STATE COURT
DocketWatch®

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New Hampshire Family Court Orders Girl to Public School over Home Schooling Preference of Mother

by Nathan Fox

In a case that is of great consequence to education law, as well as to religious liberties issues more broadly, a New Hampshire state court judge recently removed a girl from home schooling by order.[1] On June 14, 2009, Judge Lucinda Sadler of the Laconia Family Division ordered a ten-year-old girl out of religious home schooling and into public school against the wishes of her mother. In *The Matter of Martin Kurowski and Brenda (Kurowski) Voydatch*,[2] "the parties reserved for the court the issue of whether Amanda would attend public school for the 2009-2010 school year, or continue to be home schooled by Ms. Voydatch."[3] The portion of the case discussing the background and decision of the judge ordering Amanda Voydatch into public school is summarized below.

Amanda Voydatch had been home schooled by her mother since first grade. Ms. Voydatch assembled Amanda's home schooling curriculum from a private university where the materials were created by certified teachers. Since first grade, Amanda has undergone regular standardized testing and is evaluated via interviews and a portfolio review to determine her academic proficiency. Amanda's curriculum at the time of this hearing included "math, reading, English, social studies, science, handwriting and spelling, Spanish and bible *[sic]* class."[4] Amanda's curriculum was comparable to the public school curriculum, except for the addition of Bible class. Mr. Kurowski, Amanda's father, disagreed with Ms. Voydatch's decision to home school Amanda because he believed "home schooling prevented adequate socialization for Amanda with other children of her age."[5]

In January 2009, Amanda began attending art, Spanish, and physical education classes in the public school. One teacher stated Amanda is "an active participant in classes and is adapting well and making friends and keeping up with the work."[6] Another confirmed that Amanda "seemed to get along and was a pleasant participant in the class, but also said that Amanda might feel more comfortable if she were a member of the class: she did not have as much intimacy with the group as might be expected."[7] However, her art teacher commented that

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Missouri Court Upholds State School Funding Formula

by Carolyn Hamilton

In 2004, Plaintiffs, which include two not-for-profit education advocacy groups, 271 out of 524 Missouri school districts, students, parents, and taxpayers, originally brought suit to challenge Missouri's school funding formula, alleging the formula was unconstitutional under Article IX, Section 1(a) of the Missouri Constitution because it resulted in inadequate and inequitable funding to Missouri's public schools.[1] Defendants included the State of Missouri, the State Treasurer, the State Board of Education, the Department of Elementary and Secondary

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INSIDE

FROM THE EDITOR

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

Additionally, readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Sarah Field, at sarah.field@fed-soc.org.

CASE IN FOCUS

North Carolina High Court Is First to Overturn Restriction on Felony Gun Ownership

by Scott W. Gaylord

The United States Supreme Court's 2008 decision in *District of Columbia v. Heller*[1] focused national attention on the Second Amendment. In a 5-4 opinion, the Supreme Court held that "the right of the people to keep and bear Arms"[2] was an individual right and therefore the District of Columbia's ban on handgun possession in the home violated the Second Amendment. However, the majority expressly stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill…."[3] That is, the Court acknowledged that the right to bear arms is not absolute and that under certain circumstances the government may preclude particular individuals from owning or possessing a gun.

In *Britt v. State*, the North Carolina Supreme Court addressed this specific issue—whether a 2004 amendment of a North Carolina statute, which barred all felons from possessing a gun, was a reasonable restriction under North Carolina's version of the Second Amendment as applied to Barney Britt, who was convicted of a nonviolent felony.[4] In holding that the regulation was unreasonable, the North Carolina Supreme Court became the first state high court to maintain that a state's attempt to protect the health and safety of its citizens by restricting a felon's gun ownership violated his right to bear arms.

North Carolina's Changing Restrictions on Britt

In 1979, Barney Britt pled guilty to a felony drug crime: possession with intent to sell and deliver a controlled substance. Mr. Britt's crime was nonviolent and did not involve the use of a firearm.[5] After completing his sentence (four months in prison and 20 months of supervised probation) in 1982, his civil rights—including his right to possess a gun—were fully restored in 1987 by operation of North Carolina law.[6] In 1995, the North Carolina General Assembly modified the applicable law, N.C. Gen. Stat. § 14-415.1, to prohibit all persons convicted of a felony from possessing any firearms that did not meet certain minimum barrel and overall length requirements.[7] The 1995 amendment did not alter the provision in the 1975 version of the statute which stated that "nothing herein would prohibit the right of any person to have possession of a firearm within his own house or on his lawful place of business."[8] In 2004, though, the General Assembly amended N.C. Gen. Stat. § 14-415.1 yet again, expanding the prohibition on possession to include all firearms by any person convicted of a felony, even possession in the convicted felon's home or place of business.[9]

After learning about the 2004 amendment, Mr. Britt consulted a local sheriff regarding its impact on Mr. Britt's right to possess a firearm. The sheriff determined that Mr. Britt could not possess any firearms under the amended statute, and Mr. Britt subsequently got rid of his various firearms, which included rifles and shotguns that he used for hunting on his property. The North Carolina Supreme Court emphasized that in the 30 years since his conviction for a nonviolent felony, (i) Mr. Britt had neither been charged with any other crime nor misused a firearm in any way and (ii) no agency or court in North Carolina had indicated "that plaintiff is violent, potentially dangerous,

or is more likely than the general public to commit a crime involving a firearm."[10]

In September 2005, Mr. Britt filed a civil action against the State of North Carolina alleging that N.C. Gen. Stat. § 14-415.1 as amended violated various rights of Mr. Britt under the United States and North Carolina Constitutions. In March 2006, the trial court granted the State's motion for summary judgment on the grounds that "the amended statute is rationally related to a legitimate government interest and is not an unconstitutional ex post facto law or bill of attainder."[11] A majority of a three judge panel on the North Carolina Court Appeals agreed with the lower court. The lone dissenter argued that the 2004 amendment constituted an ex post facto law that violated Mr. Britt's due process rights under the Federal and State Constitutions. The North Carolina Supreme Court granted review on a single issue: "Whether the application of the 2004 amendment to N.C.G.S. § 14-415.1 to plaintiff violates his rights under N.C. Const. art. I, § 30," which is North Carolina's version of the Second Amendment.[12]

The Restrictions as Applied to Mr. Britt

The right to bear arms in the Second Amendment to the United States Constitution finds expression in Article I, section 30 of the North Carolina Constitution: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."[13] The North Carolina Supreme Court has interpreted this provision to guarantee the right of individuals to bear arms.[14] Consistent with *Heller*, though, the North Carolina Supreme Court recognizes that this right is not absolute. The General Assembly may impose restrictions on the right to bear arms, but any such restrictions must be "reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety."[15] Thus, the central issue in *Britt* is whether the complete ban on gun ownership by convicted felons under N.C. Gen. Stat. § 14-415.1 is reasonable as applied to Mr. Britt.[16]

Given the nonviolent nature of Mr. Britt's original offense and his subsequent nonviolent conduct, the North Carolina Supreme Court determined that Mr. Britt did not endanger the public peace and safety. In particular, the

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Washington Supreme Court Upholds At-Will Employment:
Employees Who Object to "Bad Boss" Are Not Protected from Termination

by Michael J. Reitz

The Washington State Supreme Court narrowly affirmed an employer's right to terminate employees who disagree with management decisions.[1] Several employees of a nonprofit objected to the decisions of their executive director. After several were fired and others quit in protest, the employees sued the nonprofit, claiming they should be statutorily protected from termination.

Employee-management relations break down

Nova Services is a Washington nonprofit corporation that provides services to disabled persons. In 2004, a hostile work environment developed between several employees and the organization's executive director, Linda Brennan. Apparently in violation of company policy, the employees wrote to the organization's board of directors, describing the employees' concerns about Brennan's leadership in several areas, including administration, finance, board development, corporate culture, and community relations. The employees asked for a meeting and threatened they would collectively leave the organization if Brennan terminated any of them for going to the board.

The board of directors hired an attorney to investigate the employee concerns. The attorney determined director Brennan had committed no illegal behavior and he recommended the board terminate either Brennan or some of the employees because of the "personal animosity" that had developed in the workplace.[2] The board then turned to a mediator.

Eventually director Brennan fired two of the employees for insubordination, while a third employee quit after hearing the news. Later that week six other employees sent a letter to the board requesting reinstatement of the employees who had been fired and demanding that Brennan be terminated. The employees threatened to "walk out of Nova Services" if the board failed to contact them by close of business the next day, and indicated these requests were "non-negotiable."[3] The board did not contact the employees, who did not return to work as threatened. Brennan declared the action a group resignation and

hired replacements for the workers who had walked off the job.

In September 2004, the employees filed a complaint against Nova Services alleging, among other things, wrongful discharge in violation of public policy and unlawful retaliation. The trial court granted Nova's motion for summary judgment and the state court of appeals affirmed.[4] The Washington Supreme Court granted review in 2007.

Washington Supreme Court's plurality decision

On August 27, 2009, the Washington Supreme Court issued a ruling affirming the court of appeals with a 3-vote lead opinion by Justice James Johnson.

Justice Johnson opened the plurality opinion by noting that Washington, like most other states, allows employers and employees to terminate their employment relationship at any time for any reason. One of the narrow exceptions to the terminable at-will doctrine is the tort of wrongful discharge in violation of public policy. In order to prevail, the employee must show: "(1) Washington has a clear public policy (the *clarity* element), (2) discouraging the conduct would jeopardize the public policy (the *jeopardy* element), and (3) that policy-protected conduct caused the dismissal (the *causation* element)."[5] The public policy exception is often recognized when an employee is terminated as a result of a refusal to commit an illegal act, performance of a public duty or obligation, exercise of a legal right or privilege, or in retaliation for reporting employer misconduct.

The terminated Nova Services employees argued that Washington state has a public policy protecting "concerted activities" by employees, citing a Depression-

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Alabama Courts Will Not Second-Guess Legislature's Voting Procedures

by E. Berton Spence

A holding that Alabama's largest county has been collecting an occupational tax repealed by the state legislature ten years ago constitutes another example of the Supreme Court of Alabama's interpretation of that state's separation-of-powers doctrine. In *Jefferson County Commission v. Edwards*,[1] Alabama's high court reached back a full decade to invalidate a trial court's never-appealed ruling that a repealer of the tax was, itself, unconstitutional. The court held that whether the repealer had been passed with sufficient votes in the state legislature was a non-justiciable, political question and an impermissible exercise of legislative power. Because the trial court had no jurisdiction to review the repealer act on those grounds, its invalidation of the repealer was void, and therefore the repealer was effective in removing the county's authority to impose the tax.

An Exquisitely Complex Sequence

The unanimous opinion,[2] authored by Associate Justice Champ Lyons, is grounded on what he terms an "exquisitely complex sequence of legislative enactments and related litigation."[3] The story begins in 1967, when the Alabama Legislature first created authority for Jefferson County to levy an occupational tax, but only on persons who were not required to purchase state or local business licenses. In 1999, a Jefferson County judge hearing a taxpayer class action[4] held the 1967 law to be violative of the federal Equal Protection Clause because of the exemptions for business license holders. The judge enjoined further collection of the tax unless the county began collecting it from everyone employed in the county, which the county promptly did.

Immediately thereafter, still in 1999, formerly-exempt taxpayers filed a class action[5] arguing that because the legislative authorization for the tax excluded business-license holders, the county had no authority to include them. While that action was pending, the Alabama Legislature passed 99-406, which gave the county authority to levy a tax without exemptions for license holders, but did not repeal the 1967 authorization. Instead, it allowed the county to proceed under 99-406 if it wished, but made the decision to do so irrevocable. It also passed 1999-669 which expressly repealed the original 1967 act.

In early 2000, the *Triantos* trial court held the county had no legislative authority under the 1967 act to collect the tax from license holders, and also decided that the new grant of taxing authority (99-406) violated Alabama's constitution on the basis of deficiencies in legal notices when the act was proposed.

In March of 2000, a third, separate action in the Jefferson County Circuit Court[6] produced a ruling that 99-669 (repealer of the 1967 act) was itself unconstitutional based on a finding that the repealer had not passed with

enough votes to satisfy the applicable supermajority requirement.[7] The Circuit Court interpreted the Alabama Constitution to require a vote of two-thirds of those present and constituting a quorum, rather than simply two-thirds of those actually voting as legislative rules allowed.

In April of 2000, the Alabama Legislature (via 2000-215) repealed again the 1967 law and repealed 99-406 (the alternative taxing authority held unconstitutional in *Triantos*), replacing them both with a new tax applicable only to counties with populations over 500,000 (this affected only Jefferson County at the time), and with no exemptions for business-license holders.

Still in 2000, however, the Jefferson County Circuit Court in a fourth case[8] held 2000-215 unconstitutional because, as a local law, it could not contravene general laws, several of which prohibited imposition of county license/privilege taxes on people who paid such taxes to the state.

In 2001, the appeals from the *Richards*, *Triantos* and *Izzi* cases were decided by the Supreme Court of Alabama.[9] In the consolidated appeal of *Richards* and *Triantos*, the court (1) overruled the holding in *Richards* and found the 1967 act free of constitutional infirmity on the Equal Protection issue; and (2) affirmed the holding in *Triantos* regarding the lack of legislative authority for the county to expand the tax to include business-license holders. In *Izzi*, the court affirmed the striking down of 2000-215 (the "replacement" tax) on grounds of deficient public notice.

So by 2001, once again only the 1967 act remained standing; or so it seemed. Jefferson County continued to collect the tax from those who held no exemption from it.

In 2005, however, the court decided *Birmingham-Jefferson Civic Center Auth. v. City of Birmingham*,[10] and held, *sua sponte*, that Alabama's judicial branch of government has no jurisdiction to interpret the Alabama Legislature's rules and procedures insofar as the issue is whether, by application of those rules, a bill has garnered sufficient votes for passage. The court deemed such issues non-justiciable, political questions based on the Alabama Constitution's grant of power to the Legislature to create its own procedural rules via the general separation-of-powers section.[11]

The *Edwards* class filed suit in 2007, arguing primarily that under the holding of *Birmingham-Jefferson Civic Center Auth.*, the never-appealed trial court decision that invalidated the 1999 repealer of the 1967 tax (99-669) was a void judgment, issued by a court without subject-matter jurisdiction. Accordingly, they claimed, the 1967 tax had been validly repealed in 1999. On January 12,

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After Change in Personnel, Michigan Supreme Court Reverses Itself in Major Insurance Decision[1]

by R. Lance Boldrey, Esq.

In 2008, the Michigan Supreme Court, by a 4-3 majority, issued an opinion in *United States Fidelity Insurance & Guaranty Co. v. Michigan Catastrophic Claims Ass'n* (hereinafter "*USF&G I*"),[2] a hotly contested case concerning whether a Michigan auto insurer must be indemnified for payments being made to an injured party under Michigan's automobile no-fault law, without considering any reasonableness requirements for those payments. Following a personnel change in the court, and with no new arguments or facts being presented, the court granted a motion for rehearing. On July 21, 2009, in "*USF&G II*,"[3] the court reversed itself, again with a 4-3 majority issuing the court's decision.

Michigan's No-Fault Statutory Scheme

In 1978, Michigan created the Michigan Catastrophic Claims Association ("MCCA"), an entity intended to protect Michigan insurers from being overburdened by the unlimited personal injury protection benefits required by the state's no-fault law. The MCCA essentially acts as a reinsurer, indemnifying member insurance companies for losses incurred in the event of "catastrophic" injury claims, those that result in the payment of personal injury benefits in excess of a statutory cap.[4]

More specifically, Michigan law provides that the MCCA "shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of" a threshold loss amount determined by the date the underlying policy was issued or renewed.[5] The term "ultimate loss" is defined as "the actual loss amounts that a member is obligated

to pay and that are paid or payable by the member," but not including claim expenses.[6]

Based on the total amount of catastrophic claims payments anticipated to be made by the MCCA, the MCCA establishes a premium to be paid by the member insurers, which, of course, is ultimately passed on in an assessment to policy holders, in other words, all Michigan drivers.[7]

By its statutory charter, the MCCA is granted a number of enumerated powers, including a catch-all provision allowing the MCCA to "perform other acts... necessary or proper to accomplish the purposes of the [MCCA] and that are not inconsistent with" the statute and MCCA's "plan of operation."[8]

***USF&G I*: The Reasonableness of Insurer Claims**

In *USF&G I*, the Court was confronted with the issue of whether the MCCA was statutorily empowered to review the reasonableness of claims for indemnity submitted by member insurers. The case arose out of a no-fault insurance policy held by Daniel Migdal, a USF&G insured who was seriously injured in a 1981 accident. Ever since the time of his injury, Mr. Migdal has required attendant care on a 24-hour basis. In a case filed by Mr. Migdal's father in 1988, USF&G in 1990 entered into a consent judgment under which USF&G must pay $17.50 per hour for attendant care, subject to a compounded annual inflation rate of 8.5%.[9]

By 2003, inflation had driven the payments made pursuant to the consent judgment to $54.84 per hour, well in excess of the applicable $250,000 threshold for MCCA indemnification of catastrophic claims. MCCA refused to reimburse USF&G for amounts over $22.05

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Georgia Supreme Court and Vaccine Claims

by Jack Park

In *American Home Products Corp. v. Ferrari*,[1] the Supreme Court of Georgia held that the National Child Vaccine Injury Act of 1986 does not preempt all state law claims that a vaccine has been defectively designed. Instead, relying on its reading of the statutory text and the legislative history, the court held that the Act preempts such claims if it is determined, on a case-by-case basis, that the vaccine's injurious side effects were unavoidable.[2] In so doing, the court reached a conclusion that differed from the conclusion reached by the Third Circuit Court of Appeals and other courts.[3]

The National Childhood Vaccine Injury Act of 1986 was enacted in response to a sharp rise in the number of vaccine-related lawsuits filed against the manufacturers of those vaccines. The cost of defending those lawsuits and the related increases in insurance costs were chasing manufacturers from the market, threatening the supply of vaccines. The Act establishes an alternative, mandatory forum for the resolution of vaccine-injury claims. Those claims are heard in the first instance by a Vaccine Court which is part of the Court of Federal Claims. Claimants dissatisfied with the result in that forum can appeal to the Court of Appeals for the Federal Circuit or can pursue certain limited claims in federal or state court.[4]

In pertinent part, the subsection (b)(1) of the Act provides, "No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings."[5] As one court, which found that the Act preempted design defect claims related to the pertussis vaccine, observed, this provision can be read in two ways. Either "any injury caused by a covered vaccine is deemed 'unavoidable' as a matter of law provided that the vaccine was properly prepared and accompanied by proper warnings," or defective design claims are barred only when the injury is unavoidable, with unavoidability to be determined on a case-by-case basis.[6]

In *Ferrari*, the Georgia Supreme Court noted that the courts considering the issue had universally recognized that Congress based the preemption provision set forth in subsection (b)(1) on comment (k) to § 402A of the Restatement (Second) of Torts. Comment k addresses "[u]navoidably unsafe products," pointing out that, while some products cannot be "made safe for their intended and ordinary use," those products are neither defective nor unreasonably dangerous when "properly prepared and accompanied by proper directions and warning."[7] The Georgia Supreme Court noted that comment k "distinguishes three fundamental types of products liability: defects in design, manufacturing, and packaging or marketing."[8]

That parsing of comment k led the Georgia Supreme Court to disagree with the other courts which had considered the issue. Those courts had overlooked the fact that "most of the states, including Georgia, that have adopted Comment k have applied it in a... limited fashion and on a case-by-case basis."[9] Accordingly, when Congress adopted comment k, it "understood that comment in the same way" as the majority of the courts understood it.[10]

Furthermore, the Georgia Supreme Court pointed out that the text of subsection (b)(1) is conditional, providing that there is no liability "if the injury or death resulted from side effects that were unavoidable." In its view, that logically meant that some injuries were avoidable, and, for those injuries, the manufacturer could be civilly liable. Congress "could easily" have omitted the conditional language, but those words should not be read out of the statute.[11] With the conditional language, subsection (b)(1) preempted defective manufacturing and most defective packaging claims, but did not preempt design defect claims unless the "side effects… were not avoidable by a safer design."[12]

The Georgia Supreme Court supported its reading of subsection (b)(1) by referring to the legislative history, both from the 1986 Act and subsequent legislative history from 1987. In 1986, the House Committee on Energy and Commerce stated that it "intend[ed] that the principle in Comment K regarding 'unavoidably unsafe' products... apply to the vaccines covered in the bill and that such products not be the subject of liability in the tort system."[13] Congress then established an alternative compensation scheme that allowed for compensation "even if the manufacturer has made as safe a vaccine as possible."[14] The court went on to state:

> Accordingly, if the [injured persons] cannot demonstrate under applicable law either that a vaccine was improperly prepared or that it was accompanied by improper directions or inadequate warnings [they] should pursue recompense in the compensation system, not the tort system.[15]

The Georgia Supreme Court stated that the Committee did not "use language which indicates that use of the compensation system is mandatory."[16] Instead, it assumed that the new Vaccine Court "would attract even vaccine-injured persons who may be able to prove that the vaccine was not made as safe as reasonably possible."[17] Characterizing that assumption of Congress as "certainly questionable, to say the least," the Georgia Supreme Court concluded that Congress intended "only" that "if a vaccine-injured person does not have a claim for a manufacturing or warning defect, he should find the compensation system appealing even though he is authorized to attempt to prove the existence of a safer design in the tort system."[18] But, the legislative

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New York Court Weakens Product Liability Defenses

by Craig Mausler

In *Passante v. Agway Consumer Products,* the plaintiff, an employee of a loading company, was injured while using a mechanical dock leveler at his company's warehouse.[1] The plaintiff was standing on the leveler while loading products onto a truck, but did not realize that the dock lever was not yet secured. The truck was then moved, causing the leveler to collapse, thereby injuring the plaintiff.

The plaintiff brought suit against his employer, the manufacturer of the mechanical platform, and the company that sold it to his employer, alleging that the leveler:

> was defectively designed by Rite-Hite because it lacked equipment restraining the tractor trailer or securing it to the loading dock while the dock leveler was in use, and lacked a system to warn the operator when it was safe to enter the trailer or, in the alternative, notifying the driver that a dock leveler was in position.[2]

Plaintiff's employer was eventually dismissed from the case, limiting its liability to workers compensation damages. Extensive discovery revealed that safety equipment was optional, but recommended, and that the employer chose not to buy said equipment, instead issuing various warnings. According to Plaintiff's expert witness, these warnings proved inadequate. Summary judgment motions were granted to the two defendants by the mid-level appellate court.

By the time the case reached the highest court in New York State, two causes of action were in dispute, namely, whether there was a defective design due to lack of proper safety equipment on the leveler, and whether there was a failure to properly warn of the dangers involved. The questions on appeal hinged

on interpretation of relevant New York State precedent, *Scarangella v. Thomas Built Buses,* which dictates that equipment is not defective, as a matter of law, if it fails to incorporate safety equipment.[3]

In a 4-3 decision, the New York State Court of Appeals found that its *Scarangella* requirements were not met, causing it to reverse the lower court's summary judgment motion and reinstate the causes of action for defective design and failure to warn. The majority supported the plaintiff's position that a dock leveler of this design creates a substantial risk of harm as normally used, and that it is unreasonably dangerous without a trailer restraint system. The majority also held that there were triable issues of fact as to the sufficiency of the warnings concerning the use of the equipment, thus reinstating the cause of action for failure to warn. The majority remanded the case for a jury trial.

Justices Smith, Read, and Graffeo dissented, arguing that the majority's decision essentially overruled *Scarangella*. They pointed out that Plaintiff's employer decided against buying the safety equipment and "whether safety equipment should be bought is a decision for the buyer, not the seller and not the courts."[4] As for failure to warn, the defense wrote, "[I]t is abundantly clear that no warning could have prevented this accident."[5] Plaintiff was fully aware of the danger of using the platform leveler without it being locked or having proper support.

The dissent concluded by querying about the "real economic consequences" of this decision:

> The predictability that was offered until today to manufacturers and distributors of equipment in this State is gone, and the result can only be an increase in cost—in the cost of liability insurance, and in the cost of safety features that buyers will no longer have the option to refuse… Decisions like today's can only make things worse.[6]

It appears that the New York State Court of Appeals may have fundamentally "changed some contours of products liability law as it affects cases involving optional equipment, knowledgeable purchasers and off-product warnings."[7] Whether the dissent's speculation about the "real economic consequences" is accurate remains to be seen.

** Craig Mausler is the President of The Federalist Society's Albany Lawyers Chapter.*

Endnotes

1 2009 NY Slip Op 3588 (May 5, 2009). The leveler is inserted between the area in which the products are loaded and the truck itself.

2 *Id*. at 3.

3 Scarangella v. Thomas Built Buses, 717 N.E.2d 679 (N.Y. 1999). In *Scarangella*, the court rejected the notion that a product which fails to use safety equipment is, as a matter of law, defective:

> where the evidence and reasonable inferences therefrom show that: (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product. In such a case, the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and a well-considered decision by the buyer to dispense with the optional safety equipment will excuse the manufacturer from liability.

Id. at 683.

4 2009 NY Slip Op 03588 at 8 (Smith, J., dissenting).

5 *Id.* at 10.

6 *Id*. at 10-11.

7 Michael Hoenig, *Optional Safety Equipment and the Savvy Purchaser*, N.Y. L. J., May 11, 2009, *available at*: http://www.herzfeld-rubin.com/publ_products/200905.htm.

North Carolina High Court Is First to Overturn Restriction on Felony Gun Ownership

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court emphasized four features of Mr. Britt's conduct that "affirmatively demonstrated that he is not among the class of citizens who pose a threat to public peace and safety:"[17] (i) Mr. Britt's original crime did not involve violence or the threat of violence, (ii) he had been a law-abiding citizen for the thirty years since his crime, (iii) he had lawfully possessed and responsibly used firearms between 1987 and 2004, and (iv) he voluntarily and proactively complied with the 2004 amendment to N.C. Gen. Stat. § 14-415.1.[18] Accordingly, because Mr. Britt did not jeopardize the State's interest in preserving peace and safety, North Carolina's complete ban on gun ownership was unreasonable as applied to him and, therefore, violated his right to own a firearm under Article I, section 30 of the North Carolina Constitution.

The *Britt* decision spawned two dissents. In a short, two sentence dissent, Chief Justice Parker stated simply that she did not think that the statute as applied to Mr. Britt violated Article I, section 30. Justice Timmons-Goodson, drawing on the United States Supreme Court's decision in *Heller*¸ argued that North Carolina's ban on gun ownership by convicted felons was a reasonable restriction that directly related to the State's interest in preserving public peace and safety.[19] Given that felonies represent the most serious crimes, the legislature could reasonably conclude that this entire class of persons posed a threat to the public peace and safety if they were allowed to possess firearms.[20] Thus, although Mr. Britt was a sympathetic plaintiff, the court should not have crafted an individual exception for him. As the saying goes, "'[h]ard cases make bad law.'"[21] Moreover, according to Justice Timmons-Goodson, by granting Mr. Britt relief from the statute, the majority (i) became the first court to hold that a convicted felon's right to bear arms superseded the inherent police power of the State to protect the public peace and safety[22] and (ii) called into question statutes restricting other classes of citizens—such as incompetents, persons acquitted by reason of insanity, and persons subject to domestic violence orders—from purchasing or possessing firearms.[23] As a result, Justice Timmons-Goodson would have deferred to the legislature's determination that gun ownership by felons posed a risk to public safety and upheld the statute.

The Impact of Britt on the Right to Bear Arms

Regardless of whether one agrees with the majority or dissent, Justice Timmons-Goodson is probably correct that *Britt* will open "the floodgates wide before an inevitable wave of individual challenges" to North Carolina's felony firearms act.[24] Because it is unreasonable to preclude Mr. Britt from possessing a firearm, similarly situated felons will contend that N.C. Gen. Stat. § 14-415.1 also is unconstitutional as applied to them. Thus, it will be critical to know when a plaintiff is "similarly situated enough" to qualify for relief under *Britt*. But the Court does not specify which, if any, of Mr. Britt's personal circumstances were dispositive. At a minimum, a challenger may have to show that she was convicted of a nonviolent felony. To make a successful as applied challenge, though, must the nonviolent felon also show that her right to possess a firearm had been restored and then subsequently taken away by the 2004 amendment? Or that she "assiduous[ly] and proactive[ly] compli[ed] with the 2004 amendment"? Must she have 30 years of law-abiding conduct since her crime to demonstrate that she is not a threat to the public peace and safety?[25] Or is some shorter time sufficient?

Moreover, if certain felons cannot be deprived of their right to bear arms, others who have been precluded from owning a firearm under North Carolina statutes—such as incompetents, those acquitted of a nonviolent crime by reason of insanity, and the mentally ill—also may file as applied challenges. The lower courts, therefore, will have to wrestle with all of these (and various related) questions until the North Carolina Supreme Court clarifies the standard for as applied challenges to statutes that infringe on the right to bear arms under Article I, section 30 of the North Carolina Constitution.

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Endnotes

1 128 S.Ct. 2783 (2008).

2 U.S. Const. amend. II.

3 *Heller*, 128 S.Ct. at 2816-17.

4 681 S.E.2d 320 (N.C. 2009).

5 *Id.* at 321.

6 *See* N.C. Gen. Stat. § 14-415.1 (1975) (prohibiting the possession of "any handgun or other firearm" with a certain barrel length or overall length by persons convicted of certain felonies "within five years from the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later").

7 The 1995 amendment retained the minimum requirements originally specified in the 1975 legislation, thereby banning the possession of "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches." N.C. Gen. Stat. § 14-415.1 (1995).

8 *Id.*

9 N.C. Gen. Stat. § 14-415.1 (2004).

10 *Britt*, 681 S.E.2d at 322.

11 *Id.*

12 *Id.*

13 N.C. Const. art. I, § 30.

14 State v. Dawson, 159 S.E.2d 1, 9 (N.C. 1968).

15 *Id.* at 10. Because the North Carolina Supreme Court ultimately granted Mr. Britt's as applied challenge under *Dawson*'s reasonableness test, the Court did not address his argument "that the right to keep and bear arms is a fundamental right entitled to a higher level of scrutiny." *Britt*, 681 S.E.2d at 322 n.2.

16 *Britt*, 681 S.E.2d at 322.

17 *Id.* The *Britt* majority also noted that "the nature of the 2004 amendment is relevant" because it "functioned as a total and permanent prohibition on possession of any type of firearm in any location." *Id.* In light of Mr. Britt's nonviolent history, the complete ban, which "lack[ed] … any exception or possible relief from the statute's operation," reinforced the unreasonableness of the restriction. *Id.*

18 *Id.* at 323.

19 *Id.* at 323-24 (Timmons-Goodson, J., dissenting) (citing *Heller*, 128 S.Ct. at 2816-17 for the proposition that "the 'longstanding prohibitions on the possession of firearms by felons and the mentally ill' survive Second Amendment scrutiny").

20 State v. Jackson, 546 S.E.2d 570 (N.C. 2001) ("[T]here is also heightened risk and public concern associated with convicted felons possessing firearms, which the legislature addressed through N.C.G.S. § 14-415.1.").

21 *Britt*, 681 S.E.2d at 325 (Timmons-Goodson, J., dissenting) (quoting Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting)).

22 *Britt*, 681 S.E.2d at 323 (Timmons-Goodson, J., dissenting).

23 *See*, *e.g.*, N.C. Gen. Stat. §§ 14-269.8 and 14-415.3.

24 *Britt*, 681 S.E.2d at 325 (Timmons-Goodson, J., dissenting).

25 *Id.* at 323.

Washington Supreme Court Upholds At-Will Employment

Continued from page 4...

era statute which protects the "concerted activities" of nonunion workers. The law states, in relevant part:

> [T]he individual unorganized... shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections.[6]

The court noted that to be protected, "concerted activities" must relate to terms and conditions of employment or other activities for the purpose of improving working conditions—for example, better wages, improved medical coverage, lunch breaks, and work rules.[7] The court emphasized, however, that working conditions do not include "managerial decisions, which lie at the core of entrepreneurial control."[8]

Turning to the Nova Services case, the court determined that the employees who were fired and those who quit were not engaged in protected activities related to working conditions. Rather, said the court, the employees merely objected to their executive director. For example, in their letter to the board of directors, the employees stated that there are "six widely accepted key areas of responsibility for CEOs of non-profit corporations" and the employees stated their belief that Brennan was deficient in each of these areas.[9]

The court noted the limits of the rights of employees in Washington to work collectively to improve working conditions:

> [T]hese rights do not extend so far as to supersede the employer's right to hire and retain the leadership of a company and surely do not block an employee's ability to quit. Nova did not violate a clear public policy when it fired two employees based on an undeniable conflict of personalities and stated inability to work within the company. Nor did Nova violate a clear public policy when it accepted the resignation of the other six employees who would not work for Nova's choice of an executive director.[10]

Concurring opinions

Two justices wrote separate concurring opinions, agreeing with the outcome of the plurality, but for differing reasons.

Associate Chief Justice Charles Johnson criticized the plurality for confusing the "concerted activities" cause of action with the tort of discharge in violation of public policy. Justice Johnson pointed out that the Washington Supreme Court previously declined to analyze these issues together in a 1995 case.[11] There the court observed that discharge that violates the concerted activities statute also gives rise to a tort of discharge in violation of public policy. Thus, a party must prove that RCW 49.32.020 was violated *before* he or she can argue a violation of public policy. Justice Johnson wrote the Nova employees were not acting to improve working conditions, but were merely attempting to remove a person they considered a bad boss. He concluded that because the employees' activities "cannot be considered 'concerted activities' for purposes of RCW 49.32.020, their claims against Nova Services must fail...."[12]

Justice Barbara Madsen, also concurring, did not reach the issue of whether the employees of Nova Services were actually engaged in protected concerted activities.[13] The tort of wrongful discharge in violation of public policy requires the plaintiff to identify the public policy that was violated by his or her discharge. While the former Nova Services employees argued wrongful discharge, Justice Madsen noted they failed to identify any public policy that had been offended, only raising "concerted activities" on appeal. Instead, they focused on the executive director's management of the organization, prompting Justice Madsen to wryly note: "[I]t appears the public policy urged in plaintiffs' first claim is a broad public policy favoring efficient management of charitable organizations."[14] As the issue of whether there was a violation of the employees' right to engage in concerted activities was not before the trial court, Justice Madsen agreed with the lower court's finding of summary judgment in Nova's favor.

Dissent argues for broader exception to terminable at-will doctrine

Justice Susan Owens, with three other members of the court, dissented. The dissent agreed with the lead opinion that RCW 49.32.020 creates a right protected under the public policy exception to the state's rule of at-will employment, but took issue with the majority's narrow characterization of what behavior constitutes concerted activity.[15]

Justice Owens wrote that concerted activity simply means that employees act together to improve working conditions, and that the statute created broad protections for actions of nonunion employees, including protection for "employee protests over management personnel decisions... when the decision relates to the employee's working conditions."[16] She wrote that "working conditions" should be construed broadly to include objecting to a manager's delegation, communication, hiring of staff, and financial management. Additionally, a director's professional competence and management capacity are "proper employee concerns,"[17] along with concerted employee activity seeking the reinstatement of a co-worker. The dissent argued that the case presented genuine questions of material fact and should be remanded to trial court for further proceedings.

The employees' arguments prompted Louis Rukavina, attorney for Nova Services, to observe during oral argument: "If their position were adopted, this state would become the most hostile to business state in the country and private management would be reduced to judicially supervised employee referendum."

The Washington Supreme Court's decision was applauded by the *Seattle Times*: "The court reaffirmed an employer's right to dismiss an employee—a right that is important to running a productive business and a high-wage economy."[18]

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Endnotes

1 Briggs v. Nova Services, 213 P.3d 910 (Wash. 2009).

2 *Id.* at 913.

3 *Id.*

4 Briggs v. Nova Services, 135 Wash.App. 955, 147 P.3d 616 (2006).

5 *Briggs*, 213 P.3d at 914 (citing Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377 (1996)).

6 RCW 49.32.020. This statute is modeled on the Norris-LaGuardia Act, 29 U.S.C. § 102 (1932).

7 *Briggs*, 213 P.3d at 915.

8 *Id.*

9 *Id.*

10 *Id.* at 916.

11 Bravo v. Dolsen Cos., 125 Wash.2d 745, 888 P.2d 147 (1995).

12 *Briggs*, 213 P.3d at 917 (C. Johnson, J., concurring).

13 *Id.* at 918 (Madsen, J., concurring).

14 *Id.* at 920.

15 *Id.* at 922 (Owens, J., dissenting).

16 *Id.* at 926.

17 *Id.* at 925.

18 Editorial, "Washington state Supreme Court upholds employer's right to fire," *Seattle Times*, August 28, 2009.

After Change in Personnel, Michigan Supreme Court Reverses Itself in Major Insurance Decision

Continued from page 6...

per hour, which the MCCA deemed to be the reasonable cost for care. It made this determination after considering that while USF&G was making full payment under the consent decree to "Medical Management," a company created by Mr. Migdal's father, Medical Management in turn only paid the nurses actually providing care between $21 and $25 per hour. Even with the cost of benefits for the nurses, Mr. Migdal's company was generating profits of approximately $200,000 in 2003.[10]

In *USF&G I*, the Michigan Supreme Court addressed two questions pertaining to the MCCA's statute: first, whether the MCCA was even allowed to review member insurer claims, and second, the extent of review, if permissible (more precisely, whether application of a "reasonableness" standard was permitted).[11]

Writing for a four justice majority, Justice Robert Young in *USF&G I* began his analysis by incorporating the statute's definition of "ultimate loss" into the provision mandating indemnification, explaining that the statute provides that "[the MCCA] shall provide and each member shall accept indemnification for 100% of the amount of [the actual loss amounts that a member is obligated to pay and that are paid or payable by the member] sustained under personal protection insurance coverages in excess of" the applicable threshold.[12]

From this, the court concluded that there are three requirements for indemnification, with the MCCA's obligation to indemnify arising only if all three requirements are met. Specifically, to be reimbursable, (1) the claim must be for "actual loss amounts that a member is obligated to pay and that are paid or payable by the member"; (2) the claim must be "sustained under personal protection insurance coverages"; and (3) the loss must exceed the statutory threshold.[13] Because the Legislature determined that only certain claims are reimbursable, the court reasoned that having the MCCA review claims to ensure they meet the statutory requirement was "necessary or proper to accomplish the MCCA's purposes" and was also "not inconsistent" with the MCCA's statute.[14] Further, because the MCCA's plan of operation has always provided that reimbursements follow verification by the MCCA "of the propriety and amount of the payments made and the member's entitlement to reimbursement," review of claims by the MCCA would in no way be inconsistent with the plan of operation.[15] In other words, review of claims by the MCCA is encompassed by the statute's broad "catch-all" grant of power to the MCCA.[16]

Having concluded that the MCCA's statute allowed for review of member claims, and that prior Michigan Supreme Court precedent had also implicitly recognized this power, the court expressly determined that the MCCA may review claims of member insurers and reject those that fail to meet the requirements for reimbursement.[17]

The court next turned to the question of whether the MCCA is permitted to review claims for reasonableness and refuse to indemnify what it deems unreasonable charges. In contesting this point, the plaintiffs in the case pointed to the language of the MCCA's statute providing that "100%" of loss due to a member insurer's obligation must be covered, and also pointed out that the statutory section concerning indemnification nowhere uses the term "reasonable."[18]

The court, however, explained that the compulsory coverage mandated by Michigan's no-fault act defines personal protection insurance benefits as "allowable expenses consisting of all *reasonable* charges incurred for *reasonably necessary* products, services and accommodations for an injured person's care recovery, or rehabilitation."[19] (Emphasis added.) From this, the court determined that coverage for reasonable charges is the statutory minimum, and that where an insurer provides this minimum coverage, the MCCA's power to review whether claims by an insurer meet the test for indemnification (actual loss a member is *obligated* to pay) necessarily includes determining if charges are reasonable.[20]

Recognizing that the MCCA must indemnify members for losses they are obligated to pay, and that members may choose to offer more than the minimum required coverage, the court did not simply conclude that the MCCA in all instances could apply a reasonableness test to decide whether to reimburse an insurer for a particular claim. Rather, the court held that MCCA has the authority to refuse to indemnify unreasonable charges if the underlying policy provides coverage only for "reasonable charges." "If the policy provides broader coverage, the MCCA must review for compliance with

the broader coverage and indemnify claims within that coverage, but it may reject claims in excess of that coverage."[21] Accordingly, the court remanded the case to the trial court to examine the MCCA's decision in light of the USF&G policy at issue.[22]

Writing for the three-member dissenting minority, Justice Elizabeth Weaver began her analysis in a markedly different place, starting from the proposition that in undertaking the interpretation of statutes, "what is 'plain and unambiguous' often depends on one's frame of reference" and that the "frame of reference" for interpreting plain language "shares a deep nexus with the intent of the Legislature."[23] The dissent then concluded that the term "coverages" in the provision governing what claims must be reimbursed was distinct from the definition of "benefits" and its reasonableness component.[24] Instead, the dissent opined that the term "coverages" should be broadly defined, and that it should include all contractual liability of an insurer—not simply the liability under the terms of the policy, but any liability later acceded to under a consent judgment or other settlement.[25] Consequently, when the statute requires indemnification for "ultimate loss sustained under personal protection insurance coverages", this encompasses any amount the insurer has agreed to pay, regardless of whether the underlying policy includes a reasonableness component.[26]

USF&G II

Three days after the Court rendered its decision in *USF&G I*, the composition of the court changed, with former Chief Justice Cliff Taylor having been replaced by new Justice Diane Hathaway. A motion for rehearing was filed in the case, and the court granted it. On July 21, 2009, ten days before the close of the court's term and without any further briefing or argument on the merits of the case, the court issued a new decision. In *USF&G II*, Justice Weaver authored a new four-justice majority opinion. This opinion was virtually word-for-word a repetition of her earlier dissent, augmented with only a few mostly footnoted replies to the dissenting opinions in *USF&G II*.

In his dissent to *USF&G II*, Justice Young argued that rehearing in the case should not have been granted, citing all the way back to 1879 and 1886 Michigan Supreme Court decisions for the consistently upheld principle that "a motion for rehearing should be denied unless a party has raised an issue of fact or law that was not previously considered but which may affect the outcome."[27] In response to Justice Weaver's contention that Michigan's Court Rules provide that rehearing can be granted simply if the court believes that a prior opinion was erroneous, he pointed out that the actual standard in the rules is that rehearing can be granted based on a "palpable error *by which the court and the parties have been misled*."[28] Given that no such argument was advanced here, that no new arguments had been raised by the parties and that no new rationale appeared in the new majority's opinion, Justice Young concluded that rehearing was improperly granted—solely because of the change in composition of the court.[29]

With regard to the substance of the new majority opinion, the dissent acknowledged that the terms "coverages" and "benefits" in the statute are not identical. The dissent, however, reasoned that this was immaterial for purposes of the analysis of what amounts must be indemnified under the statute. In the dissent's view, even the majority's definitions of the term "coverages" made clear that the term refers only to the scope of the underlying policy and not to separate later created agreements in the form of the consent judgment providing for payments far beyond an original policy tied to reasonable benefits.[30]

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Endnotes

1 United States Fidelity Insurance and Guaranty Co. v. Michigan Catastrophic Claims Ass'n, 484 Mich. 1, 13 (2009) (Young, J., dissenting).

2 759 N.W. 2d 154 (Mich. 2008).

3 484 Mich. 1 (2009).

4 *USF&G I* at 424; MCL 500.3104.

5 MCL 500.3104(2).

6 MCL 500.3104(25)(c).

7 MCL 500.3104(22).

8 MCL 500.3104(8)(g).

9 *USF&G I* at 418.

10 *Id.* Reportedly, by 2009, the hourly costs had risen to $89 per hour and the profits of the company created by Mr. Migdal's father were estimated by the MCCA at approximately $500,000. *High Court's Insurance Ruling Will Cost Drivers, Critics Say*, Lansing State Journal, August 17, 2009.

11 *USF&G I* at 423.

12 *USF&G I* at 425.

13 *Id.*

14 *Id.*

15 *Id.*

16 *See* MCL 500.3014(8)(g).

17 *USF&G I* at 427-28.

18 *Id.* at 428.

19 *Id.* at 430.

20 *Id.*

21 *Id.* at 432.

22 *Id.*

23 *Id* at 445 (Weaver, J., dissenting).

24 *Id* at 446.

25 *Id.* at 450.

26 *Id.*

27 *USF&G II* at 10.

28 *Id.* at 11.

29 *Id.* at 10. Justice Young also noted that new Justice Diane Hathaway had run on a platform of favoring "middle-class families" and opposing "big insurance companies and corporate special interests." *Id.* at 13 n.32.

30 *Id.* at 12.

Alabama Courts Will Not Second-Guess Legislature's Voting Procedures

Continued from page 5...

2009, the trial court granted summary judgment to the plaintiffs.

Separation Of Powers And Strict Constitutional Construction

On Jefferson County's appeal from the summary judgment, the Supreme Court of Alabama addressed six issues: (1) subject-matter jurisdiction of courts to review legislative procedures; (2) whether a court usurps legislative powers if it looks beyond the plain meaning of a statute; (3) whether constitutional interpretations should ever be "prospective;" (4) whether the judgment in *Richards* (which challenged the 1967 act on Equal Protection grounds) precluded litigation of the 1999 repealer's validity; (5) whether repeal of the tax violated the federal and state Contract Clauses (by impairing bond obligations); and (6) whether 99-406 (held unconstitutional for notice defects in *Triantos*) was *in pari materia* with 99-669 (the repealer) such that the unconstitutionality of 99-406 infected and invalidated 99-669 as well.

The court dispensed quickly with the res judicata argument, holding in essence that the *Richards* class was challenging the validity of the 1967 act, while the *Edwards* class sought a determination that the 1999 repealer was valid. Thus, the *Richards* judgment did not bar the *Edwards* claim.[12]

The Contract Clause and "*pari materia*" arguments failed on procedural grounds, the former because the county raised the argument for the first time on appeal, the latter because it failed to support the argument with citation to authority in its principal brief.

On the primary issue—whether the court could second-guess the Legislature on voting procedures—the court carefully distinguished between decisions regarding validity of the procedures themselves and decisions concerning whether the procedures had actually been followed. In discussing its prior holding on this point (in the *Birmingham-Jefferson Civic Center Auth.* case), the court noted that in the earlier case, "the Court did not have facts before it indicating that a majority was not attained under any rule or procedure utilized by the legislature."[13] Without deciding a case not before it, the court gave strong indications that it would not consider itself to be without

jurisdiction if asked to review whether the Legislature had followed its own procedures; i.e., if confronted with a situation in which simple math showed that, even under the Legislature's practice of measuring a majority based on votes cast, no majority was obtained.[14]

Regarding the first scenario, however, the court was clear in holding that when the Jefferson County Circuit Court purported to interpret the supermajority requirement applicable to the 1999 repealer to require "yea" votes from two-thirds of those present and constituting a quorum as opposed to two-thirds of those actually voting, it had impermissibly transgressed the boundary between judicial and legislative functions such that its judgment was void for lack of subject-matter jurisdiction.[15]

On the statutory construction issue, the court adopted a similarly strict view of separation-of-powers. The county argued that the 1999 repealer should be interpreted to mean something other than what it said[16] because the Legislature passed the act only to coerce Jefferson County into adopting a tax ordinance under its alternative legislative authority (99-406) and thus had no intent to actually deprive the county of taxing authority. The court rejected this, explaining that if a court looks beyond the plain meaning of legislative language in any situation other than one in which there is "no rational way to interpret the words as stated" it would be usurping the legislative function in violation of the separation-of-powers doctrine.[17]

And finally, on the issue of whether the court's 2005 holding regarding the inability of courts to second-guess legislative voting rules should be deemed "prospective," the Alabama Court turned to Justice Scalia for inspiration, adopting his reasoning in his concurrence in *American Trucking Ass'ns, Inc. v. Smith*;[18] i.e., that because the Constitution does not change, and because the Constitution does not therefore conform to judicial decisions but rather judicial decisions should conform to the Constitution, "prospective only" application of constitutional interpretations "does not make sense."[19]

On the basis of the above, the court ruled that the 1999 act of the legislature validly repealed the 1967 grant of authority to Jefferson County to impose an occupational tax.

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Endnotes

1 ____ So. 2d ____, Docket no. 1080496 (available on Westlaw ® at 2009 WL 2596483) (Ala. Aug. 25, 2009), *reh'g denied*, ____ So. 2d ____, Docket no. 1080496 (Ala. Sept. 18, 2009).

2 All six participating justices concurred. Three others recused. All three are or were residents of Jefferson County, and one of the three (Justice Woodall) decided two other cases that affected the *Edwards* outcome while he was a trial court judge in Jefferson County.

3 *Edwards*, 2009 WL 2596483 at *1.

4 Styled in the Circuit Court of Jefferson County as *Richards v. Jefferson County*, this action was later appealed sub nom. *Jefferson County v. Richards*, 805 So. 2d 690 (Ala. 2001).

5 Triantos v. Jefferson County, consolidated on appeal into *Jefferson County v. Richards*, *supra* n.4.

6 Jefferson County Employees Association v. Jefferson County.

7 Because 99-669 was passed in a special legislative session called by the Governor for another purpose, it was subject to a two-thirds supermajority requirement under the Alabama Constitution. *See Edwards*, 2009 WL 2596483 at *3.

8 Richards v. Izzi.

9 *Richards* and *Triantos* were consolidated as *Jefferson County v. Richards*, *supra* n.4; *Izzi* was styled *Richards v. Izzi*, 819 So. 2d 25 (Ala. 2001).

10 912 So. 2d 204 (Ala. 2005).

11 Ala. Const. art. I, § 43 states in pertinent part that "the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

12 *Edwards*, 2009 WL 2596483 at *7.

13 *Id.* at *9.

14 *Id*. at *10.

15 *Id*. at *10-11.

16 99-669 stated, "Act 406 of the 1967 Regular Sessions (Acts 1967, p. 1031), relating to a license or privilege tax upon person engaging in certain business' in Jefferson County, is repealed."

17 *Edwards*, 2009 WL 2596483 at *12.

18 496 U.S. 167 (1990)

19 *Edwards*, 2009 WL 2596483 at *12 (quoting *American Trucking*, 496 U.S. at 201 (Scalia, J., concurring)).

Georgia Supreme Court and Vaccine Claims

Continued from page 7...

history does not mean that subsection (b)(1) preempts all design defect claims.

The Georgia Supreme Court also pointed to the legislative history for the 1987 amendments to the Act, subsequent legislative history that the Georgia Court of Appeals had declined to consider. That report, prepared by the same Committee that prepared the 1986 Report, states:

> [T]he codification of Comment (k) of The Restatement (Second) of Torts was not intended to decide as a matter of law the circumstances in which a vaccine should be deemed unavoidably unsafe. The Committee stresses that there should be no misunderstanding that the Act undertook to decide as a matter of law whether vaccines were unavoidably unsafe or not. This question is left to the courts to determine in accordance with applicable law.[19]

The Georgia Supreme Court saw this language as "strikingly clear and emphatic" confirmation of its conclusion that subsection (b)(1) does not preempt all design defect claims.[20] It also noted that, in 1987, an amendment that would have made it clear "that a manufacturer's failure to develop [a] safer vaccine was not grounds for liability was rejected by the Committee during its original consideration of the Act."[21]

The Georgia Supreme Court concluded by rejecting a reading of subsection (b)(1) that would "have the perverse effect of granting complete [tort] immunity from design defect liability to an entire industry..."[22] It held that subsection (b)(1) provides only that a vaccine manufacturer "cannot be held liable for defective design if it is determined, on a case-by-case basis, that the particular vaccine was unavoidably unsafe."[23]

The court said that its rejection of industry-wide immunity would stand "until the Supreme Court of the United States has spoken on the issue."[24] A petition for certiorari is pending, and, on June 8, 2009, the Court asked the Solicitor General for its views. To date, the Solicitor General has not responded, and the Court's next term began on October 5, 2009.

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Endnotes

1 668 S.E.2d 236 (Ga. 2008).

2 *Id.* at 237-8.

3 *See* Bruesewitz v. Wyeth, Inc., 561 F. 3d 233 (3d Cir. 2009); Sykes v. Glaxo-SmithKline, 484 F. Supp. 2d 289 (E.D. Pa. 2007); Blackmon v. American Home Products Corp., 328 F. Supp. 2d 659 (S.D. Tex. 2004); Militrano v. Lederle Laboratories, 3 Misc. 3d 523, 769 N.Y.S. 2d 839 (2003), 26 A.D. 3d 475, 810 N.Y.S. 2d 506 (2006).

4 42 U.S.C. §§ 300aa-11, 12(f), 21.

5 42 U.S.C. § 300aa-22(b)(1).

6 Militrano v. Lederle Laboratories, 769 N.Y.S. 2d at 843-44.

7 Restatement (Second) of Torts § 402A cmt. K.

8 668 S.E.2d at 239.

9 *Id.* (quoting Bryant v. Hoffman-La Roche, 585 S.E.2d 723 (Ga. Ct. App. 2003)).

10 *Id.* at 240.

11 *Id.*

12 *Id.*

13 H. Rep. 99-908, at 26, 1986 U.S.C.C.A.N. at 6367.

14 *Id.*

15 *Id.*

16 *Id.* at 241.

17 *Id.*

18 *Id.*

19 668 S.E.2d at 241 (quoting H.R. Rep. 100-391(I), at 691, as reprinted in 1987 U.S.C.C.A.N. 2313-1, 2313-365).

20 668 S.E.2d at 241.

21 *Id.* (quoting H. Rep. 100-391(I) at 691, 1987 U.S.C.C.A.N. at 2313-365).

22 *Id.* at 243 (quoting Doyle v. Volkswagenwerk Aktiengesellschaft, 481 S.E.2d 518 (Ga. 1997), itself quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 498 (IV)(1996)).

23 668 S.E.2d at 242.

24 *Id.* at 243.

New Hampshire Family Court Orders Girl to Public School over Home Schooling Preference of Mother

Continued from front cover...

Amanda had a number of absences resulting in unfinished projects.

In February 2009, the *Guardian ad Litem* recommended Amanda receive counseling. She was then enrolled with a counselor after a pleading in which Ms. Voydatch sought modification of the parenting schedule, alleging that Amanda was "experiencing "extreme difficulty"…[and] "Amanda's emotional and mental health have been negatively impacted…"" by the increased time with Mr. Kurowski.[8]

The counselor determined that Amanda "appeared to reflect her mother's rigidity on issues of religion and faith. Amanda challenged the counselor to say what the counselor believed, and she prepared some highlighted biblical *[sic]* text for the counselor to read over and discuss, and she was visibly upset when the counselor (purposely) did not complete the assignment."[9] The court determined that the counselor was unable to conclude that Amanda was experiencing extreme difficulty or that extended contact with her father was placing her mental and emotional health at risk. The counselor concluded that frequent continued contact with Mr. Kurowski's similarly-aged daughter would benefit Amanda.

The counselor also determined that Amanda would be best served by exposure to differing points of view. The counselor's assessment was that Amanda's interests, emotional and intellectual development, would be best served in a public school setting where group learning was present, as would be social interaction with similarly-aged children.

The *Guardian ad Litem* highlighted her concerns that Amanda's relationship with her father suffers due to Amanda's religious beliefs. Amanda expressed her belief to the counselor that her father's refusal to "adopt her religious beliefs and his choice instead to spend eternity away from her proves that he does not love her as much as he says he does."[10] Mr. Kurowski testified that although he and Amanda discuss religion, he believes that exposing Amanda to other points of view will decrease Amanda's "rigid adherence to her mother's religious beliefs, and increase her ability to get along with others and to function in a world which requires some element of independent thinking and tolerance for different points of view."[11]

In response, Ms. Voydatch acknowledges that she has strong religious beliefs and that she shares those beliefs with Amanda. However, Ms. Voydatch denies that she pushed Amanda to the same belief system. Ms. Voydatch testified that Amanda is upset with the parenting schedule because Mr. Kurowski "bombards [Amanda] constantly" about her faith and that Amanda only reveals her true feelings Ms. Voydatch, who is "the trusted adult" in Amanda's life.[12]

The court determined that the evidence from the *Guardian ad Litem*, the counselor, and Amanda's teachers does not support a conclusion that Amanda is a deeply troubled child at risk of emotional and mental damage from exposure to her father. The court found that the evidence in this matter supported a contrary conclusion that Amanda is generally well-liked, socially interactive, academically promising, and is at or superior to grade level. The court continued that:

> [d]espite Ms. Voydatch's insistence that Amanda's choice to share her mother's religious beliefs is a free choice, it would be remarkable if a ten year old child who spends her school time with her mother and the vast majority of all of her other time with her mother would seriously consider adopting any other religious point of view. Amanda's vigorous defense of her religious beliefs to the counselor suggests strongly that she has not had the opportunity to seriously consider any other point of view.[13]

The court explained that it "is extremely reluctant" to make a determination about Amanda's education.[14] In then making the determination to send Amanda to public school, the court explained that it is "guided by the premise that education is by its nature an exploration and examination of new things" and children require "academic, social, cultural, and physical interaction with a variety of experiences, people, concepts, and surroundings in order to grow into an adult who can make intelligent decisions about how to achieve a productive and satisfying life."[15] The court noted that "it is clear that the home schooling Ms. Voydatch has provided has more than kept up with the academic requirements of the Meredith public school system."[16] But the court determined the issue was whether public school will provide Amanda "an increased opportunity for group learning, group interaction, social problem solving, and exposure to a variety of points of view."[17] The court held that by a preponderance of the evidence, "it would be in Amanda's best interest to attend public school."[18]

The court cautioned in *dicta* following its holding that it is "mindful of its obligation not to consider the specific tenets of any religious system unless there is evidence that those tenets have been applied in such a way as to cause actual harm to the child" and determined that this evidence did not exist.[19] Thus, the court declined "to impose any restrictions on either party's ability to provide Amanda with religious training or to share with Amanda their own religious beliefs."[20]

Amanda Voydatch was then ordered by Judge Lucinda Sadler to attend public school starting with the 2009-2010 school year.

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Endnotes

1 The Alliance Defense Fund, http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=5050.

2 No. 2006-M-669.

3 *In re* Martin Kurowski and Brenda (Kurowski) Voydatch, No. 2006-M-669, 1 (N.H. Fam. Div. July 14, 2009).

4 *Id.* at 2.

5 *Id.* at 2-3.

6 *Id.* at 4.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.* at 5.

11 *Id.*

12 *Id.* at 6.

13 *Id.*

14 *Id.* at 7.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* at 7-8.

20 *Id.* at 8.

Missouri Court Upholds State School Funding Formula

Continued from front cover...

Education, the Missouri Commissioner of Education, the Commissioner of Administration, and Missouri's Attorney General.[2]

In 2005, while Plaintiffs' case was ongoing, the Missouri legislature amended the school funding formula, under then-existing Senate Bill 380 (SB380), in an attempt to remedy inequities resulting from school funding that is financed in part by state funds and in part by local funds.[3] Senate Bill No. 287 (2005) (SB287) is codified in Chapter 163, RSMo Supp. 2008[4] and provides state aid to Missouri's public schools utilizing a calculation that determines the amount of state funding needed by subtracting "local effort"[5] from "subtotal of dollars needed."[6] The formula reflects the idea that "schools with greater 'local effort' contributions require less state financial assistance to meet the costs of providing a free public education."[7] The legislature planned to phase in SB287 over seven years, while the old formula was being phased out.[8]

At trial, Plaintiffs alleged that Missouri's school funding formula used incorrectly calculated tax assessment data. This faulty data, in turn, rendered the "local effort" contributions incorrect and directly impacted the adequacy and equity of the education provided in Missouri's schools.[9] Plaintiffs based their argument on a critical study of Missouri's school funding formula, *Disparity of Assessment Results: Why Missouri's School Funding Formula Doesn't Add Up*, which was conducted at the Public Policy Research Center (PPRC) at the University of Missouri-St. Louis and was published in October 2006.[10] In addition to information from the study, Plaintiffs provided an expert on education finance who testified that Missouri's system was "one of the most disparate systems in existence in the United States" because it placed a "greater financial burden on local school districts by increasing their responsibility for funding public schools."[11] In response, the State of Missouri argued that the formula was constitutional and that it incorporated appropriate tax assessment data.[12]

The trial court agreed with Defendants that the constitution does not require the State to provide funding beyond 25 percent of the State's revenues, although the legislature may choose to allocate more funding to schools.[13] In addition, the trial court held

that Plaintiffs "had not shown that SB287 violated the Missouri Constitution's Hancock Amendment[14] or that it provided the remedy sought."[15] Finally, the trial court dismissed the assessment calculation issues on standing and jurisdictional grounds and rejected Plaintiffs' claims that the legislature wrongly relied on the State Tax Commission's 2004 assessment data.[16]

Plaintiffs appealed the trial court's decisions, raising four challenges to Missouri's school funding formula: (1) the formula "inadequately" funds schools in violation of Article IX of the Missouri Constitution; (2) the formula violates equal protection; (3) the formula violates Missouri's Hancock Amendment; and (4) the legislature violated Article X of the Missouri Constitution and certain statutes by incorporating inaccurate assessment figures into the formula.[17]

First, the Missouri Supreme Court held that the school funding formula does not violate Article IX of the Missouri Constitution. Plaintiffs argued that SB287's failure to provide school funding beyond that granted by section 3(b) violates Missouri Constitution Article IX, Section 1(a), because the SB287 school funding formula fails to "adequately" provide the "general diffusion of knowledge and intelligence" mandated by Section 1(a).[18] The court held that Section 1(a) provides no specific directive or standard for how the State must accomplish the goal of "diffusion of knowledge."[19] Plaintiffs' attempts to "read a separate funding requirement into section 1(a) that would require the legislature to provide 'adequate' education funding in excess of the 25 percent requirement contained in section 3(b)." This, the court said, does not exist.[20] The court found that "[r]eading a free-standing obligation to provide certain school funding into the introductory language of section 1(a) would be contrary to the specific flexibility afforded the legislature in Article IX, Section 3(b)."[21] Section 3(b) provides the legislature a flexible framework for funding Missouri's public schools, said the court, and it is this section that provides the constitutional parameters for funding Missouri's public schools.[22] The court concluded that the Plaintiffs' claims that SB287's funding formula is unconstitutional because it fails to provide funding required by Article IX, Section 1(a) are without merit and not justiciable because "[t]he judiciary cannot invade the legislative branch's province to fund schools beyond the requirements of section 3(b)."[23]

Second, the court held that the school funding formula does not violate equal protection because SB287's funding formula satisfies the highly deferential rational basis standard in that funding free public schools in Missouri is clearly a legitimate end.[24] Education is not a fundamental right under the United States Constitution's equal protection provision, and Missouri courts have followed the federal approach in defining fundamental rights. Therefore, the Missouri Supreme Court reviewed the equal protection claim under a rational basis review.[25] The Missouri Constitution does not forbid funding schools "in a way that envisions a combination of state funds and local funds, with the state funds going disproportionately to those schools with fewer local funds," and "no mandate requires that per-pupil expenditures be equal."[26]

Third, the court held that the school funding formula does not violate the Hancock Amendment because the purpose of the Hancock Amendment is "to limit government expenditures" and the relief that Plaintiffs request is "a declaratory judgment that results in increased funding."[27] According to the court, "[t]his remedy is unavailable under the Hancock Amendment... [b]ecause Plaintiffs expressly disaffirm that they seek to be released from any mandate."[28] As a result, their Hancock Amendment challenge "necessarily fails."[29]

Finally, the court held that the legislature did not violate Article X of the Missouri Constitution and certain statutes by incorporating inaccurate assessment figures into the formula. The duties of the commission are outlined by the constitutional and statutory provisions cited by Plaintiffs.[30] The allegations by Plaintiffs were not that the statute itself imposes non-uniform taxes, but that the legislature relied on the Commission's erroneous property assessment figures from 2004.[31] The court noted that the Commission "was never joined as a necessary party to this case, which prevents evaluation of its actions."[32] The role of the court is "limited to deciding the issues before it and not making advisory opinions," therefore this question was left "for another day."[33]

In addition, the court held that Plaintiffs "cannot show that the constitutional provisions they invoke restrict the legislature's discretion in shaping the school funding formula." The only claim left to Plaintiffs is "to argue that the legislature acted irrationally or arbitrarily when relying on the Commission's 2004 assessment data."[34] The court held that there is no record to find that the legislature's reliance on the Commission's 2004 assessment data was irrational.[35] The PPRC report was created after the passage of SB287, thus the "legislature did not have this information available when debating revisions to the school funding formula in 2005."[36] It was not irrational for the legislature to use the Commission's 2004 data, even if "imperfect," because

"property assessment is not an exact science."[37] The 2005 amendments incorporated the most recent data. The reliance by the legislature on the Commission's report "was a rational attempt toward the legitimate end of funding Missouri's free public schools."[38] The court acknowledged the importance of judicial review of legislative enactments, but noted that "[a]ssessing the wisdom of the legislature's reliance on the Commission's data would invade the legislature's deliberative process and violate the separation of powers between the judicial and legislative branches of government."[39]

Finally, the Court found "no basis to declare the decision to phase in SB287 over seven years irrational" nor did they find "the act of freezing in the 2004 data irrational."[40] The court found that the legislature "may have wished to promote continuity between the old and new funding systems and their actions were consistent with the historical practice of revisiting the school funding formula approximately every 10 years."[41]

The dissent agreed with the primary opinion that the "inquiry here should be limited to specific constitutional provisions" and that the "Missouri Constitution does not mandate equality among school districts."[42] However, it parted from the "majority's refusal to provide a remedy for the violation of specific constitutional requirements as to property tax assessments."[43] The constitutional flaws in the 2005 revision, according to the dissent, have resulted in "constitutionally inadequate" adequacy of funding.[44] The flaw is founded in the General Assembly's definition of "adequate funding," which has disparate results between property-rich districts and their property-poor counterparts.[45] The dissent analogized the current funding system to a racecourse, where some districts are forced to run uphill; in such a situation, the only remedy must be determined by the judiciary.[46] By "failing in its role of enforcing specific constitutional provisions," the dissent stated that the court is perpetuating the harm caused by such violations of the Missouri Constitution.[47]

Ultimately, the court found no error in the trial court's findings upholding the constitutional validity of SB287's school funding formula.[48]

** Carolyn Hamilton is a third year law student at the University of Missouri in Columbia. She is the Chair of the Board of Advocates and was the President of the Federalist Society during her 2L year.*

Endnotes

1 Comm. for Educ. Equal. v. State, 2009 Mo. LEXIS 386, 2, 3 (Mo. Sept. 1, 2009).

2 *Id*. at 2.

3 *Id*. at 4.

4 All statutory references in this opinion were made to RSMo Supp. 2008, unless otherwise indicated.

5 "Local effort" is calculated according to section 163.011 (10).

6 *Id.* "Subtotal of dollars needed" is calculated using the formula: weighted average daily attendance (accounts for the average number of students and student needs) X state adequacy target (per-pupil spending target defined and calculated according to section 163.011(18); for 2007 & 2008, the target was set at $6,117) X the dollar value modifier (adjusts for variations in costs across the state).

7 *Id*. at 4-5.

8 *Id*.

9 *Id*. at 2.

10 *Id*. at 6.

11 *Id.*

12 *Id*. at 2.

13 *Id.*

14 Audit Report, REVIEW OF ARTICLE X, SECTIONS 16 THROUGH 24, CONSTITUTION OF MISSOURI; Report No. 2000-18, March 22, 2000 (On November 4, 1980, the voters of Missouri passed Constitutional Amendment No. 5, which added Article X, Sections 16 through 24 to the Constitution of Missouri. The amendment, commonly referred to as the Hancock Amendment, requires that no greater portion of Missourians' personal income be used in any future year to fund state government than was the case in fiscal year 1981, except as authorized by a vote of the people).

15 *Id*.

16 *Id*.

17 *Id*. at 7-8.

18 *Id*. at 15.

19 *Id*.

20 *Id*.

21 *Id*.

22 *Id*. at 16-17.

23 *Id*.

24 *Id*. at 20.

25 *Id*. at 18-19, 20; *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *In re* Marriage of Woodson, 92 S.W.3d 780, 783 (Mo. banc 2003).

26 *Id*. at 20.

27 *Id*. at 21, 22.

28 *Id.* at 22.

29 *Id*.

30 *Id*. at 24.

31 *Id*.

32 *Id*.

33 *Id*. at 25.

34 *Id*.

35 *Id*. at 26.

36 *Id*.

37 *Id*.

38 *Id*. at 27.

39 *Id*.

40 *Id*.

41 *Id*.

42 *Community for Education Quality v. Missouri* at 2.

43 *Id.* at 3.

44 *Id.* at 34.

45 *Id* at 19.

46 *Id.* at 34.

47 *Id.* at 34-35.

48 *Id*. at 28.

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