STATE COURT
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New Mexico Supreme Court: Wedding Photographer May Not Decline Business from Same-Sex Couple's Commitment Ceremony

*By Jordan Lorence**

On August 22, the New Mexico Supreme Court handed down a noteworthy opinion in a case involving the First Amendment rights of business owners. In *Elane Photography v. Willock*,[1] the court unanimously upheld a ruling against a small company, Elane Photography LLC, for declining to shoot a same-sex commitment ceremony due to the owners' beliefs on marriage. The New Mexico Supreme Court rejected the photographer's arguments that the company's rights to freedom of speech and religious liberty under federal and state law protected it from being forced to produce images.

I. Background

Elane Photography LLC is a small photography business in Albuquerque operated by husband and wife, Jon and Elaine Huguenin. Elaine works as the photographer. She specializes in the "photojournalistic" style of wedding photography, in which the photographers take expressive or spontaneous shots during the wedding day in the manner that news photographers do. Many believe the photojournalistic approach to wedding photography better communicates the emotions, interpersonal dynamics and ideas of the day than the traditional set shots of the wedding party standing together, etc. Elane Photography advertises its artistic skills on its website.

Vanessa Willock, a lesbian looking for a photographer to shoot her commitment ceremony to Misti Collingsworth, found the Elane Photography website, liked the examples of work that she saw, and then wrote an email inquiring whether Elaine would be "open to helping celebrate" her same-sex "commitment ceremony." Upon receiving this email, Elaine wrote an email politely declining to shoot their ceremony. Elaine did not want to use her photographic skills to communicate the message that marriage can be defined as other than one man and one woman as this was contrary to Elaine and Jon's beliefs. Two months later, Willock sent Elaine

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Illinois Supreme Court Ruling Explores Scope of Second Amendment

*By Tara A. Fumerton**

On September 12, 2013, in *People v. Aguilar*, the Illinois Supreme Court held that Illinois's blanket prohibition of the concealed carry of a firearm in public in its aggravated unlawful use of weapons ("AUUW") statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)) violated the second amendment to the U.S. Constitution, but that the portion of Illinois's unlawful possession of a firearm ("UPF") statute ((720 ILCS 5/24-3.1(a)(1) (West 2008)) that prohibited

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FROM THE EDITOR

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

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Florida Supreme Court Finds That the Sixth Amendment Right to Counsel Allows Withdrawal of Public Defenders from Criminal Cases

*By Caroline Johnson Levine**

A significant decision by the Florida Supreme Court ruled that requiring criminal defense attorneys, employed as public defenders, to represent excessive numbers of indigent clients is a violation of a client's right to effective legal representation under the Sixth Amendment of the United States Constitution. The case, *Public Defender, Eleventh Judicial Circuit of Florida, et al. v. State of Florida,*[1] also addressed the constitutionality of a Florida statute forbidding public defenders to withdraw from representation based solely upon inadequate funding or an excessive workload.

I. The Trial Courts

Two cases with substantially the same issues were presented to the trial courts in Florida's Eleventh Judicial Circuit.

In the first case, *Public Defender, Eleventh Judicial Circuit v. State*, the public defender filed motions to withdraw in several non-capital felony cases, claiming that "excessive caseloads caused by underfunding meant the office could not carry out its legal and ethical obligations to the defendants."[2] The trial court determined that the public defender's caseload was excessive and resulted in the public defender providing only "minimally competent representation" to criminal defendants. The court granted the withdrawal of the public defender from third degree felony cases after arraignment.[3]

In the second case, *Bowens v. State*, the public defender filed a motion to withdraw representation from criminal defendant Antoine Bowens, claiming that his excessive caseload created a conflict of interest. He argued that he was required to choose which cases would be considered important enough to receive adequate representation (e.g. murders) and which cases would have to be sacrificed (e.g. third degree felonies with reduced penalties). Further, the public defender challenged the constitutionality of Florida Statute § 27.5303(1)(d), which "excludes excessive caseload as a ground for withdrawal."[4] While the court found that the public defender had indeed "demonstrated adequate, individualized proof of prejudice to Bowens as a direct result of" an excessive caseload, however it still denied the constitutional challenge.[5]

II. The Appellate Court

The State of Florida appealed both decisions to Florida's Third District Court of Appeal.

In *State v. Public Defender, Eleventh Judicial Circuit*,[6] the appellate court reversed the trial court's order and concluded that a public defender's withdrawal and associated ethical implications must be made "on a case-by-case basis, and not in the aggregate."[7] The appellate court further found that an excessive caseload would not constitute a conflict of interest because the Legislature had allotted funds for the hiring of new attorneys in the public defender's office but the public defender had neglected to hire new attorneys since 2005.[8]

Similarly, in *Bowens v. State*,[9] the appellate court reversed the trial court's order and required an evidentiary

demonstration of client harm on a case-by-case basis. This decision also upheld the constitutionality of the statute.[10]

III. The Supreme Court

The Third District Court of Appeal submitted its findings to the Florida Supreme Court and certified these cases to contain issues of "great public importance," which provided the Florida Supreme Court with the jurisdiction to decide this matter under Florida's Constitution.[11]

The appellate court requested that the Florida Supreme Court specifically decide two separate issues related to the statute prohibiting a trial court from granting motions for withdrawal to public defenders due to conflicts arising from 'underfunding, excessive caseload or prospective inability to represent a client.' Namely, the appellate court asked whether this statute is:

1. an unconstitutional violation of an indigent client's right to effective assistance of counsel and access to courts, and

2. a violation of separation of powers mandated by Article II, section 3 of the Florida Constitution as legislative interference with the judiciary's inherent authority to provide counsel and the Florida Supreme Court's exclusive control over the relevant ethical rules for attorneys?[12]

The Florida Supreme Court consolidated the two appellate cases as both cases addressed the same issues regarding defense attorneys withdrawing from criminal representation and "directly affect[ed] a class of constitutional officers, namely public defenders."[13]

The weight of the issues presented and the potential impact on the criminal justice system involved in this case resulted in a large number of *Amicus Curiae* briefs by influential parties including the American Bar Association, and the Criminal Law Section of The Florida Bar, among others.[14] Many of the *Amicus* briefs "contend[ed] that systemic or aggregate prospective relief is ethically required by the Florida Rules of Professional Conduct [e.g. competence, diligence, and communication] and by the Sixth Amendment rights of indigent defendants."[15]

A. Majority Decision

The Florida Supreme Court first stated that pursuant to the U.S. Supreme Court decision *Gideon v.*

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New Jersey Supreme Court Strikes Down Reorganization of the Council on Affordable Housing

*By Alida Kass**

In a highly anticipated decision, the New Jersey Supreme Court rejected Governor Chris Christie's attempt to reform the Council on Affordable Housing ("COAH"), holding that the Reorganization Act did not authorize the Governor "to abolish independent agencies that were created by legislative action."[1] Since its creation in 1984, COAH has governed the state's housing policy and set the criteria for municipal compliance with the Fair Housing Act.[2]

The Supreme Court overturned the Governor's attempt to dissolve the agency, holding that COAH, as a quasi-independent agency created "in but not of" the executive branch, was beyond the scope of his authority under the Reorganization Act. Justice Anne Patterson dissented, concluding that "the Act was and is intended to authorize the abolition and reorganization of COAH and other agencies that are similarly treated by our laws."[3]

I. Council on Affordable Housing

Beginning in 1975, a series of cases known as the *Mount Laurel* decisions established a municipal constitutional obligation to provide for a "realistic opportunity for the construction of [their] fair share" of affordable housing.[4] In 1985 the New Jersey Legislature responded by passing the Fair Housing Act, which codified COAH as the agency tasked with ensuring municipal compliance with the *Mount Laurel* doctrine.[5]

In February 2010, the Governor issued an executive order creating a task force to study "the continued existence of COAH" among other questions. The Legislature similarly embarked on an effort to abolish COAH. The legislative solution broke down after a bill that would have eliminated COAH was conditionally vetoed by the Governor and the Legislature failed to pass a bill incorporating the proposed amendments.[6] In January 2011, the Governor issued a second executive order, dissolving the agency and placing its powers and responsibilities under the authority of the Department

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of Community Affairs ("DCA"), according to the authority of the Reorganization Act.[7]

II. Appellate Court Decision

Following Governor Christie's executive order, the move to dissolve COAH was challenged by the Fair Share Housing Center, a housing advocacy group, which argued that because the agency was "in but not of" the executive branch, it was not subject to the Reorganization Act.[8]

The appellate court agreed with the Fair Share Housing Center, and held that the Reorganization Act did not apply to agencies which were "in but not of" the executive branch. The court considered the definition of "agency" under the Act, which includes: "[a]ny division, bureau, board, commission, agency, office, authority or institution of the executive branch created by law," and concluded that the absence of an express mention of "in but not of" agencies suggested an intent that they not be included.[9] The court also noted that COAH's enabling legislation as a whole represented "a carefully crafted statutory scheme" which, in the court's estimation, suggested that the Legislature would not likely have intended to subject the agency to the Reorganization Act.[10]

Finally, the court raised separation of powers concerns regarding the Reorganization Act. It noted that the initial decision upholding the constitutionality of the Act, *Brown v. Heymann*,[11] "relied primarily" on the fact that similar legislation had been upheld at the federal level. Interestingly, the court emphasized testimony by then-Assistant Attorney General Antonin Scalia, who had objected to the "legislative veto" in the federal law specifically because it would have allowed just one legislative house to block a reorganization plan. Since the New Jersey Act provided for a bicameral legislative veto, his concern presumably would not apply. Nevertheless, the court suggested that the subsequent amendments that excluded independent agencies from the federal law might call the application of the Reorganization Act to "in but not of" agencies into question.[12]

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Maryland Court of Appeals Limits Asbestos Liability

*By Michael J. Ellis**

For decades, asbestos cases have wound their way through state and federal courts. The first wave of cases, starting in the 1970s, was brought by construction workers and other plaintiffs who were directly exposed to asbestos.[1] Thousands of direct-exposure cases led to the bankruptcy of major asbestos-producing companies, including Johns-Mansville.[2] Thirty years later, most direct-exposure plaintiffs have obtained relief or died. That, you might think, would mean an end to asbestos lawsuits. And yet, litigation is alive and well, thanks to a second wave of lawsuits.[3] Many plaintiffs in this second wave allege that they were exposed to asbestos through the contaminated work clothing of spouses or family members.[4]

Georgia Pacific LLC v. Farrar was part of that second wave of "take-home" asbestos cases.[5] The plaintiff, Joyce Farrar, lived with her grandparents in Maryland in the 1960s. Her grandfather, a construction worker at a federal building in Washington, DC, in 1968 and 1969, did not use any asbestos products himself, but he spent time near drywall workers who used an asbestos-based Georgia-Pacific joint compound. As a teenager, Ms. Farrar shook out her grandfather's dust-covered work clothes, washed the clothes, and swept the dust from the laundry room floor. Forty years after laundering her grandfather's clothes, in 2008, Farrar was diagnosed with mesothelioma. She sued thirty defendants, including Georgia-Pacific, in Maryland state court, and a jury awarded her nearly $20 million.

Farrar presented the Maryland Court of Appeals, the Free State's highest court, with two questions: (1) whether Georgia-Pacific owed a duty to warn the family members of workers who came into contact with its products about the dangers of asbestos and (2) whether Farrar presented sufficient evidence that Georgia-Pacific's products caused her mesothelioma. Unanimously finding the answer to the first question to be no, the court did not answer the second.

The Maryland court's holding was in some respects unremarkable. Based on the Second Restatement of Torts, *Farrar* reasoned that "[a] manufacturer cannot warn of dangers that were not known to it or knowable in light of the generally recognized and prevailing scientific and

technical knowledge available at the time of manufacture and distribution."[6] Some state courts before *Farrar* had ruled that manufacturers owed a duty to family members of asbestos workers.[7] In this light, the Maryland decision represents a significant step to limit future "take-home" asbestos claims.

Farrar found that, based on the state of scientific research in the late 1960s, Georgia-Pacific could not have known that asbestos-contaminated clothing could harm workers' families. A few studies in the 1960s suggested exposure to dust that traveled home on the workers' clothes could cause health problems, but OSHA did not require employers to provide changing rooms and specialized clothing for asbestos workers until 1972. Even though it was "in hindsight perhaps fairly inferable" that asbestos dust could harm workers' families, that inference was not enough to impose a duty.[8] In other words, the uncertain state of science about secondhand asbestos exposure prior to the 1972 OSHA regulations made it unforeseeable to Georgia-Pacific that family members like Joyce Farrar who never stepped foot on a construction site could suffer harms from its products.

Foreseeability was not, however, the only element of *Farrar*'s duty analysis. The court further held that whether Georgia-Pacific had a duty to warn family members depended on whether any warnings would have been feasible and effective. Because OSHA did not issue regulations on changing rooms for asbestos workers until 1972, even if Georgia-Pacific had told its customers—builders and manufacturers—about the dangers of asbestos dust exposure, nothing guaranteed those middlemen would have passed that warning along to asbestos workers, let alone to members of their families. Thus, "even if Georgia-Pacific should have foreseen back in 1968–69 that individuals such as Ms. Farrar were in a zone of dangers, there was no practical way that any warning . . . could have avoided that danger."[9]

Feasibility and foreseeability make for unusual bedfellows. Earlier Maryland cases suggest that whether a defendant's warning would have been effective is an element of proximate cause, not foreseeability.[10] And Maryland is not alone. In the famous *Palsgraf* case, for instance, the dissent by Judge Andrews argued that proximate cause means "the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[11] Judge Cardozo's majority opinion, on the other hand, eschewed the practical considerations of proximate cause in favor of foreseeability.[12] *Farrar*'s addition of feasibility to foreseeability blends the two sides of the *Palsgraf* debate into an uneasy compromise.

Because the Maryland court decided *Farrar* on duty alone, it avoided the second question before it: whether Farrar presented sufficient evidence that Georgia-Pacific's products caused her mesothelioma. Causation, a factual question for the jury, might have been a nettlesome issue for the court because Georgia-Pacific argued strenuously that the verdict below rested on questionable grounds.[13] Farrar's grandfather had worked at the federal building for several months, but he also installed asbestos insulation and cement for much of his fifty-year career as a construction worker—insulation and cement that Georgia-Pacific did not manufacture.[14] The jury nevertheless found that Georgia-Pacific's drywall joint compound, rather than any other manufacturer's product, was the proximate cause of Farrar's mesothelioma. Foreseeability, even when modified with feasibility, by contrast, was a purely legal question that did not require the Court of Appeals to overturn a jury verdict.

In sum, *Farrar* represents a significant step to limit asbestos liability. Maryland courts will be less likely to impose a duty on manufacturers with respect to third-party bystanders, especially when the scientific evidence of a product's harmfulness is less than certain. Even if harm is foreseeable, manufacturers may not be liable if they can show it would not have been possible to issue an effective warning.

**Michael J. Ellis is counsel to the U.S. House Permanent Select Committee on Intelligence. This article represents his views only and not the view of the Committee.*

Endnotes

1 *See* Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 500, 528 (2009).

2 *Id.* at 502–03

3 *Id.* at 545–46.

4 *Id.*

5 ___ A.3d ___, No. 102, Sept. Term 2012, 2013 WL 3456573 (Md. Jul. 8, 2013).

6 *Farrar*, 2013 WL 3456573, at *7; *see also* Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 447 (6th Cir. 2009) (rejecting take-home liability under Kentucky law); Holdampf v. A.C. & S. (*In re* N.Y. City Asbestos Litig.), 840 N.E.2d 115, 116 (N.Y. 2005) (same under New York law); Riedel v. ICI Ams., Inc., 968 A.2d 17, 25– 26 (Del. 2009) (same under Delaware law). *See generally* Restatement (Second) of Torts § 402A cmt. k (1965) (explaining that the seller of an "unavoidably unsafe" product is "not to be held to strict liability for unfortunate consequences attending [its] use, merely because he has undertaken to supply the public with an apparently useful and

desirable product, attended with a known but apparently reasonable risk").

7 *See, e.g.*, Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1149 (N.J. 2006); Satterfield v. Breeding Insulation, Inc., 266 S.W.3d 347, 374 (Tenn. 2008).

8 *Farrar*, 2013 WL 3456573, at *13.

9 *Id.* at *10.

10 *See* Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 469 (Md. 1992); Anchor Packing Co. v. Grimshaw, 692 A.2d 5, 35 (Md. Ct. Spec. App. 1997), *vacated on other grounds sub nom.* Porter Hayden Co. v. Bullinger, 713 A.2d 962 (Md. 1998).

11 Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

12 *Id.* at 101 (Cardozo, J.).

13 *See* Georgia-Pacific Br., *Farrar*, 2013 WL 3456573, at *33–34.

14 *Id.* at *3.

Florida Supreme Court Finds That the Sixth Amendment Right to Counsel Allows Withdrawal of Public Defenders from Criminal Cases

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Wainwright,[16] criminal defendants "are guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution."[17] Florida also guarantees this right under Article I, section 16 of the Florida Constitution.[18] The majority reaffirmed that the right to effective assistance of counsel "encompasses the right to representation free from actual conflict"[19] and that, furthermore, an "actual conflict of interest that adversely affects a lawyer's performance violates a defendant's Sixth Amendment right to effective assistance of counsel."[20]

To address the issue, the Court first reviewed the historical evidence of the public defender's budget reductions and increased caseload assignments. The Court noted that the Eleventh Judicial Circuit Office of the Public Defender routinely assigned approximately "400 cases per attorney for a number of years" and that third degree "felony attorneys often have as many as fifty cases set for trial in one week," and yet most professional legal organizations recommended caseloads of "200 to 300 [or] less."[21]

The Court found that excessive caseloads result in an inability "to interview clients, conduct investigations, take depositions, prepare mitigation, or counsel clients about pleas."[22]

The Court noted that the United States Supreme Court recently issued two decisions addressing ineffective assistance of counsel in pre-trial matters and plea agreements in *Lafler v. Cooper*[23] and *Missouri v. Frye.*[24] These cases determined that ineffective pre-trial representation was just as critically important as representation at trial, as most criminal cases conclude in plea agreements.[25]

Next, the court turned to the statutory language governing withdrawal by the public defender based on conflicts. The Florida Legislature enacted statutory language in 1999, which required a trial court to review motions to withdraw from the public defender and determine whether an asserted conflict is prejudicial to an indigent client.[26] In 2004, the Legislature added the Section 27.5303(1)(d) requirement (which was challenged constitutionally in *Bowens*) that "[i]n no case shall the court approve a withdrawal by the public defender based solely upon inadequacy of funding or excess workload of the public defender."[27]

Ultimately, the court decided that "section 27.5303 should not be interpreted to proscribe courts from considering or granting motions for prospective withdrawal when necessary to safeguard the constitutional rights of indigent defendants to have competent representation."[28] The Court concluded that the prejudice required for withdrawal under the statute, when it is based on an excessive caseload, is a showing of "'a substantial risk that the representation of [one] or more clients will be materially limited by the lawyer's responsibilities to another client'" under the relevant provisions of Florida Bar Rules.[29]

The Court found that the statute to be facially constitutional. However, the Court noted that the statute "should not be applied to preclude a public defender from filing a motion to withdraw based on excessive caseload or underfunding that would result in ineffective representation of indigent defendants nor to preclude a trial court from granting a motion to withdraw under those circumstances."[30] Significantly, the Court found that pursuant to the doctrine of inherent judicial power, it is the sole province of the judicial branch to regulate issues of ethical representation and conflicts of interest, and that this doctrine is most compelling when safeguarding fundamental rights.[31]

B. Dissent and Concurrence

Chief Justice Polston and Justice Canady dissented in part and concurred in part with the four justices in the majority. The two justices agreed with the majority in finding section the statute at issue to be constitutional.[32] They dissented in part because they did not agree that the "Public Defender's Office for the largest circuit in Florida should be permitted to withdraw from 60% of its cases by testifying that, due to its high caseload, attorneys *may possibly* end up violating individual ethical obligations."[33] They also noted, "there was no showing that individual attorneys were providing inadequate representation" and proof of actual harm to a criminal defendant cannot be established "in the aggregate, simply based on caseload averages and anecdotal testimony."[34]

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Endnotes

1 Public Defender, Eleventh Judicial Circuit of Florida, et al. v. State of Florida, Nos. SC09-1181 and SC10-1349, slip op. (Fla. May 23, 2013).

2 *Id*. at 2.

3 *Id*. at 3.

4 *Id*. at 5-6.

5 *Id*. at 6.

6 State v. Public Defender, Eleventh Judicial Circuit, 996 So.2d 213 (Fla. 3d DCA 2009).

7 *Id*. at 805-806; *see also* Nos. SC09-1181 and SC10-1349, slip op. at 4.

8 *Id*. at 803-805; *see also* Nos. SC09-1181 and SC10-1349, slip op. at 5.

9 Bowens v. State, 39 So.2d 479 (Fla. 3d DCA 2010).

10 *Id*. at 482; *see also* Nos. SC09-1181 and SC10-1349, slip op. at 6.

11 Nos. SC09-1181 and SC10-1349, slip op. at 6 (The court found jurisdiction under Florida's Constitution Article V, § 3(b)(3),(4)).

12 *Id*. at 2.

13 *Id*. at 2.

14 Additional *Amicus* briefs were submitted by the Criminal Conflict and Civil Regional Counsel, the Florida Association of Criminal Defense Lawyers, the Public Interest Law Section of The Florida Bar, the Brennan Center For Justice, the National Association of Criminal Defense Lawyers, the Florida Public Defender Association, and the Florida Prosecuting Attorneys Association.

15 *Id*. at 16.

16 Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963).

17 Nos. SC09-1181 and SC10-1349, slip op. at 6-7.

18 *Id*.

19 Hunter v. State, 817 So.2d 786, 791 (Fla. 2002).

20 Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708 (1980).

21 Nos. SC09-1181 and SC10-1349, slip op. at 23.

22 *Id*. at 24.

23 Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

24 Missouri v. Frye, ___U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d 379, *cert. denied,* ___U.S. ___, 132 S.Ct. 1789, 182 L.Ed.2d 615 (2012).

25 Nos. SC09-1181 and SC10-1349, slip op. at 34.

26 *Id.* at 8 (citing Ch. 99-282 § 1, at 3084, Laws of Fla.). The Florida Legislature amended the statute in response to the Florida Supreme Court's decision in *Guzman v. State*. Before its amendment in 1999, the statutory provision governing withdrawal by the public defender based on conflicts of interest required a trial court to grant a public defender's motion to withdraw based on conflict without conducting any factual determination. *Id.* at 8-9. In *Guzman*, the Florida Supreme Court held that once a public defender's motion to withdraw based on conflict due to adverse or hostile interests between two clients, the trial court must grant separate representation. *Id.* (citing Guzman v. State, 644 So. 2d 996, 999 (Fla. 1994)). The Legislature's response was to require that the court, once the public defender files a motion the withdraw,

> shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. The court shall permit withdrawal unless the court determines that the asserted conflict is not prejudicial to the indigent client. If the court grants the motion to withdraw, it may appoint [a member of the Bar] … to represent those accused.

Nos. SC09-1181 and SC10-1349, slip op. at 9 (citing Ch. 99-282 § 1, at 3084, Laws of Fla.). Thus, under the amended statute, the court was "no longer required to automatically grant a public defender's motion to withdraw based upon an assertion of conflict" and was "specifically charged with reviewing the motion and making a determination of whether the asserted conflict is prejudicial to the client. *Id.* at 9-10.

27 Florida Statute § 27.5303(1)(d); *see also* Nos. SC09-1181 and SC10-1349, slip op. at 4 n.4.

28 Nos. SC09-1181 and SC10-1349, slip op. at 14 (internal quotations omitted).

29 *Id.* at 35. The relevant provision of the Florida Bar rule is 4–1.7(a)(2).

30 *Id*. at 42-43.

31 *Id*. at 41-42.

32 *Id*. at 46 (Polston, C.J., dissenting).

33 *Id*. (emphasis added).

34 *Id*. at 47.

New Jersey Supreme Court Strikes Down Reorganization of COAH

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III. Supreme Court Opinion

The New Jersey Supreme Court upheld the appellate court's decision primarily on statutory grounds: "At the heart of this case is a question of statutory interpretation: whether an independent agency like COAH is subject to the Reorganization Act." And in analyzing the scope of "agency" as defined under the Act, the court focused specifically on the choice of pronoun. Emphasizing that the Act covers "any . . . agency . . . *of* the executive branch," the court deemed "of" to be a "term of art" to which the court was "required to give meaning."[13]

The court also focused considerable attention on the question of whether the Reorganization Act had ever been applied to an "in but not of" agency. The court seemed to acknowledge the prior application of the Act to independent agencies, but emphasized that there has been no cited example "of a Chief Executive relying on the Reorganization Act to *abolish* an independent agency."[14] Though the Court did not cite anything from the statute itself that would suggest the scope of the Act would differ according to the function being authorized, it appeared to draw a line between the application of the Reorganization Act to transfer or modify an "in but not of" agency, and abolishing such an agency.

Although the court wrote that it was deciding the case on statutory grounds, that line-drawing was likely informed by the court's concerns over separation of powers doctrine and the Presentment Clause. The court noted that it had previously upheld the constitutionality of the Reorganization Act in reliance on the constitutionality of existing federal law, and "did not anticipate or address the changes to federal law made years later in response to constitutional concerns." To that point, the court cited the appellate opinion invoking of then-Assistant Attorney General Antonin Scalia's concerns regarding the legislative veto and the subsequent amendments to the federal law which limited its application to independent agencies. It also emphasized that *Brown* upheld the application of the Reorganization act to the rearranging and not to the abolition of an "in but not of" agency.[15]

Justice Anne Patterson dissented, joined by Justice Helen Hoens. Justice Patterson disputed the majority's reliance on the simple use of the preposition "of" to carry the burden of legislative intent, and argued it was unlikely the Legislature would seek to express itself in such "oblique" fashion rather than simply exempting the class of agencies explicitly in the definition section."[16] Justice Patterson also argued that the history of the Reorganization Act included numerous instances of the Act being applied to agencies that were "in but not of" the executive branch. She noted that the first case brought under the Act involved the reorganization of the Public Employment Relations Commission ("PERC"), an "in but not of" agency, and yet there was no indication either from legislative history of the Act or from the opinion in *Brown* that the Reorganization Act did not apply due to PERC's status.[17] Justice Patterson further argued that the Act has since been used on numerous occasions to abolish or reorganize "in but not of" agencies without having been challenged by the Legislature and without suggestion that its application to that special class of agency exceeded the authority of the Act.[18]

IV. Significance of the Case

Most immediately, the decision seems to clear the way for a return to *Mount Laurel*-based methodologies. In a decision issued just two months after *In re Plan for Abolition of COAH*, the New Jersey Supreme Court rejected the latest round of COAH regulations and ordered the agency to issue new guidelines within the next five months based on previous COAH methodologies. Not only has COAH been reinstated, this most recent decision seems to confirm that any significant change in the way COAH regulates municipal housing policy must begin in the legislature.[19]

**Alida Kass is Chief Counsel at the New Jersey Civil Justice Institute.*

Endnotes

1 *In re* Plan for Abolition of Council on Affordable Housing, No. 070426, 2013 WL 3717751, at *1 (N.J. Jul. 10, 2013).

2 *Id.* at *3.

3 *Id.* at *20 (Patterson, J., dissenting).

4 *Id.* at *2.

5 *Id.*

6 *Id.* at *1.

7 *Id.*

8 The "in but not of" language has been used by New Jersey courts to reconcile the requirement under the New Jersey Constitution that

all agencies be housed within one of the 20 executive departments with the attempt to give some agencies quasi-independent status. New Jersey Turnpike Authority v. Parsons, 3 N.J. 235 (1949).

9 N.J. Stat. Ann. § 52:14C-3(a).

10 *In re* Plan for Abolition of Council on Affordable Housing, 424 N.J.Super. 419, 425 (N.J. App. Div. 2012).

11 62 N.J. 1, 297 A.2d 572 (1972).

12 424 N.J. Super at 430.

13 *In re* Plan for Abolition of Council on Affordable Housing, No. 070426, 2013 WL 3717751, at *14 (N.J. Jul. 10, 2013) (emphasis added).

14 *Id*. at *16 (emphasis added).

15 *Id*. at *19.

16 *Id*. at *23 (Patterson, J., dissenting).

17 *Id*. at *29 (Patterson, J., dissenting).

18 *Id. at* *27 (Patterson, J. dissenting).

19 *In re* Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, No. 067126, 2013 WL 53568707 (N.J. Sept. 26, 2013).

New Mexico Supreme Court: *Elane Photography v. Willock*

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another email, asking whether Elane Photography offers its "services to same-sex couples." Elaine responded that the Company does "not photograph same-sex weddings" and thanked Willock for her interest.

Although Willock and her partner found another photographer at a lower price than what Elane Photography would have charged, Willock filed a complaint with the State, claiming Elane Photography violated the state public accommodations law by engaging in sexual orientation discrimination. The State found probable cause, and accordingly subjected Elane Photography to a one day trial before a hearing examiner. Based on the hearing examiner's report, the New Mexico Commission on Human Rights found Elane Photography guilty of sexual orientation discrimination by a public accommodation, and ordered it to pay $6,637.94 in attorneys' fees. Elane Photography appealed, and lost at both the state district court and the New Mexico Court of Appeals. The New Mexico Supreme Court granted review and heard oral arguments in March 2013. On August 22, 2013, the New Mexico Supreme Court unanimously ruled against Elane Photography.

II. Decision

A. Public Accommodation

The New Mexico Supreme Court found that Elane Photography was a public accommodation subject to New Mexico's Human Rights Act. By way of background, a public accommodation in general is a commercial enterprise that provides goods or services to the public. The New Mexico Human Rights Act prohibits "public accommodations" from discriminating against its customers based on "sexual orientation," among other characteristics. Elane Photography did not appeal the issue of whether it was a "public accommodation" under state law to the New Mexico Supreme Court, but did appeal the issue of whether it had engaged in "sexual orientation" discrimination under New Mexico law. Elane argued that it turned down the request because of the ceremony's message it would have to communicate via its photography, not the sexual orientation of the participants. Elane argued that it would photograph homosexuals in other contexts (e.g., shooting head shots for business advertising), but would not photograph stills of heterosexual actors depicting a same-sex wedding in a play. The high court disagreed, and upheld the lower court rulings that Elane had engaged in sexual orientation discrimination.

The New Mexico Supreme Court then addressed the various free speech and religious liberty defenses Elane raised in the case.

B. Compelled Speech

Elane first argued that the public accommodations statute, as applied to this situation, violated the company's First Amendment rights protecting it from compelled speech. The United States Supreme Court has ruled that the government may not force people to say the government's own message, in *West Virginia Board of Education v. Barnette*[2] (prohibiting public schools from forcing unwilling students to recite the Pledge of Allegiance) and *Wooley v. Maynard*[3] (New Hampshire cannot fine drivers who cover the state motto, "Live Free or Die" on their auto license plates, because of their opposition to that message).

Also, the U.S. Supreme Court has ruled that the First Amendment protects corporations from governmental compelled speech, even if the speech comes from private individuals and not the state actors.[4] Elane Photography also relied on the *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995), in which a unanimous Supreme Court reversed

the decision by the Massachusetts courts that found the privately-run Boston St. Patrick's Day Parade in violation of the state public accommodation law for declining to allow a group with a pro-homosexual message to march in the parade. The Supreme Court ruled that the public accommodations law, as applied to the parade organizers, violated the First Amendment prohibition on compelled speech. Additionally, Elane Photography argued that it did more than convey a message on marriage that it disagreed with—it created the expression itself, which is a greater violation of the protection against compelled speech.

The New Mexico Supreme Court carefully examined the compelled speech defense and rejected it. It ruled that this case is most like *Rumsfeld v. FAIR*,[5] in which the Supreme Court upheld a federal law requiring universities receiving federal funding to allow military recruiters to come on campus to interview students interested in joining the military. The U.S. Supreme Court rejected the universities' compelled speech claim. The New Mexico Supreme Court reasoned that state law merely required Elane Photography to offer the same services to all of its customers, the way the universities had to treat the military recruiters the same as all other recruiters, by providing them meeting space, sending out their meeting notices, etc. Like the schools in *Rumsfeld*, the New Mexico Supreme Court stated, the law here did not require Elane Photography to express support or opposition to any idea. This equal treatment requirement applies to businesses that create expression, the court ruled. "The reality is that because [Elane Photography] is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work," the court stated.

C. Religious Liberty

Religious liberty provisions also provided no defense for the photography company, according to the New Mexico Supreme Court. The Huguenins are evangelical Christians, who believe that the Bible teaches that marriage can only be defined as one man and one woman. Because the Huguenins believe they must live in accord with Biblical teaching in order to please the Lord, they could not in good conscience use their work to promote an alternative definition of marriage.

Elane Photography asserted protection under two religious liberty provisions—the First Amendment's Free Exercise Clause, and the New Mexico Religious Freedom Restoration Act ("NMRFRA"), a state statute that grants great protection than the First Amendment's Free Exercise Clause.

The court rejected Elane's defense under the Free Exercise Clause because the public accommodation law is a neutral law of general applicability, which means no Free Exercise protection exists under the U.S. Supreme Court's decision in *Employment Division v. Smith*.[6] Businesses generally must treat customers alike under the state public accommodations law.

The New Mexico Religious Freedom Restoration Act provides much broader protection than the federal Free Exercise Clause, because it protects those with religious objections even against laws that are neutral on their face about religion and apply generally to all. That statute requires the government to justify infringements on religious liberty with a compelling state interest, implemented by the least restrictive means. However, Elane Photography could not benefit from the protections provided by the NMRFRA, the New Mexico Supreme Court ruled, because the statute applies only to legal actions in which the government was a party. Therefore, the statute did not to apply to this case, because Vanessa Willock, not the State of New Mexico, was Elane Photography's opponent in court.

The concurring opinion by Justice Bosson included a widely-reported discussion of the clash of rights in this case between the lesbian couple and the Huguenins' efforts to live their lives consistent with their religious beliefs. Justice Bosson wrote that in the "more focused world of the marketplace . . . the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation. . . . In short, I would say to the Huguenins, with utmost respect: it is the price of citizenship."[7]

Alliance Defending Freedom, which has represented Elane Photography throughout this litigation, appealed the compelled speech claim to the U.S. Supreme Court. ADF expects the Supreme Court to decide whether to grant review of the case or not in late March 2014.

**Senior Counsel, Alliance Defending Freedom*

Endnotes

1 ___ N.M. ___, 309 P.3d 53 (2013).

2 319 U.S. 624 (1943).

3 430 U.S. 705 (1977).

4 *See* Miami Herald v. Tornillo, 418 U.S. 241 (1974) (Florida may not force a private newspaper to print responses from private individuals who disagree with the newspaper's editorial positions); Pacific Gas and Electric v. Public Utilities Commission of California, 475 U.S.

Washington Supreme Court Addresses Constitutionality of Water Pollution Control Mandate

*By Seth L. Cooper**

In *Lemire v. Department of Ecology* (2013),[1] the Washington Supreme Court addressed the constitutionality of an order made pursuant to the State's Water Pollution Control Act ("WPCA"). Lemire offers the Washington Supreme Court's latest take on evidentiary standards for reviewing administrative agency actions that affect property rights.

I. Background

At issue in *Lemire* was an administrative order issued by the Washington Department of Ecology ("Department") to cattle rancher Joseph Lemire pursuant to the WPCA.[2] The Department directed Lemire to take steps—namely constructing livestock fencing and off-stream water facilities to eliminate livestock access to the stream corridor—to curb activities it determined were polluting a creek that runs through Lemire's property.

Lemire challenged the order but the Pollution Control Hearings Board ("Board") upheld it on summary judgment. However, on administrative appeal the Columbia County Superior Court reversed the judgment and invalidated the Department's order. In its decision, the Superior Court ruled the Department's order was unsupported by substantial evidence and constituted a taking. Division Three of the Washington Court of Appeals certified the case directly to the Washington Supreme Court for review.

By an 8-1 vote, the Washington Supreme Court reversed the Superior Court on all counts. In an opinion written by Justice Debra Stephens,[3] the majority held that the Department acted within its authority, the order was supported by substantial evidence, and Lemire failed to establish that a taking occurred.

II. Majority Opinion: Substantial Evidence Analysis

The evidence presented by the Department at the administrative hearing consisted of reports of four visits to Lemire's property by a Department employee between

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1 (1986) (California commission may not force a regulated utility to include in its billing envelopes a newsletter from an activist group criticizing the company's actions).

5 547 U.S. 47 (2006).

6 494 872 (1990).

7 309 P.3d at 79.

Illinois Supreme Court Ruling Explores Scope of Second Amendment

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the possession of firearms by minors did not.[1] Upon denial of rehearing on December 19, 2013, the Court modified its opinion and clarified that its holding was limited to the "Class 4" form of the specified AUUW violation, leaving unanswered the question of whether other "classes" of a similar AUUW violation (such as a "Class 2" violation of the statute by a felon) would also be deemed unconstitutional and leading two Justices to dissent from the majority opinion, which was previously unanimous.[2]

The Illinois Supreme Court's ruling came on the heels of (and largely adopted) the Seventh Circuit's ruling in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), which similarly found that the AUUW's blanket prohibition on concealed carry of a firearm in public was unconstitutional. While the practical effect of the Court's ruling was largely mooted by the Illinois legislature's enactment after *Moore* of the Firearm Concealed Carry Act (*see* Pub. Act 98-0063 (eff. July 9, 2013)), which amended the AUUW to allow for a limited right to carry certain firearms in public, the ruling nevertheless provides insight into the outcome of future challenges to Illinois laws restricting and regulating the personal use of firearms.

I. Factual Background

At issue in *Aguilar* were defendant's second amendment challenges to his conviction for violating two Illinois gun control laws.[3] Police arrested defendant (who was then 17 years old) after they had investigated a group of teenagers who were making disturbances

and observed defendant with a gun in his hand. At the time of this observation (and his arrest), defendant was in his friend's backyard.[4] Defendant was charged with and convicted of violating the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute (prohibiting the concealed carrying of a loaded firearm anywhere other than "his or her land or in his or her abode or fixed place of business") and section 24-3.1(a)(1) of the UPF statute (prohibiting the possession of "any firearm of a size which may be concealed upon the person" by anyone under 18 years of age).[5] The trial court sentenced defendant to 24 months' probation for the AUUW conviction and did not impose any sentence on the UPF conviction.[6] Defendant appealed his convictions and the appellate court affirmed.[7]

II. Standing Challenge

Before addressing the constitutionality of the two Illinois statutes at issue, the Illinois Supreme Court first rejected the State's argument that defendant lacked standing to assert a constitutional challenge to these statutes.[8] The State's position was that to have standing defendant must show that "he was engaged in conduct that enjoys second amendment protection" and that he could not do so because "the conduct involved in this case, namely, possessing a loaded, defaced, and illegally modified handgun on another person's property without consent, enjoys no such protection."[9] In rejecting the State's argument, the Illinois Supreme Court noted that defendant was not arguing that these statutes *as applied in this case* were unconstitutional, rather he was arguing that they *facially* violated the second amendment and could not be enforced against *anyone*.[10] It further stated, "If anyone has standing to challenge the validity of these sections, it is defendant. Or to put it another way, if defendant does *not* have standing to challenge the validity of these sections, then no one does."[11]

III. Second Amendment Challenge to the AUUW Statute

After disposing of the State's standing argument, the Illinois Supreme Court first tackled the constitutionality of the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute. To do so, it looked to the U.S. Supreme Court's decisions in *District of Columbia v. Heller,* 554 U.S. 570 (2008) (holding that a District Columbia law banning handgun possession in the home violated the second amendment) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (holding that second amendment right recognized in *Heller* is applicable to the states through the due process class of the fourteenth amendment and striking down similar laws that banned the possession of handguns in the home).[12] The Illinois Supreme Court noted that Illinois appellate courts previously upholding the constitutionality of the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) had uniformly read *Heller* and *McDonald* to hold only that the second amendment protects the right to possess a handgun *in the home* for the purpose of self-defense and that neither *Heller* nor *McDonald* expressly recognized a right to keep and bear arms *outside the home*.[13]

The Illinois Supreme Court also noted, however, that less than a year earlier, the Seventh Circuit Court of Appeals in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) applied the broader principles that informed *Heller* and *McDonald* to find that section 24-1.6(a)(1), (a)(3)(A) (the same Illinois provision at issue in *Aguilar*) violated the second amendment.[14] In summarizing the Seventh Circuit's holding and rationale in *Moore*, the Illinois Supreme Court cited to several portions of that opinion that stated that the clear implication of *Heller* and *McDonald* is that the constitutional right of armed self-defense is broader than the right to have a gun in one's home.[15] The Illinois Supreme Court also cited to the Seventh Circuit's discussion in *Moore* of the fact that the second amendment guarantees not only the right to "keep" arms, but also the right to "bear" arms, and that the latter must imply a right to carry a loaded gun outside the home if it is to be read (as it should be) as being distinct from the former.[16]

Ultimately, the Illinois Supreme Court rejected the prior Illinois appellate court decisions and adopted the Seventh Circuit's analysis in *Moore*. It stated: "As the Seventh Circuit correctly noted, neither *Heller* nor *McDonald* expressly limits the second amendment's protections to the home. On the contrary, both decisions contain language strongly suggesting if not outright confirming that the second amendment right to keep and bear arms extends beyond the home."[17] Although it concluded in no uncertain terms "that the second amendment protects the right to possess and use a firearm for self defense outside the home," the Illinois Supreme Court was careful to state that it was "in no way saying that such a right is unlimited or is not subject to meaningful regulation."[18] The issue of what would constitute "meaningful regulation" was not, however, before the Illinois Supreme Court as it concluded that the statute at issue "categorically prohibits the possession and use of an operable firearm for self-defense outside the

home."[19] Accordingly, the Court reversed defendant's conviction of the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW.[20]

Notably, after the Seventh Circuit's decision in *Moore*, but before the Illinois Supreme Court's decision in *Aguilar*, the Illinois General Assembly enacted the Firearm Concealed Carry Act, which amended the AUUW statute to allow for a limited right to carry certain firearms in public.[21] The Illinois Supreme Court noted this change in the law but specifically refrained from commenting on the Act or the amended AUUW statute because it was not at issue in the case before it.[22]

IV. Second Amendment Challenge to the UPF Statute

Having concluded that defendant's conviction under the AUUW statute should be reversed, the Illinois Supreme Court next turned to defendant's challenge to his UPF conviction under section 24-3.1(a)(1) for possession of a firearm by a minor.[23] Defendant argued that the right to keep and bear arms extended to persons younger than 18 years of age and, in support, pointed to the fact that historically many colonies required people as young as 15 years of age to "bear arms" for purposes of militia service.[24]

The Illinois Supreme Court rejected defendant's argument. In reaching its holding, the court cited to specific language in *Heller* where the U.S. Supreme Court emphasized that its opinion should not cast doubt on longstanding prohibitions on the possession of firearms by certain categories of people (*e.g.*, felons or the mentally ill) or in certain sensitive locations (*e.g.*, schools and government buildings).[25] While prohibitions on the possession of firearms by minors was not one of the specific examples enumerated in *Heller*, the Illinois Supreme Court surveyed several other courts that have upheld such prohibitions and found that while historically many colonies *permitted* or *required* minors to possess firearms for purposes of militia service, nothing like a *right* for minors to own firearms has ever existed.[26] Relying on the rationale and historical evidence espoused by these other courts, the Illinois Supreme Court stated its "agreement with the obvious and undeniable conclusion that the possession of handguns by minors is conduct that falls outside of the scope of the second amendment's protection."[27] Thus, the Court affirmed defendant's conviction under 24-3.1(a)(1) and remanded the case to the trial court for imposition of sentence on the UPF conviction.[28]

V. The Denial of Rehearing and Dissenting Opinions

The Court's initial opinion issued on September 12, 2013 was unanimous. The State petitioned for rehearing, arguing that the AUUW sections at issue were not facially unconstitutional because, looking to the sentencing provisions in the AUUW, they can be applied to felons without violating the second amendment in its "Class 2" form of the offense.[29] On December 19, 2013, the Court denied the State's petition, but modified its original opinion to make it clear that it was only addressing the "Class 4 form" of the AUUW statute, which applied to anyone who violated the statute with no aggravating circumstances (*e.g.* prior offense, prior conviction of a felony).[30] Other than the insertion of "Class 4 form of" in front of every AUUW citation, the opinion remained virtually unchanged. The denial of rehearing and the insertion of this clarifying language, however, led two Justices to dissent to the new majority opinion.

Chief Justice Garman dissented from the denial of rehearing because, in her view, the State "fundamentally redefined the issue presented in this case" in its petition for rehearing.[31] While she acknowledged that this fact may typically weigh against rehearing, she wrote, "[G]iven the constitutional nature of the issue and the potential far-reaching consequences of our decision, I would prefer to resolve this question after more deliberation."[32] Justice Theis also dissented from the modified majority opinion and denial of rehearing, stating that "the majority seeks to dramatically alter the issue in this case" by "consider[ing] not only the elements of the offense of AUUW in determining the constitutionality of the statute, but also incorporat[ing] the sentencing provisions into its constitutional analysis."[33] While questioning the "unintended consequences" of conflating the distinctions between the elements of an offense and the factors relevant to enhancing a sentence, Justice Theis took issue with the fact that the majority never explained why the class of sentence has any bearing on the constitutional question and noted that neither the Seventh Circuit decision in *Moore* nor the Illinois appellate decisions relied on and cited by the majority mention the words "Class 4 form" at all.[34] Given this decision's " momentous import to the litigants and to the people of this state," Justice Theis concluded that the "majority's new analysis leaves too many questions unresolved" to not warrant rehearing and an opportunity for the parties to argue

about whether the court's new constitutional analysis should cause it to reconsider the determination that the AUUW statute is facially unconstitutional.[35]

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Endnotes

1 People v. Aguilar, 2013 IL 112116, __N.E.2d__, 2013 Ill. LEXIS 1626 (Ill. Sept. 12, 2013) (petition for rehearing denied).

2 *Aguilar*, 2013 IL 112116, ¶22, n.3.

3 *Id.* at ¶¶1, 11.

4 *Id.* at ¶¶3-7.

5 *Id.* at ¶¶7, 15, 25.

6 *Id.* at ¶7.

7 *Id.*

8 *Id.* at ¶¶11-12.

9 *Id.* at ¶11.

10 *Id.* at ¶12.

11 *Id.*

12 *Id.* at ¶¶15-18.

13 *Id.* at ¶18.

14 *Id.* at ¶19.

15 *Id.*

16 *Id.*

17 *Id.* at ¶20.

18 *Id.* at ¶21.

19 *Id.*

20 *Id.* at ¶21.

21 *See* Pub. Act 98-0063 (eff. July 9, 2013).

22 *Aguilar*, 2013 IL 112116, ¶22 n.4.

23 *Id.* at ¶¶24-25.

24 *Id.* ¶25.

25 *Id.* at ¶26 (*quoting Heller*, 554 U.S. at 626).

26 *Id.* at ¶27.

27 *Id.*

28 *Id.* ¶¶28-30.

29 *Id.* at ¶36 (Garman, J., dissenting).

30 Id. at ¶22 n.3 (majority opinion); *see also* 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008).

31 *Id.* at ¶33 (Garman, J., dissenting).

32 *Id.*

33 *Id.* at ¶40 (Theis, J., dissenting).

34 *Id.* at ¶44-45 (Theis, J., dissenting).

35 *Id.* at ¶48 (Theis, J., dissenting).

Washington Supreme Court Addresses Constitutionality of Water Pollution Control Mandate

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2003 and 2008, as well as four visits to his property in 2009. Reported conditions at the property included "livestock with direct access to the creek, overgrazing of the riparian corridor, manure in the stream corridor, inadequate vegetation, bare ground, erosion, cattle trails across the creek, trampled stream banks, and cattle wallowing in the creek."

Addressing this, Justice Stephens' opinion noted that the Department's expert had "described via declaration how these conditions tend to cause pollution."[4] The declaration also stated that Washington State's water quality assessment report to Congress—required by the federal Clean Water Act—listed the creek as polluted. The majority continued that even when viewing the record in the light most favorable to Lemire, the evidence still supports a grant of summary judgment to the Department. It reasoned that the observations of cattle access to the stream on Lemire's property was "consistent with the kind of pollution found in the stream, such as sediment content, fecal coliform, and other disturbances of the water quality" and this was all the Department was required to prove.[5]

This can be distinguished from the Superior Court decision, which emphasized that "[t]he record is absolutely absent of any evidence-direct evidence-that Mr. Lemire's modest herd *actually polluted* Pataha Creek."[6] The Supreme Court applied a different standard than the lower court, ruling that the statute at issue "does not require it [the Department] to prove causation" and that it was sufficient that the Department's "expert declaration provided evidence that the *current condition* of Pataha Creek is polluted."[7] The court rejected arguments that causation is a question of fact and stated rather that "the 'causation' contemplated by the statutes is the likelihood that organic or inorganic matter will cause or tend to cause pollution."[8]

III. Majority Opinion: Takings Analysis

The court also rejected Lemire's argument that the fence he was required to construct on his property amounted to a taking by depriving him of the economic use of his land. Specifically, Lemire had argued the fence was a taking because it prevented his cattle from grazing pasturelands on the far side of the creek and his exercise of stock water rights.

The majority opinion did not consider "whether and to what extent our state constitutional takings provision may offer greater protection than its federal counterpart," since, they reasoned, "no factual basis existed for finding a taking."[9] The majority concluded that none of the evidence in the record suggested the Department's order would restrict cattle from any access to the creek, the record was devoid of evidence regarding stock water rights, and Lemire had conceded that his claim of economic loss is "neither a physical invasion nor a regulatory taking."[10]

IV. Dissent

The sole dissenter in the case, Justice James Johnson, asserted that "the majority disregards constitutionally protected private property rights, and bases its decision on credibility judgments and factual findings."[11]

Specifically, Justice Johnson contended that "the majority assumed that [the Department of] Ecology's allegations are gospel truth and summarily dismissed the statements in Lemire's declaration that counter [the Department of] Ecology's claims as 'conclusory allegations.'"[12] Justice Johnson examined Lemire's responses to the Department's allegations, and concluded that several issues of fact remained. He argued that because the Washington Administrative Procedure Act requires that this type of appeal to be viewed in the light most favorable to the nonmoving party[13] and Lemire's statements "amount to much more than 'conclusory allegations,"[14] there were "genuine issues of material fact about whether or not the conditions [the Department of] Ecology's witness (not a qualified 'expert') allegedly observed are present."[15]

Justice Johnson also took issue with the majority's application of the WPCA, asserting that the majority's and Board's approach was inconsistent with what the drafters of the statute intended.[16]

With respect to takings, Justice Johnson asserted that "to make it clear that the 'question' of whether or not our state constitutional takings provision offers greater protection than its federal counterpart has already been answered in the affirmative," and cited two cases in support of this proposition.[17] Pointing to the Washington Constitution Article I, Section 16's provision that "[n]o private property shall be taken or *damaged* for public or private use without just compensation having been first made," Justice Johnson maintained that "[t]he extent of this greater protection has not yet been fully delineated in all contexts."[18]

Justice Johnson determined there was insufficient record evidence to establish a *per se* taking under Washington jurisprudence, reasoning that it was "possible that Lemire's property has been 'damaged' by the order, but there is not enough evidence in the record to establish the type and magnitude of this damage."[19] Nonetheless, Justice Johnson premised his takings analysis on an apparent clarification or change in the Department's interpretation of its order's effect.[20]

V. Conclusion

Lemire did not establish any new jurisprudential doctrines or significantly expand on existing ones. But the opinion is noteworthy because it provides the Washington Supreme Court's latest gloss on evidentiary requirements and burdens for judicial review of administrative agency orders affecting private property.

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Endnotes

1 Lemire v. Department of Ecology, No. 87703-3 (Wash. Aug. 15, 2013).

2 Wash. Rev. Code § 90.48.

3 Justice Stephens' opinion was joined by Chief Justice Barbara Madsen, by Justices Charles Johnson, Susan Owens, Mary Fairhurst, Charlie Wiggins, Steven Gonzalez, and by Justice *Pro Tempore* Tom Chambers.

4 Lemire v. Department of Ecology, No. 87703-3, slip op. at 7 (Wash. Aug. 15, 2013) (majority opinion).

5 *Id.* at 9.

6 *Id.* 9 (internal citation omitted). The Superior Court stated, "There's no testing, there's no showing, there's no increased numbers, there's nothing."

7 *Id.* at 10.

8 *Id.* (internal citation omitted).

9 *Id.* at 16 (citing U.S. Const. amend. V; Wash. Const., art. I, § 16).

10 *Id.* at 17.

11 Lemire v. Department of Ecology, No. 87703-3, slip op. at 2, (Wash. Aug. 15, 2013) (Johnson, J., dissenting).

12 *Id*. at 5.

13 *Id*. at 3 (citing chapter Wash. Rev. Code § 34.05 (internal citartion omitted)).

14 *Id*. at 13.

15 *Id*. at 13.

16 *Id*. at 11-12 (citing Wash. Rev. Code § 90.48.120(1)) ("According to the Board and the majority, in order for a rancher to create a "substantial potential" to pollute, all the rancher has to do is (1) have a state water body on his or her property that is not completely fenced off and (2) own cattle that occasionally cross or drink from the water body. That is it. Nothing else needs to be proved but those facts. Surely, that cannot be what the 1945 legislature intended by "substantial potential to violate.").

17 *See id*. at 15 (citing Manufactured Hous. Cmtys. of Wash. v. State, 142 Wn.2d 347, 357-361, 13 P.3d 183 (2000); Brutsche v. City of Kent, 164 Wn.2d 664,681 n.11, 193 P.3d 110 (2008)).

18 *Id*.

19 *Id*. at 18.

20 *Id*. at 17 ("If we review the order, it clearly does not make any specific provision for the cattle to drink from or cross the creek . . . To the contrary, it requires "exclusion fencing," "off-stream watering facilities," and that Lemire eliminate "[l]ivestock access to the stream corridor" . . . It was only later in its briefing to the superior court and before this court that Ecology finally clarified that Lemire's cattle would be allowed to drink from and cross the stream to reach the other pasturelands; this is argument, and it contradicts the challenged order in the record.").

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