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Appellate and Supreme Court Practice

The Ohio Supreme Court 2015: What's on the First-Half Docket?

Table of contents

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The Ohio Supreme Court 2015: What's on the First-Half Docket?

BY: BRAD HUGHES | FEBRUARY 2015

Now that the Ohio Supreme Court's oral argument calendar is set through June, it is a good time to look ahead at some of the cases that will be argued in the first half of 2015 and submitted to the court for decision. Below is a summary of just some of the notable issues that will be presented to the justices in the coming months on the civil side of the docket, excluding public-utility cases and attorney discipline cases. Click on the hyperlinks below for instant access to the dockets, briefs and statutes at issue, and be sure to check out the live stream (or video archive) of any oral arguments that may interest you, which can be accessed via the Supreme Court's main page, www. supremecourt.ohio.gov.

February 24: 14-0451 *Dillon v. Farmers Ins. of Columbus, Inc.*

Most lawyers reflexively believe that Ohio's Consumer Sales Practices Act (CSPA) does not apply in the context of insurance. And that is not surprising. The phrase "consumer transaction" in the CSPA expressly excludes transactions between insurance companies and their customers. R.C. 1345.01(A). In this case, however, the Coshocton County Court of Appeals affirmed an award of treble damages and attorneys' fees under the CSPA against an insurance company whose agent failed to obtain the customer's signature on a vehicle repair estimate containing a notice about the use of non-OEM (original equipment manufacturer) parts for the repair. In doing so, the court relied upon a specific section of the CSPA, R.C. 1345.81, which imposes certain requirements on insurers who provide repair estimates regarding the use of non-OEM parts. Farmers Insurance of Columbus, joined by *amicus curiae* the Ohio Association of Civil Trial Attorneys, has asked the Supreme Court to reverse the court of appeals and hold that an insurer does not engage in a "consumer transaction" or commit an "unfair or deceptive act or practice" under the CSPA when it adjusts an insured's claim and issues a repair estimate such as the one at issue here involving non-OEM parts.

February 25: 14-0531 *City of Cincinnati v. Testa, Tax Commr.*

The City of Cincinnati turned over operation of its seven golf courses to a professional golf course management contractor, Cincinnati Golf Management, Inc., which is a for-profit entity. A local golf course owner, Paul Macke, filed a complaint against the continuing exemption of the city's golf courses from the state's real property tax. Although the tax commissioner found that the golf courses were not used exclusively for a public purpose, and thus did not qualify for exemption, the Board of Tax Appeals (BTA) reversed. So the tax commissioner is asking the court to reverse the BTA and confirm that the city's choice to turn over operations of the golf courses to a for-profit entity abandoned any claim to an "exclusive" public purpose for the property, thereby negating the possibility of real property tax exemption. The City of Mason has chimed in as *amicus curiae* on Cincinnati's side of the dispute. The cities argue that the revenue generated under the management contract is inconsequential and does not violate the public-purpose requirement of R.C. 5709.08. They contend that public golf courses are open-air recreational facilities

essential to the health, comfort and pleasure of the cities' residents, and fall squarely within the definition of public property "used exclusively for a public purpose" under the statute.

March 10: 14-0164 *Stewart v. Bd. of Edn. of Lockland School Dist.*

This appeal implicates Ohio's Open Meetings Act and will require the court to clarify whether public employees who request entirely public, pre-termination hearings are entitled to get one, even if the employer prefers to go into executive session during portions of the hearing to deliberate. Mr. Stewart was employed by the Lockland School District as a data coordinator. In 2012, he learned that the school board would be holding a special meeting to assess his continued employment, at which he would be given the chance to speak and present evidence. At the meeting, in spite of Mr. Stewart's request that all deliberations take place in public, the board adjourned into executive session to deliberate both before and after affording Mr. Stewart his opportunity to speak. Mr. Stewart contends that the Board's adjournment into executive session violates Ohio's Open Meetings Act, R.C. 121.22(G)(1), which provides:

> …the members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:
>
> (1) To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, *unless the public employee, official, licensee, or regulated individual requests a public hearing*.

(Emphasis added). Mr. Stewart's appeal may require the court to consider whether and how its 1980 decision in *Matheny v. Frontier Local Bd. of Edn.*, 62 Ohio St.2d 362, was affected by the U.S. Supreme Court's decision five years later in *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532.

May 5: 14-0601 *Kuhn v. Kuhn n.k.a. Cottle*

The oil and gas boom in Ohio has impacted many facets of the law. The court just decided a case rejecting municipal efforts to impose licensing requirements upon oil and gas drillers who have received state permits, and the court has several cases still pending regarding how the Dormant Mineral Act confirms ownership or abandonment of these resources. In *Kuhn* we see the effects of the oil and gas boom in the context of a divorce. Mr. Kuhn owned certain property, including mineral rights, before the parties were married. After their marriage, the husband's property became the marital residence. Four years into their marriage, Mr. and Mrs. Kuhn executed an oil and gas lease with Gulfport Energy Corporation, leasing the property for oil and gas development. The lease provided for a signing bonus of over $120,000 and 20 percent royalties from any future oil and gas production. Soon after they received their bonus check, Mr. and Mrs. Kuhn divorced and agreed on all issues except for the disposition of the signing bonus and royalties. A magistrate determined that the marital residence property was Mr. Kuhn's separate property, and that *both* the signing bonus and future royalties were his sole property. The trial court agreed and Mrs. Kuhn appealed.

The Guernsey County Court of Appeals partially reversed the trial court, agreeing that Mr. Kuhn was entitled to all future royalties, but concluding that the signing bonus was marital property like other income generated during a marriage and therefore divisible by half. Mr. Kuhn appealed to the Supreme Court, asking it to hold that:

> Where one spouse owns real property in an area experiencing a high volume of oil and gas exploration and leasing, the acquisition and execution of a lease by the property owner is not the result of contribution of labor, money or in-kind contribution such that any income generated from said lease could be considered 'active income' pursuant to Ohio Revised Code Section 3105.171 but is instead 'passive income' generated from the separate property and therefore is not subject to division between the spouses in an action for divorce.

Mem. in Supp. of Jurisdiction at 9.

May 6: 14-0140 Navistar, Inc. v. Levin, Tax Commr.

This appeal concerns Navistar's argument that the Ohio Tax Commissioner misapplied the state's Commercial Activity Tax (CAT) – specifically, that the commissioner failed to apply a credit for net operating loss carryforwards (NOLs) in the manner that the Ohio General Assembly intended. In 2005, the General Assembly overhauled Ohio's business tax regime, phasing out the Ohio franchise tax for most businesses and instituting the CAT tax, which is a low-rate, broad-based tax on gross receipts for the privilege of doing business in Ohio. As enacted, at the urging of several manufacturers, the CAT tax included a credit for certain taxpayers which was codified in R.C. 5751.53. The credit permitted taxpayers with more than $50 million in unused NOLs to make a one-time binding election to convert their NOLs into a credit against future CAT liability. Navistar made the election and claimed the credit, but the tax commissioner denied it. Navistar argues that the commissioner impermissibly based his denial on changes to Navistar's financial statements that did not exist at the time of the statutory filing deadline to claim the credit. The Supreme Court will have to determine whether the Commissioner erred by relying on information post-dating the June 2006 filing deadline.

May 6: 14-0804 Corban v. Chesapeake Exploration, L.L.C.

Last August, the Supreme Court heard oral arguments in two big cases concerning Ohio's Dormant Mineral Act (DMA) that have yet to be decided, *Dodd v. Croskey* and *Chesapeake Exploration, L.L.C. v. Buell*. In *Corban*, to be argued in May, the court will be faced with still other pressing questions relating to the DMA, R.C. 5301.56, which was originally enacted in 1989, but substantially amended in 2006. The *Corban* case, as well as 14-0803 *Walker v. Shondrick-Nau, Executrix* (a discretionary appeal to be argued on June 23) will present the court with several interpretational issues to resolve under the DMA that are of compelling interest to surface owners and holders of mineral interests in Ohio's shale play. For example, in *Corban*, a federal court must determine which parties are entitled to the oil, gas and mineral rights below 164.5 acres in Harrison County. To resolve that dispute, U.S. District Judge Watson has asked the Supreme Court two key questions about the DMA: (1) Does the 2006 version or the 1989 version of the DMA apply to claims asserted after 2006 alleging that the rights to oil, gas and other minerals automatically vested in the surface land holder before the 2006 amendments as a result of abandonment?; and (2) is the payment of a delay rental during the primary term of an oil and gas lease a title transaction and "savings event" under the Act? In *Walker*, the Court will also address whether the 1989 or 2006 version of the statute applies to an action to

establish abandonment, as well as other related issues. It will be interesting to see if the court decides *Dodd* and *Chesapeake* before hearing arguments in *Corban* and *Walker,* or if the court is gathering all of the information it can about the pending DMA cases before opining on any of them.

May 20: 14-0319 *State ex rel. Ohio Civ. Serv. Emp. Assn. v. State of Ohio*

Ohio's appeal from the Tenth District regarding the General Assembly's ongoing efforts to privatize the prison system is notable for several reasons. For one, the Tenth District decided that the General Assembly violated the Ohio Constitution's one-subject rule by including legislation continuing to implement prison privatization (a process that began with legislation enacted in 1995) within a 3,000-page appropriations bill, HB 153, that was signed by Ohio's governor in 2012. In and of itself, that is noteworthy, because it is not often that courts invoke the one-subject rule to nullify legislative enactments. Second, in early 2015, the appellees (who won their one-subject challenge in the Tenth District, and are now seeking to preserve that win in the Supreme Court), sought to recuse Justice French from participating in the appeal, based on certain comments she made as a candidate for the bench in the November 2014 election that were reported in the press. Appellees believed that her comments reflected an impermissible bias. In February 2015, Justice French declined the request to recuse herself, saying "[t]he statements reflect my philosophical view that policy-making must stop with the legislature and must not enter my decision-making as a judge. The statements do not reflect bias as to a particular case, issue or party. There being no grounds for recusal, I decline appellees/cross-appellants' request." Third, the appellees filed a cross-appeal challenging the entanglement between the state and private enterprise that they believe is presented by the prison privatization legislation – a challenge similar to one that was raised in prior litigation about JobsOhio, but was never decided on the merits due to the plantiffs' lack of standing. This appeal has attracted numerous *amici* and will be very interesting to follow.

June 9: 14-0876 *Akron Gen. Med. Ctr. v. Testa, Tax Commr.*

This tax case shares some themes in common with the Cincinnati golf-course privatization case discussed above. Akron General Medical Center (AGMC), a nonprofit charitable institution, opened an outpatient health care facility in Stow, Ohio. The facility provides a full range of health care services to patients, including a 24-hour emergency room, radiology, diagnostics, physical therapy, cardiac and pulmonary testing, orthopedics, sports medicine, and a fitness center called LifeStyles. When AGMC applied for the same charitable tax exemption that had been granted for its other health-care facilities, the Ohio Tax Commissioner granted the exemption for all portions of the outpatient facility used for "hospital purposes," but denied an exemption for the LifeStyles space on the basis that it was being used for a "business." The Board of Tax Appeals affirmed. AGMC argues that the BTA applied the wrong standard of review, and that even though it makes LifeStyles available to the public for a membership fee, LifeStyles is also a "clinically integrated department of AGMC, a charitable institution, that has been used by thousands of patients who obtain rehabilitation and physical therapy services from AGMC without regard to the ability to pay." As such, AGMC asks the court to reverse the BTA and hold that real property such as LifeStyles, which belongs to a charitable institution, is exempt from taxation under R.C. 5709.121 if it is being used in furtherance of, or incidental to, the institution's charitable purposes and "not with a view to profit."

June 9: 14-0978 *Boone Coleman Constr., Inc. v. Village of Piketon*

The *Boone* appeal will give the court a chance to revisit the topic of liquidated damage provisions in contracts; when they are enforceable versus unreasonable under the leading case establishing the test, *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27 (1984). State law requires all public improvement

contracts supported by state funds to contain a liquidated damages clause; and the contract at issue here – for roadway improvements in the Village of Piketon – did so. It was a $700 per-day liquidated damage provision on a $683,000 project, where the parties agreed that time was of the essence. After the contractor's 397-day delay in completing the project, the court of appeals decided that the $277,000 liquidated damage award pursuant to that per-diem clause was "so manifestly unreasonable and disproportionate that it is plainly unrealistic and inequitable" and amounted to an unenforceable penalty. The Village of Piketon and its *amici* (County Commissioners Association; Municipal League; School Board Association; and Township Association) want to see the court of appeals decision reversed and the liquidated damage provision upheld. It will be interesting to see if the Supreme Court modifies the *Samson Sales* test in any way, or simply applies it in its opinion, which could have ramifications for many other liquidated damage provisions in contracts across the state.

June 23: 13-0656 *State ex rel. Walgate v. Kasich*

One of the cases that has attracted significant attention in the media and from various *amici curiae* – including a brief written by Porter Wright attorneys on behalf of the Dayton Chamber of Commerce; Youngstown/Warren Regional Chamber; Seafarers Entertainment and Allied Trades Union; Affiliated Construction Trades Ohio Foundation; Fraternal Order of Police of Ohio Inc.; and Lebanon City School District – is this challenge to Ohio's statutes providing for casinos and video lottery terminals (VLTs), which the trial court and Tenth District agreed should be dismissed for the plaintiffs' lack of standing. Among the Propositions of Law that the court has been asked to address is that "[p]arents of public school students and contributors to special funds for schools have standing to pursue claims of unconstitutional diversion of lottery proceeds and casino tax proceeds from education or school funds."

June 24: 14-0574 *MacDonald v. Shaker Hts. Income Tax Bd. of Rev.*

Mr. MacDonald worked for National City Corp. for more than 38 years. When he retired, he was vice chairman of National City and qualified for benefits under its qualified retirement plan and supplemental executive retirement plan (SERP) – a nonqualified deferred compensation plan that was intended to supplement the qualified retirement plan. The City of Shaker Heights sought to tax in 2006 the present value of the future monthly payments under the SERP. The MacDonalds contended that the SERP benefit was a pension and thus exempt from municipal taxation under Shaker Heights' codified ordinances. The city's Board of Review decided that the SERP benefit was not a pension and was taxable. The BTA reversed; and the Tenth District affirmed the BTA. So, the City of Shaker Heights and its tax administrator are asking the Supreme Court to do two things: (1) hold that the proper municipal income tax treatment of the SERP is as taxable wages, not a tax-exempt pension; and (2) confirm a deferential standard of review for the BTA to use in appeals from a municipal Board of Review.

Additional Resources

***City of Norwood V. Horney* – Much more than Eminent Domain: A Forceful Affirmation of the Independent Authority of the Ohio Constitution and the Court's Power to Enforce**

Kathleen Trafford, a partner in Porter Wright's Litigation Department and Chair of its Appellate and Ohio Supreme Court Practice Group, wrote the article "*City of Norwood V. Horney* – Much more than Eminent Domain: A Forceful Affirmation of the Independent Authority of the Ohio Constitution and the Court's Power to Enforce," published in the *Akron Law Review*. The article is one of several articles in a symposium recognizing Ohio Supreme Court Justice Maureen O'Connor. Read full article

'Friending' the Court: Using amicus advocacy before the Ohio Supreme Court

Attorney Dennis Hirsch has published the article "'Friending' the Court: Using amicus advocacy before the Ohio Supreme Court" in the Spring 2014 issue of *Columbus Bar Lawyers Quarterly*. The article discusses how the motivations behind amicus curiae have changed through the years. Read full article

Can you 'DIG' it? The dismissal of appeals as improvidently granted

Brad Hughes, a partner in Porter Wright's Litigation Department, published the article "Can you 'DIG' it? The dismissal of appeals as improvidently granted" in the September/October 2013 issue of *Ohio Lawyer*, the magazine of the Ohio State Bar Association. Read full article

The importance of legislative history in Supreme Court decisions

Kathleen Trafford, a partner in Porter Wright's Litigation Department, published the article "The importance of legislative history in Supreme Court decisions" in the September/October issue of *Ohio Lawyer*, the magazine of the Ohio State Bar Association. Read full article

New rules on en banc review: Strategic implications for Supreme Court and appellate practice

Of the recent changes to the Rules of Appellate Procedure and to the Supreme Court's Rules of Practice, the most significant may be the new rules on en banc review in the district courts of appeals. Read full article

The less traveled road to the Supreme Court of Ohio

Twenty-three years ago, the Supreme Court of Ohio adopted a rule that allows federal courts to certify to the Court for resolution questions of state law that may be determinative of the federal proceeding but for which there is no controlling precedent. Since 1988, federal district courts and the Sixth Circuit Court of Appeals have invoked the certification rule on average four times a year for a total of 105 cases as of September 2011. Read full article

Law reviews: An undervalued resource

Jared Klaus, an attorney in Porter Wright's Litigation Department, recently authored the article "Law reviews: An undervalued resource," published in the May/June 2012 issue of *Ohio Lawyer.* Read full article