STATE COURT

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Florida Supreme Court Allows Assignment of Legal Malpractice Claim to Third Party Plaintiff

In *Cowan Liebowitz & Latman, P.C., v. Kaplan*[1], the Florida Supreme Court decided whether a potential plaintiff may assign a legal malpractice claim involving the preparation of private placement memoranda (documents explaining the details of an investment to potential investors). The Florida Supreme Court concluded that attorneys preparing private placement memoranda owe a duty to those who rely on statements made in their memoranda. Therefore, parties may assign legal malpractice claims to a non-client for an attorney's misrepresentation and failure to disclose accurate information in preparing private placement memoranda.

I. Assignment of Legal Malpractice Claims and Related Cases

The traditional rule in Florida and in most states is that attorney malpractice claims are nontransferable. This longstanding practice and policy applies a blanket prohibition against assignment of legal malpractice claims, allowing only clients to sue for malpractice. Malpractice is a personal tort arising from the attorney/client relationship. *Kaplan* creates an exception to the customary rule and practice.

In *Forgione v. Dennis Pirtle Agency, Inc.*,[2] the Florida Supreme Court determined that an insured's negligence claim against an insurance agent for failure to obtain proper coverage is assignable to a third party. Although the Florida Supreme Court permitted the assignment of claims against an insurance agent, the Court reiterated its agreement with the policy of foreclosing assignment of legal malpractice claims. The *Forgione* opinion addresses the grounds precluding assignment of a claim for attorney malpractice, stating that such a cause of action is not assignable because "Florida law views legal malpractice as a personal tort [. . .] involv[ing] a confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owed to the client."[3]

In *KPMG Peat Marwick v. National Union Fire Ins. Co. of Pittsburgh, Pa.*,[4] the Florida Supreme Court considered whether an insurer/assignee and/or insurer/subrogee may assert a malpractice claim against an independent auditor for negligently performed audits and failure to detect losses, which led an insurance company to pay amounts to its insured to cover the losses. Although the Florida Supreme Court

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Inside...

Attorney-Client Privilege May Be Weakened By Recent Cases

Several attorney-client privilege cases compelling disclosure have recently made news:

- Illinois and North Carolina courts have held that the "common interest" doctrine, which in California applies to *preserve* the attorney-client privilege among parties with a common interest, *compels disclosure* of attorney-client communications to another party with an alleged common interest. *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 617 S.E. 2d 40 (N.C. App. 2005); *Western States Ins. Co. v. O'Hara*, 357 Ill. App. 3d 509 (Ill. App. 2005).

- A District Court, applying Arizona law, held that a defendant waived its privilege by asserting it acted "within the bounds of the law," in defense of a bad faith claim. *Roehrs v. Minnesota Life Ins. Co.*, 228 F.R.D. 642 (D. Ariz. 2005).

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Expanding State Constitutional Rights in Criminal Law

The Supreme Court of Wisconsin has issued a series of decisions in its 2004-2005 term which significantly changed that court's interpretation of the Wisconsin Constitution in the area of criminal law.

In two cases the court announced that after many decades it would no longer necessarily interpret similarly-worded provisions in the federal and state constitutions in concert. Rather, the majority of the state supreme court adopted an approach termed the "new federalism," which encourages state courts interpreting state constitutional provisions to view them more broadly than federal constitutional provisions using similar or identical language.

In the first case, the court limited the use of "show-up" identifications, in which a suspect is presented singly to a witness for identification purposes.[1] Police detained the defendant within minutes after an armed robbery. The victim viewed the defendant as he sat in the rear of a police squad car. The victim said he was "98% sure" that the defendant was the robber. At a second "show-up" of the defendant at the police station the victim again identified the defendant. Shortly thereafter, the victim identified the defendant a third time as the perpetrator, this time in a "mug shot."

Although the trial court and the state appeals court denied the defendant's motion to suppress his identification, the supreme court held that evidence obtained from an out-of-court "show-up" is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. In its ruling the court relied on social science studies which concluded that "show ups" were inherently suggestive. The court found that a "show-up" was not necessary unless the police lacked probable cause to make an arrest, or as a result of other exigent circumstances could not have conducted a line-up or photo array. The court found that the admission of out-of-court identification evidence denied the defendant a right to due process under the Wisconsin state constitution.

The justices in dissent referenced the many previous Wisconsin decisions which had ruled that the almost identical language of the state and federal constitutional "due process" provisions resulted in identical interpretations, and how this case's result was a departure therefrom. The dissenting justices were troubled by the majority's reliance on social science studies to justify departure from *stare decisis*. One justice wrote: "It is not the function of this court to create what it considers good social policy based on data from social science 'studies.' That is the province of the legislature."[2] Another dissenting justice cited other social science theory on the subject of identifications to the contrary of that relied on by the majority.[3]

In a second case, the supreme court ruled that physical evidence obtained after police violated a suspect's *Miranda* warnings may not be considered at a trial.[4] A police detective asked the defendant, a suspect in a homicide, what the defendant had been wearing the previous evening when he was seen with the victim. The defendant pointed to a pile of clothing on the floor, within which was a bloody sweatshirt. The detective posed the question before he read the defendant the *Miranda* warnings.

The trial court denied the defendant's suppression motion, but the Supreme Court of Wisconsin reversed, concluding that physical evidence obtained as the direct result of a *Miranda* violation should be suppressed when the violation was an intentional attempt to prevent the suspect from exercising his Fifth Amendment rights. The state petitioned for a writ of *certiorari* in the Supreme Court of the United States, which was granted, and that Court vacated the Wisconsin court's decision for further consideration in light of *United States v. Patane*, 542 U.S. 630 (2004), which held that the fruit of the poisonous tree doctrine does not extend to derivative evidence discovered as a result of a defendant's voluntary statements without *Miranda* warnings.

On remand, the Supreme Court of Wisconsin ruled that the "fruit of the poisonous tree" doctrine does apply to this case's circumstances under the Wisconsin state constitution. The court found the police conduct in the case "particularly repugnant and requiring

From The Editor...

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents this fourth issue of *State Court Docket Watch* in 2005. This newsletter is one component of the Society's State Courts Project. *Docket Watch* presents original research on state court jurisprudence, illustrating new trends and ground-breaking decisions in the state courts. The articles and opinions reported here are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in assiduously tracking state court jurisprudential trends.

The December 2005 issue presents several case studies, including a Florida Supreme Court decision that allows assignment of legal malpractice claim to third-party plaintiffs and a ruling in a recent takings case from the Washington State Supreme Court. This issue also features an in-depth look at some of the decisions made by the Supreme Court of Wisconsin in the 2004-2005 term that altered how the court interpreted criminal law in light of the Wisconsin Constitution. Finally, this issue highlights some recent decisions made by state supreme courts that weaken attorney-client privilege.

deterrence" (2004 WI 127 at paragraph 75), and asserted that the judicial system "is systemically corrupted" when law enforcement takes unwarranted investigatory shortcuts to obtain convictions.[5] Accordingly, it applied the exclusionary rule to bar physical evidence obtained from a deliberate *Miranda* violation.

The dissenting justices in these opinions took issue with the state supreme court's reliance on the "new federalism" as substantial deviations from past precedent and violations of the principle of *stare decisis*. "When legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results," one justice wrote.[6] To another, the majority had not advanced the necessary extraordinary showing which the court had demanded to overrule one of its precedents.[7] One dissenting justice wrote that "[w]e should not suddenly change our well-settled manner of interpreting [the state constitution] simply to avoid the impact of the United States Supreme Court's recent decision in *Patane*."[8]

In a third case, the Supreme Court of Wisconsin relied on an old state constitutional provision in a new way. The court adopted a rule requiring police to record electronically all interviews of juveniles.[9] To so rule the court relied on the "superintending and administrative authority" clause in the Wisconsin Constitution.

In this decision, all seven justices agreed that the juvenile defendant's confession was involuntary and that his conviction should be reversed. The court found that following the juvenile's arrest, the failure of police to call the juvenile's parents was strong evidence that coercive tactics were used to elicit incriminating statements. But a majority of the court then pronounced that all custodial interviews of juveniles in future criminal cases in Wisconsin must be recorded electronically when feasible, and without exception when questioning occurs within a detention facility.

The court majority relied on the Supreme Court's "supervisory and administrative authority" as the legal basis for its pronouncement. The court stated that it "has authority to adopt rules governing the admissibility of evidence,"[10] and concluded that by this ruling it was "exercis[ing] our supervisory power to insure the fair administration of justice."[11] The decision makes any unrecorded interrogations and any written statements of a juvenile that are not accompanied by recorded interrogations inadmissible as evidence in court.

The dissenting justices questioned the interpretation of this "superintending and administrative authority" constitutional provision in such a broad manner, as well as the court's authority to make such a pronouncement.

One dissenting justice noted the separation of powers problem raised by the supreme court regulating how law enforcement, a part of the executive branch of government, accomplishes its official duties. "The court should have recommended legislation instead of legislating from the bench."[12] "Somehow the court's superintending authority over all courts has been transformed into broad authority to mandate desirable policy ostensibly related to judicial proceedings but extending far beyond the litigants in a specific case."[13]

According to another dissenting justice, the Supreme Court of Wisconsin "has never before concluded that it had the power to suppress defendants' statements in certain situations merely because it preferred a different law enforcement technique in the procurement of those statements."[14]

These decisions represent the last word on these issues. By interpreting the state constitution in each case, and in the *Knapp* case resting its decision on "independent and adequate state law grounds," the Supreme Court of Wisconsin precluded any further review by the Supreme Court of the United States.

Sidebars:

1. **Massachusetts**: In May 2005 the Massachusetts Supreme Judicial Court ("SJC") decided *Commonwealth v. Martin*, 444 Mass. 213 (2005). In that case the SJC rejected *United States v. Patane*, 542 U.S. 630 (2004), and held, under the state constitution, that evidence seized as a result of a statement obtained in violation of *Miranda* must be suppressed. *Martin*, 444 Mass. at 215. The SJC provided no real analysis why the state constitution differed from the federal constitution on this point, but instead relied on the fact that it had previously rejected U.S. Supreme Court precedent on *Miranda*.

In August 2004 the SJC decided *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004). The SJC rejected creating a rule that untaped confessions would be inadmissible. Instead, it required a jury instruction whenever an untaped confession was introduced where that confession was obtained either (1) during custodial interrogation or (2) in a place of detention. The instruction tells the jury that the "State's highest court has expressed a preference that such interrogations be recorded whenever practicable" and warns the jurors to "weigh [them] with great caution and care." The instruction was to apply to all further trials, even where the questioning occurred prior to the decision.

2. **Wisconsin**: Civil law decisions by the Supreme Court of Wisconsin have also generated controversy. The October 2005 issue of *State Court Docket Watch* describes in detail how product liability law was greatly expanded in Wisconsin in *Thomas v. Mallett*, 2005 WI 129, in which the court adopted a "risk contribution" theory of liability and ruled that a plaintiff injured as a result of ingesting lead paint chips and dust could sue various paint companies for manufacturing one of the raw materials formerly used in paint.

The state supreme court also struck down as unconstitutional Wisconsin's cap on non-economic damages in medical malpractice cases not involving wrongful death of the patient.[15] In this case the plaintiffs challenged the constitutionality of those statutory limits as violative of the equal protection guarantee of the Wisconsin constitution. In its review the court

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Attorney-Client Privilege (Cont. From Pg. 1)

- A District Court in California held that a defendant waived its privilege by asserting in its defense that it adequately investigated discrimination claims. *Walker v. County of Contra Costa*, 227 F.R.D. 529 (N.D. Cal. 2005).

- An Ohio court held that the insurer effectively waived its privilege by denying an insured's claim of bad faith. *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 213-14, 744 N.E. 2d 154 (2001).

A client will not communicate with his or her attorney with the complete confidence required, and vice versa, if courts commonly compel disclosure in situations that they did not foresee in advance. Certainly each court found a persuasive reason that justified disclosure in its view. However, collectively, these cases threaten to pull the cornerstone out from under the attorney-client privilege.

In contrast with *Nationwide Mut. Fire Ins. Co.*, another recent case illustrates a different approach more sympathetic to the privilege. The court in *Neighborhood Dev. Collab. v. Murphy*, __ F. Supp. 2d __, 2005 WL 3272711, *6 (D.Md. Dec 02, 2005) "t[ook] exception" to the argument that a common interest resulted in waiver:

> [T]he Court takes exception to [the argument] that a joint representation of Party A and Party B may somehow arise through the expectations of Party B alone, despite Party A's views to the contrary. This position is untenable, because it would, as Defendant Murphy points out, "allow the mistaken (albeit reasonable) belief by one party that it was represented by an attorney, to serve to infiltrate the protections and privileges afforded to another client.

Accordingly, the "claim of implied joint representation" was held "to be without merit." *Id.*

A brief examination of the history and rationale of the attorney-client privilege explains why many argue confidence in the privilege is so essential. Until 1776, the objection—or rather the "point of honor"—was thought to belong not to the client but to the attorney as "a part of the professional accoutrement of the gentleman of the law." *Rigolfi v. Superior Court,* 215 Cal. App. 2d 497 (1963). That year, the Duchess of Kingston was tried in the House of Lords on charges of bigamy. At trial, her counsel was asked by one of the Lords about the Duchess's conversations with him about a prior marriage. Though she exempted him from secrecy, the attorney refused to answer. The House of Lords directed the attorney to answer, thus ending the "point of honor" theory. 20 Howell, State Trials 355, 586 (1776).

In its place developed the modern theory of the attorney-client privilege, in which the privilege belongs to the client. In California, this basis for the attorney-client privilege was explained in the former section 1881 of the Code of Civil Procedure: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate." Likewise, section 6068 of the Business and Professions Code warned: "It is the duty of an attorney: . . . (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client."

Thus, it is and always has been essential to the privilege that the client have unbroken confidence in the privilege, so the client will disclose all relevant facts. If he or she does not, "the advice which follows will be useless, if not misleading, the lawsuit will be conducted along improper lines, the trial will be full of surprises, and much useless litigation may result." *San Francisco v. Superior Court*, 37 Cal. 2d 235 (1951). Moreover, the absence of the privilege would inevitably convert the attorney into a mere informer for the benefit of the opponent. *San Francisco v. Superior Court, supra.*

This is not, of course, to say that exceptions to the privilege are not justified, such as when a client attempts to use those communications in furtherance of a crime or fraud. But the exceptions are historically construed as exceptional. As the Supreme Court has warned: "Unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavorable facts."

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contrasted the corporate client/independent auditor relationship to the attorney/client relationship, the Florida Supreme Court declined to shield independent auditors in the same way attorneys are shielded from assignment of legal malpractice claims. In reaching its decision, the *KPMG* Court distinguished an attorney from an independent auditor, stating: "[r]ather than acting as an advocate with an undivided duty of loyalty owed to a client, an independent auditor performs a different function."[5] Because the attorney/client relationship requires "zealous" representation of a client's position in an adversarial setting, as opposed to an independent auditor who is hired to give an opinion on a client's financial statements with impartiality, the prohibition of assigning a legal malpractice claim does not apply equally to the assignment of malpractice claims against an independent auditor.[6]

II. Factual Background of *Kaplan*

Medical Research Industries, Inc. (MRI), a Florida corporation, developed homeopathic medical products. In order to secure money for company improvements, MRI's attorneys prepared private placement memoranda, offering shares in the company to potential investors. Four private placements were issued from 1996-1998, raising over fifty million dollars from about two-thousand shareholders for MRI. Later, MRI's majority shareholder, William Tishman, borrowed eighteen million dollars in unsecured loans from MRI. In the "Use of Proceeds" section of the private placement memoranda, the attorneys claimed that the capital raised in connection with the placement would be used to operate and expand MRI's business. However, the attorneys knew that a substantial amount of the money was being funneled into unsecured loans to Tishman. The Tishman loan led MRI to eventual insolvency. MRI sued Tishman to recover the loan. Unable to satisfy the judgment against Tishman, MRI executed an "Assignment for the Benefit of Creditors" to Donald Kaplan. Kaplan then sued the attorneys who prepared the private placement memoranda for legal malpractice. On appeal, the Third District Court of Appeal held that the "legal services at issue [were] not personal in nature but involved the publication of corporate information to third parties, i.e., the investors [and therefore] the policies underlying the prohibition of bare assignment of legal malpractice claims are inapplicable."[7]

III. *Kaplan* v. *Cowan Liebowitz & Latman, P.C.*, and the Third District Court of Appeal Opinion

In *Kaplan* v. *Cowan Liebowitz & Latman, P.C.*,[8] the Third District Court of Appeal permitted the assignment of MRI's legal malpractice claim by holding the following: first, in preparing the private placement memoranda for potential investors, the MRI attorneys are similar to the accountant conducting an independent audit described in *KPMG*, therefore "the policies underlying the prohibition of bare assignment of legal malpractice claims are inapplicable,"[9] and, second, under Chapter 727 of the Florida Statutes, an assignee for the benefit of creditors is analogous to a bankruptcy trustee, to whom legal malpractice claims may be transferred.[10] Therefore, because Kaplan, as an assignee for the benefit of creditors, was charged with gathering and liquidating MRI's assets, "[he] is no different from a trustee in bankruptcy who has full standing to bring a debtor's legal malpractice claim."[11]

The Florida Supreme Court acknowledged that by analogizing the MRI attorneys to an accountant conducting an audit, the Third District Court of Appeal "expressly and directly conflict[ed] with [the Supreme Court's] statements in *KPMG* and *Forgione* (albeit in dictum) implying a blanket prohibition against assignment of legal malpractice claims."[12] Based on this conflict in law, the Florida Supreme Court accepted jurisdiction. Although the Third District Court of Appeal decision also rested on an analysis of Chapter 727, the Florida Supreme Court declined to resolve the statutory issue of Chapter 727, limiting the scope of its opinion to examining the MRI attorney's duty to third parties who rely on statements made in private placement memoranda.

IV. The Florida Supreme Court Opinion in *Kaplan*

In *Kaplan*, the Florida Supreme Court adopted the reasoning set forth by the Third District Court of Appeal and receded "from the broad dicta in *KPMG* and *Forgione* purporting to prohibit the assignment of all legal malpractice claims."[13] Nevertheless, the Florida Supreme Court stressed that "the vast majority of legal malpractice claims remain unassignable because in most cases the lawyer's duty is to the client."[14] When attorneys prepare private (or public) placement memoranda, "[they] act much as accountants do in performing independent audits. That is, they act not just for the corporation's benefit, but for the benefit of all those who rely on the representation in their documents."[15]

In order to support the assignment of MRI's legal malpractice claim, the court compared the role of the attorneys in *Kaplan* with the role of the independent auditor in *KPMG*. "Like the independent auditors in *KPMG*, the attorneys intended that third parties would rely on the representations in the memoranda. The legal services at issue, therefore, were not personal but involved publication of corporate information."[16] In addition, the court explained that the assignment of a legal malpractice claim, such as the claim MRI assigned to Kaplan, would not endanger the attorney-client relationship because the "attorney's services for MRI involved publication of information to third parties, [therefore] the attorneys owed a duty to the public when advising MRI and preparing the private placement memoranda."[17]

The Florida Supreme Court also examined the role of securities lawyers and the communication of investment information. The court stated that "securities lawyers have been held to owe a duty to the public."[18] Because compliance with the securities laws present complicated questions to investors, an attorney has a unique role in communicating accurate information to investors. In order to secure the proper functioning of market transactions, the public must be able to rely on information or an opinion offered by an attorney regarding the securities laws and statutes. In this regard, "lawyers often have public duties beyond those owed to the clients."[19] Since the attorneys in *Kaplan* drafted

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the private placement memoranda knowing that such information would be disseminated to potential investors relying on the content of the memoranda, the services were not personal and may be assigned to a non-client plaintiff.

V. Conclusion

Kaplan creates an exception to the longstanding rule of non-assignment of a legal malpractice claim. The *Kaplan* rationale rests on the public nature of the attorney's communication which was intended for release to third parties—i.e. shareholders and the investing public. As the Court stated: "the documents the attorneys prepared not only were intended for release; they were released to third parties."[20] Thus, the confidentiality concerns arising from the attorney/client privilege do not apply. Additionally, because the MRI attorneys did not disclose accurate information in private placement memoranda when soliciting investors, the Florida Supreme Court permitted the assignment of the legal malpractice claim to a third party plaintiff. While the Florida Supreme Court expressed reluctance about creating a market for legal malpractice claims, most claims would be prevented so long as information is not intended for release to third parties.

Footnotes

[1] 902 So.2d 755 (Fla. 2005).

[2] 701 So.2d 557 (Fla. 1997).

[3] *Forgione*, 701 So.2d at 559.

[4] 765 So.2d 36 (Fla. 2000).

[5] *Id.* at 37.

[6] *Id.* at 38.

[7] *Kaplan* v. *Cowan Liebowitz & Latman, P.C.*, 832 So.2d 138, 140 (Fla.3d DCA 2002).

[8] 832 So.2d 138 (Fla.3d DCA 2002).

[9] *Id.* at 140.

[10] *Id.* at 140.

[11] *Id.* at 140.

[12] *Kaplan*, 902 So.2d 755, at 756.

[13] *Id* at 756.

[14] *Id.* at 756.

[15] *Id.* at 758.

[16] *Id.* at 759.

[17] *Id* at 759.

[18] *Id.* at 759.

[19] *Id.* at 759.

[20] *Id* at 759.

Washington State Supreme Court Hands Down Decision in Eminent Domain Case

In *HTK Management, L.L.C. v. Seattle Popular Monorail Authority* (Wash. 2005), the Washington State Supreme Court issued its first opinion in a takings case in the wake of the U.S. Supreme Court's decision of *Kelo v. City of New London*, ___ U.S. ___, 125 S. Ct. 2655 (2005). By a 7-2 vote, however, the Washington Supreme Court declined an invitation to reinvigorate its own state constitution's provision for the exercise of eminent domain. The court instead chose to uphold a local authority's condemnation of private property belonging to the descendants of a late immigrant worker who had been displaced to a Japanese-American internment camp.

Although many internees lost all their possessions in the wake of President Franklin D. Roosevelt's Executive Order 9066, immigrant railroad laborer Henry T. Kubota ("HTK") found a loyal friend to manage his property and return it to him upon his release. After Kubota's death in 1989, his descendants managed his property in a historic part of downtown Seattle under his namesake, HTK Management, L.L.C. HTK's parcel was well-known for the Sinking Ship garage that was constructed and operated on the property.

In 2002, the local Seattle Monorail Authority (Monorail) identified HTK's parcel as a potential monorail station site. HTK learned this from a local newspaper rather than direct contact from the agency, but he expressed willingness to collaborate with the Monorail so that Monorail could build a station on a portion of HTK's parcel and HTK could realize Kobuta's dream of redeveloping the remainder of the parcel. At some point during negotiation, the Monrail passed a resolution to acquire HTK's entire parcel by condemnation.

At a subsequent trial court hearing on pubic use and necessity, Monorail conceded that the station's footprint would occupy only one-quarter to one-third of the parcel. Monorail contended that condemnation of the remainder property was needed for construction staging and staff parking activities. While conceding the station and construction staging may be public uses, HTK countered that the temporary nature of the staging and parking did not justify a fee simple interest in the remainder property. At the hearing HTK also presented evidence that Monorail sought agency profit from the remainder property through its anticipated increase in value following station construction and a subsequent sale of the remainder property to developers. The trial court sided with Monorail, entering a judgment of public use and necessity.

Unlike the federal constitution, the Washington Constitution's provision for takings makes explicit that the exercise of eminent domain for public use is subject to judicial review. Under Article I, Sec. 6 of Washington's Declaration of Rights:

> Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial

question, and determined as such, without regard to any Legislative assertion that the use is public.

Under Washington State jurisprudence, for a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose.

Writing for the majority, Justice Barbara Madsen thrice denied any resemblance between the case at hand and *Kelo*. Madsen read over Art. I. Sec. 6's plain provision that "the question [as to] whether the contemplated use be really public shall be a judicial question," by saying that a legislative declaration of "public use" is nonetheless "entitled to great weight." Madsen went on to contend that a local authority's determination of "public necessity" for the exercise of eminent domain was a "legislative question" that was "conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud." Madsen insisted that decisions as to the type and extent of property interest necessary to carry out the public purposes are legislative questions, thereby announcing "the rule" that "decisions as to the amount of property do be condemned are legislative questions, reviewed under the legislative standard for necessity." With a final denial of any *Kelo* connection to the present case, Madsen cited the present case's involvement with "one of the most fundamental public uses for which property can be condemned - public transportation" and affirmed the trial court's finding of public use and necessity.

In dissent, newly-elected Justice Jim Johnson offered, if only in passing, the first published judicial opinion from a state court calling *Kelo*'s soundness into question. The focus of Johnson's dissent, however, was upon the majority's reluctance to give credence to the state constitution's plain language or its previous enforcement in Washington case law. Johnson sharply criticized the majority's interpretation of the tri-partite "public use" test. Johnson cited early cases from the Evergreen State holding that because municipal corporations have no inherent power of eminent domain that such exercise can only take place in accordance with express statutory authorization, and because statutes conferring such power are in derogation of the common right, they "must be strictly construed, both as to the extent of the power and as to the manner of its exercise."

In unmistakable terms, Johnson asserted that it is "stupefying" to give "great weight" to legislative determinations of public use and necessity when the constitutional provision for takings explicitly states that the question of public use *shall* be a judicial question, "without regard to any Legislative assertion that the use is public."

Johnson also contended that an inquiry into public necessity of a taking is a corollary judicial construct to the public use inquiry. Going beyond the majority's conclusion that public necessity declarations are conclusive absent fraud or constructive fraud, Johnson cited case law for the proposition that a declaration of necessity is neither upheld where there is arbitrary or capricious conduct, manifest abuse of discretion, violation of law, improper motives, or collusion. Cases cited defined arbitrary and capricious conduct as " willful and unreasoning action and taken without regard to the attending facts or circumstances." Johnson concluded that the record established that Monorail's action was arbitrary and capricious and based upon improper motives. Justice Richard Sanders joined the dissent.

Public opinion and even local media opinion sided strongly against the majority's opinion in the case—which is now frequently referred to as "the Sinking Ship case." As of this writing the court has another eminent domain decision pending that might offer further indication as to whether private property rights in the state will follow the *Kelo* trajectory.

employed a new legal standard less deferential to the state legislature. As a result of the review, the majority concluded that "a rational relationship does not exist between the classifications of victims in the $350,000 cap on noneconomic damages and the legislative objective of compensating victims of medical malpractice fairly."

The justices in dissent noted the separation of powers problem in the court's change in its standard of review, and concluded that the majority's "disproportionality" finding could apply to any cap.

Footnotes

[1] *State v. Dubose*, 2005 WI 126.

[2] *Id* at para. 66.

[3] *Id* at para. 90.

[4] *State v. Knapp*, 2005 WI 127.

[5] *Id*. at para. 81.

[6] *Id*. at para. 96 (citation omitted).

[7] *Id*. at para. 101.

[8] *Id*. at para. 102.

[9] *State v. Jerrell C.J.*, 2005 WI 105.

[10] *Id*. at para. 48.

[11] *Id*. at para. 58.

[12] *Id*. at para. 132.

[13] *Id*. at para. 146.

[14] *Id*. at para. 162.

[15] *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125.

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