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Arkansas: Twists and Turns in Civil Justice Reform

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With the enactment of the Civil Justice Reform Act of 2003 ("CJRA"), Arkansas joined the many states that have enacted comprehensive civil justice reform legislation. The CJRA replaced "deep pocket" joint and several liability with "fair share" liability, limited outlier punitive damages awards, and protected the right to an appeal, among other reforms. Additional reforms in the CJRA built on the Medical Malpractice Act

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Michigan: Enforceability of Non-Disclosure & Non-Competition Covenants

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The Michigan Supreme Court will soon decide several issues of immense importance to business relationships governed by Michigan law. In 2014, the Michigan Court of Appeals issued an opinion in *Innovation Ventures, L.L.C. v. Liquid Manufacturing, Inc.* that applied a somewhat novel approach to two issues of contract law. The first issue is whether a principle governing consideration in employer-employee non-disclosure agreements should be applied to a business transaction between sophisticated parties. The second issue is whether these same sophisticated businesses could create an enforceable non-competition agreement that allowed one party to lend its equipment to the other party and exercise an effective "veto"

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Over the last decade, the Arkansas Supreme Court has struck down several key provisions of the CJRA.[3] More recently, the court has overseen a process to restore or preserve some of the gains that had been made in the CJRA through amendments to the Arkansas Rules of Civil and Appellate Procedure.

This paper will discuss the CJRA and the Arkansas Supreme Court cases that have addressed major provisions of the legislation. It will also touch on some of the recent rule changes implemented in Arkansas to fill in some of the gaps that were created by the court's decisions.

I. The Civil Justice Reform Act of 2003

The CJRA made important changes to Arkansas law regarding (1) joint and several liability, (2) punitive damages, (3) protecting the right to an appeal, (4) "phantom damages" (collateral source), and (4) medical liability.[4]

A. Joint and Several Liability

The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant may be held liable for a plaintiff's entire compensatory damages award. Thus, a jury's finding that a particular defendant may have been only one percent at fault is overridden and that defendant may be forced to pay the entire award if other responsible defendants are insolvent or unable to pay their share of the judgment.

The doctrine of joint and several liability is tied to the all-or-nothing doctrine of contributory negligence. Under the contributory negligence doctrine, a plaintiff had to be blameless or was barred from any recovery. Over time, however, virtually all states moved away from contributory negligence and began to adopt comparative fault. Under comparative fault, a plaintiff who is partially to blame for her own injury is not barred from recovery; instead, that person's recovery is reduced

1 *See* 2003 Ark. Acts 649 (effective Mar. 25, 2003) (codified at Ark. Code Ann. §§ 16-55-201 to -220, 16-114-206, and 16-114-208 to -212), *available at* http://www.arkleg.state.ar.us/assembly/2003/R/Acts/Act649.pdf (CJRA); 1979 Ark. Acts 709 (codified as amended at Ark. Code Ann. §§ 16-114-201 to -209) (Medical Malpractice Act). *See also* Whorton v. Dixon, 214 S.W.3d 225 (Ark. 2005) (statute was rationally related to policy of trying to control rapidly rising health care costs).

2 Robert B. Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38-Fall Ark. Law. 26, 27 (2003). In addition to the CJRA, Arkansas has enacted other civil justice reforms including the Medical Malpractice Act of 1979, *supra*, Product Liability Act of 1979, *see* 1979 Ark. Acts 511 (codified as amended at Ark. Code. Ann. §§ 16-116-101 to -107), Volunteer Immunity Act, *see* Ark. Code. Ann. §§ 16-6-101 to -105, and laws addressing volunteer fire fighter liability, *see* Ark. Code. Ann. §§ 16-6-101 to -102, firearm, nonpowder gun, and ammunition manufacturer liability, Ark. Code. Ann. § 16-116-201, equine and livestock activity liability, *see* Ark. Code. Ann. § 16-120-202, liability for suppliers of specialized equipment and personnel responding to emergency agency requests, *see* Ark. Code. Ann. § 16-120-401, successor corporation asbestos-related liability, *see* Ark. Code §§ 16-120-601 to 16-120-606, and transparency in private attorney contracts entered into by the state, *see* Ark. Code §§ 25-16-714 to -715.

3 *See Summerville v. Thrower*, 253 S.W.3d 415 (Ark. 2007) (striking down CJRA's 30-day affidavit of merit requirement in medical malpractice actions); *Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135 (Ark. 2009) (striking down CJRA's nonparty-fault and medical costs provisions); *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011) (striking down CJRA's punitive damages cap); *Broussard v. St. Edward Mercy Health Sys., Inc.*, 386 S.W.3d 385 (Ark. 2012) (striking down CJRA's requirement that medical malpractice plaintiff's expert must be in the same specialty as the defendant).

4 The CJRA also contained venue reform. *See* Ark. Code. Ann. § 16-55-213; *see also Clark v. Johnson Reg'l Med. Ctr.*, 362 S.W.3d 311 (Ark. 2010) (statute governing venue in medical malpractice action did not violate separation of powers under Arkansas Constitution); Kelly W. McNulty, *Ark. Code Ann. § 16-55-213: Tort Reform Brings Sweeping Changes to Venue Law in Arkansas*, 44-Winter Ark. Law. 10 (2009). This section was repealed by 2015 Ark. Acts 830.

in proportion to his or her share of fault for the harm (e.g., a plaintiff who is found to be forty percent at fault will have her award reduced by forty percent). Arkansas was a pioneer in adopting comparative fault in 1955.[5] In 1957, Arkansas moved from pure comparative fault to a form of modified comparative fault.[6]

The advent of comparative fault has enabled many more plaintiffs to win their cases. Most states, including Arkansas, will permit a plaintiff to recover in this manner unless the jury decides that the plaintiff was principally at fault for his own harm.[7] This approach encourages responsible behavior by not rewarding highly negligent plaintiffs, and reflects the view that it is morally wrong to award damages to a plaintiff who is more at fault than all of the defendants.

With the advent of comparative fault in Arkansas, as elsewhere, the justification for requiring solvent defendants to bear a disproportionate burden was lost. Courts no longer had the assurance that imposition of joint and several liability would pit a morally blameless plaintiff against a morally blameworthy defendant. Today's plaintiff can recover damages even when he or she is not completely innocent.[8] Furthermore, joint and several liability is unfair because it puts full responsibility on those who may have been only marginally at fault, and it blunts incentives for safety because it allows negligent actors to underinsure.

For these reasons, the clear trend over the past few decades has been a move away from joint and several liability.[9] In Arkansas, the CJRA generally replaced traditional joint and several liability with "fair share" liability.[10] Under the CJRA, "[e]ach defendant shall be liable only for amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault."[11]

To give substance to this reform, the CJRA provided that "the fact finder shall consider the fault of all persons or entities who contributed to the alleged injury... regardless of whether the person or entity was

5 *See* 1955 Ark. Acts 191.

6 *See* 1957 Ark. Acts 296.

7 *See* Ark. Code. Ann. § 16-55-216 ("a plaintiff may not recover any amount of damages if the plaintiff's own fault is determined to be fifty percent (50%) or greater.").

8 As the Tennessee Supreme Court explained in *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992):

> Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.

See also Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 27 (Ky. 1999) ("Whereas it is fundamentally unfair for a plaintiff who is only 5 percent at fault to be absolutely barred from recovery from a defendant who is 95 percent at fault, it is equally and fundamentally unfair to require one joint tort-feasor to bear the entire loss when another tort-feasor has caused 95 percent of the loss.").

9 Most states have modified or abolished joint and several liability, at least with respect to many types of cases. *See* Alaska Stat. § 09.17.080(d); Ariz. Rev. Stat. § 12-2506(A); Ark. Code Ann. § 16-55-201; Cal. Civ. Code § 1431.2; Colo. Rev. Stat. § 13-21-111.5; Conn. Gen. Stat. Ann. § 52-572h ; Fla. Stat. Ann. § 768.81; Ga. Code Ann. § 51-12-33; Haw. Rev. Stat. § 663-10.9; Idaho Code Ann. § 6-803; 735 Ill. Comp. Stat. Ann. 5/2-1117; Ind. Code Ann. § 34-20-7-1; Iowa Code Ann. § 668.4; Kan. Stat. Ann. § 60-258a(d); Ky. Rev. Stat. Ann. § 411.182(3); Mass. Gen. Laws ch. 231B §§ 1-2; Mich. Comp. Laws §§ 600.6304(4), 600.6312; Minn. Stat. Ann. § 604.02; Miss. Code Ann. § 85-5-7; Mo. Rev. Stat. § 537.067(3); Mont. Code Ann. § 27-1-703; Neb. Rev. Stat. § 25-21,185.10; Nev. Rev. Stat. Ann § 41.141; N.H. Rev. Stat. Ann. § 507:7-e; N.J. Stat. Ann. § 2A:15-5.3; N.M. Stat. Ann. § 41-3A-1; N.Y. Civ. Prac. L. & R. §§ 1601-1602; N.D. Cent Code § 3203.202 ; Ohio Rev. Code Ann. § 2307.22; Okla. Stat. tit. 23, § 15.1; Or. Rev. Stat. § 31.610(4); 42 Pa. Consol. Stat. § 7102; S.C. Code Ann. § 15-38-15; S.D. Codified Laws Ann. § 15-8-15.1; Tenn. Code Ann. § 29-11-107; Tex. Civ. Prac. & Rem. Code Ann. § 33.013; Utah Code Ann. §§ 78-27-39(2), 78-27-40(1); Vt. Stat. Ann. tit. 12, § 1036; Wash. Rev. Code Ann. § 4.22.070(1)(b); W. Va. Code § 55-17-13c; W. Va. Code Ann. § 55-7B-9; Wis. Stat. Ann. §§ 895.045(1), 895.85(5); Wyo. Stat. § 1-1-109(e); *see also* R.*L. Mc Coy v. Jack*, 772 N.E.2d 987 (Ind. 2002); *Brown v. Keill*, 580 P.2d 867 (Kan. 1978); *Prudential Life Ins. Co. v. Moody*, 696 S.W.2d 503 (Ky. 1985); *Howard v. Spafford*, 321 A.2d 74 (Vt. 1974); *Washburn v. Beatt Equip. Co.*, 840 P.2d 860 (Wash. 1992).

10 *See* Ark. Code. Ann. § 16-55-201; *see also Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135 (Ark. 2009) (finding the switch from joint and several to pure several liability to be substantive and, therefore, not a violation of amendment 80 § 3 to the Arkansas Constitution). Joint and several liability continues to apply to persons acting in concert. *See* Ark. Code. Ann. § 16-55-205.

11 Ark. Code. Ann. § 16-55-201(b)(1).

or could have been named as a party to the suit."[12] This provision permitted the attribution of fault to settling tortfeasors, "as previously allowed in Arkansas."[13] It also permitted fault to be allocated to other nonparties including entities that are immune (e.g., negligent employers in cases brought against product manufacturers for workplace injuries), insolvent, or beyond the court's jurisdiction.

To allow the plaintiff to prepare for a trial in which nonparty fault may be at issue, the CJRA provided that the defendant must provide notice of its intent to raise the issue of nonparty fault at least 120 days before trial by filing a pleading that identifies the nonparty and stating the basis for believing the nonparty to be at fault.[14]

Lastly, the CJRA provided a mechanism to potentially reapportion the several share of any defendant that is not reasonably collectible.[15]

B. Punitive Damages

The General Assembly also responded to "concerns about large punitive damages in Arkansas and elsewhere"[16] by tightening the burden of proof for punitive damages, establishing a cap to restrain outlier awards, and allowing parties to request bifurcated trials in punitive damages cases.[17]

In order to recover punitive damages under the CJRA, a plaintiff must prove that the defendant is liable for compensatory damages and that either (1) "[t]he defendant knew or ought to have known, in light of the surrounding circumstances, that his or her conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences, from which malice may be inferred; or (2) [t]he defendant intentionally pursued a course of conduct for the purpose of causing injury or damage."[18] The CJRA's standard for punitive damages liability "codifie[d] existing precedent."[19]

Evidence that the defendant engaged in either of the above classes of conduct must be "clear and convincing" under the CJRA.[20] Reflecting the quasi-criminal nature of punitive damages, the "clear convincing evidence" burden of proof falls between the preponderance of evidence standard ordinarily used in civil cases and the criminal law standard of proof beyond a reasonable doubt. The clear and convincing evidence standard is the law in a majority of states, has enjoyed widespread support in the legal community,[21] and was endorsed by the Supreme Court of the United States.[22]

The CJRA addressed the problem of unpredictable outlier awards through a cap, as many states have done. Nationally, about half of the states limit[23] or

12 Ark. Code. Ann. § 16-55-202(a).

13 Robert B. Leflar, *The Civil Justice Reform Act and The Empty Chair*, 2003 Ark. L. Notes 67, 72 (2003).

14 Ark. Code. Ann. § 16-55-202(b).

15 Ark. Code. Ann. § 16-55-203. The reallocation of uncollectible fault shares "applies only to the fault shares of 'defendants,' not to fault shares attributed to nonparties." Leflar, *The Civil Justice Reform Act and The Empty Chair*, 2003 Ark. L. Notes 67 at 73.

16 Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38-Fall Ark. Law. at 26-27.

17 *See* Ark. Code. Ann. §§ 16-55-206 to -208, § 16-55-206-211.

18 Ark. Code. Ann. § 16-55-206.

19 Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38-Fall Ark. Law. at 26-27.

20 *See* Ark. Code. Ann. § 16-55-207.

21 *See* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals For Reform By Courts And Legislatures*, 65 Brook. L. Rev. 1003, 1014 (2000) (citing Am. Bar Ass'n, Special Committee on Punitive Damages of the Am. Bar Ass'n, Section on Litig., Punitive Damages: A Constructive Examination 19 (1986); Am. College of Trial Lawyers, Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice 15-16 (1989); Nat'l Conf. of Commissioners On Uniform State Laws, Uniform Law Commissioners' Model Punitive Damages Act § 5 (approved July 18, 1996); Am. L. Inst., 2 Enterprise Responsibility for Personal Injury Reporters' Study 248-49 (1991)).

22 *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991) ("There is much to be said in favor of a state's requiring, as many do, injury, . . . a standard of 'clear and convincing evidence.'").

23 *See* Ala. Code § 6-11-21; Alaska Stat. § 9.17.020(f)-(h); Colo. Rev. Stat. § 13-21-102(1)(a); Conn. Gen. Stat. Ann. § 52-240; Fla. Stat. Ann. § 768.73; Ga. Code Ann. § 51-12-5.1(f), (g); Idaho Code Ann. § 6-1604; Ind. Code Ann. § 34-51-3-4; Kan. Stat. Ann. § 60-3702; Me. Rev. Stat. Ann. tit.28-A § 2-804(b) (wrongful death); Miss. Code Ann. § 11-1-65; Mont. Code Ann. § 27-1-220(3); Nev. Rev. Stat. Ann. § 42.005; N.J. Stat. Ann. § 2A:155.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32.03.2-11(4); Ohio Rev. Code Ann. § 2315.21; Okla.

bar[24] punitive damages. The CJRA capped punitive damages at the greater of $250,000 or three times the amount of compensatory damages (not to exceed $1 million)[25]—adjusted triannually for inflation.[26] The cap would not apply if the finder of fact determined that by "clear and convincing evidence that... the defendant intentionally pursued his course of conduct for the purpose of causing injury or damage" and "did, in fact, harm the plaintiff."[27]

Finally, the CJRA provided that any party may request a bifurcated trial so that proceedings on punitive damages are separate from and subsequent to proceedings on compensatory damages before the same jury.[28] The request must be made at least ten days before trial to give other parties time to prepare for trial.[29] Bifurcated trials prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining liability for compensatory damages.[30] Bifurcation also helps jurors "compartmentalize" a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards from the higher burden of proof required for punitive damages (i.e., clear and convincing evidence). For these reasons, bifurcation of punitive damages trials has been widely adopted nationwide[31] and has been supported by leading legal groups.[32]

C. Protecting the Right to Appeal

A civil defendant that loses at trial must post a supersedeas bond (commonly called an appeal bond) to secure its right to appeal and stay the judgment. Appeal bond statutes were initially adopted in an era when judgments were generally smaller in scale—before the emergence of government-sponsored lawsuits and class actions that aim to reach into the deep pockets of corporate defendants. In the modern era, appeal bond requirements are often roadblocks to appellate review.[33]

Stat. Ann. tit. 23, § 9.1; 40 Pa. Cons. Stat. Ann. § 1303.505 (healthcare providers); S.C. Code Ann. § 15-32-530; Tenn. Code Ann. § 29-39-104; Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Va. Code Ann. § 8.01-38.1; W. Va. Code § 55-7-29; Wis. Stat. § 895.043(6).

24 Nebraska bars punitive damages on state constitutional grounds. Louisiana, Massachusetts, and Washington, and New Hampshire permit punitive damages only when authorized by statute. Michigan recognizes exemplary damages as compensatory, rather than truly punitive. Connecticut has limited what they call punitive recovery to the expenses of bringing the action. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495 (2008).

25 Ark. Code. Ann. § 16-55-208(a).

26 Ark. Code. Ann. § 16-55-208(c). Many states limit punitive damages to a fixed amount or a certain multiple of compensatory damages. *See, e.g.*, Ala. Code § 6-11-21(d) (limiting punitive damages in cases involving physical injuries to the greater of three times compensatory damages or $1.5 million, indexed to inflation); Fla. Stat. Ann. § 768.725 (limiting punitive damages to the greater of three times compensatory damages or $500,000 subject to certain exceptions); Ga. Code Ann. § 51-12-5.1(f), (g) (limiting punitive damages to $250,000 unless the plaintiff demonstrated that the defendant acted with a specific intent to harm); Okla. Stat. Ann. tit. 23, § 9.1 (limiting punitive damages to the greater of $100,000 or compensatory damages, or greater of $500,000 or two times compensatory damages or the amount of the increased financial gain where the jury finds by clear and convincing evidence that the defendant acted with malice or an insurer intentionally acted in bad faith, and lifting limit when there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in life-threatening conduct); Tenn. Code Ann. § 29-39-104 (limiting punitive damages to the greater of two times compensatory damages or $500,000 subject to certain exceptions); Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (limiting punitive damages to the greater of two times economic damages plus amount equal to noneconomic damages up to $750,000, or $200,000).

27 Ark. Code. Ann. § 16-55-208(b).

28 Ark. Code. Ann. § 16-55-211(a)(2).

29 Ark. Code. Ann. § 16-55-211(a)(1).

30 *See* Ark. Code. Ann. § 16-55-211(b) ("Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible with regard to any compensatory damages determination.").

31 *See, e.g.,* Cal. Civ. Code § 3295(d); Minn. Stat. Ann. § 549.20(4); Miss Code Ann. § 11-1-65(1)(b)-(d).

32 *See* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals For Reform By Courts And Legislatures*, 65 Brook. L. Rev. 1003, 1019 (2000) ("Bifurcation of punitive damages trials is supported by the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws, among other well-known organizations.").

33 *See* Mark A. Behrens & Donald J. Kochan, *Protecting the Right to Appellate Review in the New Era of Civil Actions: A Call for Bonding Fairness*, 29:21 Prod. Safety & Liab. Rptr. (BNA) 515 (May 21, 2001). The problem of oppressive bonding requirements

Many states have adopted appeal bond caps to protect a defendant's right to appeal.[34] The CJRA provided that the maximum appeal bond that may be required in any civil action under any legal theory shall be limited to $25 million, regardless of the amount of the judgment.[35] The CJRA protected plaintiffs from unscrupulous defendants by providing that if the plaintiff proves that the defendant that posted the bond is "purposely dissipating or diverting assets outside of the ordinary course of its business for the purpose of evading ultimate payment of the judgment, the court may enter orders as are necessary to prevent dissipation or diversion, including requiring that a bond be posted equal to the full amount of the judgment."[36]

D. "Phantom Damages" or Collateral Source Reform

Plaintiffs in personal injury lawsuits often seek inflated recoveries by introducing evidence of the amounts billed by health care providers for medical treatment, even though the amount actually paid by the plaintiff or that person's insurer may have been much less. "Phantom damages" reflect awards for medical expenses that were written off by the medical provider and never paid by the plaintiff or his or her insurer. A growing number of courts and legislatures are rejecting phantom damages. For example, Texas enacted a law in 2003 to provide that the amounts paid for medical expenses are admissible at trial, not the amounts billed for treatment.[37]

Before the CJRA, Arkansas allowed plaintiffs to introduce evidence of the full amount of billed medical expenses and recover that amount, even if the healthcare provider accepted a significantly discounted rate as full payment and wrote off the remainder of the bill.[38] The CJRA, however, provided that "[a]ny evidence of damages for the costs of any necessary medical care, treatment, or services received shall include only those costs actually paid by or on behalf of the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible."[39]

E. Medical Liability

In the years prior to the CJRA, many malpractice insurers left Arkansas, ceased writing new policies in the state, or increased their rates. The CJRA contained a number of reforms to address the state's medical liability climate, help curb frivolous lawsuits, and promote access to care. These reforms included:

Expert witness requirements: The CJRA required that a plaintiff's expert testimony in a medical malpractice case must come from a medical care provider "of the same specialty as the defendant."[40]

Periodic payment of future damages: The CJRA provided that in any medical malpractice action in which the award for future damages exceeds $100,000, the court shall order, at the request of either party, that the amount of future damages exceeding $100,000 shall be paid "in whole or in part, by periodic payments as determined by the court, rather than by lump sum payment, on such terms and conditions as the court deems just and equitable in order to protect the plaintiff's

first became evident during the state attorneys general litigation against the tobacco industry. As one law professor observed, "if multi-billion dollar judgments had been entered against the tobacco manufacturers in the states' lawsuits, the manufacturers likely would have lacked the resources to immediately pay the judgments (or even to post an appeal bond), and may have been forced into bankruptcy." Richard L. Cupp, *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect For Lead Paint Manufacturers And Others Fair Game?*, 27 Pepp. L. Rev. 685, 689-90 (2000).

34 *See, e.g.,* Ark. Code § 16-55-214; Ariz. Rev. Stat. § 12-2108; Colo. Rev. Stat. § 13-16-125; Ga. Code Ann. § 5-6-46; Haw. Rev. Stat. Ann. § 607-26; Ind. Code Ann. § 34-49-5-3; Mich. Comp. Laws § 600.2607(1); N.C. Gen. Stat. § 1-289; N.D. Cent. Code § 28-21-25; Okla. Stat. Ann. tit. 12 § 990.4(B)(5); S.C. Code Ann. § 18-9-130(A)(1); S.D. Codified Laws § 15-26A-26; Tenn. Code Ann. § 27-1-124; Va. Code Ann. § 8.01-676.1; Wyo. Stat. § 1-17-201; *see also* Mont. Code Ann. § 25-12-103 ($50 million).

35 *See* Ark. Code. Ann. § 16-55-214(a).

36 *See* Ark. Code. Ann. § 16-55-214(b).

37 *See* Tex. Civ. Prac. & Rem. Code § 41.0105 ("recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.").

38 *See Montgomery Ward & Co., Inc. v. Anderson*, 976 S.W.2d 382, 385 (Ark. 1998) ("We choose to adopt the rule that gratuitous or discounted medical services are a collateral source not to be considered in assessing the damages due a personal-injury plaintiff.").

39 *See* Ark. Code. Ann. § 16-55-212(b); *see also* Ark. Code. Ann. § 16-114-208(a)(1)(B) (applicable to medical liability actions).

40 *See* Ark. Code. Ann. § 16-114-206(a).

rights to future payments."[41] One commentator noted that "[t]his change[d] the prior statute giving the court discretion in the matter."[42] Furthermore, "[a]s a condition to authorizing periodic payments of future damages, the court may order a judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages."[43]

Expert medical affidavit: Reflecting the legislature's concern about "frivolous medical malpractice actions," the CJRA "beefed up existing deterrents against 'false and unreasonable pleadings.'"[44] Under the CJRA, a plaintiff in a medical malpractice case in which expert testimony is required must file an affidavit signed by an expert engaged in the same type of medical care as the defendant and include details as to the expert's qualifications, familiarity with the case, and opinion as to how the defendant's alleged breach of the appropriate standard of care resulted in the plaintiff's harm.[45] The CJRA also provided that if the expert affidavit is not filed within thirty days after the complaint is filed, "the complaint shall be dismissed by the court."[46]

Vicarious liability: The CJRA provided that if "the only reason" for naming a medical care facility as a defendant is that a codefendant medical care provider practices in the facility, the plaintiff must prove that the medical care provider is the facility's employee before the facility may be liable for the medical care provider's negligence.[47] The CJRA preempted theories adopted in other jurisdictions that permit "vicarious liability actions against a hospital for negligence committed at the hospital by non-employee physicians with staff privileges to use the hospital's facilities and personnel in treating their patients."[48]

Survey and inspection report admissibility: The CJRA limited a plaintiff's ability to admit the results of surveys and inspections by state or federal regulators against a medical care provider. Such reports are only admissible if "relevant to the plaintiff's injury."[49]

II. The Arkansas Supreme Court and the CJRA

The CJRA showed signs of success following its implementation. For example, the legislation reduced the number of medical malpractice filings in Arkansas:

> Records of the Administrative Office of the Courts show 383 malpractice cases filed in 2001, another 383 in 2002, 385 in 2003. In 2004, the first year the effect of [CJRA] was felt, the number dropped to 305. It dropped again in 2005, to 282, and yet again in 2006, to 255. It rose slightly in 2007, to 285, but remained far below the pre-[CJRA] levels.[50]

Furthermore, the Arkansas Insurance Commissioner reported that "new insurance companies were coming in because they found a friendlier and more stable climate since passage of [the CJRA.]"[51] Over time, however, several of the CJRA's key provisions have been struck down by the Arkansas Supreme Court.

In 2007, in *Summerville v. Thrower*,[52] the Arkansas Supreme Court struck down the CJRA's requirement that medical malpractice actions be dismissed when plaintiffs fail to file affidavits of reasonable cause within thirty days of filing the complaint. The court held that this provision was "directly in conflict" with Rule 3 of the Arkansas Rules of Civil Procedure and the court's authority under amendment 80 of the Arkansas Constitution.[53] The court noted that a pre-

41 Ark. Code. Ann. § 16-114-208(c)(1).

42 Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38-Fall Ark. Law. at 26.

43 Ark. Code. Ann. § 16-114-208(c)(2).

44 Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38- Fall Ark. Law. at 28.

45 *See* Ark. Code. Ann. § 16-114-209(b)(1)-(2).

46 *See* Ark. Code. Ann. § 16-114-209(b)(3).

47 *See* Ark. Code. Ann. § 16-114-210.

48 Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38- Fall Ark. Law. at 28.

49 *See* Ark. Code. Ann. § 16-114-211.

50 Doug Smith, *Fewer Medical Malpractice Suits*, Ark. Times, Nov. 6, 2008, *available at* http://www.arktimes.com/arkansas/fewer-medical-malpractice-suits/Content?oid=1013626.

51 *Id.*

52 253 S.W.3d 415 (Ark. 2007).

53 *Id.* at 421. Section 3 of Amendment 80 to the Arkansas Constitution, which was approved by voters in November 2000 and became effective in July 2001, provides: "The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury

amendment 80 case, 1992's *Weidrick v. Arnold*,[54] held that a mandatory sixty-day notice prefatory to filing a medical malpractice action directly conflicted with Rule 3, which superseded it. The court in *Summerville* found little, if any, practical difference between "a legislative requirement before commencing a cause of action like we had in *Weidrick* and a mandatory requirement within thirty days immediately after filing a complaint."[55] The court said that "[b]oth procedures add a legislative encumbrance to commencing a cause of action that is not found in Rule 3 of our civil rules."[56]

Two years later, in *Johnson v. Rockwell Automation, Inc.*,[57] the Arkansas Supreme Court struck down the nonparty-fault allocation and medical costs evidence provisions of the CJRA. The court said, "[a]s was the case in *Summerville* and *Weidrick*, the nonparty-fault provision... conflicts with our 'rules of pleading, practice and procedure.'"[58] In response to the defendants' argument that the non-party fault provision did not directly conflict with the Arkansas Rules of Civil Procedure (as the legislative requirements did in in *Summerville* and *Weidrick*), the court in *Johnson* said "we take this opportunity to note that so long as a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional. This is because rules regarding pleading, practice, and procedure are solely the responsibility of this court."[59] The court determined that the nonparty-fault allocation provision unconstitutionally created a "procedure by which the fault of a nonparty shall be litigated."[60] In addition, the court held, the CJRA's requirement of "a pleading" giving notice of a defendant's intent to raise nonparty fault at trial was "in direct conflict" with Arkansas Rule of Civil Procedure 7.[61] Thus, post-*Johnson*, a defendant "possessed a substantive right to a fair-share apportionment of fault; yet, a mechanism did not exist to protect this right when a nonparty contributed to the plaintiff's injury."[62]

Next, the court in *Johnson* concluded that the medical costs evidence provision of the CJRA "promulgates a rule of evidence."[63] As it had proclaimed with respect to court procedures, the court stated that "rules regarding the admissibility of evidence are within our providence."[64] Thus, the court held, "the medical-costs provision also violates separation of powers under article 4, § 2, and amendment 80, § 3 of the Arkansas Constitution."[65]

Two years after *Johnson*, the Arkansas Supreme Court addressed another centerpiece of the CJRA—the cap on punitive damages. In *Bayer CropScience LP v. Schafer*,[66] the court held that the cap conflicted with a provision in the Arkansas Constitution which prohibits limits on the amount to be recovered for personal injury or death or property damage outside

as declared in this Constitution."

54 835 S.W.2d 843 (Ark 1992).

55 *Summerville,* 253 S.W.3d at 421.

56 *Id.*

57 308 S.W.3d 135 (Ark. 2009).

58 *Id.* at 141; *see also Burns v. Ford Motor Co.*, 549 F. Supp. 2d 1081, 1085 (W.D. Ark. 2008); *cf. McMullin v. United States*, 515 F. Supp. 2d 904 (E.D. Ark. 2007).

59 *Johnson*, 308 S.W.3d at 141 (citing Ark. Const. amend. 80, § 3).

60 *Id.*

61 *Id.*

62 Samuel T. Waddell, *Examining The Evolution of Nonparty Fault Apportionment in Arkansas: Must A Defendant Pay More Than Its Fair Share*, 66 Ark. L. Rev. 485, 487 (2013); *see also* Scott M. Strauss, *The Arkansas Several Liability 'Catch-22': The Civil Justice Reform Act Post Johnson*, 46-Fall Ark. Law. 10, 10 (2011) ("with all due apologies to Marie Antoinette," post-*Johnson*, "in the absence of a procedural change we may have our cake, but we may not eat it."); *but see* James Bruce McMath, *The Arkansas Civil Reform Act of 2003 and Johnson v. Rockwell Automation, Inc.*, 46-Fall Ark. Law. 14 (2011). Post-*Johnson* rulings created additional hurdles for defendants. *See Proassurance Indem. Co., Inc. v. Metheny*, 425 S.W.3d 689 (Ark. 2012); *St. Vincent Infirmary Med. Ctr. v. Shelton*, 425 S.W.3d 761 (Ark. 2013), *overruled by statute as recognized in J-McDaniel Constr. Co. v. Dale E. Peters Plumbing Ltd.*, 436 S.W.3d 458 (Ark. 2014). Act 1116 of 2013 "demonstrates the General Assembly's commitment to a several-only liability scheme," Waddell, *supra*, at 520, while the procedure for accomplishing the General Assembly's intent remained "exclusively within the province of the Arkansas Supreme Court's rule-making authority." *Id.*

63 *Johnson*, 308 S.W.3d at 142.

64 *Id.*

65 *Id.*

66 385 S.W.3d 822 (Ark. 2011).

the employment relationship.[67] The court acknowledged that "compensatory damages are awarded for the purpose of making the injured party whole, as nearly as possible," while "the function of punitive damages is not to compensate but to punish the defendant for this wrong."[68] Nevertheless, the court said that the constitutional prohibition applied to the CJRA's punitive damages cap, finding that an award of punitive damages is "an integrant part of 'the amount to be recovered for injuries resulting in death or for injuries to persons or property.'"[69]

In 2012, the Arkansas Supreme Court in *Broussard v. St. Edward Mercy Health System, Inc*.[70] struck down the CJRA's requirement that expert testimony in malpractice actions be given by providers of the same specialty as the defendant. The court reaffirmed its position that "[p]rocedural matters lie solely within the province of this court."[71] The court added, "[t]he General Assembly lacks authority to create procedural rules, and this is true even where the procedure it creates does not conflict with already existing court procedure."[72] Turning to the CJRA provision at issue, the court held that "[t]he authority to decide who may testify and under what conditions is a procedural matter solely within the province of the courts pursuant to section 3 of amendment 80 and pursuant to the inherent authority of common-law courts."[73]

III. Recent Rule Changes

In 2013, the Arkansas Supreme Court commissioned a special task force to consider potential changes to the Arkansas Rules of Civil Procedure to address issues of damages and liability in civil litigation.[74] In January 2014, the Arkansas Supreme Court published the special task force's recommendations in two per curiam opinions and invited public comment.[75]

In August 2014, the Arkansas Supreme Court adopted amended Arkansas Rules of Civil Procedure 9, 49, and 52, effective January 1, 2015.[76] These changes addressed allocation of fault, including nonparty fault, and sought to "fill the procedural void resulting from procedural aspects of [the CJRA] that were struck on separation-of-powers grounds."[77] The court also adopted amended Arkansas Rule of Appellate Procedure-Civil 8, governing supersedeas bonds on appeal. The amendment, which became effective immediately, superseded the CJRA's appeal bond cap, but kept the maximum civil bond requirement at $25 million.[78] The court declined to adopt proposed amendments to Arkansas Rule of Evidence 702 to include a "same specialty" requirement for experts in medical malpractice actions.

In February 2015, the Arkansas Supreme Court adopted amendments to Arkansas Rules of Civil Procedure 11 and 42, effective April 1, 2015.[79]

67 *Id*. at 831 (citing Ark. Const. art. 5, § 32).

68 *Id*. (citations omitted).

69 *Id*. (quoting Ark. Const. art. 5, § 32).

70 386 S.W.3d 385 (Ark. 2012).

71 *Id.* at 389 (citing *Johnson*, 308 S.W.3d at 141).

72 *Id.* (citing *Johnson*, 308 S.W.3d at 141).

73 *Id.*

74 *See In re The Appointment of a Special Task Force on Practice and Procedure in Civil Cases*, 2013 Ark. 303 (Aug. 2, 2013) (per curiam) ("The extended debate in the recent session of the Arkansas General Assembly over both the substance of court rules and changes to this court's constitutional power and authority to promulgate those rules, coupled with the debate surrounding recent cases involving issues of damages and liability in civil litigation, has revealed the need for review and/or revision of some sections of the Arkansas Rules of Civil Procedure."); *see also* Austin A. King, *A Problematic Procedure: The Struggle for Control of Procedural Rulemaking Power*, 67 Ark. L. Rev. 759 (2014); Sevawn Foster, *Arkansas's Current Procedural Rulemaking Conundrum: Attempting to Quell the Political Discord*, 37 U. Ark. Little Rock L. Rev. 105 (2014); Mark James Chanay, *Recent Developments*, 67 Ark. L. Rev. 193 (2014).

75 *See In re Special Task Force on Practice and Procedure in Civil Cases*, 2014 Ark. 5 (Jan. 10, 2014) (per curiam); *In re Special Task Force on Practice and Procedure in Civil Cases—Final Report*, 2014 Ark. 47 (Jan. 30, 2014) (per curiam).

76 *See In re Special Task Force on Practice and Procedure in Civil Cases- Ark. R. Civ. P. 9, 49, 52, and Ark. R. App. P.-Civ. 8*, 2014 Ark. 340 (Aug. 7, 2014) (per curiam).

77 *Id.; see generally* Joseph Falasco, *Negotiating Arkansas's Law of Several Liability*, 46- Fall Ark. Law. 22, 24 (2011); Brian G. Brooks, *Act 649 of 2003, Act 1116 of 2013, Shelton, Methany, and a Special Task Force Later, Where Are We on Allocation of Fault?*, 50-Winter Ark. Law. 18 (2015).

78 *See In re Special Task Force on Practice and Procedure in Civil Cases- Ark. R. Civ. P. 9, 49, 52, and Ark. R. App. P.-Civ. 8*, 2014 Ark. 340 (Aug. 7, 2014) (per curiam).

79 *See In re Special Task Force on Practice and Procedure in Civil*

Amended Rule 11 "replaces the affidavit requirement for medical injury cases invalidated in *Summerville v. Thrower*, . . . but is not limited to cases of that type."[80] Amended Rule 42 supersedes the CJRA's bifurcated punitive damages trial provision.[81] The court also adopted amended Arkansas Rule of Civil Procedure 3 to provide a sixty-day presuit notice requirement for medical malpractice actions (effective upon enactment of a companion limitations-tolling provision), resolving the separation of powers issue at the core of *Weidrick v. Arnold*.[82]

IV. Future Reform Proposals

Given the Arkansas Supreme Court's rulings, it is likely that the most far-reaching reforms would require a constitutional amendment. But, in the interim, policymakers could consider reforms that do not involve court pleadings, practice, or procedure, and that do not limit damages for personal injury and property damages outside the employment relationship. Recent examples include laws signed by Governor Asa Hutchinson in 2015 to provide transparency in private attorney contracts entered into by the state[83] and to rein in consumer lawsuit lending abuses.[84]

In the future, the General Assembly could consider amendments to the Arkansas Deceptive Trade Practices Act,[85] such as to address the issue of private causes of action. The General Assembly also could address the high post-judgment interest rate in Arkansas.[86] In addition, the General Assembly could consider reforms to strengthen the jury system and improve the representativeness of juries, as other states have done.[87]

V. Conclusion

The Civil Justice Reform Act of 2003 altered several important areas of Arkansas law. The core components of the CJRA reflected mainstream changes that have been made in many other states. In the post-amendment 80 environment, however, the Arkansas Supreme Court has declared rules regarding pleading, practice, and procedure to be beyond the General Assembly's authority. The court has also used the Arkansas Constitution's prohibition against limits on personal injury and property damages outside the employment relationship to strike down a punitive damages cap. Some of those issues have been addressed by the Arkansas Supreme Court, which has used the rules amendment process to address procedural aspects of the CJRA that were struck down and to supersede other procedural elements of the CJRA. The General Assembly, however, can continue to identify reforms that would pass constitutional muster in Arkansas, including permissible changes to the Arkansas Deceptive Trade Practices Act, the state's post-judgment interest rate statute, and jury service improvements.

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Cases- Ark. R. Civ. P. 11 and 42, 2015 Ark. 88 (Feb. 26, 2015) (per curiam) (the amended rule is effective "upon the General Assembly's enactment of a companion limitations-tolling provision.").

80 *Id.*

81 *See id.*

82 *See In re Special Task Force on Practice and Procedure in Civil Cases- Ark. R. Civ. P. 3*, 2015 Ark. 89 (Feb. 26, 2015) (per curiam) (the amended rule is effective "upon the General Assembly's enactment of a companion limitations-tolling provision.").

83 *See* Ark. Code §§ 25-16-714 to -715.

84 *See* Ark. Code § 4-57-109.

85 *See* Ark. Code §§ 4-88-101 to -210.

86 *See* Ark. Code § 16-65-114 (the greater of 10% per annum or the rate provided in the contract in an action on a contract; on all other judgments, 10% per annum; but not more than the maximum rate permitted under Arkansas Constitution, Amendment 89, § 3 (the maximum rate of interest permissible is 17% per annum)).

87 *See generally* Cary Silverman, *ALEC's Jury Patriotism Act Reduces Hardship for Thousands of Jurors and Ensures Representative Juries on Complex Cases,* Inside ALEC (Am. Legislative Exch. Council, Apr. 2012).

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power over the other party's use of that equipment to serve its competitors.

The Court of Appeals' decision was unpublished and unanimous,[1] but it has attracted significant interest from the Michigan business community because of its potential implications for existing and future business relationships under Michigan contract law.[2] To emphasize that point, the Michigan Chamber of Commerce filed an *amicus curiae* brief urging the Michigan Supreme Court to take up the case because it was concerned that the lower court's decision "may threaten the stability of contractual relationships between companies doing business in Michigan" as well as potentially disrupting federal court interpretations of interstate business contracts.[3]

This article provides a comparative analysis of the states' differing approaches to the questions before the Michigan Supreme Court. After a brief overview of the case, the article turns to the first issue: what consideration is necessary to support non-disclosure and non-competition covenants between businesses? After that, it will discuss the rule of reason governing enforceability of non-competition covenants and

1 Innovation Ventures, L.L.C. v. Liquid Mfg., Inc., 2014 Mich. App. LEXIS 2058 (Mich. App. Oct. 23, 2014).

The petition presented three questions. The first question as proposed concerns the necessary duration of an ongoing business relationship to support consideration in non-competition and non-disclosure contracts. The second proposed question is whether a contract between a manufacturer and contractor can require pre-approval of that contractor's additional client relationships by the manufacturer pursuant to a non-competition agreement. The appellant's application to the Michigan Supreme Court also submits a third question regarding the trial court's decision to dispose of the case summarily before the close of discovery. Although Michigan is more flexible about early summary disposition than many other states, most states to have ruled on the issue presented find summary judgment premature only if the party moving for summary disposition is in exclusive possession of information relevant to a disputed issue. Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 769 N.W.2d 234, 251 (Mich. App. 2009) ("Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete. However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position."); *see* Lebron v. City of New York, 2014 N.Y. Misc. LEXIS 2881, *5-*6 (N.Y. Misc. May 16, 2014); Webster Bank, N.A. v. Banner Spring Corp., 2012 Conn. Super. LEXIS 1705, *11 (Conn. Super. July 3, 2012) (requiring affidavit showing what facts would be shown); Landmark Partners, Inc. v. Michael Invs., 2002 Minn. App. LEXIS 166, *12 (Minn. App. Feb. 5, 2002); Demelash v. Ross Stores, Inc., 20 P.3d 447 (Wash. 2001); Marx v. Truck Renting & Lasing Ass'n, 520 So. 2d 1333, 1343-44 (Miss. 1987), *abrogated on other grounds* Commonwealth Brands v. Morgan, 110 So. 3d 752 (Miss. 2013); Velantzas v. Colgate-Palmolive Co., Inc., 536 A.2d 237, 239 (N.J. 1988) (holding that summary judgment is inappropriate when discovery is incomplete and material facts are within the exclusive knowledge of the moving party); Marchiondo v. Brown, 649 P.2d 462, 467 (N.M. 1982); Parkoff v. General Tel. & Electronics Corp., 425 N.E.2d 820, 822 (N.Y. 1981) ("Inasmuch as almost all possible evidentiary data with respect to the areas of permissible inquiry were within the exclusive possession of defendants and, by reason of their nature, could be described with any degree of specificity only by resort to imaginative speculation, it would be unreasonable to hold plaintiff in cases such as this to the customary requirement that he show that facts essential to the defeat of the motion may exist although they cannot be stated."); *but see* Am. Emplrs. Grp. v. Lentz, 2002 Neb. App. LEXIS 310, *24 (Neb. App. Dec. 10, 2002) ("no cogent explanation of what specific facts it was attempting to obtain").

2 *See* Jere M. Webb, Stoel Rives LLP, *A Practitioner's Guide to Confidentiality Agreements*, *available at* www.stoel.com/files/confidentialityagreementguide.pdf. A frequent mistake in dealing with confidential information is to neglect protection during preliminary discussions which could lead to preparation of a formal agreement containing confidentiality obligations. The discussions may be preliminary to sale of a business, arrangements for manufacturing a product, joint marketing of technology, technology licensing or transfer, employment arrangements, and a variety of other situations where it may be difficult, if not impossible, to conduct the discussions without at least some disclosure of confidential information. Although common law principles may imply promises of nondisclosure or nonuse in such circumstances and, although oral promises of nondisclosure may be made, reliance on these avenues of protection is inadvisable. The rule of thumb should be that no confidential information will ever be disclosed without a written agreement, even if it is just a one-paragraph letter agreement.

3 Chamber Br. at 1, 12-13. Many of these business arrangements involve contracts between companies in Michigan and other states, allowing for litigation in federal court based on diversity jurisdiction. When considering issues of state law, "a federal court may not disregard a decision of the state appellate court on point, unless it is convinced by other persuasive data that the highest court of the state would decide otherwise, . . . regardless of whether 13 the appellate court decision is published or unpublished." Ziegler v IBP Hog Market, Inc., 249 F3d 509, 517 (CA 6, 2001).

analyze whether case law from other states could provide any insight on the issues presented.

I. Background

In 2007, Innovation Ventures ("Innovation") contracted with Liquid Manufacturing ("Liquid") and one of its officers, Peter Paisley ("Paisley"), to bottle its signature product, 5-Hour Energy. In 2008, Innovation entered into an oral agreement with K&L Development ("K&L") and one of its officers, Andrew Krause ("Krause"), who would provide consulting services related to the bottling of 5-Hour Energy. In April 2009, Innovation entered into two written agreements with K&L that contained various non-disclosure and non-competition covenants (NDCs and NCCs, respectively) and provided for cancellation of the business relationship with two weeks' notice. Approximately two weeks later, in May 2009, Innovation terminated the business relationship with K&L.

In June 2010, Innovation and Liquid terminated their bottling arrangement and entered an agreement ("Termination Agreement") formalizing Liquid's purchase of the equipment that Liquid had used to bottle Innovation's product and allowing Liquid to use Innovation's equipment to bottle pre-approved products that competed with 5-Hour Energy.

During the option period, Krause and Paisley joined newly-formed companies Eternal Energy and LXR Biotech, both of which marketed and distributed bottled energy products similar to 5-Hour Energy. Liquid also obtained permission to bottle a formula of Eternal Energy on Innovation's equipment. (Innovation was apparently unaware of Krause's involvement with Eternal Energy at the time of the approval.)

Eventually, Innovation filed suit against Liquid, Paisley, K&L, Krause, Eternal Energy, and LXR Biotech, alleging breach of the NDCs, NCCs, and Termination Agreement (among other things). After some discovery, the trial court granted summary judgment against Innovation, holding that the NDCs and NCCs failed for lack of consideration and that the Termination Agreement's use restrictions were unenforceable as an unreasonable restraint on trade.

The Court of Appeals affirmed, holding that sufficient consideration supported the NDCs and NCCs only because of the continuing business relationship. But the court also held that because the relationship had not continued "for a substantial time after the covenant was signed,"[4] the defendant bottler never received the promised consideration, so it failed as a "nullity." In support of its conclusion, the Court of Appeals adopted the view of several out-of-state cases applying a "substantial time" criterion to continued employment supporting employment agreements.

The Court of Appeals also held that the Termination Agreement's provision allowing the plaintiff to pre-approve bottling of competing products on a case-by-case basis was unenforceable as an unreasonable restraint on competition.

II. What Consideration is Necessary to Support Non-Competition and Non-Disclosure Covenants Between a Manufacturer and a Contractor?

The plaintiff argues that the Court of Appeals' failure-of-consideration analysis indirectly (and incorrectly) evaluated the adequacy of the consideration underlying the agreements. The agreement specified that it could be terminated with two weeks' notice. Thus, the plaintiff contends, the two-week period after the agreement during which the business relationship continued was sufficient to sustain the agreement since, under the contract, the relationship could have been ended at any time anyway.

The defendants claim that the written agreements between the parties were a "sham" and point to the two-week period between the signing of the agreements and the termination of the work required by the contract. The short length of the subsequent relationship and other conduct, the defendants assert, show that the agreements were advanced in bad faith, which reinforces their alternative attack on the non-competition agreements themselves.

The essential step in the Court of Appeals' analysis was its adoption of a standard ("substantial time") for determining how long a subsequent business relationship must continue in order to avoid failure. The court drew this standard from out-of-state case law addressing non-competition covenants between

4 Innovation Ventures, 2014 Mich. App. LEXIS 2058, at *28-*29.

employers and employees. Assuming that the agreement in this case is properly analogous to an employer-employee agreement, no consensus has emerged from other states regarding the proper rule.

By evaluating the value of the subsequent performance in this manner, the Court of Appeals rejected application of the so-called "peppercorn" theory of consideration, under which courts refuse to second-guess the parties' valuations of consideration supporting an agreement "though," in Blackstone's words, "it be but a peppercorn."[5] Fifteen state supreme courts (along with several state appellate courts) have retained some version of the peppercorn theory, endorsing the proposition that continuation of at-will employment can support an employment contract because it involves forbearance by one party from doing something that it is legally entitled to do, which constitutes valuable consideration.[6] Under this view, no assessment of the employment relationship's value is necessary as long as there is some continuation of the employment relationship.

States that have abandoned the peppercorn theory for restrictive covenants in employment contracts have adopted varying standards for the adequacy of post-agreement consideration. Two state supreme courts and several appellate courts have concluded that employment must continue at least some length of time to constitute sufficient consideration, with some defining bright-line rules and others establishing standards.[7] Eight states look beyond the duration of subsequent employment and require independent consideration—something other than just the continuation of the employment relationship—to support a restrictive covenant that has been adopted after employment began.[8] None of these states, however, applies the special rule to general commercial contracts between businesses.

III. May a Non-Compete Agreement Require Pre-Approval of Services to Competitors?

The non-competition agreement in this case governs an unusual situation in which the agreement regulates the defendant contractor's use of equipment in which the plaintiff maintained a property interest (here in the form of an option). The plaintiff argues

5 William Blackstone, 2 Commentaries *440.

6 Runzheimer Int'l, Ltd. v. Friedlen, __ Wi. ___, *P23, 2015 Wisc. LEXIS 174, *11 (Wisc. Apr. 30, 2015); Lucht's Concrete Pumping, Inc. v. Horner et al., 255 P.3d 1058, 1061 (Colo. 2011); Vanegas v. Am. Energy Servs., 302 S.W.3d 299, 301-04 (Tex. 2009); Summits 7, Inc. v. Kelly, 886 A.2d 365, 373 (Vt. 2005); Lake Land Empl. Group of Akron, LLC v. Columber, 804 N.E.2d 27, 31 (Ohio 2004); Open Magnetic Imaging v. Nieves-Garcia, 826 So. 2d 415, 417-18 (Fla. Dist. Ct. App. 3d Dist. 2002); Camco, Inc. v. Baker, 936 P.2d 829, 832 (Nev. 1998); Ackerman v. Kimball Int'l, Inc., 652 N.E.2d 507, 509 (Ind. 1995) (incorporating by reference Ackerman v. Kimball Int'l, 634 N.E.2d 778, 781 (Ind. Ct. App. 1994)); Research & Trading Corp. v. Powell, 468 A.2d 1301, 1305 (Del. Ch. 1983); Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1312 (N.H. 1979); Farm Bureau Service Co. v. Kohls, 203 N.W.2d 209, 212 (Iowa 1972); Daughtry v. Capital Gas Co., 229 So. 2d 480, 483 (Ala. 1969); Thomas v Coastal Indus. Svcs., 108 S.E.2d 328, 329 (Ga. 1959); Roessler v. Burwell, 176 A. 126, 127 (Conn. 1934); Sherman v. Pfefferkorn, 135 N.E. 568, 569 (Mass. 1922); *see also* Copeco, Inc. v. Caley, 632 N.E.2d 1299, 1301 (Ohio App. 1992) ("As a practical matter every day is a new day for both employer and employee in an at-will relationship."); Mattison v. Johnson, 730 P.2d 286, 288-90 (Ariz. Ct. App. 1986); Puritan-Bennett Corp. v. Richter, 657 P.2d 589, 592 (Kan. Ct. App. 1983); Hogan v. Bergen Brunswig Corp., 378 A.2d 1164, 1167 (N.J. App. 1977); Ramsey v. Mutual Supply Co., 427 S.W.2d 849 (Tenn. Ct. App. 1968); *accord* Jumbosack Corp. v. Buyck, 407 S.W.3d 51, 55-56 (Mo. Ct. App. 2013) (consideration where employee has continued access to protectable assets and relationships during employment).

7 *See* Brignull v. Albert, 666 A.2d 82, 83 (Me. 1995) (three years); Frierson v. Sheppard Bldg Supply Co., 154 So. 2d 151, 154 (Miss. 1963) (four years); *see also* Brown & Brown, Inc. v. Mudron, 379 Ill. App. 3d 724, 728 (2008) (two years); Zellner v. Stephen D. Conrad, M.D., P.C., 183 A.D.2d 250, 256-57 (N.Y. App. Div. 1992) ("substantial period after the covenant is given"); Simko, Inc. v. Graymar Co., 464 A.2d 1104, 1107 (Md. Ct. Spec. App. 1983) (not "unconscionably short length of time"); Central Adjustment Bureau, Inc. v. Ingram Associates, Inc., 622 S.W.2d 681, 685 (Ky. Ct. App. 1981) ("appreciable length of time"); *but see* Curtis 1000 v. Suess, 24 F.3d 941, 945-46 (7th Cir. 1994) (collecting contrary Illinois cases).

8 Access Organics, Inc. v. Hernandez, 175 P.3d 899, 903 (Mont. 2008); Labriola v. Pollard Grp., Inc., 100 P.3d 791, 792 (Wash. 2004); National Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 740 (Minn. 1982) (such consideration must have "substantial economic and professional benefits"); George W. Kistler, Inc. v. O'Brien, 347 A.2d 311, 316 (Pa. 1975); Mail-Well Envelope Co. v. Saley, 497 P.2d 364, 367 (Ore. 1972); Standard Register Co. v. Kerrigan, 119 S.E.2d 533, 543-544 (S.C. 1961); Kadis v. Britt, 29 S.E.2d 543, 548-49 (N.C. 1944); *accord* Access Organics, Inc. v. Hernandez, 175 P.3d 899, 903 (Mont. 2008) ("good consideration").

that the Court of Appeals erred by declaring the non-competition provision of its Termination Agreement to be unenforceable. Innovation and Liquid had stipulated in the Termination Agreement that Liquid would be prohibited from producing and formulating certain types of bottled products for three years after the agreement was signed. In evaluating the breach of contract claim, the Court of Appeals accepted Liquid's contention that the non-competition covenant was barred by a provision of the Michigan Antitrust Reform Act (MARA) that deals with employer-employee agreements, even though the parties in this case were sophisticated actors.[9] The central legal dispute before the Michigan Supreme Court is whether MARA's employer-employee provision applies in the same way as its general provision.

A. Michigan Law

The two sections seem to set out different standards. Section 2 appears to create a more restrictive general rule than in Section 4a, which expressly allows certain types of non-competition agreements for employer-employee agreements. Section 2 of MARA says generally:

> A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.[10]

Section 4a(1) contains a special provision governing employer-employee agreements:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.[11]

Although this latter provision is limited to employers and employees, the Court of Appeals applied it to the Termination Agreement at issue in this case. Innovation argues that the standard under Section 2 is less restrictive than the standard under Section 4a. Liquid counters that "[t]here is virtually no difference" between the two, and that Section 4a is merely a specific case of the general rule.[12]

The Michigan Supreme Court has not yet addressed the issue, but the Michigan Court of Appeals has concluded that the enactment of the current Section 2 (which replaced a much harsher anti-competition provision) merely restored the common law "rule of reason" that governed agreements affecting competition before the legislation.[13] Under that test, a non-competition covenant must be (1) for an honest and just purpose; (2) for the protection of the legitimate interests of the party in whose favor it is imposed; (3) reasonable as between the parties to the contract; and (4) not specially injurious to the public.[14] It has also concluded that Section 4a(1) restates the rule of reason from Section 2 as applied to employment agreements, another holding not yet addressed by the Supreme Court.[15]

B. Policy Considerations Specific to the Employer-Employee Relationship

Competition law is a combination of statutory and common law in many states, so comparisons with

9 Innovation Ventures, 2014 Mich. App. LEXIS 2058 at *14-*15 (citing St. Clair Med., P.C. v. Borgiel, 715 N.W.2d 914 (Mich. App. 2006)).

10 MCLS § 445.772.

11 MCLS § 445.774a(1).

12 Def's. Br. at 21.

13 Bristol Window & Door v. Hoogensteyn, 650 N.W.2d 670, 679-80 (Mich. App. 2002) ("The Legislature's repeal of and decision not to reenact former MCL 445.761, which was in derogation of the common law, clearly demonstrates the Legislature's intent to revive the common-law rule set forth in *Hubbard* [*v. Miller*], that the enforceability of non-competition agreements depends on their reasonableness.") (cited in Spradlin v. Lakestates Workplace Sol'ns, Inc., 284 B.R. 830, 834-35 (E.D. Mich. 2002)).

14 Cardiology Assoc. of S.W. Mich. v. Zencka, 400 N.W.2d 606, 607-08 (Mich. App. 1995) (citing Hubbard v. Miller, 27 Mich. 15, 19 (1873)).

15 St. Clair Med., P.C. v. Borgiel, 715 N.W.2d 914, 918 (Mich. App. 2006); *accord* Spradlin, 284 B.R. at 835-36.

other state approaches are unlikely to shed much light on the statutory question of whether the two sections impose the same standard. Nevertheless, a comparison reveals that policy concerns specific to the employer-employee relationship motivate a variety of different approaches that distinguish that type of agreement from non-competition agreements unrelated to the employee-employer relationship. As one article puts it:

> A broad set of public policy concerns informs the reasonableness test: courts are concerned with protecting employees from hardship, often citing inequality of bargaining power as a basis for giving special scrutiny to non-compete agreements. Courts also articulate a general resistance to restraints on trade. There is a strong imperative that the restriction be no greater in terms of duration, geographic scope, and limitation on vocational activities than is reasonably necessary to protect the interests of the employer.[16]

Even with these shared similarities:

> states vary widely in their friendliness to employee non-compete agreements. A few states, such as California, have such a strong policy favoring employee mobility that they either prohibit or very strictly limit such agreements. A number of legal scholars have speculated that the success of Silicon Valley may be due, at least in part, to California's weak enforcement regime. The nub of their argument is that weak enforcement within "high velocity" labor markets—where highly-skilled employees move fluidly between firms taking ideas and innovations with them—permits the rapid diffusion of information, leading to industry-wide technological gains that arguably swamp the investment disincentives that weak entitlements may engender. Moreover, even among states more willing to enforce reasonable agreements, the ease of creating and enforcing restrictive covenants varies widely. Some states operate under constitutional limitations that impose strict limits on enforcement, some require consideration, some statutorily limit duration, some limit protectable interests (other than trade secrets) to an employer's well-established customer relationships, some distinguish between high-level employees and others, some permit, and others prohibit, reformation or blue-penciling.[17]

C. Competition Law Beyond the Employer-Employee Relationship

The policy considerations that have informed close scrutiny of employer-employee non-competition agreements are absent from purely business-to-business non-competition agreements, which tend to be treated more leniently.[18] For instance, covenants "arising out of the sale of a business [are] enforced more liberally than such covenants arising out of an employer-employee relationship," and the same goes for non-competition covenants ancillary to the sale of a business or employment covenants not to compete that are executed in the same transaction as a business sale, where the seller becomes an employee of the buyer.[19]

Cases addressing non-competition covenants that restrict the use of real property have reached varying results, but, as the Supreme Court of New Jersey observed:

> To the extent that non-competition covenants in real estate transactions are deemed valid if reasonable in scope and duration, they are more readily upheld than similar covenants arising out of employment contracts. In this regard, Williston points out that "[r]estriction upon the use of real property is considered less likely to affect the public interest adversely than restraint of the activities of individual parties and accordingly, such covenants are usually held not contrary to public policy."[20]

16 Gillian Lester & Elizabeth Ryan, *Choice of Law & Employee Restrictive Covenants: An American Perspective*, 31 Comp. Lab. L. & Pol'y J. 389, 390 (2010) (footnotes omitted).

17 Lester & Ryan, *supra* note 17, at 392-93 (footnotes omitted).

18 Selmer Co. v. Timothy Rinn & Ganther Constr., Inc., 789 N.W.2d 621, 628-29 (Wis. 2010) (distinguishing standard for employer-employee covenants from others).

19 Alexander v. Alexander, Inc. v. Danahy, 488 N.E.2d 22, 28 (Mass. App. 1986); *accord* Heritage Operating, L.P. v. Rhine Bros., LLC, 2012 Tex. App. LEXIS 4939, at *14-*16 (Tex. App. 2012).

20 Davidson Bros v. D. Katz & Sons, Inc., 579 A.2d 288, 303 (N.J. 1990) (quoting 14 Williston on Contracts § 1642 (3d ed. 1972) (citations omitted)); *see also* Newport Terminals, Inc.

The same rationale could just as easily extend to restrictions on the use of personal property.

Courts applying the rule of reason tend to reject arrangements that give one party to a non-compete the power to "veto" another party's business affairs at will while upholding arrangements that impose a flat bar on competition.[21] This case presents the slightly different question of whether a company can reasonably contract to allow limited competition using property in which it retains an ongoing (though limited) interest. This particular issue presented—whether an interest in personal property is a sufficiently legitimate interest for the purposes of the rule of reason—appears to be one of first impression in Michigan and among the other state supreme courts.[22]

IV. Conclusion

The Court of Appeals ventured into unsettled questions of commercial law that few other states have resolved and did so, oddly enough, in an unpublished but unanimous opinion. Moreover, the court took the unusual step of analogizing the relationship between two sophisticated business entities to the employer-employee relationship, and broke new ground by applying more generally contract rules that are driven by distinctive policy concerns related to employment. The Michigan Supreme Court has a responsibility to scrutinize cautiously the Court of Appeals' decision, which made unprecedented revisions to commercial law, and to address a serious question about whether the Court of Appeals' analysis ought to be deemed a misstep that, if uncorrected, could mark the beginning of a national trend that ignores the sophisticated nature of contracting parties.

v. Sunset Terminals, Inc., 566 P.2d 1181, 1188 (Or. 1977) ("[A] covenant by the lessor to refrain from using retained property in competition with the lessee is reasonable if it is ancillary to the lease, is reasonably limited in time and space, is necessary to protect the value of the leasehold to the lessee, and does not unduly interfere with the interests of the public."); *but see* Weston v. Gutwald, 58 Pa. D. & C. 308, 316 (Pa. Ct. Comm. Pleas 1946) (rejecting covenant limiting use of adjoining property to residential purposes as "materially impair[ing] the beneficial enjoyment of the estate granted").

21 POP Radio, LP v. News Am. Mktg. In-Store, Inc., 898 A.2d 863, 869 (Conn. Super. Ct. 2005) (applying non-competition agreement covering "similar to or competitive with audio-only, in-store advertising messaging systems for commercial establishments"); Three Phoenix Co. v. Pace Indus., 659 P.2d 1258, 1263 (Ariz. 1983) ("The restrictive covenants here were necessary to the sale transaction only in the sense that Three Phoenix had the bargaining power to veto the entire deal if it was unable to obtain the sought-after concessions. This type of necessity is insufficient to invoke the doctrine of ancillary restraints. To find otherwise would enable any entity with sufficient bargaining power to effectively circumvent the antitrust laws by refusing to deal unless the offensive conduct were incorporated into the transaction.").

22 *Cf.* Glasofer Motors v. Osterlund, Inc., 433 A.2d 780, 789 (N.J. App. Div. 1981) ("It is not per se illegal for a manufacturer or distributor of a product acting unilaterally or independently to exercise his discretion as to the parties with whom he will deal, to restrict its sales to authorized dealers or franchisees, to grant exclusive dealerships in a particular territory, or to impose other nonprice restrictions.").

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Felix v. Ganley Chevrolet: Class Actions in Ohio

Chad A. Readler & Benjamin M. Flowers

When the Ohio Supreme Court interprets state class-action law, it often relies on decisions from the Supreme Court of the United States interpreting *federal* class-action law.[1] But in *Felix v. Ganley Chevrolet, Inc.*,[2] the Ohio Supreme Court reached an issue the nation's high court has yet to, but might soon, resolve: May courts certify classes that include members who have not "suffered [an] injury as a result of the conduct challenged in the suit?"[3] *Felix* held they may not, at least not in cases alleging violations of the Ohio Consumer Sales Practices Act.[4]

I. Background

Felix arose out of Jeffrey and Stacy Felix's attempt to buy a Chevy Blazer from Ganley Chevrolet. Enticed (they say) by Ganley's offer of zero-percent financing, the Felixes signed a contract to purchase the vehicle—a contract that contained an arbitration clause.[5]

The deal fell through. When the Felixes learned they had been approved for financing at *nine* percent interest, and not the zero percent (they say) was initially offered, they backed out.[6] They then sued Ganley in state court, alleging, among other things, that its practices "pertaining to" the arbitration clause violated the Ohio Consumer Sales Practices Act (the "Act").[7]

Their case grew into a class action. Following years of litigation over ancillary issues, the trial court certified a class comprising:

> *All* consumers of Vehicles from [Ganley]… within the two-year period preceding commencement through the present date… who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto.[8]

Under Ohio law, a class may be certified only if it constitutes one of three "types" of class actions recognized by Rule 23(B) of the Ohio Rules of Civil Procedure. The trial court held that the Felixes' case was covered by Rule 23(B)(3), because "the questions of law or fact common to class members predominate[d] over any questions affecting only individual members."[9] Thus, the court certified a class that included "*[a]ll* consumers," *without regard* to whether they were injured by Ganley's use of the arbitration clause.

On the merits, the trial court ruled that Ganley's practices violated the Act, and entered judgment for the plaintiff class. Noting the impracticality of litigating each class member's entitlement to relief, and relying on its "discretion" in setting damages, the court awarded $200 per transaction to every class member.[10]

On appeal to the Cuyahoga County Court of Appeals, Ganley argued that, in suits brought under the Act, courts may not certify classes that include members who have not been injured by the challenged conduct. The Court of Appeals rejected this argument, and affirmed the trial court.[11]

II. Decision

The Supreme Court of Ohio reversed. In a 6–1 decision written by Chief Justice Maureen O'Connor, the Court held that, in class actions brought under the Act, courts may not certify classes if they include consumers not injured by the defendant's alleged violations.

The Court's holding turned on the application of Ohio Civil Rule 23. Because the Rule is modeled on Rule 23 of the Federal Rules of Civil Procedure,

1 *See, e.g.,* Stammco, L.L.C., v. United Tel. Co. of Ohio, 136 Ohio St.3d 231, 242 (2013) (holding, with reliance on the Court's decision in *Wal-Mart v. Dukes*, 131 S.Ct. 2541 (2011), "that at the certification stage in a class-action lawsuit, a trial court must undertake a rigorous analysis, which may include probing the underlying merits of the plaintiff's claim, but only for the purpose of determining whether the plaintiff has satisfied the prerequisites of Civ.R. 23.")

2 No. 2015–Ohio–3430 (Ohio Aug. 27, 2015)

3 *Id.*, slip op., at 13.

4 *Id.*

5 *Id.*, at 2.

6 *Id.*, at 2–3.

7 *Id.*, at 3 (emphasis added).

8 *Id.*, at 5 (emphasis added).

9 Ohio Civ.R. 23(B)(3).

10 Felix, slip op., at 6.

11 *Id.*, at 6-7.

the Court interpreted Ohio Rule 23 with reference to federal class-action case law.[12] Those cases—especially *Wal-Mart Stores v. Dukes*[13]—make clear that Rule 23 is "not 'a mere pleading standard.'"[14] To the contrary, class-action plaintiffs must "affirmatively demonstrate compliance" with Rule 23's requirements.[15]

The class plaintiffs failed to do so. "During the period set forth in the class action,"[16] the Act permitted plaintiffs in *individual* actions to seek the larger of three times the amount of their actual damages, or $200.[17] But it expressly limited the relief available in *class* actions to actual damages; neither treble damages, nor the $200 statutory damages, were available.[18] Thus, those who brought class actions under the Act were required to "allege and prove that actual damages were proximately caused by the defendant's conduct."[19] And that, the Court explained, had important ramifications for the Rule 23(B)(3) predominance inquiry. For in classes that include uninjured consumers, questions specific to individual class members—namely, whether each member was actually damaged by the alleged wrongdoing—will predominate. Questions common to the class—for example, whether the defendant violated the law—will *not*. Rule 23(B)(3) is thus not satisfied when a proposed class includes uninjured members.

Here, the class certified by the trial court plainly included individuals in no way harmed by Ganley's practices;[20] for example, those who never had any dispute with Ganley, and who were therefore unaffected by the arbitration clause's inclusion. For these reasons, the Court reversed the certification order.

12 *Id.*, at 7–8.

13 131 S.Ct. 2541.

14 Felix, slip op., at 8 (quoting *Dukes*, 131 S.Ct. at 2551).

15 *Id.*, at 8 (citing *Dukes*, 131 S.Ct. at 2551).

16 *Id.*, at 9.

17 *Id.* (citing Former Rev. Code § 1345.09(B), 137 Ohio Laws, Part II, at 3227).

18 *Id.*

19 *Id.*, at 10.

20 *Id.*, at 14 ("[T]he class certified in this case includes plaintiffs whose damages are, at best, inchoate.")

III. Dissent

Justice William O'Neill cast the lone dissenting vote. Justice O'Neill agreed that Rule 23's predominance requirement prohibits the certification of any class unless common *questions* of law and fact will predominate. But, he said, the class can be certified even if the common questions lack common answers.[21] And because each class member signed a contract with the same arbitration clause, the same issue—whether that clause violated the Act—was "overwhelmingly and obviously common to the class members because every single class member's claim would be won or lost on the answer to that question."[22] He would therefore have affirmed the trial court.[23]

IV. Impact

While the Court limited its holding to suits "alleging violations of the [Act],"[24] *Felix* arguably stands for a much broader proposition; namely, that in a class action arising under *any* Ohio law, no class that contains members uninjured by the challenged conduct satisfies the predominance requirement of Rule 23(B)(3). After all, when a class-action plaintiff asserts *any* cause of action that requires proof of actual injury, questions regarding whether individual members were injured will predominate to the same degree they did in *Felix*, *unless* every class member is injured by the challenged conduct.

It remains to be seen how *Felix* affects cases in which the predominance requirement is not implicated. As with federal law, Ohio law permits certification of any class that satisfies the numerosity, commonality, typicality, and adequate representation requirements of Rule 23(A), but *only if* the class action falls within one of the three types of cases set out in Rule 23(B). Just one type of case expressly includes a predominance requirement; those that fall within Rule 23(B)(3). (And in fact, the trial court in *Felix*, in addition to certifying the class under Rule 23(B)(3), also did so

21 *Id.*, at 16–17 (O'Neill, J., dissenting) (citing Amgen, Inc., v. Connecticut Retirement Plans & Trust Funds, 133 S. Ct. 1184 (2013)).

22 *Id.*, at 18.

23 *Id.*, at 17.

24 *Id.*, at 13 (majority).

under Rule 23(B)(2).[25] That section refers to cases in which "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[26] But neither the majority nor the dissent addressed the propriety of certifying the class under Rule 23(B)(2).) Accordingly, while *Felix* holds "that all members of a class in class action litigation alleging violations of the [Act] must have suffered injury as a result of the conduct challenged in the suit,"[27] it is unclear whether this holding is applicable when Rule 23(B)(3) is *in*applicable.

Finally, as noted at the outset, the Supreme Court of the United States has not yet decided whether classes that included uninjured members can be certified. But it might this Term, in *Tyson Foods, Inc. v. Bouaphakeo*. That case presents the question whether a class can be certified under Federal Rule 23(b)(3) when it "contains hundreds of members who were not injured and have no legal right to any damages."[28] In light of the heavy reliance *Felix* placed on the Supreme Court of the United States' cases interpreting Federal Rule 23(b)(3), the Court's willingness in *Tyson* to permit the certification of classes containing uninjured members will likely influence the Supreme Court of Ohio's willingness to extend or narrow *Felix*.

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25 *Id.*, at 5.

26 Ohio Civ. R. 23(B)(2).

27 Felix, slip op., at 13.

28 Petn. For Cert. in Tyson Foods, Inc. v. Bouaphakeo, No. 14–1146, at i. (filed Mar. 19, 2015).

North Carolina Supreme Court Upholds State-Funded Private School Scholarships for Economically Disadvantaged Students

Scott W. Gaylord

In *Hart v. State*,[1] the North Carolina Supreme Court considered whether the Opportunity Scholarship Program ("OSP"),[2] which provided state-funded scholarships to private schools for students from lower income families, violated the North Carolina Constitution. In a 4-3 decision, the Court upheld the program, focusing largely on separation of powers concerns. Because nothing in the state constitution precluded the North Carolina General Assembly from attempting to improve educational outcomes of economically disadvantaged children, the wisdom of the OSP was a legislative, not a judicial, issue. Thus, the plaintiffs had to seek changes to the program through the political process, not the courts.

Enacted in 2013, the OSP provided a relatively small number of selected students with a scholarship grant up to $4,200 to attend a nonpublic school.[3] For fiscal year 2014-15, the General Assembly appropriated $10,800,000 from general revenues to the program.[4] Under the OSP, nonpublic schools that accept scholarship recipients must adhere to certain minimal requirements, including, among other things, (i) providing the parent or guardian of each participating student with an annual progress report, including standardized test scores; (ii) giving at least one nationally standardized test for each participating student in grades three or higher that measures achievement in English, grammar, reading, spelling, and mathematics; and

1 2015 WL 4488553 (N.C. 2015).

2 N.C.G.S. §§ 115C-562.1 *et seq*.

3 *Id.*, § 155C-562.2(b). The majority noted that in the OSP's first year only 2,300 students—out of the roughly 1.5 million students attending public and charter schools in North Carolina—were chosen to participate in the program.

4 Hart, 2015 WL 4488553 at *3.

(iii) submitting graduation rates of scholarship recipients to the State Educational Assistance Authority (the "Authority").

The Authority, in turn, was required to provide demographic information and program data to the Joint Legislative Oversight Committee (the "Committee") and to select an independent research group to prepare an annual report relating to "[l]earning gains or losses of students receiving scholarship grants" as well as the "[c]ompetitive effects on public school performance on standardized tests as a result of the scholarship grant program."[5] The Committee was then responsible for reviewing the reports and making ongoing recommendations to the General Assembly to improve the administration and accountability for nonpublic schools participating in the OSP.

In December 2013, twenty-five taxpayers filed suit in state superior court alleging that the OSP violated the education provisions in the North Carolina Constitution. In particular, the plaintiffs asserted five claims: that the OSP (1) violated Article IX, section 6 by appropriating funds for nonpublic schools that must be used exclusively for the public school system; (2) contravened Article IX, section 5 by not requiring the Board of Education to supervise the appropriated funds; (3) created a non-uniform system of schools in violation of Article IX, section 2(1); (4) lacked any accountability or educational requirements that would ensure that students received a sound, basic education as required by Article V and *Leandro v. State*;[6] and (5) breached Article V's public purpose requirement by permitting nonpublic schools receiving scholarship money to discriminate against students based on race, color, religion, or national origin.

The parties filed cross-motions for summary judgment. On August 28, 2014, the trial court granted the taxpayers' motion on all claims and permanently enjoined the OSP, thereby precluding the disbursement of public funds to participating nonpublic schools. The defendants appealed. Given the importance of the constitutional questions raised, the North Carolina Supreme Court, on its own initiative, certified the appeal for immediate review and bypassed the Court of Appeals. In reversing the trial court, the majority focused on two central issues: (i) the proper role of the judiciary in reviewing facial challenges to duly enacted legislation and (ii) whether nonpublic schools receiving state scholarship funds were subject to the same substantive educational requirements under the North Carolina Constitution as public schools.

With respect to the separation of powers issue, Chief Justice Martin, writing for the majority, emphasized the circumscribed role of the judiciary. Like "the legislative and executive branches of government," the courts are "expected to operate within [their] constitutionally defined spheres."[7] But the judiciary's "constitutionally assigned role is limited to a determination of whether the legislation is plainly and clearly prohibited by the constitution."[8] Absent such a prohibition, the nature and scope of educational reforms (such as the OSP) are left to the General Assembly. Judges "neither participate in this dialogue nor assess the wisdom of legislation."[9] As a result, the majority would "presume that a statute is constitutional, and … will not declare it invalid unless its unconstitutionality is demonstrated beyond reasonable doubt."[10]

Turning to the plaintiffs' specific claims, the majority determined that the plaintiffs did not make the requisite showing. The plaintiffs' first claim was that Article IX, section 6 "requires that any and all funds for education be appropriated exclusively for our public school system."[11] Titled "State school fund," section 6 provides that four specific non-revenue sources of funding "together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools."[12] The majority rejected the plaintiffs' claim, concluding that this section requires only that appropriations from the State's general revenues that were "set apart" for public education must be used for

5 N.C.G.S. § 115C-562.7(c) (2014).

6 346 N.C. 336 (1997)

7 Hart, 2015 WL 4488553 at *2.

8 *Id.*

9 *Id.*

10 *Id.* at *5.

11 Hart, 2015 WL 4488553 at *5.

12 N.C. Const. art. IX, § 6.

maintaining a uniform system of free public schools. Nothing in section 6, though, prevented the General Assembly from appropriating other funds from general revenue—*i.e.*, funds that had not been set apart for the state school fund—to support additional educational initiatives, such as the OSP.

The majority's resolution of the first claim also answered the plaintiffs' second and third claims. The plaintiffs contended that, because the OSP did not require the State Board of Education to supervise the scholarship funds, it violated the express terms of Article IX, section 5, which states that "[t]he State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support."[13] Given that the OSP scholarships did not come from revenues set apart for the uniform system of free public schools, the majority denied that those funds were subject to the supervision and administration of the State Board of Education. For the same reason, the majority rejected the plaintiffs' claim that the OSP legislation created an alternate system of publicly funded private schools in violation of Article IX, section 2(1), which requires the General Assembly to "provide by taxation and otherwise for a general and uniform system of free public schools."[14] Rather than create an alternate system of public education, the OSP "provides modest scholarships to lower-income students for use at nonpublic schools of their choice."[15] Because the uniformity clause applied only to the public school system, the legislature could fund educational initiatives outside of that system without infringing the North Carolina Constitution.

The fundamental disagreement between the majority and the dissent, though, centered on plaintiffs' fourth and fifth claims, which were predicated on the "public purpose" requirement in Article V, sections 2(1) and 2(7). Pursuant to Article V, section 2(1), "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended or contracted away."[16] Similarly, Article V, section 2(7) states that "[t]he General Assembly may enact laws whereby the State… may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only."[17] Plaintiffs argued that the OSP did not accomplish a public purpose because the program used public moneys to fund scholarships to private schools without requiring those schools to meet the substantive education standards set forth in *Leandro v. State*, which held that the public school system must provide students with a sound basic education.[18]

The majority once again rejected the plaintiffs' argument. According to the majority, when considering challenges to legislative appropriations under the public purpose clauses, the court must consider "whether the legislative purpose behind the appropriation is public or private."[19] Because even well-intentioned legislation may not always achieve the desired legislative outcome, courts must focus on whether the legislation was directed at a public (as opposed to private) purpose, not on whether the legislation actually "accomplished" that purpose. Accordingly, if the legislation had a public purpose, then "the wisdom, expediency, or necessity of the appropriation is a legislative decision, not a judicial decision."[20]

13 N.C. Const. art. IX, § 5.

14 *See* N.C. Const. art. IX, § 2(1).

15 Hart, 2015 WL 4488553 at *7.

16 N.C. Const. art. V, § 2(1).

17 N.C. Const. art. V, § 2(7).

18 346 N.C. at 347. The plaintiffs and the trial court also claimed that the lack of educational standards meant that the OSP violated the requirements of *Leandro* and Article I, section 15 of the North Carolina Constitution, which states that the State has "the duty … to guard and maintain [the] right" to the privilege of education. N.C. Const., art. I, § 15. The majority denied that Article I, section 15 provided an independent basis for relief because (i) *Leandro*'s sound basic education requirement does not apply outside the public school context and (2) the North Carolina Constitution expressly acknowledged that children may be educated outside the public school system. *See* Hart, 2015 WL 4488553 at *11; N.C. Const. art. IX, § 3 ("The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.").

19 Hart, 2015 WL 4488553 at *8.

20 *Id.* (citing Maready v. City of Winston-Salem, 342 N.C. 708, 714 (1996)).

Although acknowledging that a "'slide-rule definition to determine public purpose for all time cannot be formulated,'"[21] the majority applied two "guiding principles" to determine whether the OSP served a public purpose: whether "'(1) it involves a reasonable connection with the convenience and necessity of the [State]; and (2) the activity benefits the public generally, as opposed to special interests or persons.'"[22]

The majority determined that both principles supported the OSP's having a public purpose.[23] Given that education is critically important to the citizens of North Carolina and that providing education is a central government function, the majority easily concluded that the OSP was reasonably connected to the convenience and necessity of the State: "the provision of monetary assistance to lower-income families so that their children have additional educational opportunities is well within the scope of permissible governmental action and is intimately related to the needs of our state's citizenry."[24]

Similarly, because education "is of paramount public importance to our state," the majority determined that the OSP benefitted the public generally.[25] Although the scholarships helped eligible students as well as certain nonpublic schools, "the ultimate beneficiary of providing these children additional educational opportunities is our collective citizenry."[26] Consequently, the OSP satisfied the public purpose requirements under Article V, sections 2(1) and 2(7).

The dissenters sharply disagreed with the majority's public purpose analysis. Given the complete lack of educational standards governing the OSP, Justice Hudson's dissent, joined by Justices Beasley and Ervin, argued that the OSP violated the North Carolina Constitution in two ways. First, the OSP violated the public purpose requirements of Article V, sections 2(1) and 2(7) because the public purpose inquiry required the courts to "'look not only to the ends sought to be attained but also "to the means to be used." ' "[27] Under this view, the judiciary must determine whether the OSP appropriations would "accomplish" the intended public purpose, not simply whether education served a public purpose at some abstract level. Even assuming that a standard less demanding than *Leandro*'s sound basic education might apply to private schools, the lack of any substantive standards on teachers, administrators, and educational instruction precluded the OSP's serving a public purpose: "When taxpayer money is used, the total absence of standards cannot be constitutional."[28]

According to the dissent, the second constitutional flaw stemmed from the same source—the lack of substantive standards. Contrary to the majority, the dissent agreed with the trial court that *Leandro* interpreted Article I, section 15 and Article IX, section 2 as imposing a substantive requirement on the State to provide each child with the opportunity to receive a minimum level of education.[29] Because the OSP "allows for taxpayer funds to be spent on private schooling with no required standard to ensure that teachers are competent or that students are learning at all," the State breached its "duty… to guard and maintain [the] right" to the privilege of education under Article I, section 15. Thus, because the OSP did not ensure that the scholarships would "prepare our children to participate

21 *Id*. at *9 (quoting Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 144 (1968)).

22 *Id*. (quoting Maready, 342 N.C. at 722).

23 The majority dismissed the plaintiffs' argument—that the OSP permitted nonpublic schools to discriminate on the basis of religion and, therefore, violated the public purpose requirement—as "inapposite to the public purpose analysis. *Id*. at *8. To the extent the OSP breached other constitutional provisions, plaintiffs with standing were required to assert bring claims under those provisions, not he public purpose clauses.

24 *Id*. *See also* State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 587 (1970) ("Unquestionably, the education of residents of this State is a recognized object of State government."); Hughey v. Cloninger, 297 N.C. 86, 95 (1979) (stating in dicta that, where there is statutory authority permitting a Board of Commissioners to appropriate money to a private school for dyslexic children, such an appropriation "would have presented no 'public purpose' difficulties as it is well established that both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose.").

25 Hart, 2015 WL 4488553 at *10.

26 *Id*.

27 *Id*. at *14 (Hudson, J., dissenting) (quoting Stanley v. Dept. of Conservation and Devel., 284 N.C. 15, 34 (1973), *abrogated in part on other grounds by* Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 647-48 (1989)).

28 *Id*. at *15 (Hudson, J., dissenting).

29 *Id*. at *19 (Hudson, J., dissenting).

and thrive in our state's society," the dissent would have enjoined the OSP as violative of the North Carolina Constitution.

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Scott W. Gaylord is Associate Professor of Law at Elon University School of Law. He practiced with the Charlotte, N.C. firm of Robinson, Bradshaw & Hinson before joining Elon Law. During seven years with the firm, Prof. Gaylord handled complex civil and commercial litigation involving breach of contract, unfair trade practice, bankruptcy and appellate work in both state and federal courts. He served as a law clerk to Judge Edith Jones on the Fifth Circuit Court of Appeals in Houston from 1999 to 2000, working on a wide range of legal issues, including various constitutional amendments and the Bankruptcy Code. He began his teaching career in 1990 as a teaching fellow at the University of North Carolina at Chapel Hill, where he received the Students' Undergraduate Teaching Award. He has served as a teaching assistant and research assistant at University of Notre Dame Law School, and as assistant professor at Ave Maria School of Law. Gaylord received a bachelor's degree summa cum laude and Phi Beta Kappa from Colgate University, and master's and doctoral degrees in philosophy from the University of North Carolina at Chapel Hill. He is a summa cum laude graduate of Notre Dame Law School, where he was a member of the law review and received the Dean Joseph O'Meara Award as salutatorian.

West Virginia Rejects Wrongful Conduct Rule on Comparative Fault Grounds

Marc E. Williams

In the latest round of litigation related to prescription drug abuse in Appalachia, the Supreme Court of Appeals of West Virginia declined to apply the wrongful conduct rule. The court held that the drug-addicted plaintiffs in the case were able to sue the pharmacies and doctors that provided prescription painkillers to them, despite the fact that the plaintiffs engaged in criminal misconduct to obtain the prescription. Instead, these factors would be considered along with the other circumstances under a comparative fault model.

Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mingo County, [1] was an action by twenty-nine plaintiffs alleging that their prescribing doctors and dispensing pharmacies contributed to their addiction to controlled substances. The plaintiffs brought the suit even though they admitted to engaging in criminal conduct associated with the acquisition and abuse of the controlled substances.[2] All of the plaintiffs were patients of the Mountain Medical Center and were prescribed Lortab, Oxycontin, and Xanax. The plaintiffs also alleged that the pharmacies filled these prescriptions knowing that the prescribing doctors were operating pill mills. All of the plaintiffs testified that their criminal abuse of prescription painkillers pre-dated their treatment at Mountain Medical Center and the filling of their prescriptions at the defendants' pharmacies.

Based on the admissions of criminal activity that were directly related to their claims for damages, the defendants moved for summary judgment and asked the trial court to apply the "wrongful conduct rule," which "stands for the proposition that a plaintiff may not recover when his or her unlawful conduct or immoral act caused or contributed to the injuries."[3] The trial

1 Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mingo County, No. 14-0144 (W.Va. May 13, 2015).

2 *Id.* at *1.

3 *Id.* at *5 (citing Orzel v. Scott Drug Co., 537 N.W.2d 208 (Mich. 1995)).

court held that the plaintiffs' actions were not barred but agreed to certify the question of the applicability of the wrongful conduct rule to the Supreme Court of Appeals.[4]

The defendants argued that the wrongful conduct rule would be a complete bar to plaintiffs' claims because the plaintiffs admitted that in order to maintain their causes of action that they must rely on their own illegal or immoral acts. The plaintiffs argued that the adoption of the wrongful conduct rule would reward the defendants' own wrongful acts. The plaintiffs asserted that their conduct should be assessed according to West Virginia's comparative fault concepts.[5]

In a 3-2 decision authored by Chief Justice Margaret Workman, the Supreme Court of Appeals declined to adopt the wrongful conduct rule, holding instead that West Virginia's longstanding principles of comparative fault disfavored defenses that act as an absolute bar to liability. The court went on to hold that:

> [q]uestions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.[6]

The Court also feared that the adoption of the wrongful conduct rule would show a lack of faith in West Virginia's jury system and would destabilize comparative fault in West Virginia.[7]

The court noted that since West Virginia adopted modified comparative fault in *Bradley v. Appalachian Power Co.*[8] in 1979, an array of absolute defenses to liability had been abolished and were subsumed within the concept of comparative fault, including assumption of risk, last clear chance and sudden emergency.[9] As a result, the evolution of comparative fault jurisprudence away from absolute bars to liability continued with the inclusion of criminal conduct by the plaintiff in the furtherance of her claim now to be considered by the jury. The Court noted that if self-incrimination issues arose in this context, those could be addressed in the normal handling of Fifth Amendment privilege preservation claims in civil matters.[10]

Justices Menis E. Ketchum, II and Allen H. Loughry II issued forceful dissents from the majority opinion. Justice Ketchum objected to the majority's opinion "because criminals should not be allowed to use our judicial system to profit from their criminal activity."[11] Justice Ketchum voiced his concern that, by allowing these plaintiffs to maintain their actions, the court may be emboldening "other criminals to file similar lawsuits in an attempt to profit from their criminal behavior."[12] Justice Ketchum also chided the majority for their belief that the wrongful conduct rule was too difficult to apply. He stated that the "wrongful conduct rule is straightforward and requires a court to exercise its basic common sense when applying [it]" and that the Supreme Court of Appeals was "perfectly capable of reviewing such scenarios and providing clarity on the rule's application to a particular circumstance."[13]

In Justice Loughry's dissent, he similarly criticized the majority for their rejection of the wrongful conduct rule. He called the majority's opinion "misguided" and stated that, "[b]y summarily dismissing the wrongful conduct rule as unworkable, the majority's decision requires hardworking West Virginians to immerse themselves in the sordid details of the parties' enterprise in an attempt to determine who is the least culpable—a drug addict or his dealer."[14]

Justice Loughry articulated his frustration with the majority's opinion and the effect it will have on the citizens of West Virginia:

4 The court also certified an issue relating to the application of the defense of *in pari delicto,*but the Supreme Court of Appeals failed to address that issue.

5 *Id*. at *7.

6 *Id*. at *21 (citing syl. pt. 6, McAllister v. Weirton Hosp. Co., 173 W. Va. 75, 312 S.E.2d 738 (1983)).

7 *Id*. at *22.

8 Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W.Va. 1979).

9 Tug Valley at *18

10 *Id.* at n.14

11 *See* Justice Ketchum's dissent at *1.

12 *Id*. at *2.

13 *Id*. at *3.

14 *See* Loughry's dissent at *1.

> the majority seeks to have West Virginia citizens do its "dirty work" with no regard for the egregious waste of judicial time and resources, loss of earnings occasioned by citizens' jury duty, *etc*., that such a case engenders. . . . In a state where drug abuse is so prevalent and where its devastating effects are routinely seen in cases before this Court, it is simply unconscionable to me that the majority would permit admitted criminal drug abusers to manipulate our justice system to obtain monetary damages to further fund their abuse and addiction.[15]

On May 28, 2015, fifteen days after the majority decision and dissents were issued, and after a groundswell of criticism of the ruling had been published by local media,[16] Justice Brent D. Benjamin issued an opinion concurring with the result, but on different grounds than the majority. He also directly addressed the criticisms in the dissents of his colleagues.

Justice Benjamin believed that the dissents to the majority's opinion amounted to judicial activism. Justice Benjamin repeatedly stated that judicial conservatism barred the dissenting justice's rationale in light of the passing of W. Va. Code § 55-7-13d(c)[17] by the West Virginia Legislature.[18] Specifically, Justice Benjamin stated that "[t]he principles of judicial conservatism *require* us to give effect to the wisdom and consideration of our sister branches of government—the branches designed to make public policy—and not to bestow upon ourselves the role of super legislature simply because we do not believe they went far enough.[19]

Justice Benjamin believed that the majority's final opinion complemented W. Va. Code § 55-7-13d(c) by not restricting access to the courts for those who base their cause of action on a criminal act that did not result in a felony conviction. Justice Benjamin strongly disagreed with his dissenting colleagues because they wanted to adopt a broader interpretation of the wrongful conduct statute than the one adopted by the Legislature and the Governor. He believed that it would be judicial activism for the Supreme Court of Appeals to adopt a broader interpretation of the wrongful conduct statute.[20] The Legislature had already debated the issue of the scope of the wrongful conduct statute and had decided, along with the Governor, on the narrow interpretation instead of the broader interpretation championed by defendants and the dissenting justices.[21] While Justice Benjamin believed that the plaintiffs should have access to the courts, he did not believe that they would be successful because, due to their pleading of the Fifth Amendment during their depositions, they cannot prove proximate cause.[22]

The *Tug Valley* opinion is controversial, not only because of the underlying struggle with prescription drug abuse in West Virginia, but also because of the ongoing effort of those who seek to push the tort system away from policy choices like the one expressed in the wrongful conduct rule. The basis for the rule is the appealing intuition that criminals should not be entitled to bring an action for damages that were caused by their crime. Now that rule, sometimes harsh in application, is having its sharp edges shaved into the round hole of comparative fault, where it will be considered along with concepts like negligence and assumption of risk.

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15 *Id*.

16 *See e.g.*, Hoppy Kercheval, *Lawmakers Should Act on Supreme Court Ruling*, Charleston Daily Mail, May 19, 2015, *available at http*://www.charlestondailymail.com/article/20150519/DM04/150519299/1279.

17 W. Va. Code § 55-7-13d(c) shields defendants from liability when the plaintiff's damages "arise out of the plaintiff's commission . . . of a felony criminal act: *Provided*, that the plaintiff has been convicted of such felony[.]"

18 *See* Justice Benjamin's concurrence at *1-8 and 15.

19 *Id*. at 3.

20 *Id*. at *3-8.

21 *Id.* at *1, 4-5, and 11.

22 *Id*. at *2 and 14.

Tennessee Trial Court Strikes Down State's Tort Reform Act

Stephen A. Vaden

In the latest battle on the state level between the plaintiffs' and defense bars, a Tennessee trial court has declared portions of that state's Civil Justice Act of 2011,[1] better known as the Tort Reform Act, unconstitutional under the Tennessee constitution.[2] The ruling in *Clark v. Cain* — the first to hold the Act unconstitutional despite dozens of attempts since the law's enactment — also conflicts with a federal decision in a separate case currently pending in the Middle District of Tennessee.[3] If the ruling stands, its forceful interpretation of the right to a civil jury trial could call into question other judicial reforms being considered by the Tennessee legislature such as medical malpractice reform.

The Tennessee Civil Justice Act is a short four-section Act designed to limit large jury verdicts in the state. The provision at issue in *Clark* limits non-economic damages such as pain and suffering and loss of consortium to $750,000 per plaintiff in most cases.[4] That limit increases to $1 million per plaintiff if the loss or injury is "catastrophic," meaning that the victim suffered a spinal cord injury or amputated limbs, had severe burns, or involved the wrongful death of a parent with a surviving minor child.[5] The statute removes the limit on non-economic damages altogether if the claim involves an intentional act, the destruction of evidence to conceal liability, a person who was under the influence or alcohol or drugs, or an act that also results in a felony conviction under state or federal law.[6] Separate provisions of the statute not at issue in *Cain* limit punitive damage awards to the greater of $500,000 or twice the awarded economic damages.[7] Similar exemptions to those for non-economic damages also are provided.[8]

Clark stems from an automobile accident on a Chattanooga interstate that severely injured a father and son. None of the statutory exemptions to the limit applied, however so each of the two plaintiffs would be limited in any recovery for non-economic damages to no more than $750,000. The plaintiffs sought a total of $22.5 million in such damages in their complaint.[9] Co-defendant AT&T filed a motion for summary judgment seeking to limit plaintiffs' recovery for non-economic damages to the statutory cap of $750,000. It was in ruling on that motion that the trial court declared the cap unconstitutional.[10]

Standing in the way of a decision on the merits of the constitutional question was the issue of ripeness. A Tennessee federal court facing a similar motion had declined on ripeness grounds to address the constitutionality of the caps on non-economic damages. The federal district court in *Gummo v. Ward* held that, unless the jury returned with a verdict in excess of the $750,000 cap, any ruling on the constitutionality of the Act would be "nothing more than an academic exercise that potentially has ramifications beyond this case."[11] Such an advisory opinion would violate the limitation on federal courts' powers under Article III of the federal Constitution to "cases" and "controversies."[12] Nonetheless, the state trial court in *Clark* rejected the same ripeness argument without citation to *Gummo*. It based its conclusion that the constitutional issue was ripe for adjudication on "two factors, one legal and one practical."[13] The legal consideration was that AT&T's summary judgment motion "depends upon

1 Tenn. Code Ann. §§ 29-39-101 – 104.

2 Clark v. Cain, No. 12C1147 (Hamilton Cnty. Cir. Ct. Mar. 9, 2015), *available at* http://tennesseebusinesslitigation.com/wp-content/uploads/2015/03/Clark-v-Cain-Judge-Thomas-Order-March-9-2015.pdf.

3 *See* Gummo v. Ward, No. 2:12-00060, 2013 U.S. Dist. LEXIS 140798 (M.D. Tenn. Sept. 30, 2013).

4 Tenn. Code Ann. § 29-39-102(a)(2).

5 *Id.* § 29-39-102(d)(1)-(4).

6 *Id.* § 29-39-102(h)(1)-(4).

7 *Id.* § 29-39-104(5).

8 *See id.* § 29-39-104(7)(A)-(D).

9 Clark, slip op. at 7.

10 *Id.* at 2.

11 Gummo, 2013 U.S. Dist. LEXIS 140798, at *6.

12 *See* U.S. Const. art. III, § 2, cl. 1.

13 Clark, slip op. at 9.

an adjudication of the constitutional question at this point in the proceeding" — an argument that seems to beg the question of ripeness rather than answer it.[14] The "practical" consideration was that, if the jury learned that its verdict on damages was to be disregarded, it "would be insulted" and such a ruling "would be a statement to them that they simply are not needed."[15] Thus, the court appears to have found ripeness, in part, based on its perception of a jury-trial right resting with the members of the jury rather than with the litigants.

On the merits, the court analyzed the Act under Article I, Section 6 of the Tennessee constitution, which declares that "[T]he right of trial by a jury shall remain inviolate" as well as the state constitution's equal protection and due process clauses.[16] The state trial court first found that the right to a jury trial was a fundamental right under the Tennessee constitution.[17] It further held that the fundamental right to a jury trial included not only the jury's ability to find facts and determine liability but also the authority to set the amount of damages. The court based its holding on Chief Justice Marshall's explanation in *Marbury v. Madison* that "every right, when withheld, must have a remedy, and every injury its proper redress."[18] It also cited the opinions of the Georgia, Alabama, and Florida supreme courts, which similarly had held their states' attempts to limit tort damages unconstitutional.[19]

Having defined the right as fundamental and determined the confines of that right, the trial court then analyzed the Civil Justice Act under strict scrutiny.[20] Its analysis featured four items of note. First, the court aggressively challenged the legislature's factual findings and justifications for the law. The Tennessee legislature had found the Act would lead to greater predictability in damage awards and thereby encourage economic development by attracting employers who would no longer have to worry about excessive jury verdicts.[21] The trial court rejected the legislature's findings as having "no viable support" and instead cited with approval the comments of the law's opponents during the legislative debate.[22] It also found there was no evidence "that there were numerous excessive verdicts in Tennessee."[23]

Second, equally as interesting was what the trial court did *not* address in its analysis. Although the court surveyed numerous state supreme court rulings on the issue of limiting tort damages, it neglected to cite the opinion of the North Carolina Supreme Court in upholding that state's tort reform act.[24] Because of the similarities between the two states' constitutions, the Tennessee Supreme Court considers opinions of its North Carolina counterpart on state constitutional issues to be particularly persuasive.[25] The trial court also failed to address a Tennessee Supreme Court opinion from 2006 that had rejected arguments similar to those of the *Clark* plaintiffs in upholding the state legislature's reform of the workers' compensation system.[26]

Third, the court appeared to interpret the jury-trial right as belonging to both the plaintiffs and the jurors themselves. There was little mention of the jury's historic role as a bulwark against society's tendency to rush to judgment against unpopular defendants. Instead, the court at various times declared the Act to be "jury reform" rather than "tort reform,"[27] an

14 *Id.*

15 *Id.*

16 *Id.* at 7-8; *see also* Tenn. Const. art. I, §§ 6, 8; art. XI, § 8.

17 Clark, slip op. at 11, 13.

18 Clark, slip. op. at 14 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, Commentaries *109)). Left unmentioned and unexplained by the state judge was that, in *Marbury*, there was no remedy available to the petitioner because the Supreme Court held the remedy to be unconstitutional. *See Marbury*, 5 U.S. (1 Cranch) at 180.

19 Clark, slip op. at 14-15.

20 *Id.* at 16; *see also* Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 11 (Tenn. 2000) (noting that Tennessee courts apply strict scrutiny "to fundamental rights without exception").

21 Clark, slip op. at 3, 16.

22 *Id.* at 17.

23 *Id.* at 18.

24 *See* Rhyne v. K-Mart Corp., 358 N.C. 160 (2004).

25 *See* State v. King, 40 S.W.3d 442, 446 (Tenn. 2001) (noting linkages between Tennessee and North Carolina law); State v. Harris, 839 S.W.2d 54, 79 (Tenn. 1992) (noting that the North Carolina constitution was a "model[]" for the Tennessee constitution) (Reid, C.J., dissenting).

26 *See* Lynch v. City of Jellico, 205 S.W.3d 384 (Tenn. 2006).

27 Clark, slip op. at 6.

"insult[]" and an "affront"[28] to the jury, and resulting in the "destr[uction]" of the jury system.[29]

Finally, the court left its equal protection and due process analysis as almost an afterthought. It declared it to be "irrational" to distinguish between less severely injured plaintiffs, who would receive the full amount of damages to which the jury determined them to be entitled, and more severely injured plaintiffs, who would be subject to the Act's caps.[30] That holding appeared to be a product of the court's earlier determination that "There can simply be no compelling state interest to which the right to a jury trial may yield."[31]

Whether that statement turns out to be a correct view of Tennessee law will likely be decided by the Tennessee Supreme Court. Until then, litigants, legislators, and judges in Tennessee and elsewhere will continue to debate the proper balance between the courts' role in determining what the law is and the legislature's role in limiting judicial remedies.

About the Author:

Stephen Vaden counsels clients on a range of political law issues and represents parties before tribunals at all levels of the state and federal court systems. He also represents clients involved in pretrial government investigations and other enforcement actions.

Prior to joining Jones Day in 2014, Stephen worked at an international firm where he focused on appellate litigation and political law. Stephen also served two federal clerkships where he worked on matters involving complex issues of constitutional, securities, and international law.

28 *Id.* at 9.

29 *Id.* at 23.

30 *Id.* at 19-20.

31 *Id.* at 16.

Indiana Supreme Court Upholds the Right to Work: Rebuffs an Involuntary Servitude Challenge

Luke A. Wake

In the past few years, four rust-belt states—Ohio, Michigan, Indiana and Wisconsin—have enacted "Right to Work" legislation.[1] In each case, organized labor fought back, mounting intense political and legal challenges to the legislation. In Ohio, the unions succeeded in generating enough public opposition to prompt a referendum—undoing Right to Work legislation in the Buckeye State.[2] But, with Michigan, Indiana and now Wisconsin joining the ranks of Right to Work states, it looks like the political tides may be turning against compulsory union dues—even in the Midwest, which had long been the center of union power.[3] Yet, as demonstrated in the Indiana Supreme Court's recent decision in *Zoeller v. Sweeney*, [4] union efforts to overturn Right to Work legislation are still best fought on the political front. Indeed, legal challenges have universally failed.[5]

1 A full list of Right to Work states is available online at *Right to Work States*, NRTW.ORG, http://www.nrtw.org/rtws.htm (last visited Mar. 17, 2015). Note that Ohio is not included on the list because the voters of Ohio passed a referendum repealing the state's Right to Work Law in November, 2011. *See Ohio Senate Bill 5 Veto Referendum, Issue 2 (2011)*, Ballotpedia, http://ballotpedia.org/Ohio_Senate_Bill_5_Veto_Referendum,_Issue_2_(2011) (last visited Mar. 17, 2015).

2 *See Ohio Senate Bill*, *supra* note 1.

3 *See* Monica Davey, *Unions Suffer Latest Defeat in Midwest With Signing of Wisconsin Measure*, N.Y. Times, Mar. 9, 2015, http://www.nytimes.com/2015/03/10/us/gov-scott-walker-of-wisconsin-signs-right-to-work-bill.html?_r=0.

4 19 N.E.3d 749 (2014).

5 Brief for David Brubaker et al. as Amici Curiae, Zoeller v. United Steel, No. 45S00-1407-PL-00492 (Ind. Aug. 29, 2014) (observing that "[l]abor interests have attacked the constitutionality of many Right to Work laws… [and that] [i]n each instance the U.S. Supreme Court, or the highest state court, has upheld those Right to Work laws as constitutional.") (citing American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949); Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal

As with the other rust-belt states, Right to Work legislation was controversial in Indiana. It was passed at the hands of a Republican controlled legislature, and—as in other states—the Indiana Right to Work Law made it illegal for employers to require the payment of union dues as a condition of employment.[6] Soon thereafter organized labor responded with three separate lawsuits—two in state court, and one in federal court. In each case, the unions crafted their legal theories around the same argument: it is unfair to allow employees to opt out of union dues while maintaining the benefits of union representation.

The federal lawsuit alleged Indiana's Right to Work Law was preempted by federal law, and further alleged a violation of the Equal Protection Clause under the Fourteenth Amendment.[7] The Federal District Court for the Northern District of Indiana dismissed those arguments, and the Seventh Circuit affirmed.[8] Meanwhile United Steel, the International Union of Operating Engineers, AFL-CIO and union employees advanced similar Equal Protection arguments in their concurrent state court cases—insisting that the Right to Work statute unfairly compelled dues-paying union members to bear the entire cost of representation for non-paying individual employees. Those arguments fared no better in state court, where they were dismissed as invoking "a now-discredited view… of the scope of the government's police power to regulate [economic liberties]."[9]

But in their state court filings the unions advanced a handful of other novel theories—from the allegation that the statute was an illegal *ex post facto* law, to the assertion that Right to Work unconstitutionally impedes upon the free speech rights of unions and their members, to the creative argument that the Right to Work statute violated Indiana's constitutional prohibition on involuntary servitude. Only the latter argument gained traction.[10]

The trial court rejected the *ex post facto* argument, holding that—based on "a plain reading"—it was clear that "the statute was intended to have only prospective, and not retroactive effect."[11] And with the same analytical ease the Court rejected the argument that the Right to Work statute "infringes on the free speech rights of [the union] and its members by diverting resources to represent non-paying individual employees..."[12] That argument, framed to raise a claim under the compelled speech doctrine, was squarely rebuffed. The Court recognized that the Supreme Court's 2012 decision in *Knox v. Serv. Employees Int'l Union Local 1000*, held that unions have "no constitutional right to receive any payment from [non-union] employees."[13]

Throughout the proceedings, National Right to Work (NRW) and National Federation of Independent Business (NFIB) argued in amicus briefs that these results were consistent with numerous Supreme Court decisions affirming that—if anything—compelled union dues raise serious First Amendment problems.[14] Yet the Court went on to accept an equally novel theory in holding that Indiana's Right to Work Law violated Article I, Section 21 of the State Constitution, which

Co., 335 U.S. 525 (1949); Mascari v. International Brotherhood of Teamsters, 187 Tenn. 345 (1948); Finney v. Hawkins, 189 Va. 878 (1949); Walter v. State, 34 Ala. App. 268 (1949); Local Union No. 519, United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Industry v. Robertson, 44 So.2d 899 (1950); Construction & General Labor Union, Local No. 688 v. Stephenson, 148 Tex. 434 (1950); UAW v. Green, 302 Mich. App. 246 (2013).

6 *See* Davey, *supra* note 3.

7 The federal lawsuit otherwise advanced similar augments as those advanced concurrently in state court. *See* Sweeny v. Pence, 767 F.3d 654 (7th Cir. 2014).

8 Regarding the preemption argument, the Seventh Circuit concluded that: "[w]e are not persuaded by Plaintiff-Appellant's claims that Indiana's law is somehow an extraordinary measure distinct from the numerous state statutes that have harmoniously existed under the federal labor law framework." *Pence*, 767 F.3d at 659.

9 Sweeney v. Zoeller, No. 45D01-1305-PL-00052, 3 (Judge John M. Sedia, Sept. 5, 2013) [hereinafter *Zoeller Order*] (order granting in part and denying in part defendants' motion to dismiss and entering declaratory judgment on Indiana constitutional claim) (quoting Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005)).

10 *Id*.

11 *Id*. at 4.

12 *Id*. at 3.

13 *Id*. at 4.

14 *See* Brief for David Drubaker, *supra* note 5.

provides that "[n]o person's particular service shall be demanded, without just compensation."[15]

In structure, this provision mirrors the language of Takings Clause of the Federal Constitution, which is also incorporated in a separate provision of the Indiana Constitution.[16] But whereas the Takings Clauses plainly requires government to pay "just compensation" when it takes private property, this provision may arguably have application against private actors, in some cases, because the requirement for the payment of "just compensation" is triggered whenever a person's particular services are demanded. Indeed, this prohibition is seemingly more akin to the Thirteenth Amendment's emphatic prohibition on involuntary servitude than the contingent requirement entailed in the Takings Clause that government must provide just compensation if it chooses to exercise its eminent domain powers.[17]

Accordingly, Article I, Section 21 might have application in a dispute between private parties, if one alleges that he or she has been compelled into service without compensation by another; however, that argument would necessarily challenge the legitimacy of laws purporting to either affirmatively require uncompensated servitude, or to impose civil or criminal penalties on individuals for failing to provide such services. To be sure, one could surely advance a claim under Article I, Section 21 in challenge to a state law requiring farmhands to work without compensation, or a state law imposing criminal sanctions on a farmhand for refusing. Indeed, Indiana courts had previously held that Article I, Section 21 has application whenever the State's request for the provision of a particular service becomes so "coercive" as to become a "demand."[18] And undoubtedly a law imposing civil or criminal penalties for non-compliance would cross that line, as it would take away any meaningful choice in the matter.[19]

Invoking this rationale, the unions argued in *Sweeney* that the Indiana Right to Work law violated Article I, Section 21 when read in conjunction with federal law. Indeed, federal law requires unions to represent all employees once the union is certified as the exclusive bargaining agent for employees in a bargaining unit.[20] Thus, the unions maintained that the Indiana Right to Work compelled them into uncompensated servitude because they have an obligation under federal law "…to process grievances for non-members, negotiate contracts on behalf of members and non-members alike, and otherwise provide services to non-members, regardless of non-members' failure to make any payments to the union for the services that the union provides."[21] And the Lake County Court accepted that argument—reasoning that the Indiana Right to Work law violated Article I, Section 21 because it made it a "criminal offense for a union to [insist upon] receiv[ing] just compensation for [these] particular services…"[22] As such, the Court struck down both the substantive Right to Work provisions and the provision imposing misdemeanor criminal penalties on violators.

At that juncture, the Attorney General appealed directly to the Indiana Supreme Court, which reversed—holding that Article I, Section 21 applies only where the state affirmatively demands an individual to render uncompensated services.[23] The Supreme Court observed that Indiana had done nothing to affirmatively compel unions to provide any service—much less an

15 Ind. Const. art. I, § 21.

16 Article I, Section 21 of the Indiana Constitution includes both a prohibition on involuntary servitude and a takings clause: "No person's particular services shall be demanded, without just compensation. No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

17 Compare, Ind. Const. art. I, § 21 ("No person's particular services shall be demanded, without just compensation."); with U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

18 *See* Bayh v. Sonneburg, 573 N.E.2d 398 (Ind. 1991).

19 *Id.* at 417 ("We have never before considered how coercive the State's request for service must be to become a 'demand,' but the U.S. Supreme Court's analysis of the type of coercion required to render servitude 'involuntary' under the thirteenth amendment is instructive.").

20 29 U.S.C. § 158(a)(3).

21 *Zoeller Order*, supra note 9, at 6.

22 *Id.*

23 *Zoeller*, 19 N.E.3d at 753.

uncompensated service.[24] Indeed, the union's theory was entirely predicated upon an understanding that federal law requires unions to provide the services in question. And of course that obligation arises only where a union has elected to seek certification as the exclusive representative of a bargaining unit because—if approved by the employees in an election—the union therein assumes both benefits and burdens.[25] Accordingly, the Supreme Court rejected the very premise that federal law thrusts an intolerable obligation upon unions to provide uncompensated services because the "federal obligation to represent all employees in a bargaining unit is optional…"[26]

But even assuming that federal law imposed an obligation on unions to represent all employees without compensation, the Indiana Supreme Court recognized that an imposition of federal law could not violate the Indiana Constitution. For one, as amicus briefs by NRW and NFIB argued, the trial court's application of the Indiana Constitution would in itself raise a Supremacy Clause problem because Congress chose to preserve the right of states to enact Right to Work legislation—which would mean that any legal challenge a state enacted Right to Work statute must be advanced in state court, under state constitutional principles.[27] And herein was the problem for the unions in *Zoeller v. Sweeney*; the Indiana Supreme Court ruled that the "[p]rovisions within Article I limit state, not federal power."[28]

Since the Indiana Right to Work Law did no more than guarantee the right of employees to choose whether or not to associate with—and pay dues to—a union, the Supreme Court held that the State had demanded nothing of the unions. Perhaps the outcome would have been different if the law had been applied to retroactively to require continued representation of employees who might opt-out of union membership during the pendency of a standing collective bargaining agreement, because in that case the union's obligation to continue representing those employees would have theoretically been enforceable under state law as a matter of contract. But here the obligation to continue representing non-union members is imposed solely by federal law—and only then in so far as a union chooses, prospectively, to assume the responsibilities that federal law imposes on parties electing to become the exclusive representatives of employees in a given bargaining unit.[29]

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Since joining the NFIB Legal Center, Wake has focused on issues ranging from employment law matters to regulatory compliance. In addition to serving as a resource for small business owners, Wake remains committed to the Legal Center's pledge to ensure that the voice of small business is heard in the nation's courts. As an appellate practitioner, Wake has focused particularly on informing the courts on matters of administrative law and on issues under the Fifth Amendment's Takings Clause. He is also working to advance small business interests in law review articles, and was recently published in the Berkeley Journal of Law & Ecology. Before joining the Legal Center's team, Wake completed a prestigious two-year fellowship as an attorney in the Pacific Legal Foundation's (PLF) College of Public Interest Law. Wake is a graduate of Case Western Reserve University School of Law in Cleveland Ohio, and is a member of the California Bar. He completed his undergraduate studies at Elon University in North Carolina in 2006.

24 *Id.* ("Because it is federal law that provides a duty of fair representation, Indiana's right-to-work statute does not 'take' property from the Union…") (quoting *Sweeney*, 767 F.3d at 666).

25 *Id.*

26 *Id.*

27 Brief for David Drubaker, *supra* note 5 at 6-7.

28 *Zoeller*, 19 N.E.3d at 753.

29 *Sweeney*, 767 F.3d at 667.

Florida Supreme Court Finds Expectation of Privacy for Third Party Disclosures

Caroline Johnson Levine

In *Tracey v. Florida*, the Florida Supreme Court recently determined that the Fourth Amendment requires police officers to establish probable cause and obtain a warrant in order to track the real-time location information of cellular telephone users.[1] This result extended the holding in *United States v. Jones*, "that the warrantless placement of a Global-Positioning-System (GPS) tracking device on [a] defendant's vehicle and use of it to monitor the vehicle's movements on public streets constituted a 'search' under the Fourth Amendment."[2]

I. The Trial Court

Shawn Alvin Tracey was a convicted felon who was suspected by Broward County Sheriff Deputies of trafficking in large quantities of cocaine.[3] The deputies had been contacted by a Drug Enforcement Administration (DEA) agent, who had received information from a confidential source that "he had made trips to pick up drugs for Tracey in the past."[4]

A Sheriff's detective "filed an application for an order authorizing the installation and use of a pen register and trap and trace device regarding Tracey's cell phone."[5] The application sought to utilize "pen registers"[6] and "trap and trace devices,"[7] in order to monitor the incoming and outgoing telephone calls of Tracey and his co-conspirator, Guipson Vilbon.[8] "Basically, a pen register is a device or process which records the telephone numbers of outgoing calls; the trap and trace device captures the telephone numbers of incoming calls,"[9] however, the contents of the telephone conversation are not recorded.

Importantly, the application only contained one factual allegation: a "DEA Confidential Source (CS) indicated that Shawn Alvin Tracey obtains multiple kilograms of cocaine from Broward County, for distribution on the West Coast of Florida. Furthermore, the CS contacts Shawn Tracey on the listed Metro PCS telephone number."[10] The application did not request authorization for "cell site location information" (CSLI), however, the judicial order granting the application "directed the cell phone company to provide the sheriff's office '[i]n accordance' with 18 U.S.C. § 2703(d), 'historical Cell Site Information indicating the physical location of cell sites, along with cell site sectors, utilized for the calls. . .'"[11] Shortly thereafter, law enforcement officers monitored "the location of the cell phones of Tracey and Vilbon using real time CSLI, [and] tracked Tracey's eastward trip across Florida."[12] Because Tracey's driver's license was suspended, a traffic stop justified a "search uncover[ing] a kilogram brick of cocaine" in his car.[13]

In a motion to suppress the cocaine evidence collected in his car, Tracey raised a claim that officers violated his Fourth Amendment right to be free from unreasonable searches and seizures by tracking Tracey through CSLI data collection. Tracey argued "that real time cell site information is a subset of prospective cell site information, which, he contended, requires a warrant."[14] The trial court found that law enforcement's application did not establish probable cause for the issuance of a warrant, nevertheless, the court denied Tracey's motion to suppress and determined that there was no Fourth Amendment violation "because Tracey had been seen committing an independent crime[,

1 Tracey v. Florida, 152 So. 3d 504 (Fla. 2014).

2 *Id.* at 514-15 (quoting United States v. Jones, 565 U.S. ---, 132 S.Ct. 945, 949-52, 181 L.Ed.2d 911 (2012)).

3 Tracey v. Florida, 69 So. 3d 992 (Fla. 4th DCA 2011).

4 *Id.* at 993.

5 *Id.*

6 *Id.* at 993 n.1; *see also* § 934.02(20), Fla. Stat. (2009).

7 *Id.* at 993 n.2; *see also* § 934.02(21), Fla. Stat. (2009).

8 Tracey v. Florida, 69 So. 3d at 993 n.3.

9 Application for Pen Register and Trap/Trace Device with Cell Site Location Auth. (Smith), 396 F.Supp.2d 747, 749 (S.D. Tex. 2005) (citations omitted).

10 *Id.*

11 *Id.* at 994.

12 *Id.*

13 *Id.* at 995.

14 Tracey v. Florida, 69 So. 3d at 995.

driving on a suspended license,] on a public street where he had no reasonable expectation of privacy."[15]

II. The Appellate Court

Florida's Fourth District Court of Appeal affirmed the trial court's ruling, noting that "[t]echnology evolves faster than the law can keep up, extending the search capabilities of law enforcement and transforming our concept of privacy."[16] The appellate court held that because the facts of this case concerned "the government's tracking of an individual's location on *public roads*, this case does not involve a Fourth Amendment violation."[17] The court acknowledged that the deputies' application did not establish "probable cause" or offer "'specific and articulable facts' to show that CSLI was 'relevant and material to an ongoing criminal investigation,'" nor did it request CSLI information as required by Florida's Security of Communications Act.[18] However, that court found that although "there was a violation of a provision of Chapter 934, the exclusionary rule is not an authorized remedy to address the violation."[19]

The appellate court relied upon United States Supreme Court precedent in *Smith v. Maryland*, which held that monitoring a telephone pen register "did not violate the Fourth Amendment because a phone user has no reasonable expectation of privacy in the information provided to a third party by his voluntary use of a phone."[20] Importantly, the court explained how real-time tracking technology associated with CSLI may be updated every 7 seconds to determine GPS location information within 50 feet of a cell phone user[21] as cell "phones are ubiquitous, and some consumers embrace them as personal tracking devices."[22]

The appellate court was "bound to follow United States Supreme Court precedent interpreting the Fourth Amendment"[23] per the Florida Constitution's conformity clause in Article 1, § 12. Accordingly, the court relied upon prior rulings by the United States Supreme Court in *United States v. Knotts*[24] and *United States v. Karo*,[25] which held that tracking activity through the "monitoring of beeper signals 'did not invade any legitimate expectation of privacy,' so that 'there was neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment.'"[26] Significantly, the District Court of Appeal previously held that "historical cell site information 'does not implicate Fourth Amendment protections.'"[27]

III. The Florida Supreme Court

Tracey appealed the Fourth District Court of Appeal's ruling to the Florida Supreme Court,[28] which began its analysis "with one of the bedrock principles of our federal constitution, the Fourth Amendment to the United States Constitution, which states: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[29] Further, the court explained that there are federal and state statutes at issue under these circumstances, which "authorize government access to stored communications in the hands of third-party providers, categorizes the different types of stored information, and sets forth what the government must do to access those different types of information."[30]

15 *Id.*

16 *Id.* at 996.

17 *Id.* at 995 (emphasis added).

18 *Id.* at 999 (quoting § 943.23(5), Fla. Stat. (2009)).

19 *Id.* at 993.

20 *Id.* at 995 (citing Smith v. Maryland, 442 U.S. 735 (1979)).

21 *Id.* at 994 (citing Application of the United States (Lenihan), 534 F.Supp.2d 585, 589–90 (W.D. Pa. 2008) (internal citations omitted), *vacated* Application of the United States, 620 F.3d 304 (3d Cir. 2010)).

22 *Id.* at 996.

23 *Id.* at 996-97; *see also* Fla. Const. art. I, § 12.

24 United States v. Knotts, 460 U.S. 276 (1983).

25 United States v. Karo, 468 U.S. 705, 707 (1984).

26 Tracey v. Florida, 69 So. 3d at 995 (quoting *Knotts*, 460 U.S. at 285).

27 *Id.* at 996 (quoting Mitchell v. State, 25 So. 3d 632, 635 (Fla. 4th DCA 2009)).

28 Tracey v. Florida, 152 So. 3d at 506; *see also* Fla. Const. art. V, § 3(b)(3).

29 *Id.* at 511.

30 *See* 18 U.S.C. § 2510 *et seq.*, 18 U.S.C. § 2701 *et seq.*, and

The court recognized that the "United States Supreme Court has not yet ruled on whether probable cause and a warrant are required, either under the statutory scheme or based on the Fourth Amendment, for an order requiring disclosure of real time cell site location information to be used by law enforcement to track a subscriber's cell phone."[31] However, the Florida Supreme Court found that the ability to track individuals through inexpensive and ubiquitous technology, could lead to an encroachment on the privacy rights that the Fourth Amendment intended to prevent. "James Madison, the principal author of the Bill of Rights, is reported to have observed, 'Since the general civilization of mankind, I believe there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations.'"[32]

Importantly, the Florida Supreme Court overruled the trial and appellate courts and suppressed the evidence of Tracey's guilt, concluding "that cell phones are 'effects' as that term is used in the Fourth Amendment"[33] and "regardless of Tracey's location on public roads, the use of his cell site location information emanating from his cell phone in order to track him in real time was a search within the purview of the Fourth Amendment for which probable cause was required. Because probable cause did not support the search in this case, and no warrant based on probable cause authorized the use of Tracey's real time cell site location information to track him, the evidence obtained as a result of that search was subject to suppression."[34] The seminal finding of this decision resulted in the court's view that a cellular telephone continues to expand every citizen's and the government's technological capabilities and that the tracking feature can be used by law enforcement only upon a determination of probable cause that a crime has been or will be committed, necessitating a search warrant.

IV. Dissent

The Florida Supreme Court's decision in *Tracey* revealed strong opposition between the majority opinion and two dissenting justices.

Justice Canady wrote that "cell site location information obtained by the police for Mr. Tracey's cell phone is subject to the third-party-disclosure doctrine under *Smith v. Maryland*."[35] Justice Canady noted that in *Smith*, the United States Supreme Court concluded that a pen register did not encroach upon the protections provided by the Fourth Amendment, "rest[ing] its conclusion on what is known as the third-party-disclosure doctrine [and] pointed out that it 'consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'"[36]

Justice Canady noted that the United States Supreme Court has held that a telephone user assumes a risk that the third-party "telephone company would reveal to police the numbers he dialed."[37] Further, Justice Canady wrote that "a strong desire for privacy does not provide a basis for this Court to abrogate the third-party-disclosure doctrine."[38] Justice Canady asserted that the third-party-disclosure doctrine may need to be revisited, however, a reexamination belongs "properly within the province of the Supreme Court. The Supreme Court gave us the third-party-disclosure doctrine, and if that doctrine is to be judicially altered, it should only be altered by the Supreme Court."[39]

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18 U.S.C. § 3121-27 (titled the Federal Wiretap Act, as amended by the Electronic Communications Privacy Act of 1986); *see also* Chapter 934, Florida Statutes (2009).

31 Tracey v. Florida, 152 So. 3d at 512.

32 *Id.* at 522 (quoting Klayman v. Obama, 957 F.Supp.2d 1, 42 & n.67 (D.D.C. 2013) (citing James Madison, Speech in the Virginia Ratifying Convention on Control of the Military (June 16, 1788), in The History Of The Virginia Federal Convention Of 1788, With Some Account Of Eminent Virginians Of That Era Who Were Members Of The Body (Vol. 1) 130 (Hugh Blair Grigsby et al. eds., 1890))).

33 *Id.* at 524.

34 *Id.* at 526.

35 *Id.* (citing Smith v. Maryland, 442 U.S. 735 (1979).

36 Smith v. Maryland, 442 U.S. at 743-44.

37 *Id.* at 744.

38 Tracey v. Florida, 152 So. 3d at 528.

39 *Id.*

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