

HIGHLIGHTS OF THE OHIO SUPREME COURT JUNE 2002-JUNE 2003

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I. INTRODUCTION

This Article explores twelve of the most significant cases decided by the Ohio Supreme Court from June 2002 through June 2003. This time period is divided between a first half dominated by the so-called liberal activist wing and a second half with a more conservative majority, with two new justices, one elected and one appointed.¹ The case selection for this Article is obviously highly subjective.

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¹ Justice Andy Douglas, a leading voice of the liberal wing of the court, retired December 31, 2002. *Judges and Justices of the Supreme Court of Ohio—1803 to the Present* (listing all Ohio Supreme Court justices and the years they served or are currently serving), available at <http://www.sconet.state.oh.us/introduction/alljustices> (last visited Oct. 24, 2004). Justice Douglas retired due to the Ohio Constitution age requirements. See OHIO CONST. art. IV, § 6 (C) (stating that “[n]o person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years”). Justice Maureen O’Connor, former lieutenant governor and a staunch conservative, replaced him. *The Supreme Court of Ohio Annual Report 2003* (posting chief Justice Moyer’s welcome to Justices O’Connor and O’Donnell), at <http://www.sconet.state.oh.us/annualreport2003.pdf> (last visited Oct. 24, 2004). Justice Deborah Cook was appointed to the U.S. Court of Appeals for the Sixth Circuit on May 16, 2003. News Release, Office of the Governor, State of Ohio, Taft Announces Appointment of Judge Terrence O’Donnell to the Ohio Supreme Court (May 12, 2003), at <http://www.governor.ohio.gov/Appointments/051203odonnell.htm>. On May 19, 2003, Governor Taft appointed former Eighth District Court of Appeals Judge Terrence O’Donnell to fill her unexpired term. *Id.* For much of the second half of the look back period, January through June 2003, various court of appeals judges sat on the Ohio Supreme Court by designation. See, e.g., *State v. Lynch*, 787 N.E.2d 1185, 1217 (Ohio 2003) (stating that William H. Wolff Jr. of the Second Appellate District sat for Justice Cook); *State v. Hughbanks*, 792 N.E.2d 1081, 1105 (Ohio 2003) (stating that Charles R. Petree of the Tenth Appellate District sat for Justice Cook); *Cincinnati Ins. Co. v. Anders*, 789 N.E.2d 1094, 1100 (Ohio 2003) (stating that Timothy E. McMonagle of the Eighth Appellate District sat for Justice Cook).

II. EDUCATIONAL FUNDING: *DEROLPH IV* AND *DEROLPH V*

*DeRolph IV*² and *DeRolph V*,³ both decided in the look back period of this Article, put an end to a constitutional challenge to the method of financing Ohio's public schools.⁴ The cases must be studied in context in order to understand them.

The *DeRolph* litigation began in December 1991 with the filing of a lawsuit in Perry County⁵ claiming that the method of financing the schools violated the "thorough and efficient" clause of the Ohio Constitution.⁶ The case involves only a state constitutional challenge to a provision with no federal analogue.⁷

A threshold issue that sharply split Ohio Supreme Court justices in their first review of the case was whether this was indeed a justiciable controversy⁸ or a nonjusticiable political question, as Justice Moyer repeatedly asserted.⁹ The majority found this to be a classic example of the court exercising its constitutional authority as set forth in *Marbury v. Madison*.¹⁰

In 1997, in *DeRolph I*, by a four to three majority, the court held that Ohio's system of public school financing violated the thorough and

² *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002) [hereinafter *DeRolph IV*].

³ *State v. Lewis*, 789 N.E.2d 195 (Ohio 2003), *cert. denied*, 124 S. Ct. 432 (2003) [hereinafter *DeRolph V*].

⁴ *Id.* at 201-02.

⁵ *Chronology of the DeRolph Ohio School Funding Litigation*, at <http://www.bricker.com/legalservices/practice/education/schoolfund/chronology.asp> (last visited Oct. 23, 2004).

⁶ *DeRolph v. State*, No. 22043, § XVI ¶ 1 (Ohio C.P. July 1, 1994), available at <http://www.bricker.com/LegalServices/Practice/Education/SchoolFund/Briefs/NPITT-1.asp>. The "thorough and efficient" clause of the Ohio Constitution states: "The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a through and efficient system of common schools throughout the state . . ." OHIO CONST. art. VI, § 2.

⁷ *DeRolph v. State*, 677 N.E.2d 733, 740 & n.5 (Ohio 1997) [hereinafter *DeRolph I*].

⁸ *See id.* at 737.

⁹ *See id.* at 783-87 (Moyer, J., dissenting). Chief Justice Moyer explained that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the legislature] or the confines of the Executive Branch." *Id.* at 783-84 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

¹⁰ *See id.* at 749. *See also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding that it is the duty of the court to determine whether enacted legislation is constitutional).

efficient clause of the state constitution.¹¹ The court's criticism focused on the current school funding formula because of its over-reliance on local property taxes.¹² This Article does not explore all the holdings of the *DeRolph* decisions, but rather focuses on the separation of powers issues that are a leitmotif throughout all the decisions.

In *DeRolph I*, although the court found the school financing system unconstitutional, it refused to tell the legislature how to fix it.¹³ It did make clear that property taxes could still be used as part of the funding formula, but they could no longer be the primary part.¹⁴ The court expressly declined to retain jurisdiction over the case to review all remedial legislation enacted in response to its decision, declaring that it is not the function of the judiciary to supervise or participate in the legislative and executive process.¹⁵ But despite this separation of powers declaration, the court stayed the effect of the decision for one year to give the General Assembly time to enact remedial legislation.¹⁶ The court remanded the case back to the trial court, ordering Judge Lewis¹⁷ to retain jurisdiction over the case until the legislature enacted a new funding system and then to rule on the constitutionality of that legislative effort.¹⁸ The court also created a right of direct appeal in the case.¹⁹

Judge Lewis reviewed the legislative response and found it wholly inadequate.²⁰ The appeal of that decision is *DeRolph II*.²¹ In *DeRolph II*, the high court evaluated the legislative response to *DeRolph I* and found that it came up short because the school financing system still relied too heavily on local property taxes.²² The court again directed the legislature to remedy the problem, but again refused to offer the General Assembly clear instructions.²³ Instead, the court simply stated that "[t]he legislature has the power to draft legislation, and the court has the power to determine whether that legislation complies with the Constitution,"²⁴ and it gave the

¹¹ *DeRolph I*, 677 N.E.2d at 747.

¹² *See id.* at 739-40, 746-47.

¹³ *Id.* at 747 & n.9.

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.* at 777.

¹⁸ *See id.* at 747.

¹⁹ *Id.* at 747 n.10.

²⁰ *DeRolph v. State*, 712 N.E.2d 125, 297 (Ohio C.P. 1999).

²¹ *DeRolph v. State*, 728 N.E.2d 993 (Ohio 2000) [hereinafter *DeRolph II*].

²² *Id.* at 1013-15.

²³ *See id.* at 1015.

²⁴ *Id.* at 1002.

legislature another year to remedy the problem.²⁵ However, this time the court itself retained continuing jurisdiction over the case and did not remand it back to the trial court.²⁶

In *DeRolph III*,²⁷ the court evaluated the legislative response to *DeRolph II* and found that despite a good faith effort, the legislature still had to make changes to the funding formula to come into constitutional compliance.²⁸ Unlike the court's previous rulings in *DeRolph I* and *DeRolph II*, this time the court laid out for the legislature the exact changes the legislature needed to make to the school funding formula and the parity aid program to comply with the court's order.²⁹ The court (with a different majority from *DeRolph I* and *DeRolph II*)³⁰ now told the legislature exactly what to do.³¹ Ironically, in *DeRolph I* and *DeRolph II* it was the "liberal, activist" justices who refused to tell the legislature exactly what to do, while in *DeRolph III*, two "conservative" justices found themselves in the position of dictating to the legislature.³²

Though many believed that *DeRolph III* was a pragmatic solution to end a sticky wicket, it was not. Subsequent to the release of the decision, both sides agreed that the change in the funding formula ordered by the court in *DeRolph III* was based on bad numbers given to the court.³³ As a result, the court agreed to reconsider its ruling, which hatched *DeRolph IV*, released in December of 2002.³⁴ In *DeRolph IV*, the court announced that it had "changed [its] collective mind"³⁵ and again found the method of financing the schools unconstitutional,³⁶ as it had in the first two *DeRolph* cases. The majority, which was the same majority as it was in *DeRolph I*

²⁵ *Id.* at 1022.

²⁶ *Id.*

²⁷ *DeRolph v. State*, 754 N.E.2d 1184 (Ohio 2001) [hereinafter *DeRolph III*].

²⁸ *Id.* at 1200.

²⁹ *Id.* at 1200-01.

³⁰ In *DeRolph I* and *DeRolph II*, the majority consisted of Justices Douglas, Pfeifer, Resnick, and Sweeney. *DeRolph I*, 677 N.E.2d 733, 736, 747 (Ohio 1997); *DeRolph II*, 728 N.E.2d. at 997, 1022. In *DeRolph III*, the majority consisted of Chief Justice Moyer and Justices Douglas, Pfeifer, and Lundberg Stratton. *DeRolph III*, 754 N.E.2d. at 1188, 1201.

³¹ *DeRolph III*, 754 N.E.2d at 1200-01.

³² See *supra* note 30 and accompanying text.

³³ *DeRolph v. State*, 758 N.E.2d 1113, 1113 (Ohio 2001). The court noted that "[t]he state first asserts that the changes to the base cost formula ordered by the court in [*DeRolph III*] 'may have been based in part upon erroneous calculations and data.'" *Id.*

³⁴ *DeRolph v. State*, 757 N.E.2d 381, 381 (Ohio 2001).

³⁵ *DeRolph IV*, 780 N.E.2d 529, 530 (Ohio 2002).

³⁶ *Id.*

and *DeRolph II*,³⁷ found that the legislature had just been “nibbling at the edges” and had still failed to focus on the “complete systematic overhaul” of the school-funding system” that was necessary.³⁸ As in *DeRolph I* and *DeRolph II*, the court in *DeRolph IV* declined to provide the legislature with specific instructions to enable it to solve the problem.³⁹

When the court decided *DeRolph IV*, the Chief Justice signed the judgment with the mandate that the matter be sent to “the Court of Common Pleas for Perry County to carry this judgment into execution.”⁴⁰ That seemingly routine language caused problems. In *DeRolph I*, the court remanded the matter back to Judge Lewis in Perry County to evaluate the legislative response.⁴¹ Consequently, following *DeRolph IV*, a coalition of five hundred school districts returned to the trial court and asked Judge Lewis to begin oversight of the legislative response to *DeRolph IV*.⁴² Their request was not unreasonable, since the court had required this after *DeRolph I*.⁴³ The state filed a writ of prohibition to prevent Judge Lewis from exercising further jurisdiction in the case,⁴⁴ and in *DeRolph V*, in a five to two decision, the court, noting the case had not been remanded for further proceedings, granted the writ and declared the case over.⁴⁵ Justice Lundberg Stratton wrote that “[t]he duty now lies with the General Assembly to remedy an educational system that has been found by the majority in *DeRolph IV* to still be unconstitutional.”⁴⁶

Currently, the *DeRolph* litigation has ended, though an unconstitutional funding formula still remains.⁴⁷ It is unclear what will happen if the legislative branch of government ignores a mandate from the

³⁷ *Id.* at 529, 532 (stating that the majority included Justices Pfeifer, Resnick, Sweeney, and Douglas). *See also supra* note 30 and accompanying text.

³⁸ *DeRolph IV*, 780 N.E.2d at 530.

³⁹ *See id.* at 531-32.

⁴⁰ *DeRolph v. State*, No. 1999-0570, 2002 Ohio LEXIS 3321, at *1-2 (Dec. 11, 2002).

⁴¹ *See DeRolph I*, 677 N.E.2d 733, 747 (Ohio 1997).

⁴² *DeRolph V? How Many Rulings on School Funding Can Lawmakers Ignore?*, AKRON BEACON JOURNAL, Apr. 04, 2003, at B2.

⁴³ *See DeRolph I*, 677 N.E.2d at 747.

⁴⁴ *DeRolph V*, 789 N.E.2d 195, 199 (Ohio 2003), *cert. denied*, 124 S. Ct. 432 (2003).

⁴⁵ *Id.* at 202.

⁴⁶ *Id.*

⁴⁷ Although the *DeRolph* plaintiffs filed a writ of certiorari to the United States Supreme Court and argued that being denied a right to a remedy with a still unconstitutional system is a federal due process violation, the Court denied their petition. *See DeRolph v. Ohio*, 124 S. Ct. 432, 432 (2003).

judicial branch. Courts do have the authority to enforce their orders, but it is not clear how this would work in practicality. As Justice Douglas stated:

The judicial branch has no concrete powers like the sword (executive) or the purse (legislative) with which to carry its judgments into effect We recognize that we have no army and no police force to send. We have only our ability to reason, persuade, and even plead with the Governor and General Assembly to do what is right and best for schoolchildren in Ohio.⁴⁸

The issue of whether education is a fundamental right under the Ohio Constitution is an important education issue that remains unresolved. In 1973, the United States Supreme Court held that education is not a fundamental right under the federal constitution.⁴⁹ The Ohio Supreme Court considered whether education is a fundamental right under the state constitution in *Cincinnati Board of Education v. Walter*,⁵⁰ the predecessor to the *DeRolph* cases. Although some argue that the *Walter* Court held it was not,⁵¹ the better view is that the issue was deflected rather than answered.⁵² Though the issue of whether education is a fundamental right under the Ohio Constitution was raised initially in *DeRolph I*,⁵³ it was taken off the table when the high court limited the issues on remand to the thorough and efficient clause questions and not equal protection issues.⁵⁴

⁴⁸ *DeRolph III*, 754 N.E.2d 1184, 1211-12 (Ohio 2001).

⁴⁹ *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 30 (1973).

⁵⁰ 390 N.E.2d 813, 817 (Ohio 1979).

⁵¹ In the Ohio Court of Appeals opinion following the initial *DeRolph* trial court decision, a majority of the Fifth District held that “[p]ursuant to the Ohio Supreme Court’s decision in *Walter*, education is *not* a fundamental right.” *DeRolph v. State*, No. CA-477, 1995 Ohio App. LEXIS 3915, at *9 (1995) (emphasis added). However, the dissent in that same case stated, “*Walter* found that the *Rodriguez* test compels a finding that education is fundamental, and would apply the doctrine of strict scrutiny to Ohio’s school funding scheme.” *Id.* at *41 (Gwin, J., dissenting). This appellate decision predated the Ohio Supreme Court’s decision to eliminate intermediate appellate review of this case in favor of direct appeal. *See DeRolph v. State*, 678 N.E.2d 886, 888 (Ohio 1997).

⁵² *DeRolph I*, 677 N.E.2d 733, 748 (Ohio 1997) (Douglas, J., concurring).

⁵³ *Id.* at 772 (Douglas, J., concurring). *See supra* note 51 and accompanying text. *See also DeRolph*, 1995 Ohio App. LEXIS 3915, at *42 (Gwin, J., dissenting).

⁵⁴ After the matter was remanded back to Judge Lewis, he propounded the following inquiry to the Ohio Supreme Court: “This Court seeks clarification of the Supreme Court’s order of March 24, 1997 as to whether the remand in the case at bar includes both the issues of equal protection and the thorough and efficient clause of the State Constitution.” *DeRolph v. State*, 699 N.E.2d 518, 518 (Ohio 1998) (citation omitted). The Ohio Supreme
(continued)

III. PUNITIVE DAMAGES AWARDS: *DARDINGER V. ANTHEM BLUE CROSS & BLUE SHIELD*

A. *The Federal Due Process Challenge*

*Dardinger v. Anthem Blue Cross & Blue Shield*⁵⁵ is an insurance bad faith case involving the way a health insurer and its parent company handled a request for the treatment of brain cancer by a terminally ill forty-nine-year-old woman named Esther Dardinger.⁵⁶ A treatment called intra-arterial chemotherapy was shrinking Esther's brain tumors and giving her a decent quality of life.⁵⁷ Anthem Blue Cross and Blue Shield (Anthem) had agreed to pay for a series of twelve of these treatments, but changed its mind after three and refused to pay for any more.⁵⁸ The case meticulously details the bureaucratic nightmare from hell in the attempt of Esther's husband and her doctors to appeal the decision.⁵⁹ The notice that the insurance appeal was denied came the day after Esther's funeral.⁶⁰ The jury from conservative Licking County rendered a verdict of \$1,350 on the breach of contract claim, \$2.5 million on the bad faith claim, and \$49 million in punitive damages.⁶¹ The verdict was against both Anthem and Anthem Insurance Companies, Inc. (AICI).⁶² Anthem is a wholly owned subsidiary of AICI.⁶³

In *Dardinger*, the Ohio Supreme Court examined the excessiveness and the distribution of the punitive damages award.⁶⁴ This was a departure from the recent past in which the Ohio Supreme Court had chiefly dealt

Court responded that "[t]he remand involve[s] the Thorough and Efficient Clause of the Ohio Constitution and not the Equal Protection Clause." *Id.*

⁵⁵ 781 N.E.2d 121 (Ohio 2002).

⁵⁶ *Id.* at 124.

⁵⁷ *Id.* at 124-25.

⁵⁸ *Id.* at 125.

⁵⁹ *See id.* at 124-30.

⁶⁰ *Id.* at 130.

⁶¹ *Id.* at 134. The trial court also awarded \$790,000 in attorney's fees. *Id.*

⁶² *Id.*

⁶³ *Id.* at 124. After the case was over, AICI tried to raise error in the joint verdict by claiming it was a separate entity from Anthem. *Id.* at 134. AICI argued that it was only a guarantor if Anthem was unable to pay and owed no contractual duty to the Dardingers with whom it was not in privity. *Id.* Without a contractual duty to the Dardingers, there could be no bad faith claim against AICI and thus no basis for a punitive damage award against it. *Id.* Although the Court of Appeals agreed with this, the Ohio Supreme Court did not, given that AICI had chosen to present a joint defense in every aspect of the case, including the jury instructions and interrogatories. *Id.* at 134-40.

⁶⁴ *Id.* at 140.

with the constitutionality of legislative attempts to limit punitive damage awards.⁶⁵ The court first considered whether the award was excessive under the Federal Due Process Clause⁶⁶—a substantive due process question.⁶⁷ To answer the question, the Ohio Supreme Court applied the guideposts set forth in the controlling case of *BMW of North America, Inc. v. Gore*.⁶⁸ *BMW* gave the court the following three guideposts to evaluate whether a punitive damages award is grossly excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to the actual or potential harm suffered by the plaintiff; and (3) the difference between the punitive damages award and civil or criminal penalties authorized or imposed for comparable misconduct.⁶⁹

The *Dardinger* court found the defendants in that case fared most poorly under the reprehensibility guidepost from *BMW* and also found that guidepost to be the most important one.⁷⁰ However, unlike *BMW*, which involved only property damage, *Dardinger* involved human life.⁷¹ Thus, the Ohio Supreme Court concluded that the conduct of the defendants reached the level of reprehensibility sufficient to warrant the punitive damages award in the case.⁷²

Turning next to the ratio of compensatory to punitive damages, the court found that the jury had been restrained in its award of compensatory

⁶⁵ See, e.g., *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1090-91 (Ohio 1999); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 870-71 (Ohio 1998); *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401-02 (Ohio 1994). For a more comprehensive list of the court's treatment of other aspects of tort reform, see *Sheward*, 715 N.E.2d at 1073 n.5.

⁶⁶ *Dardinger*, 781 N.E.2d at 140.

⁶⁷ See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 524 (2d ed. 2002). In the context of punitive damages, Erwin Chemerinsky, a constitutional scholar, explains the distinction between procedural and substantive due process by stating that “[p]rocedural due process requires that there be safeguards such as instructions to the jury to guide their discretion and judicial review to ensure the reasonableness of the awards Substantive due process prevents excessive punitive damage awards, regardless of the procedures followed.” *Id.*

⁶⁸ 517 U.S. 559 (1996). In *BMW*, the United States Supreme Court found a punitive damage award of \$2 million grossly excessive. *Id.* at 574-75. The jury awarded these damages after finding that BMW's failure to notify the plaintiff that the dealership repainted the car he purchased constituted “‘gross, oppressive or malicious’ fraud.” *Id.* at 563-65.

⁶⁹ *Id.*

⁷⁰ *Dardinger*, 781 N.E.2d at 140.

⁷¹ *Id.*

⁷² *Id.* at 142.

damages.⁷³ The court further emphasized that the United States Supreme Court had repeatedly refused to set a bright-line ratio in these cases and then offered its acceptance of the twenty-to-one ratio.⁷⁴

Finally, turning to the comparable penalties guidepost, the court observed that Anthem's conduct could result in the loss of its license, clearly a substantially worse penalty than the award, and noted that it is settled law in Ohio that an insurer can be liable for substantial punitive damages for acting in bad faith.⁷⁵ Finding that the point of this third guidepost is "to give fair notice of the conduct that will subject a defendant to punishment as well as the severity of the punishment a state may impose," the court found the third guidepost favored retention of the award.⁷⁶ Thus, in this first part of its analysis, the court concluded that there was no federal due process violation in the award, and that the punitive damages in the case were not excessive on this basis.⁷⁷

B. State Farm Mutual Automobile Insurance Co. v. Campbell

After *Dardinger* was decided, the United States Supreme Court decided another punitive damages case, *State Farm Mutual Automobile Insurance Co. v. Campbell*.⁷⁸ Like *Dardinger*, *State Farm* was an insurance bad faith case, although one involving a third party rather than a first party claim.⁷⁹ State Farm refused to settle what appeared to be a straightforward automobile accident case.⁸⁰ The insured was clearly at fault in the accident that resulted in the death of one person and catastrophic injury of another.⁸¹ Rather than settling the plaintiffs' claims as offered for the relatively low policy limits, State Farm chose to contest liability, assuring the insureds that their assets would be safe.⁸² After an excess jury verdict in the underlying action, counsel for State Farm told the Campbells that "[they] may want to put for sale signs on [their] property to get things moving."⁸³ State Farm also refused to post a supersedeas bond to allow Campbell to appeal.⁸⁴ This and more led to the bad faith claim by

⁷³ *Id.* at 142-43.

⁷⁴ *Id.*

⁷⁵ *Id.* at 143.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 538 U.S. 408 (2003).

⁷⁹ *See id.* at 412-15.

⁸⁰ *Id.* at 413.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Campbell, State Farm's insured.⁸⁵ The bad faith claim resulted in a verdict of \$2.6 million in compensatory damages and \$145 million in punitive damages.⁸⁶ The trial court remitted the compensatory damage award to \$1 million and the punitive damage award to \$25 million.⁸⁷ The Utah Supreme Court accepted the remitted compensatory damage award, but reinstated the full \$145 million in punitive damages.⁸⁸

The United States Supreme Court reviewed the case to consider whether there was a due process violation.⁸⁹ The defendant again sought a bright-line ratio in the second *BMW* guidepost to satisfy due process.⁹⁰ While reaffirming and applying the *BMW* guideposts,⁹¹ the Court found the award excessive for two reasons.⁹² First, the case involved only economic and not physical harm—Campbell faced loss of his house because of the excess judgment.⁹³ Second, and more significantly, the verdict was excessive because the plaintiff was improperly permitted to use evidence of State Farm's out-of-state conduct to show bad faith.⁹⁴ Although the Court again refused to set a bright-line ratio, it did write that “few awards exceeding a single digit ratio between punitive and compensatory damages . . . will satisfy due process.”⁹⁵ The Court remanded the case back to the Utah Supreme Court with the “suggestion” that a proper application of the *BMW* guideposts would be a one-to-one ratio of compensatory to punitive damages in this case.⁹⁶

While future federal due process challenges to punitive damage awards will have to contend with the *State Farm* case, it is unlikely that *State*

⁸⁵ *Id.* During the pendency of the appeal, the injured party and the estate of the decedent killed in the accident agreed not to execute on their judgment against the Campbells. *Id.* In exchange, the Campbells would pursue the bad faith claim using the victims' lawyers, and the injured party and the decedent's Estate would receive ninety percent of any verdict against State Farm. *Id.* at 413-14.

⁸⁶ *Id.* at 415.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 412.

⁹⁰ *Id.* at 425.

⁹¹ *Id.* at 418.

⁹² *See id.* at 421, 426.

⁹³ *See id.* at 413, 426.

⁹⁴ *See id.* at 420-24.

⁹⁵ *Id.* at 425.

⁹⁶ *See id.* at 429. On remand, the Utah Supreme Court reduced the punitive damage award to a little over \$9 million, “a figure nine times the amount of compensatory and special damages awarded to the [plaintiffs].” *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 34, at ¶1, *cert. denied*, 125 S. Ct. 114 (2004), available at <http://www.utcourts.gov/opinions/supopin/campbe042304.htm> (last visited Oct. 25, 2004).

Farm would have changed the federal due process analysis in *Dardinger*. Despite a ratio substantially beyond single digits (twenty to one), no out of state conduct of the insurer was introduced in *Dardinger*. Additionally, the reprehensibility factor was particularly egregious because this case involved death and not just the threat of economic harm.

C. Excessiveness Under Ohio Law

Having concluded that the punitive damage award to the plaintiff in *Dardinger* was not excessive under the Federal Due Process Clause, the Ohio Supreme Court turned to the question of whether the award was excessive under Ohio law and found that it was.⁹⁷ In reaching this somewhat surprising conclusion, the court considered principles established from its own case law.⁹⁸ Ohio law has clearly established that “[t]he purpose of punitive damages is not to compensate a plaintiff but to punish the guilty, deter future misconduct, and to demonstrate society’s disapproval.”⁹⁹ Additionally, the court stated that, “[a]t the punitive-damages level, it is the societal element that is most important.”¹⁰⁰ Indeed, the court has previously emphasized that “a punitive damages award is more about defendant’s behavior than the plaintiff’s loss.”¹⁰¹ Consequently, “[w]e do not require, or invite, financial ruination of a defendant that is liable for punitive damages The law requires an effective punishment, not a draconian one.”¹⁰²

In 1994, in *Schaffer v. Maier*,¹⁰³ also authored by Justice Pfeifer, the court made it clear that all Ohio courts, including the Ohio Supreme Court, have the power of remittitur.¹⁰⁴ In *Dardinger*, the court further developed this holding. The key question here is: why was the punitive damage award too high? Why did it need to be remitted? The court decided the award was excessive because it was three times as high as the next highest verdict reviewed in the last decade.¹⁰⁵ However, this reasoning does not seem particularly compelling, especially since *Wightman v. Consolidated*

⁹⁷ *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 144 (Ohio 2002).

⁹⁸ *See id.* at 144-45.

⁹⁹ *Id.* at 145 (quoting *Davis v. Wal-Mart Stores, Inc.*, 756 N.E.2d 657, 661 (Ohio 2001) (Sweeney, J., concurring in part and dissenting in part)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 144 (quoting *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546, 553 (Ohio, 1999)).

¹⁰² *Id.*

¹⁰³ 627 N.E.2d 986 (Ohio 1994).

¹⁰⁴ *See id.* at 990-91.

¹⁰⁵ *Dardinger*, 781 N.E.2d at 144-45.

Rail Corp.,¹⁰⁶ the case *Dardinger* was measured against, is not particularly comparable.¹⁰⁷

In *Wightman*, the jury awarded \$25 million in punitive damages.¹⁰⁸ The trial court remitted the award to \$15 million,¹⁰⁹ a decision upheld by the Ohio Supreme Court.¹¹⁰ Even as remitted, in this post *BMW* case the ratio of punitive to compensatory damages was 6250:1.¹¹¹ But the Ohio Supreme Court did not compare *Dardinger* to *Wightman* on the ratio guidepost. It simply looked at the totals, noting that the \$49 million in *Dardinger* was over three times the award in *Wightman*.¹¹² The fact that the punitive damages award in one case is three times more than what is awarded in another seems an unconvincing justification for a remittitur, given that punitive damage awards notoriously turn on the facts and circumstances of a particular case.

Having decided the punitive damage award in *Dardinger* was excessive, the court considered the appropriate award.¹¹³ Studying the verdict, the court noted: “It appears that the jury rather scientifically decided to take between one-third and one-fourth of the annual net income of Anthem.”¹¹⁴ While not “shockingly wrong,” the court found that an award of one-sixth of Anthem’s annual net earnings to be “more in line

¹⁰⁶ 715 N.E.2d 546 (Ohio 1999).

¹⁰⁷ *Wightman* involved a collision between a car and a train. *Id.* at 548. A Conrail train with mechanical problems was stopped near a grade crossing. *Id.* Even though the gate arm was down and the lights were flashing, drivers began driving around the gate and across the tracks. *Id.* at 548-49. Conrail employees did nothing to warn drivers of oncoming trains, despite the fact that they saw vehicles crossing the track by driving around the gates. *Id.* at 549. “Even after a phone call from police, Conrail did not take preventative measures to avert an accident.” *Id.* at 554. Sixteen-year-old Michelle Wightman followed other cars driving around the gate and a different Conrail train hit and killed her. *Id.* at 549. A jury awarded \$1 million in compensatory damages in the wrongful death claim, reduced by the driver’s forty percent fault, and \$2,400 for the property damage to the car, which Wightman’s mother owned. *Id.* at 548-49. The court excluded evidence of the driver’s .039 blood-alcohol level from the trial. *Id.* at 550.

¹⁰⁸ *Id.* Since the wrongful death statute does not provide for punitive damages, any punitive damages in the case had to be limited to the property damage claim only. *See id.* at 559 (Lundberg Stratton, J., concurring in part and dissenting in part).

¹⁰⁹ *Id.* at 550.

¹¹⁰ *Id.* at 557.

¹¹¹ *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 143 (Ohio 2002).

¹¹² *Id.* at 144-45.

¹¹³ *Id.* at 145. The court first agreed with the trial court that the award was not the result of passion or prejudice. *Id.*

¹¹⁴ *Id.*

with the history of punitive damages awards in Ohio.”¹¹⁵ Thus, the court concluded that \$30 million was the proper figure, “appropriate as to the profits of the corporations involved and appropriate in the scheme of past punitive damages awards in Ohio.”¹¹⁶

This part of the court’s analysis provides little guidance for lower courts in the future. In trying to decide whether an award is too high, must judges now compare the verdict with others? If so, what others? Only those in the same county or region? Or statewide? As for the amount to remit, a certain amount of “gastronomic jurisprudence” has been understood, even if not expressly.¹¹⁷

Having declared the punitive damages award in *Dardinger* excessive under Ohio law and having remitted it, one last surprising step remained. The court decided, *sua sponte* and without briefing from any party on this issue, that part of the award should go to “society.”¹¹⁸

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ In *Moskovitz v. Mt. Sinai Medical Center*, 635 N.E.2d 331 (Ohio 1994), the court used Judge McCormac’s discussion on remitting compensatory damages as a guide for remitting punitive damages and stated:

Determining the amount of damages which is the maximum for adequate compensation is not an easy task. No simple mathematical formula can be applied as to either a minimum or a maximum, and there is a wide range between those figures. The decision rests as much on policy considerations as it does anything else and some degree of arbitrariness cannot be totally divorced from the decision, whether made by us or by the jury.

Id. at 344 (quoting *Shoemaker v. Crawford*, 603 N.E.2d 1114, 1121-22 (Ohio Ct. App. 1991)).

¹¹⁸ *Dardinger*, 781 N.E.2d at 146.

Eight states have enacted what are known as split recovery statutes.¹¹⁹ These statutes divide punitive damage awards between the plaintiff and a state fund.¹²⁰ The Ohio Supreme Court appears to be the only court to have done this without legislation. Justice Pfeifer, the author of this opinion, justified this sweeping step by simply stating, “Ohio’s courts have a central role to play in the distribution of punitive damages.”¹²¹ The high court itself also considered the proper place to distribute the money.¹²² Again, with no input from the parties, the court selected a cancer research fund at the James Cancer Hospital and Solove Research Institute at the Ohio State University, the hospital that treated Esther,¹²³ “a place that will achieve a societal good, a good that can rationally offset the harm done by the defendants in this case.”¹²⁴ The court named the fund the “Esther Dardinger Fund.”¹²⁵ The court also considered the issue of attorney fees and costs and ordered that they be calculated from the whole \$30 million

¹¹⁹ At the time of this writing, the eight states with split-recovery laws were Georgia, Illinois, Indiana, Iowa, Oregon, Alaska, Missouri, and Utah. Adam Liptak, *Schwarzenegger Sees Money for State in Punitive Damages*, N.Y. TIMES, May 30, 2004, § 1, at 16. The Colorado Supreme Court declared that a similar statute was an unconstitutional taking because it violated both the Colorado and the United States constitutions. *Id.* While Florida, Kansas, and New York once had split-recovery laws, they were either repealed or allowed to expire. *Id.* See also Sonja Larsen, Annotation, *Validity, Construction, and Application of Statutes Requiring that Percentage of Punitive Damages Awards Be Paid Directly to State or Court-Administered Fund*, 16 A.L.R. 5th 129 (2003). “Recently, some legislatures have passed statutes allocating a portion of punitive damages to a state or court-administered fund. This appropriation of punitive damages is designed to limit what some commentators view as a windfall to the successful claimant.” *Id.* at 129.

¹²⁰ There is much variation in these statutes. Some apply to all punitive damage awards (Oregon, Alaska), others only to products liability cases (Georgia), and others only when defendant’s conduct was not specifically directed toward the plaintiff (Iowa). See Larsen, *supra* note 119. There is also much variation in where the money goes. Some states send a fixed percent to the state general fund (Alaska, Georgia, Utah), others to specifically designated funds to compensate victims of violent crimes (Indiana, Oregon), others to civil reparations or funds to compensate tort plaintiffs (Iowa, Missouri), and others to the state department of human services (Illinois). *Id.* The percentage of punitive damages diverted to the state varies state-by-state from 50% to 75%, and, while some states take their share from the total award, others take their share only after lawyers’ fees have been paid. See *id.*

¹²¹ *Dardinger*, 781 N.E.2d at 145-46.

¹²² See *id.* at 146.

¹²³ *Id.* at 124.

¹²⁴ *Id.* at 146.

¹²⁵ *Id.*

award, but that they be taken only from the charity's share.¹²⁶ As with any case involving remittitur, Dardinger, as the plaintiff, could have declined the award—presumably both the amount remitted and the chosen recipient charity—and started over.¹²⁷ However, he did not.¹²⁸

After this opinion, there are many questions that still remain. First, should there be split recovery in other cases in which punitive damages are awarded, and if so, in which ones? What percent should be remitted, and where should that share go? The only guidance from the high court on this point is that “[p]unitive damages awards should not be subject to bright-line division but instead should be considered on a case-by-case basis, with those awards making the most significant societal statements being the most likely candidates for alternative distribution.”¹²⁹

Further development is likely in this area, including the possibility of reversing course and waiting for the legislature to pass a split recovery statute—the position urged by the Chief Justice in his dissent.¹³⁰ Chief Justice Moyer also noted that, historically, remittitur has only been used to correct excessiveness and should not be judicially expanded to choosing the distributee.¹³¹

IV. SOVEREIGN IMMUNITY: *WALLACE V. OHIO DEPARTMENT OF COMMERCE, DIVISION OF STATE FIRE MARSHAL*

Many expected the old court to get rid of sovereign immunity once and for all before Justice Douglas retired. Douglas' disdain for the doctrine was legendary. In 2001, in *Butler v. Jordan*,¹³² a case involving the negligent inspection and certification of a day care home facility by a county department of human services, he asked rhetorically,

What is this doctrine that permits the government to injure its citizens with impunity? How can a government be immune from liability for an act for which that same government would impose liability upon one of its citizens? The answer is that “government,” whoever that may be, has accorded itself the right to negligently injure

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ Scott Hiaasen, *Court Took New Power with Split of Punitive Award: Critics Says Justices Can Now Aid Pet Causes*, PLAIN DEALER (Cleveland, Ohio), Jan. 5, 2003, at A1. In considering whether to accept the reduced award or pursue a new trial, Dardinger said that “[f]our and a half years of dealing with this is enough.” *Id.*

¹²⁹ *Dardinger*, 781 N.E.2d at 146.

¹³⁰ *Id.* at 147-49 (Moyer, C.J., concurring in part and dissenting in part).

¹³¹ *See id.* at 148.

¹³² 750 N.E.2d 554 (Ohio 2001).

its citizens with immunity, all in disregard of constitutional protections reserved by its citizens to themselves.¹³³

After asking this rhetorical question, Justice Douglas concluded that the constitutionality of political subdivision immunity was not properly before the court in *Butler* because the parties failed to raise the issue below.¹³⁴ Because it was brought to the high court's attention in a footnote, a procedurally improper way to raise the issue, the court did not decide the issue.¹³⁵ That said, Justice Douglas went on for nearly thirteen pages excoriating sovereign immunity.¹³⁶

So when the public duty rule, sometimes considered the “stepchild” of sovereign immunity,¹³⁷ appeared before the court in the waning days of Justice Douglas' term, many wondered if this would be a last hurrah. In *Wallace v. Ohio Department of Commerce, Division of State Fire Marshal*,¹³⁸ the court considered an allegation of negligence against the state fire marshal that implicated the public duty rule.¹³⁹ The public duty rule is a common law doctrine that precludes individual citizens from bringing tort actions against public officers for the failure to perform or for the inadequate performance of their official duties.¹⁴⁰ In shorthand, this means that a “duty to all” is actually a “duty to none.”¹⁴¹

¹³³ *Id.* at 558.

¹³⁴ *Id.* Justice Douglas' reliance on the waiver doctrine is curious. In *Hill v. City of Urbana*, 679 N.E.2d 1109 (Ohio 1997), Douglas wrote the majority opinion and decided an immunity issue that had not been raised below, noting:

This court has held on numerous occasions that the waiver doctrine is discretionary. In fact, we specifically held that ‘[e]ven where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it.’

Id. at 1112 (alteration in original) (emphasis omitted) (citations omitted) (quoting *In re M.D.*, 527 N.E.2d 286, 286-87 (Ohio 1988)).

¹³⁵ *Butler*, 750 N.E.2d at 558.

¹³⁶ *See id.* at 558-71.

¹³⁷ *Miller v. District of Columbia*, 841 A.2d 1244, 1249 (D.C. Ct. App. 2004) (Schwelb, J., concurring).

¹³⁸ 773 N.E.2d 1018 (Ohio 2002).

¹³⁹ *Id.* at 1020.

¹⁴⁰ *See Sawicki v. Village of Ottawa Hills*, 525 N.E.2d 468, 476-77 (Ohio 1988).

¹⁴¹ DAN B. DOBBS, *THE LAW OF TORTS* § 271 (2000).

Ohio law requires a mandatory annual inspection of the premises as a condition of a license to sell wholesale fireworks.¹⁴² In addition, the fire marshal may perform inspections of the premises at any time during the license period.¹⁴³ On top of this, as a matter of internal policy, the fire marshal's office encouraged its inspectors to make seasonal fireworks inspections during the July 4th fireworks season to ensure compliance with all applicable statutes and safety regulations.¹⁴⁴

The Flying Dragon, a licensed fireworks wholesaler, conducted its business in Lawrence County.¹⁴⁵ During the annual 1995 inspection, a safety inspector working for the fire marshal inspected the premises, found a properly operating sprinkler system, and noted no safety violations.¹⁴⁶ As the 1996 seasonal inspection period was approaching, the fire marshal's office received a tip that the Flying Dragon was selling Class B fireworks to unauthorized purchasers.¹⁴⁷ Acting on the tip, although only a few days remained before July 4th, the marshal's office decided to postpone the seasonal inspection and do a "buy-bust"—a kind of sting to see if they could purchase Class B fireworks without the appropriate license.¹⁴⁸ Three agents carried out the "buy-bust" and found violations.¹⁴⁹ However, they did not conduct a fire safety inspection when they were there for the "buy-bust."¹⁵⁰

On July 3rd, with no seasonal inspection yet having taken place, a teenager with a severe mental disorder carried a lit cigarette into the fireworks store and used the cigarette to ignite fireworks.¹⁵¹ A "devastating" fire resulted, killing nine people and injuring many others.¹⁵² The store's sprinkler system was inoperative at the time of the fire.¹⁵³ Suit was filed against the fire marshal in the Court of Claims for "negligence in failing to perform an adequate fire safety inspection on the date of the 'buy-bust' and otherwise failing to comply with the internal policy of conducting seasonal inspections during the peak fireworks season."¹⁵⁴ Those representing the injured and killed contended that the inspectors

¹⁴² See *Wallace*, 773 N.E.2d at 1020 (citing OHIO REV. CODE ANN. § 3743.16(1)).

¹⁴³ *Id.* (citing OHIO REV. CODE ANN. § 2743.21(A)(1)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1021.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1020 & n.1.

¹⁵² *Id.* at 1020.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1021.

present at the “buy-bust” could easily have determined whether the sprinkler system was operational.¹⁵⁵ Had it had been, many would have survived the fire.¹⁵⁶ However, the “court found that the public-duty rule precluded liability against the fire marshal.”¹⁵⁷

Although one of appellants’ arguments was that the public-duty rule is a “vestige of state sovereign immunity” and therefore unconstitutional,¹⁵⁸ the court decided the case strictly as one of statutory construction.¹⁵⁹ An unusual four to three majority of Justices Cook, Douglas, Sweeney, and Pfeifer decided the case strictly on the language in the Court of Claims Act.¹⁶⁰

In 1988, in *Sawicki v. Village of Ottawa Hills*,¹⁶¹ a case dealing with political subdivision immunity, the Ohio Supreme Court held that the public duty rule, along with its special duty exception, is an independent doctrine that survived the abrogation of sovereign immunity.¹⁶² The *Wallace* court took a narrower position than the appellants wanted, but also declined the state’s invitation to continue to apply the public duty rule in claims brought in the Court of Claims against the state.¹⁶³ The majority held that the public duty rule is incompatible with the express language of section 2743.02(A)(1) of the Ohio Revised Code, which requires that the state’s liability in the Court of Claims be determined ““in accordance with the same rules of law applicable to suits between private parties.””¹⁶⁴ Simply put, because private parties do not get the benefit of the public duty rule, neither should the state.¹⁶⁵ The court declined to reach the constitutional challenge to the rule.¹⁶⁶ The court also left undisturbed the application of the public duty rule in political subdivision liability cases.¹⁶⁷

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ *Id.* at 1022. The court also found that “liability was precluded by discretionary-function immunity” and that the criminal act of the teenager was a superseding cause in the case. *Id.* The Tenth District Court of Appeals affirmed on the public duty rule, mooting the other issues. *Id.* Only the public-duty doctrine was before the Supreme Court. *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 1032.

¹⁶⁰ *Id.* at 1020, 1029, 1032. *See also* OHIO REV. CODE ANN. § 2743 (West Supp. 2004).

¹⁶¹ 525 N.E.2d 468 (Ohio 1988).

¹⁶² *Id.* at 470.

¹⁶³ *See Wallace*, 773 N.E.2d at 1025.

¹⁶⁴ *Id.* at 1019 (quoting OHIO REV. CODE ANN. § 2743.02(A)(1)).

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 1032.

¹⁶⁷ *Id.* at 1031 n.13.

Despite its holding, the majority noted that the state still has other protections such as discretionary-function immunity.¹⁶⁸

In dissent, Justice Resnick, the author of *Sawicki*, offered a spirited defense of the public duty rule.¹⁶⁹ Justice Resnick noted that since private parties do not have public duties, the public duty doctrine merely relieves the state from liability where private parties have no duty at all.¹⁷⁰ She also disagreed with the majority that in assessing the viability of the public duty rule, there can be any valid distinction between suits against the state and suits against municipalities.¹⁷¹

Even though the majority of the court in *Wallace* held that the court of appeals erred in holding the state immune based on the public duty doctrine, the court remanded the case back to the Tenth District Court of Appeals to determine the other bases for affirmance not addressed by that court—the discretionary-function immunity issue and the superseding cause issue.¹⁷² On remand, the court held that the fire marshal’s decision to postpone the seasonal inspection until after the “buy-bust” was entitled discretionary-function immunity.¹⁷³

V. INDIVIDUAL RIGHTS

The Ohio Legislature has not been sympathetic to gay rights. The Ohio civil rights statutes do not include protection against discrimination based on sexual orientation.¹⁷⁴ The state ethnic intimidation statute does not include a penalty enhancement for crimes motivated by animus toward gays and lesbians.¹⁷⁵ And recently, since the look-back period covered by this Article, the legislature has passed a particularly restrictive Defense of Marriage Act.¹⁷⁶

The Ohio Supreme Court, on the other hand, took a bold step in 1990, holding that all unmarried persons are eligible to adopt children, including the gay male who had brought the case.¹⁷⁷ The high court reversed the appellate court’s determination that homosexuals are not eligible to adopt

¹⁶⁸ *Id.* at 1030.

¹⁶⁹ *See id.* at 1033-34 (Resnick, J., dissenting).

¹⁷⁰ *Id.* at 1042-43.

¹⁷¹ *Id.* at 1040.

¹⁷² *Id.* at 1032.

¹⁷³ *Wallace v. Ohio Dep’t of Commerce*, No. 99AP-1303, 2003 WL 22976564, at *3 (Ohio Ct. App. Dec. 18, 2003), *cert. denied*, 123 S. Ct. 310 (Oct. 12, 2004).

¹⁷⁴ *See* OHIO REV. CODE ANN. § 4112.02 (West 2003).

¹⁷⁵ *See id.* § 2927.12.

¹⁷⁶ *See* Ohio’s Defense of Marriage Act (DOMA), 2004 Ohio Legis. Bull. 96 (Anderson).

¹⁷⁷ *In re Adoption of Charles B.*, 552 N.E.2d 884, 886 (Ohio 1990).

as a matter of law.¹⁷⁸ A decade of silence followed that decision.¹⁷⁹ Then, in this past term, the court waded back into the fray with three decisions that show considerably more support for the rights of gays and the changing nature of families than the legislature has shown.

A. In re Bicknell

Two lesbians in a committed relationship, one of whom was about to have a child by artificial insemination, sought a name change in the Butler County Probate Court.¹⁸⁰ Each applied to have her name changed to a combination of both of their last names.¹⁸¹ The women stated the following reason for requesting a name change:

Applicant desires to legally have the same last name as her long-term partner of nine (9) years. This name change will only add to the level of commitment they have for each other, as well as that of their unborn child. Also, so that this tender and new family will have a unified name in the eyes of the law.¹⁸²

Even though this was an uncontested name change, it was denied.¹⁸³ The magistrate based the denial on “natural law” principles.¹⁸⁴ The probate judge, while not including this ground, affirmed the denial of the name change, finding that to grant it would be to “undermine the public policy of the state which promotes legal marriages and withholds official sanction from non-marital cohabitation.”¹⁸⁵

The high court saw the matter much more narrowly. At common law, a person could take any name so long as the change was not made for fraudulent purposes.¹⁸⁶ Now in Ohio, by statute, an application for change of name may be granted as long as the application shows reasonable and

¹⁷⁸ *Id.* at 890; *In re Adoption of Charles B.*, No. CA-3382, 1988 Ohio App. LEXIS 4435, at *17-18 (Oct. 28, 1988).

¹⁷⁹ In 1996, the court, over an unusual dissent from denial of review by Justice Pfeifer, joined by two other justices, refused to review a case involving issues of wrongful discharge for pro bono work on a gay-rights issue and for invasion of privacy in the public disclosure of sexual orientation, a private fact. *Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030 (Ohio Ct. App. 1995), *discretionary appeal denied*, 662 N.E.2d 22 (Ohio 1996).

¹⁸⁰ *In re Bicknell*, 771 N.E.2d 846, 847 (Ohio 2002).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See Pierce v. Brushart*, 92 N.E.2d 4, 8 (Ohio 1950).

proper cause.¹⁸⁷ Therefore, the issue in this case was whether the women showed reasonable and proper cause.¹⁸⁸ What exactly is the meaning of “reasonable and proper” in the statute? Since the language in the statute is permissive rather than mandatory, how much discretion do courts have to deny a change?

The magistrate, the probate court, and a majority of the appeals court all found some degree of impermissible purpose in this name change.¹⁸⁹ All found that the name change was not reasonable and proper under the public policy of the state, which is to favor marriage over cohabitation, and that the denial of these name change requests protects the rights of married persons and the sanctity of solemnized marriage.¹⁹⁰ However, the Ohio Supreme Court, except for dissenting Justice Lundberg Stratton,¹⁹¹ refused to agree. In a surprising six to one decision, the court upheld the name change, finding that the women’s only stated purpose for changing their names was “to demonstrate their level of commitment to each other and to the children that they planned to have.”¹⁹² They had no criminal or fraudulent purpose in wanting to change their names, were not attempting to evade their creditors or to create the appearance of a state-sanctioned marriage.¹⁹³ In fact, the court found discussion of “the sanctity of marriage, the well-being of society, or the state’s endorsement of nonmarital cohabitation” to be “wholly inappropriate and without any basis in law or fact.”¹⁹⁴ This opinion represents a public sea-change for its author Justice Resnick, who a decade earlier had dissented in the 1990 case, *In re Adoption of Charles B.*¹⁹⁵ After *In re Bicknell*, the court also permitted a name change for a transsexual who was going to have surgery to change from a male to a female.¹⁹⁶

¹⁸⁷ *In re Bicknell*, 662 N.E.2d at 848 (quoting OHIO REV. CODE ANN. § 2717.01(A)).

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 847.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 849 (Stratton, J., dissenting).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 552 N.E.2d 884, 889-91 (Ohio 1990) (Resnick, J., dissenting).

¹⁹⁶ *See In re Maloney*, No. CA2000-08-168, 2001 WL 908535, (Ohio Ct. App. Aug. 13, 2001), *rev'd*, 774 N.E.2d 239 (Ohio 2002).

B. In re Bonfield

About a month after *In re Bicknell*, in another six to one decision with Justice Cook partially dissenting this time, the court, in an opinion authored by Chief Justice Moyer, held that a juvenile court could award a same sex couple shared custody of the natural and adopted children of one of them if such a custody plan was in the best interest of the children.¹⁹⁷ Two lesbians, Teri Bonfield and Shelly Zachritz, were in a long-term committed relationship.¹⁹⁸ Teri had two adopted children and had also given birth to three children by becoming pregnant through artificial insemination.¹⁹⁹ Shelly, the partner with no children, was the primary caregiver.²⁰⁰ Because she was neither the birth mother nor the adoptive mother,²⁰¹ Shelly had no official status before the law.²⁰² For example, she could not order medical care in an emergency or get the children's grades.²⁰³ Teri and Shelly both wanted Shelly to have legally recognized rights in regard to the children.²⁰⁴ Because of their desire, the two went into juvenile court and petitioned for shared parenting.²⁰⁵ There was no crisis such as separation or death that propelled this action.²⁰⁶

The juvenile court judge found that the court lacked jurisdiction to grant the shared parenting petition because Shelly is not a parent as that term is used in the shared parenting statute, even though the statute does not define the term.²⁰⁷ The court of appeals reversed on the jurisdictional issue, but affirmed the dismissal of the petition for shared parenting on the ground that the juvenile court had no authority to award shared parenting

¹⁹⁷ *In re Bonfield*, 780 N.E.2d 241, 249 (Ohio 2002).

¹⁹⁸ *Id.* at 243.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Ohio does not recognize second parent adoption. *See id.* "Second parent adoption is a process by which a partner in a cohabiting and nonmarital relationship may adopt his or her partner's biological or adoptive child, without requiring the parent to relinquish any parental rights." *Id.* at 244. Thus, Shelly could not adopt the children without Teri terminating her parental rights. *Id.* at 243. This finding was part of the court's original opinion in this case. *In re Bonfield*, 773 N.E.2d 507, 509 (Ohio 2002). However, the court granted the appellant's motion for reconsideration and deleted this paragraph from the decision. *In re Bonfield*, 780 N.E.2d at 243.

²⁰² *In re Bonfield*, 780 N.E.2d at 243.

²⁰³ *Id.*

²⁰⁴ *See id.* at 244.

²⁰⁵ *Id.*

²⁰⁶ *See id.*

²⁰⁷ *Id.* (referring to the shared parenting statute, OHIO REV. CODE ANN. § 3109.04(A)(2)).

rights to a person who is neither the adoptive or natural parent of the children.²⁰⁸

The issue before the court was whether Shelly is a “parent” as that term is used in the shared parenting statute.²⁰⁹ The women offered two solutions to the problem of including Shelly as a parent.²¹⁰ The first was to find that Shelly stands *in loco parentis* to the children, assuming the same duties as a guardian or custodian.²¹¹ Alternatively, the women argued that a parent should include a “psychological” or “second” parent and provided a four-part test to make the determination:

- (1) whether the legal parent consents to and fosters the relationship between the ‘psychological’ or ‘second’ parent and the child, (2) whether the ‘psychological’ or ‘second’ parent has lived with the child, (3) whether the ‘psychological’ or ‘second’ parent performs parental functions for the child to a significant degree, and (4) whether a parent-child bond has been forged between the ‘second’ parent and the child.²¹²

The court declined both of these approaches, opting instead for a very convoluted statutory interpretation in which the court concluded that the two could seek joint custody rather than shared parenting because custody is not limited to parents.²¹³ The juvenile court could make such a determination so long as a joint custody arrangement is in the best interest of the children, which Teri and Shelly would have to prove.²¹⁴ Despite the convoluted reasoning in the case, it is clear that the court was sympathetic to the desires of the two women, but in a more conservative way than the two had wished. Ironically, the trial court had offered the women the joint custody option in the first place.²¹⁵

C. *In re Hockstok*

In 1977, in *In re Perales*,²¹⁶ the Ohio Supreme Court held that in a custody case involving a parent and a nonparent, a court “may not award custody to the nonparent without first making a finding of parental

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 245.

²¹⁰ *See id.* at 245-46.

²¹¹ *Id.* at 245.

²¹² *Id.* at 246.

²¹³ *See id.* at 247-48.

²¹⁴ *Id.* at 249.

²¹⁵ *Id.* at 244.

²¹⁶ 369 N.E.2d 1047 (Ohio 1977).

unsuitability.”²¹⁷ In *In re Bonfield*, the court limited *In re Perales* to cases in which a parent and a nonparent were competing for custody, not to cases like *In re Bonfield* where a parent voluntarily sought to relinquish sole custody in favor of shared custody.²¹⁸ Barely two weeks later, the court had the occasion to reaffirm the validity of *In re Perales* in *In re Hockstok*.²¹⁹

After the Licking County Domestic Relations Court made a determination that it would be in the best interest of Jennifer Gorslene’s child to be in the temporary custody of the Hockstoks, her father and stepmother, the three of them entered into an agreement giving temporary legal custody to the Hockstoks.²²⁰ The parties subsequently voluntarily extended that relationship by signing a written agreement, ultimately reduced to a court order.²²¹ After awhile, Jennifer desired custody of her child back.²²² Jennifer moved to regain custody, and the Hockstoks cross-filed for legal custody.²²³ The magistrate used the best interest of the child test and awarded custody to the Hockstoks.²²⁴ The trial court adopted the best-interest test over Gorslene’s objection.²²⁵ The appeals court reversed the award of custody to the Hockstoks.²²⁶

In upholding the reversal of the award of custody to the grandparents, the Supreme Court reaffirmed *In re Perales*, holding that in a child custody case between a natural parent and a nonparent, a trial court must make a parental unsuitability determination on the record before awarding legal custody of the child to a nonparent.²²⁷ The court found this constitutionally mandated under both the federal and the state constitutions²²⁸ on the basis of the fundamental liberty interest of a natural parent in the care, custody, and management of her children.²²⁹ The court concluded that the domestic relations court had erred in not making a parental unsuitability determination before awarding custody of Gorslene’s child to its

²¹⁷ *Id.* at 1048.

²¹⁸ *In re Bonfield*, 780 N.E.2d at 249.

²¹⁹ 781 N.E.2d 971 (Ohio 2002).

²²⁰ *Id.* at 973.

²²¹ *Id.*

²²² *See id.*

²²³ *Id.*

²²⁴ *Id.* at 973-74.

²²⁵ *Id.* at 974.

²²⁶ *Id.*

²²⁷ *Id.* at 975.

²²⁸ “This interest is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by Section 16, Article I of the Ohio Constitution.” *Id.* (citations omitted).

²²⁹ *Id.*

grandparents.²³⁰ The court did, however, make it clear that a parent is entitled to only one unsuitability determination, and this should occur at the time of the legal custody hearing.²³¹ After that, should any challenges to modify custody arise, the standard shifts to the best-interest-of-the-child test.²³²

VI. WARRANTLESS DRUG AND ALCOHOL TESTING: *STATE EX REL. OHIO AFL-CIO V. OHIO BUREAU OF WORKERS' COMPENSATION*

Under existing workers' compensation law, a worker whose injury is caused by drugs or alcohol is excluded from receiving benefits.²³³ In 2000, the General Assembly passed House Bill 122, which allows for testing of employees regardless of whether the employer has any reason to believe that the injury was caused by the employee's use of drugs or alcohol.²³⁴ A rebuttable presumption arises that drugs or alcohol caused the injury if certain prohibited levels show up on the test,²³⁵ or if an employee fails or refuses to submit to the test.²³⁶

The AFL-CIO, its president, and one of its member unions filed an original action in mandamus to enjoin the industrial commission from enforcing the amendments enacted in the bill.²³⁷ This case thus involves a challenge to section 4123.54 of the Ohio Revised Code, and was brought by parties who had suffered no individual, discrete injury, which initially raises the issue of standing.²³⁸

A similar standing issue caused significant divisiveness a few years earlier in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*.²³⁹ In *Sheward*, a majority of the court issued writs of mandamus and prohibition to strike down House Bill 350,²⁴⁰ the massive legislative attempt at tort

²³⁰ *Id.* at 978-79.

²³¹ *Id.* at 979. Interestingly, the court rejected the argument that Gorslene had forfeited her right to an unsuitability determination by not appealing the initial custody order, but raised the issue later in a motion for reallocation of parental rights, holding that "[u]nlike most areas of the law where permanency of final orders is a paramount principle, in child custody law, flexibility is often an overriding concern." *Id.* at 978.

²³² *Id.* at 979.

²³³ *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation*, 780 N.E.2d 981, 983-84 (Ohio 2002), *reh'g denied*, 781 N.E.2d 220 (Ohio 2003) (quoting OHIO REV. CODE ANN. § 4123.54(A)(2)).

²³⁴ *Id.* at 983.

²³⁵ *Id.* at 984 (referring to OHIO REV. CODE ANN. § 4123.54(B)).

²³⁶ *Id.* (referring to OHIO REV. CODE ANN. § 4123.54(B)(5)).

²³⁷ *Id.* at 983.

²³⁸ *Id.* at 984.

²³⁹ 715 N.E.2d 1062 (Ohio 1999).

²⁴⁰ *Id.* at 1111.

reform.²⁴¹ The AFL-CIO and its president were relators in that action as well.²⁴² The majority, over a strong dissent by the Chief Justice,²⁴³ allowed a “public action” exception to the traditional standing rule, holding:

Where the object of an action in mandamus and/or prohibition is to procure the enforcement or protection of a public right, the relator need not show any legal or special individual interest in the result, it being sufficient that the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state.²⁴⁴

In *Sheward*, the court gave its assurance that the granting of writs of mandamus or prohibition to determine the constitutionality of statutes will “remain extraordinary” and be “limited to exceptional circumstances that demand early resolution.”²⁴⁵ The fact that such an exceptional procedural remedy was allowed again by the court in *AFL-CIO*, and so soon, brought this bitter rejoinder from the Chief Justice:

Nothing even approaching the circumstances described in *Sheward* exists in the case before us

In my dissent in *Sheward*, I expressed my concern that thereafter ‘those dissatisfied with enactments of the General Assembly . . . will no longer consider a writ of mandamus or prohibition to be an extraordinary remedy: instead they will consider them the remedy of choice.’ Unfortunately, today my prognostication has been realized.

I continue to believe that *Sheward* was wrongly decided. However, even assuming the validity of *Sheward*, no fundamental ‘public right’ analogous to that found to exist in *Sheward* exists in the case at bar.²⁴⁶

Nevertheless, the majority felt the case did fall within the *Sheward* exception and proceeded to decide the case on its merits.²⁴⁷ The constitutional issue presented by this case was whether the bill, which permits warrantless drug and alcohol testing, violates the Fourth

²⁴¹ *Id.* at 1073 & n.6.

²⁴² *Id.* at 1068 & n.1.

²⁴³ *See id.* at 1112-22 (Moyer, C.J., dissenting).

²⁴⁴ *Id.* at 1084-85.

²⁴⁵ *Id.* at 1111 (Pfeifer, J., concurring).

²⁴⁶ State *ex rel.* AFL-CIO v. Ohio Bureau of Workers’ Comp., 780 N.E.2d 981, 994 (Ohio 2003) (Moyer, C.J., dissenting) (citation omitted).

²⁴⁷ *Id.* at 985.

Amendment of the United States Constitution and the virtually identical state constitutional analogue.²⁴⁸

A threshold question for the court was whether the searches authorized by the bill constitute state action, a requirement for the Fourth Amendment to apply.²⁴⁹ While such action is clearly present when the state is the employer, the more difficult issue involves private employers.²⁵⁰ The court found a sufficient nexus to create state action because of the state's coercive power in this field.²⁵¹ The establishment of the system of workers' compensation entangles employers with the state.²⁵² The state has made employer participation in the workers' compensation system mandatory, the administrative process for the adjudication of employees' claims is state-created, the final word on eligibility for workers' compensation belongs to the state, and the state has created all the rules for drug testing.²⁵³

Finding the requisite state action to trigger the Fourth Amendment and its state analogue, the court next moved to the issue of whether the drug testing constituted a search, and if so, whether it was reasonable.²⁵⁴ Relying on the line of United States Supreme Court cases addressing suspicionless drug testing in schools and the workplace, the court easily found the testing created by the bill to be a search.²⁵⁵

Moving next to the reasonableness of the search, majority opinion author Justice Pfeifer reviewed the special needs exceptions jurisprudence of the United States Supreme Court.²⁵⁶ In a nutshell, the United States Supreme Court has held that "[a] search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"²⁵⁷ The majority opinion provides an extensive and sweeping review of the federal special needs exception jurisprudence,²⁵⁸ in contrast to a more superficial review of the United States Supreme Court's Establishment Clause jurisprudence in the Ohio Supreme Court's voucher

²⁴⁸ See *id.* at 983.

²⁴⁹ See *id.* at 985.

²⁵⁰ See *id.*

²⁵¹ *Id.* at 986.

²⁵² See *id.*

²⁵³ *Id.* at 985-86.

²⁵⁴ *Id.* at 986.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 986-87.

²⁵⁷ *Id.* at 987 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (alteration in original)).

²⁵⁸ *Id.* at 986-90.

decision.²⁵⁹ Even though the United States Supreme Court has been expanding this special needs exception,²⁶⁰ and despite the fact that the Ohio Supreme Court has clearly held that its own search and seizure jurisprudence is to be harmonized with federal law,²⁶¹ the court found the testing provisions were much too broad to meet any special needs exception.²⁶² Justice Pfeifer wrote that “[s]uspicionless testing can be applicable to certain carved-out categories of workers, but not to all workers.”²⁶³

Having found the bill unconstitutional as an unreasonable search,²⁶⁴ the court could have ended its inquiry. But it added an additional ground for striking the bill, that of privacy²⁶⁵—a surprising ground for a court that has not shown a great deal of concern for this value. Justice Pfeifer wrote that even if the state had made the case for special needs, “the expectation of privacy of Ohio’s workers would outweigh them.”²⁶⁶ He found this additional basis for striking down the law implicit in the compromise that created the workers’ compensation system.²⁶⁷ “Under such a system of compromise for mutual benefit, a worker would not expect to face the indignity of drug and alcohol testing without any suspicion of wrongdoing,” he wrote for the majority.²⁶⁸ This reliance on the workers’ compensation provisions of the Ohio Constitution provided an independent basis on which to strike down the law on state grounds, in addition to the federal grounds.²⁶⁹ Justice Pfeifer has taken the lead in asserting these

²⁵⁹ See *Simmons-Harris v. Goff*, 711 N.E.2d 203, 207-08 (Ohio 1999).

²⁶⁰ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 829-30 (2002).

²⁶¹ *State v. Robinette*, 685 N.E.2d 762, 766-67 (Ohio 1997); *State v. Murrell*, 764 N.E.2d 986, 993 (Ohio 2002).

²⁶² See *AFL-CIO*, 780 N.E.2d at 990.

²⁶³ *Id.*

²⁶⁴ *Id.* at 990, 992.

²⁶⁵ *Id.* at 990.

²⁶⁶ *Id.*

²⁶⁷ The Ohio Constitution protects employers from suit for negligence, and employees receive benefits for work-related injuries and illnesses without having to prove fault. See OHIO CONST. art. II, § 35.

²⁶⁸ *AFL-CIO*, 780 N.E.2d at 991.

²⁶⁹ See *id.* at 991-92. Subsequent to the majority’s four to three holding that suspicionless substance abuse testing comprised an unconstitutional search, *see id.* at 992, the Ohio House of Representatives passed a bill remarkably similar to the one thrown out in this case. Associated Press, *Bill Targets Substance Abuse by Workers’ Comp Beneficiaries*, THE PLAIN DEALER (Cleveland, Ohio), May 12, 2004, at B4. Ohio House Bill 223 passed the House on May 11, 2004 and was introduced in the Senate without delay. See H.B. 223, 125th Gen. Ass., Reg. Sess. (Ohio 2003). House Bill 223 allows chemical testing of an employee injured at work and creates a presumption that substance abuse was the proximate

(continued)

independent state constitutional analyses.²⁷⁰ The Chief Justice and Justice Stratton dissented in this case, both on the merits and on the issue of standing.²⁷¹ Justice Cook dissented on standing only.²⁷²

VII. WRONGFUL DISCHARGE: *WILES V. MEDINA AUTO PARTS*

Herb Wiles, an employee of Medina Auto Parts, claimed he was constructively discharged in retaliation for exercising his rights under the Family and Medical Leave Act (FMLA)²⁷³ for taking a two-week leave of absence to care for his father who had been injured in an automobile accident.²⁷⁴ But Wiles did not seek recovery under the Act.²⁷⁵ Rather, he filed a common law tort claim, arguing that he was wrongfully discharged in violation of the public policy set forth in the FMLA.²⁷⁶ The issue before the court was whether there is a common law cause of action for wrongful discharge in violation of public policy based solely on an employer's violation of the FMLA.²⁷⁷

For a long time, Ohio, like most states, was an employment-at-will state, allowing employers to fire at-will employees for any reason not contrary to law.²⁷⁸ While this is still the general common law rule in this state, in 1990 Ohio joined the national trend in recognizing a tort, often referred to in Ohio as a "*Greeley*" tort for the case in which it was

cause of the injury where an employee fails or refuses the test. Ohio H.B. 223. In opposition testimony to House Bill 223, the AFL-CIO highlighted the bill's similarity to Ohio House Bill 122, the one rejected by the court in *AFL-CIO*. Ohio AFL-CIO, CAPITOL REPORT, at http://www.ohaficio.org/people-_lobby/cap_report/ (May 28, 2004). Should it be passed into law, the future of this very similar bill before a very different court remains an open question. See *Bill Targets Substance Abuse by Workers' Comp Beneficiaries, supra*.

²⁷⁰ See, e.g., *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211-12 (Ohio 1999); *Humphrey v. Lane*, 728 N.E.2d 1039, 1043-45 (Ohio 2000).

²⁷¹ *AFL-CIO*, 780 N.E.2d at 992-97 (Moyer, C.J., Lundberg Stratton, J., dissenting).

²⁷² *Id.* at 997 (Cook, J., dissenting).

²⁷³ *Wiles v. Medina Auto Parts*, 773 N.E.2d 526, 529 (Ohio 2002). See also Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601, 2611-19, 2631-36, 2651-54 (1994).

²⁷⁴ *Wiles*, 773 N.E.2d at 528.

²⁷⁵ *Id.* at 529.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 528.

²⁷⁸ See, e.g., *Evely v. Carlon Co.*, 447 N.E.2d 1290, 1295 (Ohio 1983); *Fawcett v. G. C. Murphy & Co.*, 348 N.E.2d 144, 147 (Ohio 1976); *Henkel v. Educ. Research Council of America*, 344 N.E.2d 118, 119 (Ohio 1976); *La France Elec. Constr. & Supply Co. v. Int'l. Bhd. of Elec. Workers, Local No. 8*, 140 N.E. 899, 906-07 (Ohio 1923). Of course, employees were also free to quit at will.

created,²⁷⁹ for wrongful discharge in violation of clear public policy.²⁸⁰ In Ohio, through case law development, public policy has come to include statutes, administrative regulations, the state and federal constitutions, and the common law.²⁸¹ Thus, through this precedent, Wiles used the FMLA as the public policy underpinning his *Greeley* tort.²⁸²

A key issue in this case involved the question of remedies. Wiles argued that the remedies under the *Greeley* tort are cumulative of any statutory remedies because the statutory remedies under the FMLA were not adequate to protect his interests.²⁸³ In 1997, in *Kulch v. Structural Fibers, Inc.*,²⁸⁴ the court accepted a similar argument in a whistleblower wrongful discharge case,²⁸⁵ allowing common law tort remedies in addition to the remedies provided in the whistleblower statute.²⁸⁶ In *Kulch*, the court held that a common law claim was not foreclosed because the statutory remedies were inadequate to compensate the terminated employee fully.²⁸⁷ Similarly, Wiles argued that the FMLA does not allow recovery for emotional distress or punitive damages.²⁸⁸ He argued that such tort remedies were necessary to make him whole and to carry out the intent of Congress.²⁸⁹

In a four to three decision authored by Justice Cook,²⁹⁰ the court rejected Wiles's position, observing that Wiles had read *Kulch* more broadly than is warranted, and noting that the reasoning from *Kulch* on which Wiles relied commanded only a plurality of three justices.²⁹¹ The court found that even without damages for emotional distress or punitive damages, the remedies in FMLA were adequate to vindicate the policy

²⁷⁹ *Greeley v. Miami Valley Maint. Contractors, Inc.*, 551 N.E.2d 981 (Ohio 1990).

²⁸⁰ *Wiles*, 773 N.E.2d at 529.

²⁸¹ *Id.* See also *Painter v. Galey*, 639 N.E.2d 52, 52 (Ohio 1994). Subsequently, the Court further refined the tort by adopting the four elements of clarity, jeopardy, causation, and overriding justification. *Collins v. Rizkana*, 652 N.E.2d 653, 657-58 (Ohio 1995) (discussing the test developed by Henry Perritt Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398-99 (1989)).

²⁸² *Wiles*, 773 N.E.2d at 530.

²⁸³ *Id.* at 533-34.

²⁸⁴ 677 N.E.2d 308 (Ohio 1997).

²⁸⁵ *Id.* at 312 (regarding OHIO REV. CODE ANN. § 4113.52).

²⁸⁶ *Id.* at 320.

²⁸⁷ See *id.* at 324.

²⁸⁸ *Wiles*, 773 N.E.2d at 533-34.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 528, 535.

²⁹¹ *Id.* at 534. In *Kulch*, Justice Pfeifer concurred in the syllabus and judgment only. *Kulch*, 677 N.E.2d at 329 (Pfeifer, J., concurring in syllabus and judgment only).

created by Congress.²⁹² Justice Cook warned it would be wrong to assume that Ohio law allows a common law claim for wrongful discharge every time statutory remedies “provide . . . less than the full panoply of relief that would be available” in a common law tort claim.²⁹³ Whether this signals a retrenchment in Ohio’s now expansive wrongful discharge jurisprudence remains to be seen. Once again, as in *Kulch*, Justice Pfeifer concurred in judgment only in *Wiles*.²⁹⁴ Justices Resnick and Sweeney joined in a dissent authored by Justice Douglas, arguing that employees fired in violation of the policies set forth in the FMLA should be allowed to bring *Greeley* tort claims as well.²⁹⁵ Justice Douglas, now retired from the court, authored both *Greeley*²⁹⁶ and *Kulch*.²⁹⁷

VIII. MENTALLY RETARDED DEATH ROW INMATES: *STATE V. LOTT*

Gregory Lott was convicted of aggravated murder and sentenced to death.²⁹⁸ After Lott had exhausted all his direct and post-conviction remedies, including denial of habeas corpus relief in federal court, he was set to be executed on August 27, 2002.²⁹⁹ In June of 2002, in *Atkins v. Virginia*,³⁰⁰ the United States Supreme Court held that the execution of mentally retarded criminals violates the Eighth Amendment ban on cruel and unusual punishment.³⁰¹ Lott, who had an IQ of 72,³⁰² claimed he was mentally retarded and sought further relief in light of *Atkins*.³⁰³ On August 14, 2002 the Ohio Supreme Court granted Lott a stay of execution and, on September 6, 2002, directed oral argument on the procedural and substantive standards to be followed to enforce the *Atkins* requirements.³⁰⁴

²⁹² See *Wiles*, 773 N.E.2d at 534-35.

²⁹³ *Id.* at 534.

²⁹⁴ *Id.* at 535. See *supra* note 291.

²⁹⁵ *Id.* at 536 (Douglas, J., dissenting).

²⁹⁶ See *Greeley v. Miami Valley Maint. Contractors, Inc.*, 551 N.E.2d 981 (Ohio 1990).

²⁹⁷ See *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308 (Ohio 1997).

²⁹⁸ *State v. Lott*, 779 N.E.2d 1011, 1012 (Ohio 2002).

²⁹⁹ *Id.* at 1013.

³⁰⁰ 536 U.S. 304 (2002).

³⁰¹ *Id.* at 321.

³⁰² *Lott*, 779 N.E.2d at 1013. Lott submitted evidence as to his IQ. *Id.* However, the court noted that other evidence suggested his IQ might be higher. *Id.* The court did not resolve this issue but instead held that it was a factual dispute for the trial court to decide. *Id.* at 1014.

³⁰³ *Id.* at 1013.

³⁰⁴ *Id.*

First, however, the court had to deal with the statutory ban on successive petitions for post conviction relief.³⁰⁵ Generally, the post conviction relief statute bars a court from entertaining a second or successive petitions for relief.³⁰⁶ Lott had already filed a petition and successive petition for post conviction relief, both of which had been denied.³⁰⁷ But Ohio Revised Code section 2953.23(A), the post conviction statute pertinent to this question, contains two exceptions that permit subsequent petitions.³⁰⁸ Section 2953.23(A)(1)(b) permits a successive petition when “the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation, and the petition asserts a claim based on that right.”³⁰⁹ The Ohio Supreme Court, in an opinion authored by Chief Justice Moyer, found that *Atkins* had created such a new federal right that applied retroactively to those facing the death penalty, and thus the court would entertain Lott’s new petition.³¹⁰ For similar reasons, the court rejected the State’s argument that *res judicata* barred Lott’s claim.³¹¹ Under that doctrine, the court will not consider in post conviction proceedings constitutional issues that have been or could have been raised by counsel either before conviction or on direct appeal.³¹² But the court found that, because of the new issues in *Atkins*, *res judicata* was not a bar.³¹³

The *Atkins* Court did not establish procedures for determining whether an individual is mentally retarded, choosing to leave this to the individual states.³¹⁴ The Ohio Supreme Court initially determined that whether Lott is mentally retarded is a disputed question of fact.³¹⁵ Lacking any statutory framework from the legislature to establish mental retardation,³¹⁶ the Ohio Supreme Court, over a lone dissent by Justice Cook on this point,³¹⁷ went ahead and established the “substantive standards and procedural guidelines [to be used to determine] whether convicted defendants facing the death penalty are mentally retarded.”³¹⁸ Other courts around the country,

³⁰⁵ See *id.* at 1014-15.

³⁰⁶ *Id.* (discussing OHIO REV. CODE ANN. § 2953.23(A)).

³⁰⁷ *Id.*

³⁰⁸ OHIO REV. CODE ANN. § 2953.23(A) (West 1997) (amended 2003).

³⁰⁹ *Id.*

³¹⁰ *Lott*, 779 N.E.2d at 1015.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 1014.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 1016-17 (Cook, J., dissenting in part).

³¹⁸ *Id.* at 1014.

including the Virginia court currently deciding the fate of Atkins, continue to struggle with the proper definition of mental retardation.³¹⁹ In *Lott*, the Ohio Supreme Court decided that it is for the trial court, not a jury, to decide whether a petitioner is mentally retarded.³²⁰ The trial court must make written findings on this question.³²¹ The defendant bears the burden of proving mental retardation by a preponderance of the evidence.³²²

The trial court is to evaluate the claim of mental retardation by using definitions from the American Association of Mental Retardation and the American Psychiatric Association, cited with approval in *Atkins*.³²³ “These definitions require (1) significantly sub-average intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18.”³²⁴ The court also held there to be “a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70.”³²⁵

As guidance for future cases, the *Lott* Court also held that “[f]or all other defendants who have been sentenced to death, any petition for postconviction relief specifically raising an *Atkins* claim must be filed within 180 days from the date of the judgment.”³²⁶ As to capital cases currently pending trial where this issue is raised, the court should hold *Atkins* hearings in accordance with the standards set forth in the *Lott* opinion.³²⁷ Some estimate that almost twenty percent of death row inmates in Ohio are mentally retarded, and, as of this writing, at least thirty-seven death row inmates have filed *Atkins* claims.³²⁸

³¹⁹ See Adam Liptak, *New Challenge for Courts: How to Define Retardation*, N.Y. TIMES, Mar. 17, 2004, § 1, at 20.

In hundreds of cases around the country—in challenges brought by people on death row and in new prosecutions—courts are struggling with questions left open by the *Atkins* decision: Who qualifies as retarded? Who decides whether a defendant is retarded, a judge or a jury? Should this decision come before or at a capital trial?

Id.

³²⁰ *Lott*, 779 N.E.2d at 1015.

³²¹ *Id.*

³²² *Id.* Post conviction relief is a civil remedy. See *State v. Goist*, No. 2002-T-0136, 2003 Ohio App. LEXIS 3250, at *8 (July 3, 2003).

³²³ *Lott*, 779 N.E.2d at 1014.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 1016.

³²⁷ *Id.*

³²⁸ See Margaret Talbot, *The Executioner's I.Q. Test*, N.Y. TIMES MAG., June 29, 2003, § 6, at 32. “In Ohio, [the state public defender] estimates that perhaps 40 of the 207
(continued)

IX. DUE PROCESS AND THE STATUS OF SEXUALLY ORIENTED
OFFENDERS: *STATE V. HAYDEN*

Section 2950 of the Ohio Revised Code codifies Ohio's sex offender classification, registration, and notification laws.³²⁹ The law divides sex offenders into three categories—sexual predators, habitual sex offenders, and sexually oriented offenders.³³⁰ The sexually oriented offender category is the least restrictive of the three.³³¹

In two earlier cases, the high court rebuffed constitutional challenges to various aspects of the sexual offender laws.³³² In *State v. Cook*, which explains in detail the classification, registration, and notification provisions of Ohio Revised Code section 2950, the court held that classification of a sexual offender as a sexual predator for conduct before the effective date of the statute violated neither the retroactivity clause of the Ohio Constitution³³³ nor the Ex Post Facto Clause of the United States Constitution.³³⁴ In *State v. Williams*,³³⁵ which provides an extensive history and overview of the sex offender registration laws, the court held that Ohio Revised Code section 2950 did not violate numerous other provisions of the federal and state constitutions, including the Double Jeopardy, Bill of Attainder, and Equal Protection Clauses, nor the rights enumerated in Section I, Article I of the Ohio Constitution.³³⁶ The court also rejected a void for vagueness challenge.³³⁷

In *State v. Hayden*,³³⁸ the defendant was convicted of a crime defined by law as a sexually oriented offense.³³⁹ Upon conviction, he was automatically classified as a sexually oriented offender and notified of his

people on death row may be retarded, and his office has already filed appeals based on the Atkins decision for 37 of them." *Id.*

³²⁹ OHIO REV. CODE ANN. § 2950 (West 2004).

³³⁰ *State v. Hayden*, 773 N.E.2d 502, 504 (Ohio 2002).

³³¹ *Id.*

³³² *State v. Cook*, 700 N.E.2d 570 (Ohio 1998); *State v. Williams*, 728 N.E.2d 342 (Ohio 2000).

³³³ OHIO CONST. art II, § 28.

³³⁴ *Cook*, 700 N.E.2d at 578, 585. See also U.S. CONST. art. I, § 10; OHIO CONST. art. II, § 28.

³³⁵ 728 N.E.2d 342 (Ohio 2002).

³³⁶ *Id.* at 348, 362. The court also specifically rejected the argument that Ohio Revised Code chapter 2950 impinges on the "natural law rights of privacy, favorable reputation, the acquisition of property, and the ability to pursue an occupation." *Id.* at 352, 355-57.

³³⁷ *Id.* at 360-62.

³³⁸ *State v. Hayden*, 773 N.E.2d 502 (Ohio 2002).

³³⁹ *Id.* at 505 (referring to OHIO REV. CODE ANN. § 2950.01(D)(1)(g)).

duty to register with the sheriff in the county in which he resides.³⁴⁰ The court considered the specific issue of whether due process requires the trial court to conduct a hearing to determine whether a defendant is a sexually oriented offender.³⁴¹ The court first quickly dispensed with the argument that the failure to provide a hearing violated the confrontation clauses of the state and federal constitutions, holding that neither clause applied since the classification scheme set forth “in [Ohio Revised Code] Chapter 2950 is civil, not punitive, in nature.”³⁴² The court, in a six to one decision authored by Justice Sweeny,³⁴³ then rejected the due process challenges.³⁴⁴ The opinion found the status of sexually oriented offender to attach as a matter of law from the particular crime committed³⁴⁵ and the registration provisions for sexually oriented offenders to be substantially less onerous than the registration and community notification requirements for sexual predators and habitual sex offenders.³⁴⁶ The court concluded that Hayden failed to show that he was deprived of any liberty or property interest because of the registration requirement.³⁴⁷

X. JUROR QUESTIONING OF WITNESSES: *STATE V. FISHER*

In *State v. Fisher*,³⁴⁸ a unanimous opinion authored by Chief Justice Moyer,³⁴⁹ the court held that the practice of allowing jurors to question witnesses is within the discretion of the trial judge.³⁵⁰ This appeal came to the court by way of conflict certification.³⁵¹ The issue certified by the appeals court was whether “the practice of a trial court of allowing members of a jury to submit questions to the court and attorneys for possible submission to witnesses [is] *per se* prejudicial to a criminal defendant.”³⁵²

³⁴⁰ See *id.* See also OHIO REV. CODE ANN. § 2950.04(A)(1) (West Supp. 2004). In addition to registration with the sheriff, sexually oriented offenders must also periodically verify their address. *Id.* § 2950.06(A).

³⁴¹ *Hayden*, 773 N.E.2d at 503-04.

³⁴² *Id.* at 503.

³⁴³ *Id.* at 503, 506. Justice Cook concurred in the syllabus and judgment only. *Id.* at 506 (Cook, J., concurring in syllabus and judgment only). Justice Pfeifer dissented. *Id.* at 507 (Pfeifer, J., dissenting).

³⁴⁴ *Id.* at 506.

³⁴⁵ *Id.*

³⁴⁶ See *id.* at 504-05. See also *State v. Cook*, 700 N.E.2d 570, 574-76 (Ohio 1998).

³⁴⁷ *Hayden*, 773 N.E.2d at 505.

³⁴⁸ 789 N.E.2d 222 (Ohio 2003).

³⁴⁹ *Id.* at 224, 230.

³⁵⁰ *Id.* at 230.

³⁵¹ *Id.* at 224.

³⁵² *Id.*

Before reaching the merits in this case, the court, following the lead of the United States Supreme Court in *Arizona v. Fulminante*,³⁵³ recharacterized the question by refining the way that constitutional error should be raised on appeal in criminal cases into two categories, trial error and structural error.³⁵⁴ Trial errors are reviewable under the harmless error standard and occur during the presentation of the case to the jury.³⁵⁵ They represent errors in the trial process.³⁵⁶ Structural errors “affect the framework within which the trial proceeds,”³⁵⁷ and “mandate a finding of ‘per se prejudice.’”³⁵⁸ The Chief Justice made it clear that

[i]n the future, therefore, we encourage litigants and reviewing courts to analyze whether a constitutional error is cause for automatic reversal in the context of whether the error is ‘structural.’ Accordingly, appellant’s ‘per se prejudicial’ argument—that juror questioning can never be harmless under Crim.R. 52(A)—is more appropriately characterized as alleging a structural error.³⁵⁹

A structural error must involve the deprivation of a constitutional right.³⁶⁰ In this case, Fisher argued that “juror questioning violated [his] right to an impartial jury under Section 10, Article I of the Ohio Constitution and the Sixth Amendment to the United States Constitution.”³⁶¹

After a jurisdictional survey, the court first agreed with a majority of the state courts and federal circuits that have considered the issue that juror questioning of witnesses falls within the sound discretion of the trial court.³⁶² The court considered, but ultimately rejected, the four principal dangers identified with juror questioning: “(1) jurors may submit inadmissible questions, (2) counsel may refrain from objecting to improper questions for fear of offending jurors, (3) juror interruptions may disrupt courtroom decorum, and (4) such questioning may distort juror impartiality.”³⁶³

³⁵³ 499 U.S. 279 (1991).

³⁵⁴ *Fisher*, 789 N.E.2d at 225-26.

³⁵⁵ *Id.* at 225 (quoting *Fulminante*, 499 U.S. at 307-08).

³⁵⁶ *See id.*

³⁵⁷ *Id.* (quoting *Fulminante*, 499 U.S. at 310).

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 226.

³⁶⁰ *See id.* at 228.

³⁶¹ *Id.*

³⁶² *Id.* at 226-30.

³⁶³ *Id.* at 229.

To lessen the likelihood of these dangers, the court approved procedural safeguards for those judges choosing to allow juror questioning, holding:

[T]rial courts that permit juror questioning should (1) require jurors to submit their questions to the court in writing, (2) ensure that jurors do not display or discuss a question with other jurors until the court reads the question to the witness, (3) provide counsel an opportunity to object to each question at sidebar or outside the presence of the jury, (4) instruct jurors that they should not draw adverse inferences from the court's refusal to allow certain questions, and (5) allow counsel to ask followup questions of the witnesses.³⁶⁴

While the issue of juror questioning came up in the context of a criminal case in *Fisher*, the syllabus law consigning to the discretion of trial courts the practice of letting jurors question witnesses is not limited to criminal cases.³⁶⁵

XI. CONCLUSION

These twelve cases are a snapshot of a court in transition. With the present court composition, we will likely see more deference to the legislature and fewer separation of powers spats. The use of extraordinary writs of prohibition and mandamus to bypass traditional appellate review and standing requirements, as was seen in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* and *State ex rel. AFL-CIO v. Industrial Commission*, is likely to cease. Further exceptions to the employment-at-will doctrine are likely to be reigned in. Governmental bodies may get greater immunity again. Insurance contracts are more likely to be upheld as written, with fewer ambiguities found. Time will tell. As four seats on the court will be up for election in November of 2004,³⁶⁶ the future is literally up for grabs.

³⁶⁴ *Id.* at 230 (footnote omitted).

³⁶⁵ *See id.* at 233.

³⁶⁶ Jon Craig, *Moyer Announces Bid for Fourth Term on High Court*, COLUMBUS DISPATCH, Dec. 9, 2003, at D5.

