STATE COURT
DocketWatch®

FALL 2008

Supreme Court of Missouri Expands Tort Liability

by Jennifer Wolsing

Strait v. Treasurer

The Missouri Supreme Court recently expanded on its 2007 holding in *Schoemehl v. Treasurer of the State of Missouri* that the surviving dependents of a dead employee can continue to collect workers' compensation, despite Missouri statutory law stating that benefits should be paid only "during the continuance of such disability for the lifetime of the employee..." In 2008, the Missouri General Assembly abrogated *Schoemehl* to clarify that permanent total disability benefits must expire upon the injured employee's unrelated death.

On July 15, 2008, Chief Justice Stith, writing for the court, held in *Strait v. Treasurer of Missouri* that Missouri must provide disability benefits to deceased employees' dependents, even if the dead employee's claim is still pending at the time of the employee's death.

Rosalyn Strait was injured on the job in August 2002. On January 12, 2007, the Labor and Industrial Relations Commission ("Commission") awarded Ms. Strait permanent disability benefits for life. On January 27, 2007, Ms. Strait died of injuries unrelated to her work accident. The Commission dismissed Ms. Strait's children's claim to Ms. Strait's disability benefits for "lack of jurisdiction."

On appeal, the Supreme Court held that because the Strait children's case was still pending when *Schoemehl* issued, the *Schoemehl* decision applied to the Strait children's case. The court reversed the Commission's decision and remanded the case to grant benefits to the Strait children as of the date of Ms. Strait's death.

In dissent, Judge Stephen Limbaugh explains that *Schoemehl* holds that the disability payments are not tied to the employee's death, but continue to the employee's dependents, who are then themselves considered the employees. "But if that is true," Limbaugh reasoned, "there is no basis to tie the payments in this case to the fact that the employee died while the case was still pending."

Jarrett v. Jones

On July 29, 2008, Patricia Breckinridge, writing for the Missouri Supreme Court, held that an automobile driver negligently inflicted emotional distress on a fellow motorist when the unconscious driver allowed the other

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Challenging Tennessee's Unauthorized Substance Tax

by Justin Owen

Tennessee's Unauthorized Substances Tax is currently facing its first major constitutional challenge. Since 2005, the Tennessee Department of Revenue ("Department") has attempted to collect an excise tax on all "unauthorized substances," defined by state law as controlled substances, low-street-value drugs, and certain illicit alcoholic beverages.[1] The Tennessee Supreme Court recently heard *Waters v. Chumley* to determine the constitutionality of this drug tax, as it is commonly known, and should issue its opinion in the coming weeks.[2]

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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

Florida Court Snapshot

by Morgan Wood Streetman

Florida Supreme Court Takes A Stand Against "Gubernatorial Activism"

On July 3, 2008, the Florida Supreme Court ruled that Florida Governor Charlie Crist usurped the Florida Legislature's power to make law when he executed a compact with the Seminole Indian Tribe of Florida (the "Seminoles") to allow the Seminoles to conduct on tribal lands casino gambling (termed "gaming") that is illegal throughout much, or all, of the rest of the state. Florida House of Representatives Speaker Marco Rubio[1] brought the issue before the court by filing a Petition for issuance of a writ of quo warranto[2] in the case styled *Florida House of Representatives, et al., v. The Honorable Charles J. Crist, Jr.*[3] Justice Raoul Cantero, in one of his last written opinions for the court,[4] penned the majority's decision, which included Justices Wells, Anstead, Pariente, and Bell.[5] Chief Justice Quince concurred only in the result but did not elaborate. Justice Lewis also concurred in the result, but did write an opinion to explain his disagreement with the reasoning behind the majority's decision. This article attempts to highlight and summarize the decision and to examine Justice Lewis's bases for disagreement with the majority's reasoning.

Background

The court began with a thorough examination of the relationship between sovereign Indian tribes and the federal and state governments, particularly with respect to gaming. The court next considered the history of gaming negotiations between the Seminoles and Florida, and how the courts of other states have handled Indian gaming compacts. Lastly, the Court analyzed and applied Florida's Constitution to the question of whether the Governor exceeded his authority by executing the compact without legislative approval.

The statutory foundation for the compact is the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000) ("IGRA"). Because Indian tribes are independent sovereigns, and because the U.S. Constitution gives Congress the exclusive power to override their sovereignty, IGRA is the only basis for a state's involvement in gaming on Indian lands.[6] IGRA prescribes that Class III gaming[7] is allowed on tribal lands when it is authorized by tribal ordinance, "located in a State that permits such gaming for any purpose by any person, organization, or entity," and conducted under a compact between the tribe and the state. Importantly, IGRA requires a state to negotiate with an Indian tribe in good faith to make a gaming compact. If a state refuses to negotiate or if negotiations fail, IGRA allows either the tribe to sue the state in federal court, with the state's consent,[8] or the Secretary of the Department of the Interior (the "Department") to unilaterally prescribe procedures for Class III gaming on Indian lands within the state.

Execution of the Compact

As the court detailed, the Seminoles believe negotiations with Florida have failed after 16 years of attempting to negotiate a compact with the state. The details of the failed negotiations are beyond the scope of this article; suffice it to say, the Seminoles began negotiating with Florida Governor Lawton Chiles in January 1991 and were unable to agree on a compact despite trying for over sixteen years through three different

gubernatorial administrations. The obvious implication, and the Seminoles' repeated contention, is that Tallahassee[9] was not negotiating in good faith.

After giving several ultimatums over an eight year period, the Department allowed Florida until November 15, 2007, to negotiate and execute a gaming compact with the Seminoles, or the Department would unilaterally issue procedures allowing Class III gaming on Seminole lands. On the day before the Department's deadline, Governor Crist executed a compact with the Seminoles to allow specified Class III gaming exclusively at seven Seminole casinos throughout Florida. In exchange, the compact required the Seminoles to pay Florida a portion of the revenues amounting to well over $100 million per year.[10]

The Legislature's Petition Objecting to the Execution of the Compact

Five days after Governor Crist executed the gaming compact with the Seminoles, the Florida House of Representatives, led by Speaker Rubio, filed its Petition in the Florida Supreme Court asking the court to find, based on the separation of powers doctrine in Florida's Constitution, that the Governor did not have the authority to bind the state to a gaming compact without the Legislature's approval where the compact conflicted with the state's public policy against Class III gaming in Florida.[11] The Legislature argued that the compact essentially changed state law by violating Florida's legislatively-stated public policy against Class III gaming. As such, the Legislature argued, the compact was an essentially legislative function inappropriately taken by the Governor.

The Governor's Opposition to the Petition

In opposition to the Petition, Governor Crist argued that the Florida Constitution's "Necessary Business" clause gave him the authority to unilaterally negotiate and execute the gaming compact with the Seminoles in light of the looming deadline of the Department's ultimatum. The "Necessary Business" clause, Article IV, Section 1 of the Florida Constitution, provides in pertinent part: "[t]he governor shall take care that the laws be faithfully executed ... and transact all necessary business with the officers of government." Governor Crist argues that he could not ignore the federal directive from the Department, making his negotiation and execution of the compact necessary business he was obligated to undertake.

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On the Lighter Side

Serving God

by Deborah O'Malley

On October 14th, a Nebraska judge threw out a state legislator's lawsuit against God because the defendant was not properly served notice of the charges. The judge cited the impossibility of serving a defendant who lacks a listed home address.

Ernie Chambers, a state legislator of thirty-eight years and a law school graduate, filed a lawsuit against God in September 2007, seeking a permanent injunction to prevent the Almighty from committing acts of violence such as floods, earthquakes and tornadoes—also known as "acts of God." He claims that God has made "terrorist" threats against him and his Omaha constituents and caused "widespread death, destruction and terrorization of millions upon millions of Earth's inhabitants," which are chronicled in written form. According to Chambers, such chronicles exist for the purpose of invoking fear in order to "coerce obedience" to His will.

Douglas County District Court Judge Marlon Polk ruled that under Nebraska law a plaintiff must have access to the defendant for a lawsuit to move forward. The opinion read, "Given that this Court finds that there can never be service effectuated on the named Defendant this action will be dismissed with prejudice."

Chambers invoked theological arguments to prove that God has had plenty of notice—in fact, God had known about the lawsuit even before it was filed. "The court itself acknowledges the existence of God," Chambers argued. "A consequence of that acknowledgment is a recognition of God's omniscience." Therefore, since God knows everything, he clearly had full notice of the lawsuit, perhaps even "predestining" the lawsuit, according to some pundits.

He also cited other of God's divine attributes: "If God is omnipresent," Chambers said in his court hearing, "then he is here in Douglas County and in this courtroom."

Chambers did attempt other means of "serving" the defendant, but to no avail. According to his complaint, he made a "reasonable" attempt to effectuate personal service on the defendant by entreating, "Come out, come out, wherever you are." He also considered serving the defendant through

putative "agents"—representatives of various religious denominations who are authorized to speak for and represent the defendant. But, alas, the conclusion was that it would be a "futile and perhaps unlawful act" to mail a notice to the front door of each agent, even if every one were known.

Chambers presented these arguments in court in August. He insisted that, because our country has a history of acknowledging God's existence, Polk should take judicial notice of the His existence for the purpose of this lawsuit. As evidence that the U.S. has cognized the deity's existence, Chambers cited the phrase "In God We Trust," on U.S. currency, the fact that God is invoked during oaths in court hearings, and the prayers offered by chaplains before legislative bodies.

Chambers' motion to take judicial notice of God was denied as moot.

His lawsuit, which cut into the state's finite judicial resources to litigate, was an attempt to make a statement about the necessity of access to the courts for everyone, regardless of whether they are rich or poor. "Nobody should stand at the courthouse door to predetermine who has access to the courts," he said. "My point is that anyone can sue anyone else, even God."

Chambers was ultimately driven to file the litigation after at least two attempts by fellow senators to limit frivolous lawsuits. "I was able to fend them off," Chambers said. "A lawsuit is not frivolous until a court declares it so."

Chambers has not decided whether he is going to appeal.

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Taxes and Textualism: Due Weight Deference to the Wisconsin Tax Appeals Commission

by Richard Esenberg

This summer's decision of the Wisconsin Supreme Court in *Wisconsin Department of Revenue v. Menasha Corporation*[1] involved a relatively dry question of tax law, i.e., whether a base software package that required substantial modification to meet the needs of the purchaser was a "custom computer program" exempt from Wisconsin's sales tax.[2] But the case featured a series of less technical subnarratives raising questions of judicial ethics, state fiscal policy and, although less widely appreciated, the relationship between Wisconsin taxpayers and the state's Department of Revenue.

Menasha Corporation is a packaging and logistics firm located in Neenah, Wisconsin. After a lengthy search process, it purchased a software package known as the R/3 system from a firm called SAP. The R/3 system was a rudimentary business and accounting system that could be modified to meet a user's unique needs. While the R/3 system has been sold to many companies, no company can—or ever does—use it "off the shelf." After paying $5.2 million for the system, Menasha spent roughly eighteen million dollars to make the system usable in its operations.

Whether the need to customize a base program makes it "custom" involved interpretation of an administrative rule promulgated by the Department of Revenue ("Department"). That rule defined custom computer programs as "utility and application software which accommodate the special processing needs of the customer" and listed seven factors to be considered, along with "all the facts and circumstances," in determining whether a program is "custom."[3] The rule distinguished prewritten programs from custom programs, defining the former as "programs prepared, held or existing for general use normally for more than one customer."[4]

The Department of Revenue took the position that the base R/3 program was not "custom" and that the money paid for it, although not the amounts spent to modify it, was subject to sales tax. Menasha appealed to the Wisconsin Tax Appeals Commission ("Commission") which held that the purchase price of the R/3 package was not subject to tax. It applied all seven factors and found that they militated in a finding that the system was "custom." It held that the program was not prewritten because it was not ready to be used and emphasized the need to substantially modify the program to meet Menasha's needs.

The Department appealed to the Circuit Court for Dane County which reversed the Commission's decision. The court of appeals then reversed the decision of the circuit court and the supreme court granted review. In a 4-3 decision, the court affirmed the judgment of the court of appeals finding that the R/3 package was non-taxable. Before addressing the court's reasoning, let us pause over two of the three subnarratives.

The first was a question of judicial ethics. Wisconsin

elects its supreme court justices to ten-year terms. In the last two years, we have seen hotly contested and heavily financed elections, spurred, in part, by a series of decisions in 2005 which seemed to suggest a move to a more interventionist jurisprudence.[5] In the spring of 2006, certain business groups, including Wisconsin Manufacturers & Commerce ("WMC"), spent heavily in support of Judge Annette Ziegler in her race against Attorney Linda Clifford. Ziegler won handily. In the spring of 2007, the same groups spent heavily in support of the challenger, Judge Michael Gableman, against incumbent Louis Butler (who was himself supported by substantial independent expenditures). Gableman won a bitter race and, on the ground, the Wisconsin Supreme Court has become a highly charged subject.

As the *Menasha* case approached oral argument, a number of voices began to call for the newly elected Justice Ziegler to recuse herself. WMC had not contributed to Ziegler's campaign but had independently financed ads promoting her election. It was not a party to the case and did not stand to benefit from the result. What it did do is file an *amicus* brief supporting Menasha's position and it is fair to say that many of its members, businesses who might purchase software packages similar to the R/3 package —stood to benefit from a ruling in favor of Menasha.

This call coincided with our second subnarrative. Wisconsin, like many other states, faces a biennial budget crisis. The state's Legislative Fiscal Bureau estimated that a ruling in favor of Menasha would result in lost tax revenues of almost $300 million through the end of the 2008-09 biennium and $28 million annually thereafter. Both dissents estimated the fiscal implication of the majority decision[6] and press coverage of the decision emphasized the decision's fiscal impact.[7] In the wake of the decision, politicians called for various forms of campaign finance reform and public financing of judicial elections.[8]

Thus the decision fueled the debate around the elected judiciary and the nature of judicial elections. It also raised the following issue: whether the notion that a supreme court justice ought to recuse herself from cases in which factions that actively supported her election is ultimately irreconcilable with the idea of an elected judiciary. In last spring's election, for example, while business interests supported the challenger, an organization associated with public employee unions, trial lawyers and Indian casinos spent heavily in favor of incumbent justice Louis Butler.

Having explored the atmospherics surrounding the case, let us return to the decision itself. For the dissenters, the analysis was focused upon the nature of the R/3 system at the time it was acquired without regard to what happened later. The amount Menasha paid for the system included no customization. It brought only a base package that was its responsibility to modify. This, in their view,

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Ohio Update: *Ackison v. Anchor Packing Co.*

by Jack Park

In the Summer 2008 issue of *State Court Docket Watch*, David Oswiany discussed two decisions of the Ohio Supreme Court rejecting challenges to state statutes that imposed, respectively, caps on non-economic and punitive damages and a ten-year statute of repose on product liability claims. Oswiany suggested that those decisions might "bode well" for advocates of tort reform in contrast to that court's "long and somewhat controversial history of striking down laws enacted by the Ohio General Assembly to reform the state's civil liability system."[1] Oswiany's suggestion proved correct as the Ohio Supreme Court upheld a state statute prioritizing the disposition of asbestos claims that applied to claims pending when the law was enacted in *Ackison v. Anchor Packing Co.*[2]

In 2004, the Ohio General Assembly "extensively revised state laws governing asbestos litigation... in response to the legislative finding that '[t]he current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike.'"[3] Among other things, those revisions established threshold requirements for bringing certain asbestos claims that applied to all asbestos claims pending in Ohio courts, without regard to whether they were pending when the revised law, H.B. 292, became effective. Claimants who do not suffer from a malignant condition must file certain qualifying medical evidence supported by competent medical authority stating that asbestos exposure was a substantial contributing factor to the claimant's medical condition.[4] Without such medical evidence, the claim will be dismissed without prejudice.

The Ohio General Assembly's action was a response to certain aspects of asbestos litigation in Ohio. First, Ohio had become something of a magnet for such claims. As the Ohio General Assembly found, while Ohio, Mississippi, New York, West Virginia, and Texas accounted for nine percent for the asbestos claims filed nationally before 1998, those states accounted for 60

percent of all claims filed nationally by 2000. The number of cases pending in Cuyahoga County (Cleveland) jumped from about 12,800 in 1999 to 39,000 in 2000. Second, many of the claimants were not, in fact, sick. Instead, "the vast majority of new claimants—up to ninety percent—[were] 'people who ha[d] been exposed to asbestos, and who (usually) ha[d] some marker of exposure such as changes in the pleural membrane covering the lungs, but who [were] not impaired by an asbestos-related disease and likely never [would] be.'"[5] Claims by those who show signs of pleural thickening but are not sick crowd out the claims of those who are sick.

In May 2004, some four months before the new law's effective date, Linda Ackison, widow and executor of her husband's estate, filed suit against his former employer and other defendants asserting that, among other things, exposure to asbestos caused or contributed to his death.[6] Ackison did not submit the qualifying medical evidence of her deceased husband's impairment, as the new statute required. An Ohio trial court rejected her challenge to the revised law and dismissed her claim without prejudice, but the court of appeals reversed and reinstated the case. That ruling by the court of appeals conflicted with the rulings of another Ohio court of appeals, and the conflict prompted review in the Ohio Supreme Court.

The question before the court was whether the new law, with its new procedural requirements that affected the pursuit of some claims, could constitutionally be applied to claims pending before the statute's effective date. As the court explained, while the Ohio Constitution provides that the "general assembly shall have no power to pass retroactive laws", not all laws that apply retroactively are unconstitutional.[7] The first part of the inquiry was easily met because, according to R.C. 2307.93(A)(2) and (3), the new filing requirements applied to pending cases. Accordingly, the question was whether the statute was substantive or remedial.

Justice Robert Cupp, writing for a 5-2 majority[8], concluded that the new asbestos laws were remedial and, hence, constitutional.[9] He explained:

> A statute is 'substantive' if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation[s], or liabilities as to a past transaction, or creates a new right.... Conversely, remedial laws are those affecting only the remedy provided, and include laws that substitute a new or more appropriate remedy for the enforcement of an existing right.[10]

As a general matter, laws that relate to procedures are classified as remedial.[11]

In 2007, the court had held that R.C. 2307.92 and 2307.93 were remedial because they "pertain[ed] to the machinery for carrying on a suit."[12] Ackison sought to avoid that holding by making an as-applied challenge to the provisions of the law. In particular, she contended that, because Ohio already recognized a cause of action for pleural thickening without regard to whether any impairment or disease had developed, she had a vested right that could not constitutionally be taken away.

The court disagreed, concluding that the holdings of two Ohio intermediate appellate courts on which Ackison relied were both incorrect as a matter of law and were not part of the Sate's common law. In *Verbryke v. Owens-Corning Fiberglass Corp*.,[13] Ohio's Sixth District Court of Appeals stated "a pleural plaque or thickening meets the definition of 'bodily harm,' which is a subspecies of 'physical harm' and thus satisfies the injury requirements of Sections 388 and 402A of the Restatement [of the Law 2d, Torts (1965)]."[14] The court found that the *Verbryke* holding rested on the erroneous incorporation of "intentional-tort principles into an analysis of negligence" in that the portion of the Restatement on which it relied related to harm caused by intentional torts.[15] Because the Ohio Supreme Court had never held that asymptomatic pleural thickening, by itself, was sufficient to cause an injury, and the *Verbryke* holding rested on a misreading of the Restatement, Ackison had no vested right to pursue such a claim. Absent such a vested right, the revised statute could constitutionally be applied to her claim.

The court drew support from the proposed Final Draft No. 1 of the *Restatement 3d of Torts*. That draft contains a Reporter's note that states, in part:

> An unfortunate and aberrational exception to the [general tendency] of small or trivial harms [to remain unlitigated] is asbestos claims by plaintiffs who suffer no clinical symptoms but have abnormal lung X-rays, a condition known as pleural plaque. These claims exist only because of the number of such claimants and the efficiencies of aggregating such claims to make them economically viable for litigation. Some courts have responded by requiring that an asbestos plaintiff prove the existence of clinical symptoms before sufficient bodily injury exists.[16]

The Reporter's draft cites cases from the United States District Court in Hawaii and state appellate courts in Maryland and Pennsylvania holding that pleural plaque is not a legally recognized injury, and a 1985 decision of the Fifth Circuit of Appeals that goes the other way.[17]

Ackison also contended that the definition of "competent medical authority" in H.B. 292 and the requirement that a claimant provide evidence that exposure to asbestos was a "substantial contributing factor" to his or her medical condition represented substantive changes to the law. The court quickly disposed of the first contention, concluding that the definition of "competent medical authority" related to the competency of a witness

and was, therefore, "more akin to a rule of evidence."[18] Accordingly it was a procedural change.

With respect to the definition of "substantial contributing factor," the court found the General Assembly's use of the verb "predominate" as an adjective to be "perplexing."[19] If interpreted to mean "predominant," the new definition would change the substantive law relating to proximate cause and, therefore, be unconstitutional.[20] But, the court pointed to the presumption that the General Assembly acts constitutionally, noting, as well, that it had made some portions of the new law prospective in operation. It explained: "Rather than impose a construction that results in unconstitutional application, we construe the statute to be consistent with the common law."[21] Construed in that fashion, the phrase "is, in essence, a 'but for' test of causation, which is the standard test for establishing cause in fact."[22] Thus, the new law was "intended to require that asbestos exposure be a significant, direct cause of the injury to the degree that without the exposure to asbestos the injury would not have occurred."[23] As a result, the new statute did not change the common law, it restated it.

The court next found Ackison's reliance on *Horton v. Harwick Chem. Corp*.[24] to be misplaced. There, the Ohio Supreme Court held that, in a multidefendant asbestos case, the plaintiff did not have to prove exposure to a particular manufacturer's product to the exclusion of the others. Instead, the plaintiff had to prove exposure to that product and that the defendant's product was a substantial factor in causing the injury. The court pointed out that Horton "did not address the issue here, which is whether exposure to asbestos was 'the predominate cause of the physical impairment' without which 'the physical impairment... would not have occurred."[25]

Finally, the court rebuffed Ackison's contention that the definition of "substantial occupational exposure" was the General Assembly's attempt to adopt a test that the Ohio Supreme Court had specifically rejected in Horton. First, the court noted that Ackison was the wrong person to make that claim. The definition of "substantial occupational exposure" applies "only to claims alleging lung cancer caused by asbestos when the victim is a smoker and to wrongful death claims...."[26] More generally, it concluded that, to the extent that the General Assembly had adopted the test, the provision that did so operated prospectively. Accordingly, to the extent there was a change in the substantive law, it did not operate unconstitutionally in a retroactive manner.

Justice Paul Pfeifer wrote a dissenting opinion in which he expressed the view that the new statute was unconstitutional because it operated retroactively.[27] In his view, H.B. 292 "change[s] the substance of what constitutes a valid injury, alter[s] the nature of the medical proof necessary to prove a claim, modif[ies] what constitutes causation in an asbestos-exposure claim, and essentially overrul[es] this court in establishing new requirements for the extent of exposure to asbestos that is necessary to prove a claim."[28] He went on to question the General Assembly's wisdom and the majority's characterization of its role.

In Justice Pfeifer's view, pleural thickening had been recognized as an injury in 1998.[29] While that recognition did not come from the Ohio Supreme Court, "it is the law in the Ohio appellate district where the vast majority of asbestos cases are litigated, it was never appealed to this court, and no Ohio appellate court has ever held differently."[30] The new law required plaintiffs suffering from pleural thickening to provide the court with information that was previously unnecessary. Even if a plaintiff's failure to provide that information resulted only in a dismissal without prejudice, Danny Ackison, who could no longer come up with that evidence because he was dead,[31] would never be able to vindicate his rights.

Significantly, Justice Pfeifer disagreed with the legislature's conclusion that there was a crisis, referring to an "alleged litigation crisis."[32] He pointed to statements from Chief Justice Moyer, who did not join his dissent, and the director of the state's judicial services to the effect that the system was operating efficiently. He asserted, "The fact is that the judicial system on its own, and especially in Cuyahoga County, has found a way to effectively administer asbestos litigation."[33] This led him to ask whether it "could... be that the General Assembly's declaration of an asbestos-litigation crisis is overblown?"[34] Justice Pfeifer concluded by criticizing the majority stating:

> This court's job in this case is not to fix a crisis declared by the General Assembly; our duty is to determine what is right for Danny Ackison under the Ohio Constitution. Our role in this state is to protect the rights guaranteed by the Constitution, not to guide what might or might not be a good legislative idea. This court's complicity with the General Assembly when it violates the Constitution is not judicial restraint; it is doing the work of the legislature from the bench.[35]

The majority had pointed to Ohio statutory law, which, in pertinent part, states, "In enacting a statute it is presumed that [c]ompliance with the constitution of the state and of the United States is intended...."[36] Accordingly, the majority declined to construe a portion of the statute in a way that would make it unconstitutional. Whether that constitutes legislating from the bench is for the reader to decide.

Jack Park serves as Special Assistant to the Inspector General for the Corporation for National and Community Service. He was formerly an Assistant Attorney General for the State of Alabama.

Endnotes

1 Oswiany, *Ohio Supreme Court Upholds Civil Liability Reforms*, State Court Docket Watch (Federalist Society Summer 2008), at 2, *available at* www.fed-soc.org/pub;ications/pubid.1150/pub_detail.asp, last viewed 10/31/2008.

2 2008 WL 4601676, __ N. W. 3d __, slip op. No. 2008-Ohio-5423 (Ohio S. Ct. Oct. 15, 2008).

3 *Id.*, 2008 WL 4601676 at * 2 (quoting H.B. 292, Section 3(A)(2), 150 Ohio Laws, Part III, 3988).

4 R.C. 2307.92, 2307.93(c).

5 Behrens & Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning*, 12 Conn. Ins. L. J. 477, 478-79 (quoting The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. On the Judiciary, 106th Cong.5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor Harvard Law School)).

6 The death certificate for Danny Ackison identifies the cause of death as congestive heart failure and aortic stenosis.

7 2008 WL 4601676 at * 3 (quoting Bielat v. Bielat (2000), 87 Ohio St. 3d 350, 353, 71 N.E. 2d 28 ([R]etroactivity itself is not always forbidden by Ohio law. Though the language of Section28, Article II of the Ohio Constitution provides that the General Assembly 'shall have no power to pass retroactive laws,' Ohio courts have long recognized that there is a crucial distinction between statutes that merely apply retroactively (or 'retrospectively') and those that do so in a manner that offends our Constitution.").

8 Justice Pfeifer wrote a dissenting opinion, and Chief Justice Moyer dissented without opinion.

9 Justice Cupp was elected in 2006 and is the court's junior member. He spent 25 years in private practice, served 16 years in the Ohio Senate, was elected to the 3d District Court of Appeals, and has experience as a prosecutor. *See* Adler & Adler, A More Modest Court: The Ohio Supreme Court's Newfound Judicial Restraint (Federalist Society, 2008), at 5.

10 2008 WL 4601676 at *4 (*quoting* State v. Cook (1998), 83 Ohio St. 3d 404, 411, 700 N.E. 2d 570).

11 *Id.*

12 Norfolk S. Ry. Co. v. Bogle, 115 Ohio St. 3d 455, 875 N. E. 2d 919 (2007). Justice Pfeifer wrote a dissent in *Bogle* that Chief Justice Moyer joined.

13 84 Ohio App. 3d 388, 616 N.E. 2d 1162 (1992).

14 *Id.,* 84 Ohio App. 3d at 395, 616 N.E. 2d at 1167.

15 2008 WL 4601676 at * 6.

16 *Id.* (quoting Proposed Final Draft No. 1, Restatement of the law, 3d, Torts (Apr. 6, 2005), Section 4, Comment c).

17 *Id.* The Reporter's draft cites *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990); *Owens-Ill. v. Armstrong*, 591 A. 2d 544 (Md. Ct. Spec. App. 1991), *aff'd in relevant part*, 604 A. 2d 47 (Md. 1992); *Giffear v. Johns-Manville Corp.*, 632 A. 2d 880 (Pa. Super. Ct., 1993); and *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985).

18 *Id.* at * 7.

19 *Id.* at * 8.

20 *Id.*

21 *Id.* at * 9.

22 *Id.*

23 *Id.*

24 (1995) 73 Ohio St. 3d 675, 653 N.E.2d 1196.

25 2008 WL 4601676 at * 9 (quoting R.C. 2307.91(FF)).

26 *Id.* at * 10.

27 Justice Pfeiffer is the only remaining member of the so-called "Gang of Four." Before 2002, the Ohio Supreme Court "invalidated several legislatively adopted tort reform measures and invalidated the state system of school financing four times in the span of five years." Adler & Adler, *supra* note 9, at 3. One commentator criticized the court for "blurr[ing] the lines between the legislative and judicial branches of government and essentially turn[ing] the court into a super-legislature on several major public policy issues in Ohio." *Id.* (quoting Oswiany, *supra* note 1 at 1-2).

Pfeifer was first elected in 1992. Before being elected, he had experience as an assistant county prosecutor and in private practice. He also served in both houses of the Ohio General Assembly. In response to criticism for taking a long time to produce opinions, Justice Pfeifer said that he is "slow because he puts as much thought into writing opinions for the majority as he does in penning dissents, which he wants to be as entertaining as they are legally sound." *See* Adler & Adler, *supra* note 9, at 4 (quoting Fields, *Ohio Supreme Court Writing Opinions Quicker*, Cleveland Plain Dealer, Jan. 27, 2008). Pfeifer's administrative assistant helps with his speeches and his weekly newspaper columns. Adler & Adler, *supra* note 9, at 19, n. 24.

Pfeifer has also criticized the fundraising that is part of a judicial lection campaign. He said, "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race... Everyone interested in contributing has very specific interests. They mean to be buying a vote." Adler & Adler, *supra* note 9, at 4 (quoting Liptak & Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006.

28 2008 WL 4601676 at * 12. (Pfeifer, J., dissenting).

29 *Id.*, at * 12 (citing In re Cuyahoga Cty. Asbestos Cases (1998) 127 Ohio App. 3d 358, 713 N.E.2d 20.

30 *Id.*

31 *See* fn. 6.

32 *Id.*

33 *Id.* at * 18.

34 *Id.* at * 17.

35 *Id.* at * 18.

36 *Id.* at * 9 (quoting R.C. 1.47(A)).

Florida Court Snapshot

Continued from page 3...

The Florida Supreme Court's Analysis

In determining the legal issues raised by the House of Representatives' Petition and the Governor's response, the court, while acknowledging that neither was determinative, looked first to the way compacts have traditionally been handled in Florida and second to the way the courts of other states have resolved the question of whether a governor can unilaterally bind the state to an IGRA compact. Considering Florida's tradition of handling compacts, the court found that "[i]n most cases, the Legislature enacted a law" establishing the compact, "[i]n others, the Legislature authorized the Governor to execute a compact in the form provided in a statute," and "[i]n a few... the Legislature by statute approved and ratified the compact." The court "found no instance in which the governor has signed a compact without legislative involvement." Similarly, the court found that courts of other states have overwhelmingly concluded that the negotiation and execution of an IGRA compact involve powers that fundamentally are legislative and exclusively belong to the legislature. While not determinative or binding, the traditions of Florida and the rulings of other states' courts bolster the court's resolution of the issue based on the separation of powers doctrine in Florida's Constitution.

The separation of powers doctrine is found in Article II, Section 3 of the Florida Constitution, which provides: "[t]he powers of state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The court, in analyzing the appropriate application of the doctrine, recognized that it has "'traditionally applied a strict separation of powers doctrine'"[12] but that "the state constitution does not exhaustively list each branch's powers" and that "[w]e must therefore expand our analysis beyond the plain language of the constitution" to determine which powers are appropriately exercised by each branch.

The court, citing its 75 year old decision in *Florida Motor Lines v. Railroad Commissioners*,[13] stated that "what determines whether a particular function is legislative, executive, or judicial... is not 'the name given to the function or to the officer who performs it' but the 'essential nature and effect of the governmental function to be performed.'" As mentioned above, the Legislature's position was that the compact changed state law by violating Florida's legislatively-enacted public policy against Class III gaming, a crime in most of the state. Because the power to make law rests exclusively with the Legislature, it argued that Governor Crist overstepped his constitutional bounds. The Legislature also argued that because the Florida Constitution does not specifically authorize Florida's governor to unilaterally negotiate and execute compacts, the authority to do is a "residual" power and that all residual powers belong to the Legislature. The court noted that it had previously "implied" that any residual power belongs to the Legislature.[14]

The Florida Supreme Court's Conclusion

The court declined to determine "whether the authority to bind the state to compacts always resides in the legislature," i.e., whether Florida's governor would ever be allowed to unilaterally negotiate and execute a gaming compact with an Indian tribe. The court stated that the determination of questions of fundamental policy is a legislative power[15] and that, "even if the Governor has the authority to execute compacts, [the terms of those compacts] cannot contradict the state's public policy, as expressed in its laws."[16] The court found that the Seminole gaming compact executed by Governor Crist "violates the state's public policy about the types of gambling that should be allowed." Therefore, the court concluded that "the Governor's execution of a compact authorizing types of gaming that are prohibited under Florida law violates the separation of powers. The Governor has no authority to change or amend state law. Such power falls exclusively to the Legislature." The court specifically did "not resolve the broader issue of whether the Governor ever has the authority to execute compacts without either the Legislature's prior authorization or, at least, its subsequent ratification." The court also did not actually issue the writ of quo warranto requested by the Legislature because it "believe[d] the parties will fully comply with the dictates of [its] opinion" without need of the actual issuance of the Writ.

Justice Lewis's Disagreements with the Majority

Justice Fred Lewis concurred in the result of the majority's opinion, but disagreed in at least two instances with the legal underpinnings of the decision. Justice Lewis disagreed with the court's "overly restrictive" analysis of the Governor's authority to enter into a compact. He also disagreed with the procedural vehicle chosen by the Legislature—the request for issuance of the extraordinary writ of quo warranto. It seems the majority may have addressed Justice Lewis's concerns during the drafting, discussion, and re-drafting process that takes place during any high court's preparation of a written opinion.

Concerning his disagreement with the "overly

restrictive" nature of the majority opinion, Justice Lewis stated:

> [I]f the Compact had not granted and authorized certain types of Class III gaming that are specifically prohibited by state law, the Governor would have been authorized—pursuant to the necessary-business clause—to enter into a compact on behalf of the State without either legislative authorization or ratification under the circumstances presented by the instant case.... To the extent the majority suggests otherwise, I disagree.

It seems the majority may have addressed Justice Lewis's concerns in this regard because it specifically emphasized the narrowness of its ruling and specifically stated: "We express no opinion on whether the 'necessary business' clause may ever grant the governor authority to bind the State to an IGRA compact."

Justice Lewis also objected to the procedural vehicle by which the Legislature sought to legally address the compact, stating his concern "that we [the court] may lack quo warranto jurisdiction to address the issue as reframed by the majority." In summary, Justice Lewis's disagreement with the procedural vehicle was that quo warranto jurisdiction only allowed the court to determine whether the Governor had the power to execute a compact, not whether he properly exercised that power in this specific instance. In footnote 13 of his concurrence, Justice Lewis states:

> Since the majority does not address the question of whether the Governor may enter into a compact, this appears to be a case in which we have chosen to address the *legal correctness* of the Governor's action instead of his *ultimate authority* to negotiate and enter into inter-sovereign compacts on behalf of the State.

Justice Lewis's position is bolstered by the explicit request of the Legislature's Petition that the court rule that the Governor cannot negotiate and execute any Indian gaming compact without the Legislatures authorization, regardless of whether the compact would violate Florida's public policy. Justice Lewis suggested that a declaratory judgment action was the appropriate vehicle for the Legislature to challenge Governor Crist's exercise of his authority. The majority seems to disagree with Justice Lewis's more narrow construction of quo warranto jurisdiction, reasoning that "In prior quo warranto cases... we have considered separation-of-powers arguments normally reviewed in the context of declaratory judgments, such as whether the Governor's action has usurped the Legislature's power, 'where the functions of government would be adversely affected absent an immediate determination by this court.'" In the end, however, it seems the majority may have side-stepped the issue by withholding issuance of the writ and suggesting that the parties "fully comply with the dictates" of the court's opinion.

CONCLUSION

The practical effect of the court's decision is not yet known. Governor Crist was clearly attempting to reach a pragmatic result by negotiating the Seminole gaming compact. The Department had threatened to impose Class III gaming procedures for Seminole lands in Florida and the Governor determined that the most beneficial move for Florida would be to negotiate a compact under which Florida would receive a portion of the gaming revenues. The infusion of cash is desperately needed in Florida[17] and Governor Crist knew that no such provision would be included in procedures issued by the Department. It remains to be seen whether the Department will make good on its ultimatum to issue procedures allowing Class III gaming on Seminole lands in Florida in the absence of a negotiated compact between Florida and the Seminoles.

Florida Court Strikes Another Blow Against Automobile Defect Class Actions

Florida's Third District Court of Appeal[18] recently reversed the class certification in an automobile products liability class action styled *Kia Motors America Corp. v. Butler*.[19] This article summarizes the court's reasoning in reversing the certification and offers a suggestion of its possible effects on Florida litigation.

Factual and Legal Background

The class plaintiff, Yvonne Butler, alleged that her 2000 model year Kia Sephia had a defective front brake system that caused the brakes to prematurely wear.[20] Ms. Butler's Complaint alleged that all Florida purchasers of 1999-2001 model year Kia Sephias were similarly damaged by the defective front brakes. She claimed the defective brakes caused the "'vehicle to be unable to stop, suffer an impaired stopping performance, exhibit increased stopping distances, brake shudder, brake vibration, unpredictable and violent brake pedal pressures, brake lock up, and loss of control when activated,'" all of which decreased the car's value. Despite alleging the existence of a class, it seems Ms. Butler was aware that not all of her class members actually suffered the brake problems of which she complained. The court seized upon that point, stating, "Ms. Butler, through her counsel, envisions an individual award to each member of the class, whether or not the alleged deficiency manifested itself in a particular case," and later, "Ms. Butler forgets... that fewer than half of the class members have reported brake difficulty."

Florida class actions are governed by the requirements of Rule 1.220, Fla.R.Civ.P. Rule 1.220(a) requires as a prerequisite to a class action that the trial court first find that:

> (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

These prerequisites to class action are usually called numerosity, commonality, typicality, and adequacy of representation.

After meeting the prerequisites, Rule 1.220 also requires a class plaintiff to meet one of the three subsections of Rule 1.220(b). The court declared that (b)(3) was the relevant subsection for Ms. Butler's action. Rule 1.220(b)(3) requires that:

> the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy.

Analysis

The court focused its analysis on the predominance and superiority inquiries required by Rule 1.220(b)(3).[21] In addressing whether the common questions of law and fact predominated over individual questions, the court tried to envision how a class action trial would proceed.[22] The court stated that the key issue was whether Ms. Butler could prove the cases for each of the other members of her class by proving her own individual case. It determined that she could not. Instead, relying on its observation that not all class members suffered the brake defect of which Ms. Butler complained, the court envisioned that a class action trial would first require significant individual inquiry and an "inestimable" number of mini-trials to determine the proper class members. The court found its evaluation true for both questions of law and questions of fact.[23]

The court next turned to the superiority inquiry —whether all other methods of resolving the dispute are inferior to class action. The court determined that, in fact, several other methods were superior to class action in Ms. Butler's case. In particular, the court cited Florida's Motor Vehicle Warranty Enforcement Act, Chapter 681, Fla. Stat., (a/k/a Florida's "Lemon Law") and the federal Magnuson-Moss Warranty Improvement Act, 15 U.S.C. §§ 2301-12, as assuring that vehicle owners sold an inferior product are not "outgunned" by large car companies. The court pointed out that attorney fees are recoverable by prevailing consumers under both statutes.

The court also suggested that Ms. Baker could have filed a petition under 49 U.S.C. §§ 30101-30170 with the National Highway Traffic Safety Administration to seek a national recall of the allegedly defective Kias. The court determined that a recall would reach and protect currently "uninjured" class members that would have to be painstakingly excluded from the eventual trial of Ms. Butler's class action. Because a recall would protect more consumers, the court found a recall petition to the NHTSA to also be superior to a class action.

CONCLUSION

The court determined that Ms. Butler's attempted class action did not present common questions of either law or fact among class members and was actually inferior to other methods of seeking resolution and redress. On those bases, it reversed the trial court's certification of a class. The decision is not particularly monumental—as the court noted, other courts are already "'hesitant to certify classes in... cases involving allegedly defective motor vehicles and parts.'"[24] The court even referenced its earlier decision in *Volkswagen of America, Inc. v. Sugarman*,[25] with essentially the same holding. However, it bolsters the defense of automobile products liability class actions in Florida and further raises the bar for plaintiff attorneys who may seek to bring such actions.

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Endnotes

1 Speaker Rubio is a Republican from the 111th Congressional District in western Miami-Dade County. He has disagreed with Governor Crist, also a Republican, on several issues including Florida property tax reform and offshore drilling. *E.g.,* William March, "Suit Widens Crist, Rubio Rift," The Tampa Tribune, Dec. 2, 2007, *available at* http://www2.tbo.com/content/2007/dec/02/me-suit-widens-crist-rubio-rift/news-breaking/ (last accessed on Sept. 16, 2008).

2 A writ of quo warranto is an extraordinary writ that may be issued to a state officer or agency that has improperly exercised a power or right derived from the state.

3 Case No. SC07-2154. A copy of the decision is available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/07/07-2154/Filed_07-03-2008_Opinion.pdf (last accessed on Sept. 16, 2008).

4 On April 11, 2008, Justice Raoul Cantero announced his

resignation from the Florida Supreme Court effective September 6, 2008. The court's official media release is available at http://www.floridasupremecourt.org/pub_info/documents/pressreleases/2008/04-11-2008_Cantero_Press_Release.pdf (last accessed on Sept. 16, 2008).

5 Justice Kenneth Bell has also announced his resignation from the Florida Supreme Court effective October 1, 2008. The court's official media release is available at http://www.floridasupremecourt.org/pub_info/documents/pressreleases/2008/05-23-2008_Bell_Press_Release.pdf (last accessed on Sept. 16, 2008).

6 *But see* Act of Aug. 15, 1953, Pub. L. No. 280 § 6, 67 Stat. 588, 590 (1953). As stated by the court, "Congress has... conferred on the states the authority to assume jurisdiction over crimes committed on tribal land... and Florida has assumed such jurisdiction. *See* ch. 61-252, §§ 1-2, at 452-53, Laws of Fla. (codified at § 285.16, Fla. Stat. (2007))." Therefore, to the extent gaming is a crime in Florida, it is prohibited on tribal lands within the state.

7 Under IGRA, Class III gaming includes slot machines and "banked" card games in which participants play against the house (e.g., blackjack).

8 States are immune from lawsuits to which they do not consent by the doctrine of sovereign immunity enshrined in the Eleventh Amendment to the Constitution of the United States of America. Florida's immunity in this exact situation was affirmed by the United States Supreme Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

9 Tallahassee is Florida's capitol city and the seat of its state government.

10 It should be noted that under the gaming procedures the Department had threatened to unilaterally issue on or after November 15, 2007, the Seminoles would not have been obligated to pay portions of their gaming revenue to Florida as they would under Governor Crist's compact.

11 Despite its public policy, Florida currently allows some Class III gaming within the state. Article X, Section 15 of the Florida Constitution allows the state to operate a lottery. Article X, Section 23 of the Florida Constitution allows Vegas-style slot machines in Miami-Dade and Broward counties.

12 Citing the controversial case of *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (quoting State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000)).

13 129 So. 876, 881 (Fla. 1930).

14 Citing State ex rel. Green v. Pearson, 14 So. 2d 565, 567 (Fla. 1943) ("The legislative branch looks to the Constitution not for sources of power but for limitations upon power. But if such limitations are not found to exist, its discretion reasonably exercised may not be disturbed by the judicial branch of the government."), and State ex rel. Cunningham v. Davis, 166 So. 289, 297 (Fla. 1936) ("The test of legislative power is constitutional restriction; what the people have not said in their organic law their representatives shall not do, they may do.").

15 Citing B.H. v. State, 645 So. 2d 987, 993 (Fla. 1994) ("[T]he legislature's exclusive power encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies."), and Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978) (stating that under the nondelegation doctrine, "fundamental and primary policy decisions shall be made by members of the legislature").

16 The court emphasized the point by later stating: "By authorizing the [Seminole] Tribe to conduct 'banked card games' that are illegal throughout Florida—and thus illegal for the Tribe [see note X, *infra*,]—the Compact violates Florida law. *See Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991) ('This court has repeatedly held that, under the doctrine of separation of powers, the legislature may not delegate the power to enact laws or to declare what the law shall be to any other branch.')."

17 Florida's budget shortfall as of mid-FY 2009 sits at $1.7 billion. *See, e.g.*, Elizabeth McNichol & Iris J. Lav, *State Budget Troubles Worsen*, A Report by the Center on Budget and Policy Priorities, Sept. 8, 2008, *available at* http://www.cbpp.org/9-8-08sfp.htm (last accessed on Sept. 16, 2008).

18 Article V, Section 4 of the Florida Constitution created Florida's District Courts of Appeal to hear appeals of trial courts' final judgments or orders, and some non-final orders, that cannot be heard in Florida's Supreme Court or circuit courts. Rule 9.130(a), Fla.R.App.P., provides for Florida's District Courts of Appeal to hear non-final orders that determine that a class should be certified.

19 Case No. 3D05-1145 (Fla. 3d DCA June 11, 2008).

20 Ms. Butler was represented in part by Michael D. Donovan and his firm Donovan Searles, LLC of Philadelphia, Pennsylvania. Mr. Donovan and his firm have filed nearly identical actions against Kia in other states. *E.g.*, Samuel-Bassett v. Kia Motors America Inc., 143 F. Supp. 2d 503 (E.D.Pa.2001) (removed from Pennsylvania state court); Little v. Kia Motors America, Inc., Case No. UNN-L-800-01 (N.J.L.D. Aug. 20, 2003).

21 The court did not explain why it did not address the class certification's apparent failure to meet the prerequisites of subsections 3 and 4 of Rule 1.220(a), commonality and typicality.

22 In doing so, the court was following the dictate of *Humana, Inc. v. Castillo*, 728 So. 2d 261, 266 (Fla. 2d 1999), *rev. dismissed*, 741 So. 2d 1134 (Fla. 1999).

23 As the court noted, "Rule 1.220(b)(3) reads in alternative on this prong." In other words, either questions of fact or questions of law must predominate.

24 Quoting Sanneman v. Chrysler Corp., 191 F.R.D. 441, 449 (E.D. Pa. 2000).

25 909 So. 2d 923 (Fla. 3d DCA 2005).

Taxes and Textualism: Due Weight Deference to the Wisconsin Tax Appeals Commission

Continued from page 5...

made the program not "customized but customizable" and, therefore, it was not a program that "accommodate[s] the special processing needs of the customer." Because the same base system was sold to many customers for subsequent modification, the dissenters argued that it was available "for general use normally for more than one customer." and was, therefore, a prewritten program.

This is consistent with the notion that the legislator was trying to avoid taxation of amounts that, while ostensibly spent for tangible personal property subject to tax—i.e., software—are really compensation for the services that were or will be required to modify it.

However, there are other reasonable interpretations. Customized software will almost always begin with a commonly employed base system and the legislature may have not wished to tax what is in effect, the working material to be employed in what will be, for the most part, an acquisition of consulting services to create what will be, in the end, a unique system.

That view is consistent with the approach of the Tax Appeals Commission. It also focused on the nature of the R/3 system at the time of its acquisition but was concerned about what would happen later. Because the system was not useable by Menasha for anything but customization, it was not, in its view, available for "general use" and not prewritten. Because it had to be subject to substantial modification, it was, at the end of the day, a program that would "accommodate the special processing needs of the customer." For the majority, the fact that the decision of the Tax Appeals Commission was not plainly erroneous or inconsistent with the statute or administrative rule required deference to the Commission.

And that is our third subnarrative. The majority declined to defer—or to even give much weight to the interpretation of the Department of Revenue because state law, in its view, placed final authority with the Commission. Deference to the state's taxing authority would be inconsistent with the Commission's quasi-judicial function. "The taxpayer brings his or her appeal to the Commission at a significant disadvantage," it reasoned, "if the Commission must defer to the taxpayer's opponent."[9]

Although reasonable people can differ on application of the sales tax in these circumstances, the idea that a taxpayer is entitled to a fresh look at the law when engaged in a dispute is, as Justice Ziegler wrote, an important issue for the individual taxpayer.

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Endnotes

1 2008 WI 88.

2 Wis. Stat. § 77.51(20)(defining tangible personal property subject to tax as including "computer programs except custom computer programs").

3 Wisconsin Admin. Code § Tax 11.71(1) (e).

4 *Id.* at §11.71(1)(k).

5 *See, e.g.,* A Court Unbound? The Recent Jurisprudence of the Wisconsin Supreme Court (2007), *available at* http://www.fed-soc.org/publications/pubID.5/pub_detail.asp (last visited September 28, 2008).

6 2008 WI 88 at ¶128 (Abrahamson, C.J. dissenting)("The fiscal implications of the new tax exemption created by the majority opinion are substantial"); *Id.* at ¶ 209(Bradley, J. dissenting)("Here's the $300 million question…").

7 *Business Wins Big in High Court*, Milwaukee Journal Sentinel, July 11, 2008.

8 *See, e.g.*, *Trust in Supreme Court Weakens After Tax Case*, (press release by Rep. Steve Hilgenberg (D-Dodgeville) calling for passage of something called the "Impartial Judiciary Bill"), *available at* http://www.thewheelerreport.com/releases/July08/jul14/0714hilgenbergmenasha.pdf) (last visited on September 29, 2008).

9 2008 WI 88 at ¶ 59.

Supreme Court of Missouri Expands Tort Liability

Continued from front cover...

motorist to view the dead body of the driver's child. This holding expanded the Missouri cause of action for negligent infliction of emotional distress.

On June 8, 2004, Defendant Michael Jones was traveling westbound on Interstate 44 with his wife and two daughters. Mr. Jones lost control of his vehicle on the wet road, and collided with Plaintiff Tommy R. Jarrett's truck. Mr. Jarrett rushed to Mr. Jones's vehicle to check on the occupants, and saw the body of Mr. Jones's two-year-old daughter, Makayla, who had died in the collision. In addition to physical injuries caused by the collision, Mr. Jarrett claimed that the accident caused him "post-traumatic stress disorder, past wage and income loss, past pain and suffering, anxiety, emotional trauma, and stress."

Under Missouri law, bystanders who observe an injury to a third party caused by a defendant's negligence can recover for emotional distress only if the bystander is "placed in a reasonable fear of physical injury to his or her own person." Accordingly, the trial court granted summary judgment for Mr. Jones because: (1) Mr. Jarrett was a bystander who was no longer in the "zone of danger" when he viewed Makayla's death, and (2) as Mr. Jones was injured and unconscious, Mr. Jones owed no duty to prevent Mr. Jarrett from viewing Makayla's body.

The supreme court reversed, holding that Mr. Jones was not merely a bystander, as his truck had collided with the Jones's car. While acknowledging that a plaintiff may experience emotional distress from an accident and separate emotional distress from viewing the harm to third parties as a result of the accident, the majority held that a plaintiff's emotional distress caused by the accident itself is "generally inseparable" from the emotional distress caused by observing a third-party's injuries.

Mr. Jones admitted that he suffered no emotional distress from the accident, but only from the subsequent viewing of Makayla's body. Yet, the court found that that Mr. Jones's "admissions demonstrate that the grief and distress [plaintiff] experienced were a result of his participation in the accident that killed [the child], and not simply from viewing her body."

Judge Limbaugh noted in dissent "the sad irony that the party to this action who is most subject to emotional distress—the father who lost his child—is the party being sued for having caused emotional distress to a stranger who merely saw the child." The dissent also worried that the majority's criterion for distinguishing between a "direct victim" and a "bystander" would produce illogical outcomes in future cases.

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Challenging Tennessee's Unauthorized Substance Tax

Continued from front cover...

The Department has two modes of enforcement. The owner of unauthorized substances may purchase a tax stamp and then affix the stamp to the substances' container.[3] Although the taxpayer may buy the tax stamp anonymously, such purchases do not shelter drug offenders from criminal prosecution.[4] As of August 2008, just over one thousand stamps had been purchased from the Department, the vast majority of which appear to be by stamp collectors rather than drug dealers (though the true ratio is unascertainable).[5]

The second enforcement method is used far more often. Once a taxpayer is found to be in possession of any unstamped substance that falls under the law, the Department immediately assesses the individual's tax liability, tacks on a myriad of fines for failure to satisfy the tax obligation, and then seizes the person's property if the tax liability is not satisfied within forty-eight hours of arrest.[6]

In late April 2005, Steven Waters was arrested for the unlawful possession of cocaine after purportedly purchasing one thousand grams from a police informant for $12,000. Shortly thereafter, the Department of Revenue assessed Waters' tax liability at $55,316.84, more than 4.5 times the cocaine's street value, for possessing the cocaine without a tax stamp. This figure included the tax itself, nearly $5,000 in penalties, and interest. Just over a week later, the Department filed a notice of tax lien against Waters' real property and later seized the money from his bank account. Waters filed for a declaratory judgment on the drug tax statute and also sought injunctive relief.[7]

The chancery court entered judgment in favor of Waters, holding that the tax violated his constitutional rights of due process, as well as his protections against self-incrimination and double jeopardy.[8]

The court of appeals affirmed, but on different grounds. The appellate court ruled that the drug tax "seeks to tax as a privilege, activity that prior legislation has

designated as criminal," making it "arbitrary, capricious, and unreasonable and, therefore, invalid under the Tennessee Constitution."[9]

Under the Tennessee Constitution, the state legislature is granted the power "to tax merchants, peddlers, and *privileges*, in such a manner as they may from time to time direct."[10] Case law interpreting this clause has made no distinction between a privilege tax and an excise tax. Hence, the drug tax, categorized as an "excise tax" by statute, is nothing more than a privilege tax. More specifically, the appellate court stated, the tax is "an excise upon a particular privilege, assessed according to the quantity of substance possessed in enjoyment of such privilege."[11]

Existing Tennessee Supreme Court precedent states that "the Legislature can name any privilege a taxable privilege and tax it by means other than an income tax, but the Legislature cannot name something to be a taxable privilege *unless it is first a privilege*."[12] The only other limitation imposed by the Tennessee Constitution is that the privilege tax not be arbitrary, capricious, or wholly unreasonable.[13]

As the intermediate court noted, taxing a substance that one has no privilege to possess falls outside the parameters of the privilege tax clause. In accordance with supreme court precedent, the tax was deemed unconstitutional.

It is worth analyzing the tax against the appellate court's "arbitrary, capricious, and unreasonable" standard. The petitioner could argue that, as written, the law disproportionately affects minorities and the indigent. For example, the tax for one gram of powder cocaine is $50, while the tax on the same amount of a "low-street-value drug," such as crack cocaine or methamphetamine, is $200.[14] Although this imbalance is not the direct issue on appeal, it could impact the supreme court's determination as to whether the tax is indeed arbitrary and capricious as applied.

Further, monetary incentives for law enforcement agencies are built into the statutory scheme. Under state law, the agency that investigates and arrests the errant taxpayer receives seventy-five percent of the tax proceeds collected on the unauthorized substances.[15] This could create a mighty incentive for law enforcement agencies to inflate the quantity of drugs seized. Thus, taxpayers found to be in possession of unlawful substances may be criminally charged with a greater quantity than they actually possessed and may also face an exaggerated tax bill.

Possession of illegal drugs is a crime, but this law sets up a parallel civil proceeding that uses the same evidence, yet lacks the safeguards built into a criminal prosecution, such as probable cause requirements to search and seize evidence. Here, officers who have weak evidence may be tempted to invoke search and seizure anyway. Even if the criminal charges are later dropped due to a lack of probable cause, the police department will still receive its share of the tax proceeds.

There is a question of whether Tennessee's Unauthorized Substance Tax violates the Tennessee Constitution. The court of appeals addressed this issue and sent a strong message to the state legislature and Department of Revenue. It remains to be seen whether the Tennessee Supreme Court agrees.

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Endnotes

1 Tenn Code Ann. § 67-4-2802(10) (2008).

2 Waters v. Chumley, E2006-02225-SCR11-CV, 2008 Tenn. Lexis 23 (Tenn. 2008).

3 Tennessee Department of Revenue, *Unauthorized Substances Tax*, *at* http://www.tennessee.gov/revenue/faqs/unauthsubfaq.htm#unauth5 (last visited Aug. 4, 2008).

4 In reality, the transaction is pseudo-anonymous because the stamps must be purchased in person at the Department of Revenue's Nashville headquarters.

5 Of the stamps purchased, nearly ninety percent were marijuana stamps that cost either $.40 or $3.50. The remaining (more expensive) stamps comprise just more than ten percent of those purchased.

6 Tenn. Code Ann. § 67-4-2807 (2008).

7 Waters v. Chumley, No. E2006-02225-COA-R3-CV, 2007 Tenn. App. Lexis 570 (Tenn. App. 2007).

8 *Id.* at 4.

9 *Id.* at 2.

10 Tenn. Const. art. II, § 28 (emphasis added).

11 *Waters*, 2007 Tenn. App. at 6.

12 Jack Cole Co. v. MacFarland, 337 S.W.2d 453, 455 (Tenn. 1960) (emphasis added).

13 Hooten v. Carson, 209 S.W.2d 273, 274 (Tenn. 1948).

14 Tenn. Code Ann. § 67-4-2803(a)(4) and (5) (2008).

15 Tenn. Code Ann. § § 67-4-2809(b)(2) (2008).

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