lawmakers petitioned the U.S. Supreme Court regardless, their appeal was dismissed for lack of standing.[9] In response to the lawmakers' argument that dismissal should also vacate the judgments below, restoring the invalidated statute, the Court upheld the judgments instead, relying "on the fact that New Jersey law permitted the current

presiding legislative officers, acting on behalf of the state legislature, to represent the state's interest in defending a challenged state law."[10]

Unlike the statute challenged in *Karcher*, the law at issue in *Arizonans for Official English v. Arizona*[11] was an initiative added to the state constitution by popular vote. Like the Proposition 8 proponents before the California Supreme Court, it was the Arizona initiative's principal sponsor who intervened on behalf of a law that state officials decided not to defend.[12] The initiative amended Arizona's constitution to require the state government to operate in English only, but was struck down by a federal district court after a state employee sued.[13] When the governor declined to appeal, the initiative's sponsor attempted to intervene.[14] Ultimately, the U.S. Supreme Court declined to rule on the sponsor's standing to defend the initiative, but only because the plaintiff had left state employment, mooting the lawsuit and spurring the Court to vacate the judgments below.[15] Though not deciding the initiative sponsor's standing, the U.S. Supreme Court expressed "grave doubts" about its standing, because of the Court's "uncertainty concerning the authority of official initiative proponents to defend the validity of a challenged initiative under Arizona law."[16]

While *Arizonans for Official English* cast doubt on a state initiative sponsor's federal standing to defend that initiative, the California Supreme Court read the case as potentially countenancing federal standing for the Proposition 8 proponents—if they had standing under state law.[17]

Standing to Assert the State's Interest Under State Law

Having predicted that federal courts will look to state law to determine an initiative proponent's standing to assert the state's interest,[18] the California court turned to its main work: determining the Proposition 8 proponents' standing under California law.

California's Constitution was amended in 1911 to allow voters "the authority to directly propose and adopt state constitutional amendments and statutory provisions through the initiative power."[19] Understanding it "not as a right granted the people, but as a power reserved by them," the California Supreme Court gives the initiative power a liberal construction, resolving reasonable doubts in favor of its preservation.[20]

That constitutional framework is extended by the state Elections Code, which gives a ballot initiative's official proponents "a distinct role[,]involving both authority and responsibilities that differ from other supporters of the measure."[21] The law puts on proponents an obligation "to manage and supervise the process by which signatures for the initiative petition are obtained" and, after signatures have been collected, gives them the exclusive right to file the petition.[22] The Elections Code also vests proponents "with the power to control the arguments in favor of an initiative measure," by requiring their approval before any arguments before or against the initiative are printed in the official ballot pamphlet.[23]

California case law, the court found, "repeatedly and uniformly" attests to an official proponent's standing under the state Constitution and Elections Code to defend an initiative in court.[24] In pre-election challenges testing the initiative campaign's procedural compliance, proponents "assert[] their own personal rights and interests," not the state's interest.[25] Once the initiative is voted into law, the court reasoned, its proponents' interest in the law arguably becomes no more personal than any other Californian's.[26]

But official proponents have uniformly been permitted to intervene to defend enacted initiatives, despite the lack of any particularized interest.[27] Instead, California courts have viewed proponents' participation—even alongside public officials also defending the law—as "essential" to ensuring the legitimacy of any court decision that might limit or invalidate an initiative.[28] California law creates a "unique relationship" between an initiative and its proponents that makes them "especially likely to be reliable and vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative's enactment into law."[29] When public officials decline to defend an initiative, then, the California Constitution and the applicable provisions of the Elections Code authorize its official proponents to assert the state's interest in the initiative's validity.[30] Accordingly, the Proposition 8 proponents have standing under state law to defend the initiative, as agents authorized to assert California's own interest in court.

Conclusion: The Ninth Circuit Rules on the Merits

The California Supreme Court having thus spoken, the Ninth Circuit followed through,[31] ensuring that the high-profile *Perry* controversy would continue through the federal courts, free of any jurisdictional bar. Because the State of California has Article III standing to defend its own laws' validity and because state law authorizes official proponents to assert the state's own interest, the Ninth Circuit held, the Proposition 8 proponents have standing to defend the law in federal court.[32]

With confirmation that the litigants presented a justiciable controversy, the Ninth Circuit went on to hold that Proposition 8 violated the Equal Protection Clause of

the Fourteenth Amendment.[33] While that ruling ensures continued litigation of the same-sex marriage issue, both courts' holdings on standing may not face as much opposition. California's uniquely robust initiative system[34] presents one of the strongest cases possible for proponent standing, but other states' regimes might suffice as well. When a court evaluates an initiative proponent's standing under another state's law, then, it will likely consider whether that state's initiative regime needs to be as strong as California's to authorize standing.

** 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 Perry v. Brown (*Perry VIII*), Nos. 10-16696 & 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012). The initiative's proponents have petitioned the Ninth Circuit for rehearing en banc. Appellants' Petition for Rehearing En Banc, Perry v. Brown, Nos. 10-16696 & 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. filed Feb. 21, 2012).

2 *See Perry VIII*, 2012 U.S. App. 2328 at *50-51.

3 *Id.* at *36-37 (quoting Perry v. Schwarzenegger (*Perry V*), 628 F.3d 1191, 1193 (9th Cir. 2011)).

4 Perry v. Brown (*Perry VII*), 265 P.3d 1002, 1007 (Cal. 2011). Associate Justice Joyce Kennard also wrote a separate concurrence. *Id.* at 1033-37 (Kennard, J., concurring).

5 *Perry VII*, 265 P.3d at 1015.

6 484 U.S. 72 (1984).

7 *Perry VII*, 265 P.3d at 1011-12. The statute required public schools to observe a minute of silence at the start of each school day. *Id.* at 1011.

8 *Id.* at 1012.

9 *Karcher*, 484 U.S. at 76-77.

10 *Perry VII*, 265 P.3d at 1012.

11 520 U.S. 43 (1997).

12 *Id.* at 56.

13 *See id.* at 55.

14 *See id.* at 56.

15 *Id.* at 73-75.

16 *Perry VII*, 265 P.3d at 1013 (emphasis omitted). The *Arizonans for Official English* Court said it was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." 520 U.S. at 65.

17 *Perry VII*, 265 P.3d at 1014 ("In our view, nothing in [*Arizonans for Official English*] indicates that if a state's law does authorize the official proponents of an initiative to assert the state's interest in the validity of a challenged state initiative when the public officials who ordinarily assert that interest have declined to do so, the proponents would not have standing to assert the state's interest in the initiative's validity in a federal lawsuit in which state officials have declined to provide such a defense.").

18 The parties and the Ninth Circuit all also agreed with the California Supreme Court that "if the official proponents do have authority under California law to assert the state's interest in such a case, then under federal law the proponents would have standing in a federal proceeding to defend the initiative and to appeal a judgment invalidating it." *Id.* at 1014.

19 *Id.* at 1016 (emphasis omitted).

20 *Id.*

21 *Id.* at 1017-18.

22 *Id.* at 1017.

23 *Id.*

24 *Id.* at 1018.

25 *Id.* at 1020-21.

26 *Id.* at 1021.

27 *Id.*

28 *Id.* at 1024.

29 *Id.*

30 *Id.* at 1025.

31 *Cf. supra* note 18 (discussing the Ninth Circuit and the parties' agreement that, if the Proposition 8 proponents had standing under state law to assert the state's interest in the initiative's validity, they would also have standing in federal court). The Ninth Circuit also denied as untimely a county clerk's motion to intervene in Proposition 8's defense, in light of the court's affirmation of the official proponents' standing. *Perry VIII*, 2012 U.S. App. 2328 at *36.

32 *Id.* at *50-51.

33 *See id.* at *20 ("The People may not employ the initiative power to single out a disfavored group for unequal treatment and strip them, without a legitimate justification, of a right as important as the right to marry.").

34 *Cf.* People v. Kelly, 222 P.3d 186, 200 (Cal. 2010) ("California's bar on legislative amendment of initiative statutes stands in stark contrast to the analogous constitutional provisions of other states. No other state in the nation carries the concept of initiatives as 'written in stone' to such lengths as to forbid their legislatures from updating or amending initiative legislation.") (internal quotation marks and citations omitted).

Pennsylvania Supreme Court Vacates Trial Court's Denial of a Minor's Application to Obtain an Abortion

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materials regarding adoption directly impacted the girl's capacity to give informed consent.[23] The court also relied significantly on her failure to seek her mother's consent, discrediting her testimony that she feared her mother would "throw her out" if she learned of the pregnancy.[24] The court reasoned that her mother had already accepted the unplanned pregnancies of her siblings and that she could have displayed maturity by overcoming her fear and seeking the counsel of her mother. Failing to seek her mother's approval, the court reasoned, demonstrated a lack of the type of sound judgment needed to consent to an abortion.[25] Finally, the court found that an abortion would not be in the girl's best interests and denied her application.[26]

The minor's attorney then moved for reconsideration and sought to have the trial judge recused from hearing the motion because a pro-life organization had endorsed his candidacy for judicial office.[27] The trial court denied both motions.[28] On appeal, the superior court affirmed on the basis that the trial judge had not abused his discretion in denying the judicial bypass application.[29] The Pennsylvania Supreme Court then granted review.

C. The Pennsylvania Supreme Court's Opinion

In a 6-1 decision, the Pennsylvania Supreme Court vacated the order of the superior court that had upheld the trial judge's decision. While conceding that the case had become moot (the minor was no longer pregnant[30]), the court nevertheless proceeded to the merits of the case after applying an exception to the mootness doctrine.[31] The court first confronted the issue of what standard of review appellate courts should apply when reviewing a trial court's determination that a minor lacks the necessary maturity and capacity to consent to an abortion. As noted earlier, Pennsylvania's judicial bypass statute provides for the appeal of denials but does not specify a standard of review for those appeals. Both the appellant and amicus curiae ACLU urged that a de novo standard should apply,[32] but the Pennsylvania Attorney General (whom the court had invited to defend the trial court's order) and several pro-life amici curiae advocated a more deferential abuse of discretion standard.[33]

On the standard of review issue, the court sided with the Attorney General and cited three reasons for its holding. First, a trial court's maturity and capacity determination does not concern a pure question of law, but rather constitutes a fact-intensive inquiry deserving substantial deference.[34] Second, the court previously had declined to adopt a de novo standard of review in "other appeals where constitutionally protected family concerns are implicated," such as the appeals of cases involving child custody matters and the involuntary termination of parental rights.[35] Third, as the court noted, "[S]ome states which have employed a *de novo* standard of appellate review in judicial bypass cases have done so as part of the legislative scheme."[36]

Although it accorded a great degree of deference to the trial court's decision, the Pennsylvania Supreme Court nevertheless ultimately concluded that the trial court abused its discretion when it considered the appellant's failure to seek parental consent as evidence of her lack of maturity and capacity. The court reasoned that the judicial bypass statute expressly allows minors to get an abortion without seeking the consent of their parents as long as they obtain judicial authorization.[37] Thus, as the court observed, the purpose of a judicial bypass hearing is to afford minors who have not obtained—or even sought—the consent of their parents an independent determination of whether they have the maturity and capacity to give informed consent to an abortion.[38] If trial courts could premise their denials of authorization on the failure of minors to seek the guidance or approval of their parents, the legislature's policy choice not to require parental consent would be frustrated, the court explained.[39]

For the foregoing reasons, the Pennsylvania Supreme Court vacated the order of the superior court that had upheld the trial judge's decision.[40] Even though the trial judge had impermissibly considered the appellant's failure to seek her mother's consent, the court did not reverse the order because the trial court had also relied on a variety of other factors.[41] The court expressed no opinion as to the correctness of the trial court's overall determination that the appellant lacked the maturity and capacity to consent to an abortion.[42]

In a separate concurring and dissenting opinion, Justice Orie Melvin agreed that appellate courts must review judicial bypass determinations for abuses of discretion, but disagreed with the majority's conclusion that the trial court abused its discretion in this case. Justice Melvin argued that the trial court had considered the *reason* for the appellant's choice not to seek her mother's

consent, not the *fact* of her failure to seek her mother's consent.[43] Although Pennsylvania's judicial bypass statute allows minors to obtain abortions without parental approval, the statute also empowers trial judges to consider any evidence they find "useful."[44] Certainly the *reasons* a minor chooses not to seek parental permission for an abortion bear on her maturity and capacity to consent to an abortion, Justice Melvin explained.[45] She argued that a minor who fears informing her parents about her pregnancy because of the potential for domestic abuse is more mature and capable of consenting to an abortion than one who simply desires secrecy or the avoidance of embarrassment.[46]

D. Significance of this Case

Despite its technical holding in favor of the appellant, this case is a modest win for pro-life advocates because of its command that appellate courts deferentially review judicial bypass denials. Since 1982 only a few judicial bypass petitions have been denied in Pennsylvania, and many pro-life groups feared that the state's bypass law had led to "rubber stamp" secret teen abortions.[47] By clarifying that judicial bypass determinations will be accorded great deference on appeal, pro-life groups anticipate that the Pennsylvania Supreme Court's ruling will encourage trial judges to undertake a more thorough review of judicial bypass petitions without feeling pressure to approve them mechanistically.[48] Although the court specified one way in which trial courts may not make their determinations, it nevertheless stated that those determinations carry weight on appeal.

From a national perspective, states with similar judicial bypass statutory regimes may look to this decision—and the decisions of other states that have considered the issue—when determining what level of appellate review to apply. With the high courts of Alabama,[49] Mississippi,[50] and now Pennsylvania having decided to defer to trial courts' maturity and capacity determinations, this case may mark a continued national trend toward rejecting the notion that all teenage girls are categorically "mature" enough to get abortions without involving their parents in the decision.

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Endnotes

1 Never before had the Pennsylvania Supreme Court publicly ruled on a judicial bypass determination. *See* Bobby Kerlik, *Pa. Supreme Court Upholds 'Judicial Bypass'*, Pittsburgh Tribune-Review (Dec. 23, 2011), *available at* http://www.pittsburghlive.com/x/pittsburghtrib/news/regional/s_773405.html; Steven Ertelt, *Pennsylvania Court Rules on Rubber Stamp Teen Abortions*, LifeNews.com (Dec. 26, 2011), *available at* http://www.lifenews.com/2011/12/26/pennsylvania-court-rules-on-rubber-stamp-teen-abortions/; Bobby Kerlik, *Abortion Opponents Heartened by Pennsylvania High Court Ruling*, Pittsburgh Tribune-Review (Dec. 24, 2011), *available at* http://www.pittsburghlive.com/x/pittsburghtrib/news/s_773601.html.

2 *In re* Jane Doe, J-108-2010 (Pa. 2011), *available at* http://www.pacourts.us/OpPosting/Supreme/out/J-108-2010mo.pdf.

3 Planned Parenthood v. Casey, 505 U.S. 833, 899 (1992) (plurality); Planned Parenthood v. Ashcroft, 462 U.S. 476, 491–93 (1983) (plurality opinion); Bellotti v. Baird, 443 U.S. 622, 643 (1979) (plurality); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

4 18 Pa.C.S. § 3206(a).

5 *Id.* § 3206(c).

6 *Id.* § 3206(c).

7 *Id.* § 3206(d).

8 *Id.* § 3206(f)(4).

9 *Id.* § 3206(h).

10 *In re* Jane Doe, J-108-2010, at 3 (Pa. 2011).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 4.

15 *Id.* at 4-5.

16 *Id.* at 5.

17 *Id.* at 4.

18 *Id.*

19 *Id.*

20 *Id.* at 5.

21 *Id.*

22 *Id.* at 6-7.

23 *Id.* at 6, 7.

24 *Id.* at 5-7.

25 *Id.* at 7.

26 *Id.* at 8.

27 *Id.*

28 *Id.*

29 *Id.* at 8-9.

30 After the trial court's ruling, at least one of the girl's parents consented to the abortion. *See* Ertelt, *supra* note 1.

31 *Doe*, J-108-2010 at 9.

32 *Id.* at 10-11, 11 n.11.

33 *Id.* at 12, 12-13 n.12. The pro-life amici included the Pennsylvania Family Institute and the Pennsylvania Pro-Life Federation. *Id.* at 12 n.12.

34 *Id.* at 13.

35 *Id.* at 14.

36 *Id.* at 15.

37 *Id.* at 19.

38 *Id.*

39 *Id.* at 20.

40 *Id.* at 22.

41 *Id.* at 21.

42 *Id.* at 22.

43 *Id.* at 4 (concurring and dissenting ops.), *available at* http://www.pacourts.us/OpPosting/Supreme/out/J-108-2010codo.pdf.

44 *Id.* at 3 (majority op.).

45 *Id.* at 4.

46 *Id.* at 4 n.1.

47 *See* Torsten Ove & Marylynne Pitz, *Teen Rights to Abortion in Dispute*, Pittsburgh Post-Gazette (Feb. 18, 2011), *available at* http://old.post-gazette.com/pg/11049/1126272-455.stm.

48 *See* Ertelt, *supra* note 1; *see also* Kerlik, *Abortion Opponents Heartened by Pennsylvania High Court Ruling*, *supra* note 1.

49 *See Ex Parte* Anonymous, 806 So. 2d 1269 (Ala. 2001) (declining to adopt de novo appellate review of maturity and capacity determinations).

50 *See In re* R.B., 790 So. 2d 830 (Miss. 2001) (adopting an abuse of discretion standard of appellate review).

Montana Takes on *Citizens United*

Continued from page 4...

Montana High Court Reverses and Distinguishes the Case from *Citizens United*

Attorney General Bullock immediately appealed to the Montana Supreme Court. "[T]he issue isn't a matter of overturning *Citizens United*," he argued, "but rather looking at Montana's unique historical circumstances and why people passed the initiative to impose the ban [on independent corporate expenditures.]"[17]

In a December 30, 2011, decision, the court by a 5-2 majority reversed Judge Sherlock and ruled that the MCPA's corporate expenditure ban was, in fact, constitutional.[18] Writing for the majority, Chief Justice Mike McGrath appeared concerned that American tradition was engaged in "a multi-front attack" both on contribution restrictions and "the transparency that accompanies campaign disclosure requirements."[19] Justice McGrath found that this danger distinguished the case from *Citizens United*.

Citizens United could be distinguished, the majority found, on at least two other grounds. First, setting up a Montana PAC is less burdensome than complying with analogous federal law.[20] Second, the risk of corruption from corporate contributions is much greater in Montana than in federal elections.[21] Judge McGrath cited Montana's unique history from the turn of the nineteenth century as well as recent evidence of corporate involvement in Montana ballot measure elections, but did not cite any evidence of actual corruption stemming from recent corporate contributions or expenditures in Montana. Finally, citing canons of Montana's Code of Judicial Conduct, the majority stated that the independence of Montana's judiciary, which is elected, would be imperiled by independent corporate contributions.[22] Montana corporations, Judge McGrath wrote, could "effectively drown out all other voices" by making independent expenditures in judicial elections.[23]

Ultimately, the majority concluded that Montana had proved a compelling state interest—the avoidance of corruption—and that the ban was narrowly tailored.[24] With an eye to the United States Supreme Court, the Montana court agreed emphatically with the Attorney General's argument that *Citizens United* is applicable only to instances that are factually similar involving federal statutes and elections.[25]

One of the two dissenters, Justice Jane Baker, criticized the majority for "inventing distinctions in what I fear will be a vain attempt to rescue [the MCPA]," suggesting instead that the court should have construed the MCPA so that at least its reporting provisions would remain intact.[26] Justice James C. Nelson also dissented, stating that while he "thoroughly disagree[d]" with *Citizens United*, Montana's anti-corruption interests were not so unique among the fifty states to justify a different analysis under strict scrutiny.[27] Montana, he wrote, was not entitled to "a special 'no peeing zone' in the First Amendment swimming pool."[28] Responding at length to the majority's apparent concern that independent corporate expenditures in judicial elections would endanger the independent judiciary, Judge Nelson noted that strict recusal requirements, censure provisions, and other judicial conduct rules could be adopted, but that the state could not constitutionally "censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer."[29] Justice Nelson concluded, "When this case is appealed to the Supreme Court, as I expect it will be, a summary reversal on the merits . . . would not surprise me in the least."[30]

Application to the U.S. Supreme Court

The plaintiffs retained attorney James Bopp, Jr., the architect of the *Citizens United* litigation, and applied to Justice Anthony M. Kennedy for a stay pending certiorari[31] on February 9, 2012.[32] The plaintiffs argued that the Montana Supreme Court's decision was in direct conflict with *Citizens United*, causing irreparable harm, and should, in the public's best interest, be summarily reversed.[33]

Attorney General Bullock responded on February 15, 2012.[34] In its brief, Montana asserted that its supreme court had applied strict scrutiny to the record and had determined based on the facts that the MCPA violated neither the U.S. Constitution nor the Montana Constitution.[35] Not only should the stay be denied, Bullock argued, but the case should not be decided on the merits without full briefing and a review of the record.[36]

Supreme Court Justice Anthony M. Kennedy Grants Stay

Two days later, on Friday, February 17, 2012, Justice Kennedy temporarily stayed enforcement of the ruling[37] until the Supreme Court decides whether to grant or deny certiorari.[38] As a result, corporations may now make independent expenditures in Montana candidate races, although they must truly be independent: Montana's ban on corporate contributions to candidates and PACs, and its ban on coordinated corporate expenditures (i.e., in-kind contributions) remains in effect.

But even if political speech begins to fill the airwaves in the high country of Montana—and even, as the Montana Supreme Court feared, in judicial elections—what of *Citizens United*? Justice Ruth Bader Ginsburg, joined by Justice Steven Breyer, added the following statement to Justice Kennedy's brief memorandum granting the stay:

> Montana's experience, and experience elsewhere since this Court's decision in Citizens United[,] . . . make it exceedingly difficult to maintain that independent expenditures by corporations "do not give rise to corruption or the appearance of corruption." . . . A petition for certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, Citizens United should continue to hold sway.[39]

Stay tuned.

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Endnotes

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

2 *See* Jess Bravin, *A Lone Stance on Ad Spending*, Wall St. J. (Oct. 12, 2010).

3 *Id.*

4 *See* Mont. Code Ann. § 13-35-227(3).

5 *See* Mont. Code Ann. § 13-35-227(1).

6 The case is now styled *American Tradition Partnership, Inc. v. Attorney General* because Western Tradition Partnership, Inc. has changed its name.

7 *See* Western Tradition P'ship, Inc. v. Attorney Gen., No. DA 11-0081, 2011 WL 6888567, at *1 (Mont. Dec. 30, 2011).

8 Brief for Petitioners at 5, Am. Tradition P'ship, Inc. v. Bullock, No. 11-A762 (Feb. 9, 2012).

9 *Id.*

10 *Id.*

11 *Id.* at 6.

12 *See* Charles S. Johnson, *Court to Hear Challenge of Corporate*

Spending Ban, Helena Indep. Rec. (Sept. 30, 2010).

13 *Id.*; *see also* W. Tradition P'ship, Inc. v. Attorney Gen., No. BVD-2010-238, 2010 WL 4257195 (Mont. D. Ct. Oct. 18, 2010).

14 *Id.*; *see also* W. Tradition P'ship, Inc. v. Attorney Gen., No. BVD-2010-238, 2010 WL 4257195 (Mont. D. Ct. Oct. 18, 2010).

15 *See* W. Tradition P'ship, Inc. v. Attorney Gen., No. BVD-2010-238, 2010 WL 4257195 (Mont. D. Ct. Oct. 18, 2010).

16 *Id.*; *see also* Jess Bravin, *Judge Strikes down Montana's Ban on Corporate Political Expenditures*, Wall St. J. (Oct. 18, 2010).

17 *See* Charles S. Johnson, *High Court to Decide Fate of State Ban on Corporate Donations*, Helena Indep. Rec. (Sept. 18, 2011).

18 *See* W. Tradition P'ship, Inc. v. Attorney Gen., No. DA 11-0081, 2011 WL 6888567, at *1 (Mont. Dec. 30, 2011).

19 *Id.* at *3.

20 *Id.* at *7.

21 *Id.* at *7-11.

22 *Id.* at *12-15.

23 *Id.* at *14.

24 *Id.* at *15.

25 *Id.* at *3-4.

26 *Id.* at *15.

27 *Id.* at *21.

28 *Id.* at *20.

29 *Id.* at *37.

30 *Id.* at *41.

31 Justice Kennedy is the Circuit Justice for the Ninth Circuit.

32 *See* Brief for Petitioners, Am. Tradition P'ship, Inc. v. Bullock, No. 11-A762 (Feb. 9, 2012).

33 *Id.* at 27-36.

34 *See* Brief for Respondents, Am. Tradition P'ship, Inc. v. Bullock, No. 11-A762 (Feb. 15, 2012).

35 *Id.* at 4-6.

36 *Id.* at 7-15.

37 *See* Charles S. Johnson, *US Supreme Court Blocks MT's Ban on Corporate Election Spending*, Helena Indep. Rec. (Feb. 18, 2012).

38 *See* Am. Tradition P'ship, Inc. v. Bullock, No. 11-A762 (Feb. 17, 2012) (order granting application for stay).

39 *Id.*

Georgia Supreme Court Strikes Down Ban on Assisted Suicide Advertisements

Continued from page 5...

all offers to assist in suicide when accompanied by an overt act to accomplish that goal."[15] However, without an "explanation or evidence as to why a public advertisement or offer to assist in an otherwise legal activity is sufficiently problematic," the necessary narrow tailoring was lacking.[16]

In the aftermath of the court's ruling, the consensus was that new legislation was needed. The Forsyth County District Attorney announced that she would dismiss the entire case.[17] In response, the Georgia General Assembly passed a stronger bill (H.B. 1114), which Governor Deal has signed.

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Endnotes

1 2012 WL 360523 (Ga. Feb. 6, 2012).

2 Judge Christopher Brasher from the Fulton County Superior Court participated in place of Associate Justice David Nahmias, who was disqualified.

3 The court did say that, in light of its holding, it would not consider the "other constitutional challenges" made by the appellants. 2012 WL 360523 at * 3. The court did not identify those other challenges.

4 OCGA § 16-5-5(b).

5 OCGA § 16-5-5(d).

6 Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261(1990).

7 Michigan v. Kevorkian, 527 N.W. 2d 714 (Mich. 1994).

8 Washington v. Glucksberg, 521 U.S. 702 (1997).

9 Gonzales v. Oregon, 546 U.S. 243 (2006).

10 *See supra* note 2.

11 Apart from quoting the free speech provision of the Georgia Constitution, 2012 WL 360523 at * 3 n.2, the court largely invoked decisions of the U.S. Supreme Court and cited parallel decisions of its own.

12 2102 WL 360523 at *2 (quoting Brown v. Entm't Merchs. Ass'n USA, 131 S. Ct. 2729, 2740 (2011)).

13 2012 WL 360523 at *2.

14 *Id.*

15 *Id.*

16 *Id.*

17 *See Law on Assisted Suicide Rejected*, Atlanta Journal-Constitution, Feb. 7, 2012, A1, at A9.

California Supreme Court Upholds Law Dissolving Redevelopment Agencies

Continued from page 6...

for the dissolution of redevelopment agencies entirely, and outlined winding up procedures for pending projects and outstanding debts; while AB27 provided agencies with an "opt-in" or "pay-to-play" option—the agencies could continue to operate if the sponsoring cities or counties agree to make payments into funds benefiting the state's schools and special districts.

The California Redevelopment Association, the League of California Cities, and other affected parties brought a constitutional challenge directly to the California Supreme Court. In reviewing this case, the court considered two issues: (1) "[whether under the state constitution] redevelopment agencies, once created and engaged in redevelopment plans, have a protected right to exist that immunizes them from statutory dissolution[;]" and (2) whether under the state constitution "redevelopment agencies and their sponsoring communities have a protected right not to make payments to various funds benefiting schools and special districts as a condition of continued operation."[13] The court answered the first question no and the second question yes, effectively upholding AB26 (and its elimination of California's redevelopment agencies) as a proper exercise of legislative power and striking down AB27 as unconstitutional, thereby eliminating the agencies' opt-in alternative.[14]

The court reasoned that dissolution of the redevelopment agencies "is a proper exercise of the legislative power vested in the Legislature by the state Constitution. That power includes the authority to create entities, such as redevelopment agencies, to carry out the state's ends, and the corollary power to dissolve those same entities when the Legislature deems it necessary and proper."[15] The court rejected the argument that the state constitutional amendment authorizing allocation of property taxes to redevelopment agencies created an implied right for those agencies to exist, or somehow impaired the Legislature's power to dissolve those agencies.[16] Quoting prior case law, the court reasoned that "[i]n our federal system the states are sovereign but cities and counties [along with redevelopment agencies, which are political subdivisions thereof] are not; in California as elsewhere they are mere creatures of the state and exist only at the state's sufferance."[17] Thus the court rejected the petitioners' argument and held that AB26 is not unconstitutional and is properly within the Legislature's plenary powers.

The court then turned its attention to AB27, which was meant to provide redevelopment agencies an opt-in alternative—an exoneration, as it were. If an agency, or its sponsoring municipality, were to pay into a fund benefiting the schools and special districts (in theory easing the state's financial burden), the agency would have the option to continue to operate uninterrupted and conduct new business.[18] The petitioners argued that this provision is unconstitutional because it squarely conflicts with Proposition 22, which bars the state from requiring direct or indirect payments from the agencies for its benefit.[19] The court agreed.[20] Relying on drafters' and voters' intent, the Court reasoned that despite respondent's characterization of the payment as voluntary, the bill is facially invalid.[21] Thus the court struck down AB27 as unconstitutional.

The Chief Justice concurred that AB26 is not unconstitutional, but dissented in that he would have upheld AB27, as he didn't see it in conflict with Proposition 22.[22] Conceding that they aren't perfect, the Chief Justice noted that the Public Market Building in Sacramento, the Bunker Hill Project in Downtown Los Angeles, Horton Plaza and the GasLamp Quarter in San Diego, the HP Pavilion in San Jose, and Yerba Buena Gardens in San Francisco are all successful redevelopment agency projects which "create jobs, encourage private investment, build local business, reduce crime and improve a community's public works and infrastructure."[23]

On the other hand, others have applauded the outcome,[24] as it not only alleviates the state's budgetary problems[25] but "also has the beneficial side effect of curtailing eminent domain abuse."[26] For nearly a decade, following the U.S. Supreme Court's decision in *Kelo v. New London*, redevelopment agencies have been the target of intense scrutiny and at times political beatings. The *Kelo* decision prompted a domino effect of state legislative enactments drastically reducing eminent domain powers for redevelopment.[27] This case can be seen as an unintended (or perhaps intended) extension

of the post-*Kelo* anti-redevelopment sentiment that swept the nation.

Ironically for petitioners, by losing their AB26 challenge and winning their argument with respect to AB27, they drove the final nail into their own coffin.[28] Had they not challenged the constitutionality of AB27, the agencies would have been able to pay to maintain their existence; "an alternative [they would have] vastly preferred to being shut down altogether."[29] This may not be quite the end of redevelopment as agency representatives are expected to go back to lawmakers and petition the Legislature to recreate them.[30] In the interim, Californians watch as the state's Department of Finance unwinds redevelopment projects, "throwing into question the fate [of] hundreds of millions of dollars that the cities say must be paid, while the state says, not so much."[31]

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Endnotes

1 53 Cal. 4th 231, No. S194861 (Dec. 29, 2011).

2 Assem. Bill Nos. 26 & 27 (2011-2012 1st Ex. Sess.) enacted as Stats. 2011, 1st Ex. Sess. 2011-2012, chs. 5-6; *see also* Assem. Bill 1X 26, § 1, subds. (d)-(i); Assem. Bill 1X 27, § 1, subds. (b), (c).

3 The system is much more complex, but for the purposes of this article, the nuances are not entirely relevant.

4 According to Los Angeles County Board of Supervisors Chairman Zev Yaroslavsky, "[Over the years, redevelopment has] evolved into a honey pot that was tapped to underwrite billions of dollars worth of commercial and other for-profit projects . . . . [The projects] had nothing to do with reversing blight, but everything to do with subsidizing private real estate ventures that otherwise made no economic sense." *Quoted in* Maura Dolan, Jessica Garrison & Anthony York, *California High Court Puts Redevelopment Agencies out of Business*, L.A. Times, Dec. 29, 2011, *available at* http://articles.latimes.com/2011/dec/29/local/la-me-redevelopment-20111230.

5 Slip Op. at 10 (emphasis added).

6 Slip Op at 11.

7 The Legislature has required that twenty percent of the agencies' revenue must be deposited in a fund for low- and moderate-income housing. Additionally, redevelopment agencies must make payments to local government taxing agencies on projects adopted or expanded after 1994. Relevant to this case, the Legislature has often required redevelopment agencies to make payments for the benefit of school and community college districts. In each of the 2004-2005 and 2005-2006 fiscal years, redevelopment agencies were charged amounts intended to generate a combined $250 million. Slip Op. at 11-12.

8 In the 2008-2009 fiscal year, the Legislature required a combined $350 million or five percent of the total statewide tax increment, whichever was greater, to be transferred to school district funds, but that was ultimately invalidated in litigation. Similar provisions for shifts of tax increment revenue in the 2009-2010 and 2010-2011 fiscal years are still in litigation. Slip Op. at 12.

9 *See* Cal. Const. art. XIII, § 25.5, subd. (a)(7) (added by Prop. 22, as approved by voters, Gen. Elec. (Nov. 2, 2010)).

10 Slip Op. at 8, 11.

11 Stats. 2011, 1st Ex. Sess. 2011-2012; Assem. Bill 1X 26, § 1, subds. (d)-(i).

12 Stats. 2011, 1st Ex. Sess. 2011-2012; Assem. Bill 1X 27, § 1, subds. (b), (c).

13 Slip Op. at 2-3.

14 *Id.*

15 Slip Op. at 3.

16 Slip Op. at 20-32.

17 Slip Op. at 22.

18 *See* note xii.

19 Slip Op. at 24.

20 Slip Op. at 44.

21 Slip Op. at 35.

22 Slip Op. at 26 (dissent).

23 *Id.*

24 Libertarian groups, such as Institute for Justice, that have been on the forefront of these challenges consider this decision a "landmark victory for private property owners . . . . California redevelopment agencies have been some of the worst abusers of eminent domain for decades, violating the private property rights of tens of thousands of home, business, church, and farm owners. The Institute for Justice has catalogued more than 200 abuses of eminent domain across California during the past ten years alone. Dolan et al., *supra* note 4.

25 Gov. Jerry Brown expressed satisfaction with the Court's decision: "[It] validates a key component of the state budget and guarantees more than a billion dollars of ongoing funding for schools and public safety." *Id.*

26 Posting of Ilya Somin to The Volokh Conspiracy, *California Supreme Court Upholds Law Abolishing Redevelopment Agencies*, http://volokh.com/2011/12/30/california-supreme-court-upholds-law-abolishing-redevelopment-agencies/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+volokh%2Fmainfeed+%28The+Volokh+Conspiracy%29 (Dec. 30, 2011, 00:11 EST).

27 Prior to the court's decision, only eight states had prohibitions against use of eminent domain for redevelopment (except for blight). By mid-2007, forty two states had enacted reforms to limit (to varying degrees) the power of local governments to invoke eminent domain for the purpose of redevelopment. Eminent Domain Legislation Status Since *Kelo*, http://www.castlecoalition.org/pdf/legislation/US_States_ED_Legis_Map_2007.pdf (last visited May 3, 2012).

28 Steven L. Mayer, a lawyer for the petitioners, declined to second-guess their legal strategy to sue to overturn both provisions. "Hindsight is always 20-20, isn't it?" Mayer said. *Quoted in* Dolan et al., *supra* note 4.

29 *Id.*

30 *Id.*

31 Teri Sforza, *Undoing Redevelopment: State Slaps down O.C. Cities*, Orange County Reg., Apr. 24, 2012, *available at* http://taxdollars.ocregister.com/2012/04/24/undoing-redevelopment-state-slaps-down-o-c-cities/153778/.

Wisconsin Supreme Court Rules Plaintiffs Entitled to Receive "Phantom Damages"

Continued from front cover...

expenses billed, including amounts written off ("phantom damages") is *Ellsworth v. Schelbrock*.[3]

In *Ellsworth*, the plaintiff was injured in an automobile accident and was hospitalized for months. She sued the negligent driver and the driver's insurer. At trial, the plaintiff introduced evidence of the amount billed by her medical providers, which totaled $597,448.27. The defendant objected to the amount arguing that only the amount actually paid ($354,941) by Medical Assistance to the medical providers should have been introduced as evidence. The trial court ruled that the amount billed ($597,448.27)—the sticker price—rather than the amount actually paid ($354,941) was the proper measure of the amount of past medical expenses.

The case was appealed to the Wisconsin Supreme Court, which upheld the lower court (4-3). Finding that the collateral source rule applies to medical assistance benefits, the defendant was not allowed to introduce evidence of the amount actually paid. Instead, the plaintiff could introduce the amount that was billed by the medical providers. The court reasoned that Wisconsin's tort law "applies the collateral source rule as part of a policy seeking to 'deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor.'"[4]

Former Justice Diane Sykes—who now sits on the United States Court of Appeals for the Seventh Circuit—dissented. Justice Sykes cited to a California Supreme Court decision that reached the opposite conclusion:

> In tort actions damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring him as nearly as possible to his former position, or giving him some pecuniary equivalent. . . . The primary object of an award of damages in a civil action, and the fundamental principle of which it is based, are just compensation or indemnity for the loss or injury sustained by the complainant, and no more . . . .
>
> Applying the above principles, it follows that an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation.
>
> Thus, when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate.[5]

B. *Koffman v. Leichtfuss* (2001)—Contractual Write-offs

Just a year later, the Wisconsin Supreme Court decided *Koffman v. Leichtfuss*,[6] which held (5-2) that the collateral source rule applies to cases involving payments made by health insurers. Similar to *Ellsworth*, the plaintiff in *Koffman* was injured in an automobile accident and required medical treatment. The total amount billed by the plaintiff's health providers was $187,931.78. However, due to contractual relationships with the plaintiff's health care providers, the insurance company received reduced rates and only paid $62,324 of the amount billed. Another $3,738.58 was paid by an insurance company and by the plaintiff personally, bringing the total amount of past medical expenses actually paid to $66,062.58.

During trial, the defendants moved to limit the evidence regarding medical expenses to the amounts actually paid ($66,062.58), rather than the amounts billed ($187,931.78). The trial court granted the defendant's motion, and therefore ruled that the plaintiff was only entitled to the amount of medical expenses incurred ($66,062.58) rather than the full sticker price ($187,931.78).

The case was appealed to the Wisconsin Supreme Court, which reversed the trial court. Once again, the court held that the collateral source rule applied, even to "payments that have been reduced by contractual arrangements between insurers and health care providers."[7] The court reasoned that this "assures that the liability of similarly situated defendants is not dependent on the relative fortuity of the manner in which each plaintiff's medical expenses are financed."[8]

Justice Sykes again dissented, arguing that the "proper measure of medical damages is the amount reasonably and necessarily incurred for the care and treatment of the plaintiff's injuries, not an artificial, higher amount

based upon what the plaintiff might have incurred if he or she had a different sort of health plan or no health plan at all."[9]

C. *Leitinger v. DBart* (2007)—Contractual Write-offs

In 2007, the Wisconsin Supreme Court decided *Leitinger v. DBart*,[10] in which the plaintiff suffered injuries while working on a construction site. At trial, the parties argued over the reasonable value of the plaintiff's medical services.

The trial court allowed both parties to proffer evidence of the amount billed by the medical provider ($154,818.51) and the amount paid ($111,394.73) by the plaintiff's health insurance company to prove the reasonable value of medical services. The trial court awarded plaintiff the amount his health insurance company actually paid for the medical treatment, not the sticker price.

On appeal, the Wisconsin Supreme Court held (5-2) that the "collateral source rule prohibits parties in a personal injury action from introducing evidence of the amount actually paid by the injured person's health insurance company, a collateral source, for medical treatment rendered to prove the reasonable value of the medical treatment."[11]

Justice Patience Roggensack along with Justice David Prosser, Jr., dissented, arguing that the majority had "create[d] a new category of damages . . . by unnecessarily expanding the evidentiary component of the collateral source rule to prohibit the jury from hearing what was actually paid to cover all of [plaintiff's] medical care bills while admitting evidence of what was billed, even though no one will ever pay that amount."[12]

II. Wisconsin Supreme Court Further Expands Phantom Damages to Underinsured Motorist Claims in *Orlowski v. State Farm Insurance*

A. Facts of the Case

The plaintiff (Linda Orlowski) was injured in an automobile accident caused by an underinsured driver. Orlowski recovered damages up to the limits of the underinsured driver's insurance. Orlowski also had health insurance coverage which paid a portion of her medical expenses. In addition, Orlowski had an automobile insurance policy with State Farm Insurance, including underinsured motorist (UIM) coverage.

Orlowski submitted a claim to State Farm to recover under her UIM coverage. An arbitration panel awarded Orlowski $11,498.55 for the medical service provided to her as a result of the accident. This amount ($11,498.55) was the amount actually paid to the health care provider, rather than the full amount billed by the medical provider ($72,985.94).

The arbitration panel did not include in its award the amount of Orlowski's medical expenses that had been written off by her medical provider as result of discounts through her health insurance coverage. The amount written off by the medical provider was $61,487.39. No one paid this amount. In his claim, the plaintiff was seeking the full value of the medical expenses.

Orlowski appealed the arbitration panel's decision to the circuit court which modified the award. The judge awarded the plaintiff the full amount billed by the medical provider ($72,985.94), instead of the amount actually paid ($11,498.55). As a result, the plaintiff was awarded $61,487.39 in phantom damages.

B. Wisconsin Supreme Court Decision

The specific issue in *Orlowski* was whether the collateral source rule allows the recovery of written-off medical expenses in a claim under an insured's underinsured motorist coverage.

The court reaffirmed its prior decisions that "an injured party is entitled to recover the reasonable value of medical services, which, under the operation of the collateral source rule, includes written-off medical expenses."[13]

The court offered three public policy reasons for this holding: 1) to deter a tortfeasor's negligence, 2) to fully compensate a plaintiff, and 3) to allow the insured to receive the benefit of the premiums for coverage that he or she purchased.[14]

Unlike the prior cases involving the same issue, none of the justices dissented.

III. Conclusion

Under Wisconsin case law, plaintiffs in personal injury cases are entitled to the the full price of the medical expenses, even when those expenses have been written off by the medical provider (phantom damages).

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Endnotes

1 2012 WI 21.

2 Cooperative Leasing, Inc. v. Truman Roosevelt Domer, 872 So.

2d 956, 959 (Fla. 2004); Haselden v. Davis, 353 S.C. 481, 487 (2003).

3 2000 WI 63.

4 *Id.* ¶ 7 (citing Am. Standard Ins. Co. v. Cleveland, 124 Wis. 2d 258, 264 (Ct. App. 1985)).

5 *Id.* ¶ 29 (quoting Hanif v. Hous. Auth. of Yolo County, 246 Cal. Rptr. 192, 195-96 (1988).

6 2001 WI 111.

7 *Id.* ¶ 31.

8 *Id.*

9 *Id.* ¶ 69.

10 2007 WI 84.

11 *Id.* ¶ 7.

12 *Id.* ¶ 96.

13 Orlowski v. State Farm Mut. Ins. Co., 2012 WI 21, ¶ 4.

14 *Id.* ¶ 18.

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(3) the trial court did not abuse its discretion by admitting expert testimony on future damages, and (4) the developer failed to preserve its argument that the punitive damages were grossly excessive.

FACTS

In the 1990s, Defendants-Appellants Bayer CropScience LP; Bayer CropScience Holding, Inc.; Bayer CropScience AG; Bayer AG; and Bayer BioScience NV (collectively "Bayer") or its corporate predecessors developed a strain of long-grain rice that was genetically modified to be resistant to a Bayer herbicide.[2] In August 2006, the U.S. Department of Agriculture discovered trace amounts of the genetically modified rice (LLRice 601) in the domestic long-grain rice supply and in a popular long-grain rice seed known as Cheniere.[3] The next year, the USDA discovered a second strain of the rice (LLRice 604) in another variety of long-grain rice known as Clearfield 131.[4] Neither the USDA nor any foreign government had authorized that genetically modified rice for human consumption.[5]

In response, the USDA immediately banned the use and sale of Cheniere and Clearfield 131 for the 2007-2008 crop year.[6] It also granted regulatory approval of LLRice 601 in November 2006.[7] But those steps were not enough to prevent importers of U.S. long-grain rice from imposing significant restrictions on or outright banning the importation of U.S. rice.[8] That resulted in a significant drop in U.S. rice exports from 2005 to 2008—a decline that significantly impacted domestic rice farmers who export over half of their long-grain rice.[9]

PROCEDURAL HISTORY

A group of rice farmers sued Bayer in the Arkansas Circuit Court in August 2006.[10] The farmers alleged that Bayer was negligent for not taking sufficient precautions to prevent its genetically modified rice from contaminating the domestic rice supply.[11] They also alleged that Bayer knew that U.S. rice farmers depended on exports for more than half of their crops and that any contamination by genetically modified rice would cause a sharp decline in international demand for U.S. rice.[12] The farmers alleged that Bayer recklessly and wantonly disregarded those natural and probable consequences.[13] Accordingly, they requested compensatory as well as punitive damages.[14]

This appeal concerned the circuit court's ruling on four motions. First, the circuit court denied Bayer's motion in limine to exclude the testimony of the rice farmers' damages expert.[15] Bayer argued that the expert's projection of future damages using past damages was speculative.[16]

Second, the court denied Bayer's motion for summary judgment, which sought to preclude recovery of economic loss in tort actions.[17] Under the economic-loss doctrine, a plaintiff cannot recover for purely economic loss absent personal injury or injury to his or her property.[18]

Third, the court granted the farmers' motion to declare that the statutory cap on punitive damages (Ark. Code Ann. § 16-55-208) is unconstitutional under article 4, section 2, and article 5, section 32 of the Arkansas Constitution.[19] Those provisions respectively set forth the state separation-of-powers doctrine and the ability of the state legislature to limit the amount that one can recover for injuries resulting in death or for injuries to person or property.[20]

Fourth, the court denied Bayer's motion for a directed verdict on punitive damages.[21] The court found sufficient evidence that Bayer knew or should have known the probable consequences of its conduct and Bayer maliciously or recklessly disregarded those consequences.[22]

The jury found that Bayer was negligent.[23] It awarded $5,975,605 in compensatory damages and $42 million in punitive damages.[24] Bayer timely filed motions for a judgment notwithstanding the verdict, a new trial, and a remittitur.[25] In its motion for a new trial and a remittitur, Bayer contended that the punitive-damages award was

unconstitutional under Arkansas law and the federal constitution.[26] Bayer also asked for reconsideration of the four rulings set forth above.[27] The court denied all of those motions.[28]

THE ARKANSAS SUPREME COURT'S DECISION

The Arkansas Supreme Court affirmed on direct appeal. The court first addressed the constitutionality of section 16-55-208—the statutory cap on punitive damages—under article 5, section 32 of the Arkansas Constitution.[29] That constitutional provision states, in relevant part, "The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made . . . . Provided that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property . . . ."[30] According to Bayer, the prohibition on laws limiting the "amount to be recovered" applies only to compensatory (and not punitive) damages.[31]

The court rejected that interpretation, explaining that "[a]lthough compensatory and punitive damages serve differing purposes, an award of punitive damages is nonetheless an integral part of 'the amount recovered for injuries resulting in death or for injuries to persons or property.'"[32] In addition, the court reiterated that article 5, section 32 allows the state legislature to limit tort liability "*only* where there is an employment relationship between the parties."[33] Thus, the court held "that section 16-55-208 is unconstitutional under article 5, section 32 as it limits the amount of recovery outside the employment relationship."[34]

Next, the court addressed the economic-loss doctrine. The doctrine may bar certain tort claims in three general circumstances:

> (1) when the loss is the subject matter of a contract; (2) when there is a claim against a manufacturer of a defective product where the defect results in damage only to the product and not to the person or to other property; and (3) when the parties are contractual strangers and there is no accompanying claim for damages to a person or property.[35]

The doctrine does not, however, preclude recovery for economic losses when there is also injury to the plaintiff's person or property.[36] The court had not addressed whether the doctrine applies to negligence cases and did not do so in this case because it found evidence of physical harm to the rice farmers' lands, crops, and equipment.[37]

The court then evaluated the circuit court's ruling admitting the expert testimony on damages. The court applied the framework under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* ,[38] which the court had adopted in *Farm Bureau Mutual Insurance Co. of Arkansas v. Foote*.[39] The expert testimony at issue relied on past damages to project future damages—a methodology that Bayer argued was too speculative.[40]

The court rejected that argument, explaining that damages need not "be determined with exactness" when "the cause and existence of damages have been established by the evidence."[41] Moreover, the court underscored that Bayer did not contend that the expert's methods "are unreliable."[42] Thus, "Bayer's criticisms go to the weight but not to the admissibility of [the] opinions."[43]

Bayer's arguments regarding punitive damages were also unavailing. First, quoting *National By-Products, Inc. v. Searcy House Moving Co.*,[44] Bayer argued that punitive damages are available only when the defendant acts "with absence of *all* care."[45] In Bayer's view, it exercised as least some care in handling the genetically modified rice—e.g., it instructed those handling the rice about containment measures.[46] The court rejected the notion that exercising a modicum of care, standing alone, could immunize a defendant from punitive damages.[47] Moreover, the court clarified that the "critical inquiry is whether a party likely knew or ought to have known, in light of the surrounding circumstances, that his conduct would naturally or probably result in injury, and that he continued such conduct in reckless disregard of the consequences from which malice could be inferred."[48] Bayer did not challenge the jury's findings under that standard.[49]

Second, Bayer argued that the punitive-damages award was excessive under state law and the Federal Constitution.[50] But the court did not reach those issues after concluding that Bayer had failed to preserve them for appeal.[51] Specifically, Bayer had raised the argument only in its post-trial motion for a new trial and a remittitur.[52] The motion was automatically "deemed" denied after the circuit court failed to rule on it within the thirty-day window under Rule 4(b)(1) of the Arkansas Civil Rules of Appellate Procedure.[53] Bayer did not specify in its notice of appeal that it was also appealing that "deemed-denial of the motion for a new trial and remittitur," and therefore, it had not preserved the issues in that motion.[54]

In her concurrence, Justice Baker explained that the court should not have reached the constitutional issue regarding the statutory cap.[55] In Justice Baker's view, the circuit court's failure to issue a written opinion and its conclusory oral ruling from the bench—"the Court finds

that the statute is unconstitutional"—was "not enough to preserve a constitutional matter for appeal."[56]

IMPLICATIONS

In *Bayer*, the Arkansas Supreme Court reiterated its long-standing interpretation of article 5, section 32 of the Arkansas Constitution: the General Assembly may not limit tort liability *unless* there is an employment relationship between the parties. But in doing so, the court stressed that "there is a presumption of validity attending every consideration of a statute's constitutionality; every act carries a strong presumption of constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear."[57] Moreover, the court made clear that, when interpreting the constitution, its "task is to read the laws as they are written and interpret them in accordance with established principles of constitutional construction."[58] And, indeed, the court's interpretation was grounded in the constitutional text: "The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by *employers* for injuries to or death of *employees*."[59]

This decision also resolves an ambiguity regarding the requirements for awarding punitive damages under Arkansas law—one that the Eighth Circuit had identified in *In re Aircraft Accident at Little Rock, Arkansas on June 1, 1999*.[60] The Eighth Circuit had noted that it is unclear

> whether acting with an "absence of all care" is merely an illustrative example of the requisite disposition or whether an "absence of all care" is a requirement for awarding punitive damages. The language associating an "absence of all care" with "wantonness and conscious indifference to the consequences" has neither been expressly repudiated by Arkansas courts nor has it appeared in the Arkansas Supreme Court's most recent discussion of the requirements for awarding punitive damages.[61]

Bayer puts that question to rest—it rejects the absence-of-all-care standard in favor of a standard that examines what the defendant knew or should have known and how the defendant acted (or did not act) on such knowledge in light of all the circumstances.

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Endnotes

1 Bayer Cropscience LP v. Schafer, 2011 WL 6091323, at *1 (Ark. Dec. 8, 2011).

2 *Id*. at *2.

3 *Id*. at *3.

4 *Id*.

5 *Id*.

6 *Id*.

7 *Id*. at *4.

8 *Id*.

9 *Id*. at *2, 4.

10 *Id*. at *4.

11 *Id*. at *5.

12 *Id*.

13 *Id*.

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*. at *5-6.

19 *Id*. at *6.

20 *Id*.

21 *Id*. at *7.

22 *Id*.

23 *Id*.

24 *Id*. at *7-8.

25 *Id*. at *8.

26 *Id*.

27 *Id*.

28 *Id*.

29 *Id*. at *10.

30 *Id*. at *11 (emphasis omitted).

31 *Id*. at *11-12.

32 *Id*. at *12-13.

33 *Id*. at *12 (citation and internal quotation marks omitted, emphasis added).

34 *Id*. at *13. Because the court concluded that the statutory cap is unconstitutional under article 5, section 32, it did not address whether section 16-55-208 is also unconstitutional under the separation-of-powers provision.

35 *Id*. at *15 (citation omitted).

36 *Id*.

37 *Id*.

38 509 U.S. 579 (1993).

39 14 S.W.3d 512 (2000).

40 *Id*. at *19.

41 *Id*. at *18 (citation omitted).

42 *Id*. at *19.

43 *Id.* at *20.

44 731 S.W.2d 194, 195-96 (Ark. 1987).

45 *Id*. at *20 (emphasis added).

46 *Id*.

47 *Id*. at *21.

48 *Id*. at *21-22.

49 *Id*. at *22.

50 *Id*. at *22.

51 *Id*. at *23.

52 *Id*.

53 *Id*.

54 *Id*. at *24.

55 *Id*. at *24 (Baker, J., concurring).

56 *Id.* at *24-25.

57 *Id*. at *10 (majority op.) (citation omitted).

58 *Id*. (citation omitted).

59 Ark. Const. art. 5, § 32 (emphases added).

60 351 F.3d 874 (8th Cir. 2003).

61 *Id*. at 878.

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