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Due Process: Amended Statute of Limitations Prevails Against a Former University President, Denying Habeas Corpus Relief

Spanier v. Director Dauphin County Probation Services, No. 19-2228 (3d Cir. Dec. 1, 2020).

Reversing the lower court, the Third Circuit found no evidence of due process violation where a Pennsylvania court relied on its supreme court precedent and an amended statute of limitations provision, resulting in re-affirming a conviction.

In 2001, Pennsylvania State University's former president Graham Spanier (Spanier) and others decided not to report to state authorities or agencies of suspected sexual abuse of children involving the school's football program and the team's former assistant coach Jerry Sandusky (Sandusky). In 2008, Clinton County Children and Youth Services received another report and the Commonwealth of Pennsylvania (Commonwealth) began another investigation. As a result, Sandusky was convicted of crimes related to his abuse of several children, including four he abused after 2001.

In 2012, Spanier was charged. Spanier argued that the charges should be dismissed because the allegedly wrongful acts were committed in 2001 and the normal two-year statute of limitations expired in 2003. The Commonwealth argued that Spanier engaged in a course of conduct endangering child welfare until 2012, and therefore he "was charged well within the applicable statute of limitation." At the end of trial, the court instructed the jury using the language of the 2007 amended – and significantly longer – statute of limitations. On appeal, the Superior Court relied on *Lynn* (see below) to affirm Spanier's conviction and rejected Spanier's statute of limitations argument, concluding that there was no due process violation in the Commonwealth's reliance on the § 5552 statute of limitations provision. The federal district court granted Spanier's habeas

corpus petition and held that Spanier's conviction violated the Ex Post Facto and Due Process Clauses. However, it concluded that the application of the § 5552(c) statute of limitations did not violate due process. The Third Circuit reversed.

Pennsylvania Child Endangerment Statute: The state legislature amended the 1995 statute, effective January 2, 2007. With added language (italicized below), the offense definition was expanded to include: *(1)* A parent, guardian or other person supervising the welfare of a child under 18 years of age*, or a person that employs or supervises such a person,* commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support. *(2) A person commits an offense if the person, in an official capacity, prevents or interferes with the making of a report of suspected child abuse under 23 Pa.C.S. Ch. 63 (relating to child protective services). (3) [t]he term "person supervising the welfare of a child" means a person other than a parent or guardian that provides care, education, training or control of a child.* 18 Pa. C.S. § 4304 (2007). The legislature also amended one of the exceptions to the two-year statute of limitations for § 4304. One of the exceptions—sexual offenses committed against a minor under 18 years old—was changed to, "the later of" two years after the minor reached 18 years old "or the date the minor reaches 50 years of age." 42 Pa. C.S. § 5552 (2007). The case that sparked the amendments, *Commonwealth v. Lynn*, 114 A.3d 796 (Pa. 2015), is the precedent relied upon for this case.

Due Process: The Third Circuit said any constitutional violation that occurred would be a due process error, not an ex post facto error. Thus, the issue on appeal is whether the Pennsylvania court's affirmance of Spanier's conviction, based on its interpretation of the 1995 statute, was "unexpected and indefensible" in light of prior law. The court held it is not; therefore, habeas relief is not warranted. The court reasoned that the Pennsylvania court's affirmance of Spanier's conviction, based on its interpretation of *Lynn* was not "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The state appellate court applied state supreme court precedent post-dating the conduct in question (*Lynn*) to affirm the conviction, which was "hardly unforeseeable" and Spanier did not show the Pennsylvania court's reasoning to apply § 5552(c) contradicted clearly established federal law.

LINK

Equal Protection: Veterinarians Must Physically Examine Animals before Telemedicine Advice, But Doctors Have no such Requirement for Patients

Hines v. Quillivan, no. 19-40605 (5th Cir. Dec. 2, 2020).

Reversing and remanding on the dismissal of a First Amendment claim but affirming dismissal of an Equal Protection claim, the Fifth Circuit finds Texas' prohibition against veterinarians providing telemedicine advice unless they have actually seen the animal in question—even though medical doctors are not bound by that restriction—is supported by rational basis.

This opinion opens with the question presented: "Does a veterinarian have a right to engage in telemedicine for a pet he has not physically examined?

Dr. Ronald Hines (Hines), a licensed veterinarian in Texas, stopped practicing in 2002 due to his age and physical limitations. Soon thereafter, he began using his website to write articles about pet health, and people around the world began emailing him for advice about their pets. Hines offered individualized advice over email and phone, and in 2003 added to his website a flat fee for veterinary advice.

Under Texas law, to practice lawfully, the veterinarian must have "sufficient knowledge of the animal," which is defined as either having recently examined the animal or having visited the "premises on which the animal is kept," and a client-patient relationship "may not be established solely by telephone or electronic means." Violations of these limitations are criminal offenses.

In 2012, the Texas State Board of Veterinary Medical Examiners found that Hines had violated state law and ordered him to cease providing advice electronically without physically examining the animal. Hines filed suit in 2013, arguing that Texas's physical-examination requirement violated his First Amendment, equal-protection, and substantive-due-process rights. Ultimately all of Hines claims were dismissed at the Fifth Circuit on Rule 12(b)(6) grounds.

As the Circuit now puts it "Some things have changed since our 2015 opinion." In 2017, Texas revised its laws, allowing medical doctors--but not veterinarians--to engage in some forms of telemedicine, removing the need for face-to-face consultations to establish a physician–patient relationship before engaging in any telemedical services. And in 2018, the Supreme Court *decided National Institute of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018), which overruled the Ninth Circuit and found that a state requirement that pregnancy counseling centers must advise clients about the availability of abortion services could not be justified as regulations of "professional speech."

Hines filed the present suit in October 2, 2018, citing the change in Texas's telemedicine law to support a new equal-protection claim and asserting that because *NIFLA* abrogated the professional-speech doctrine, his First Amendment claims were newly validated. The district court again dismissed.

First Amendment: Unless *NIFLA* abrogated Hines' earlier defeat, his new First Amendment claims were foreclosed. The "mode of analysis" test would govern that determination: under the rule of orderliness, "one panel may not overrule [a prior] decision, right or wrong" unless there is an intervening change of authority. Therefore, "Fifth Circuit precedent is implicitly overruled if a subsequent Supreme Court opinion establishes a rule of law inconsistent with that precedent." The question was whether *NIFLA* effected such a change. The Circuit had its own recent precedent (*Vizaline*) that might shed light: in a case involving regulation of professional speech in the context of surveyors, the Circuit had concluded that "the relevant question is whether" the state's "licensing requirements regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only non-expressive conduct." Based on that decision, the Circuit reversed the denial of Hines' First Amendment claim and remanded so the district court could make the initial evaluation of whether conduct or speech is being regulated.

Equal Protection: Hines' original equal protection claim had been based on differential treatment for veterinarians engaging in telemedicine than those with on-site practices. That claim had failed, with the court seeing a rational basis "to conclude that the quality of care will be higher, and the risk of misdiagnosis and improper treatment lower, if the veterinarian physically examines the animal in question before treating it." The new claim rested on treating medical doctors differently than veterinarians as to their right to engage in telemedicine. The State did not challenge Hines' assertion that he was similarly situated to medical doctors for equal protection purposes, requiring the court to analyze the rational basis for the medical-veterinarian distinction. The lower court had found several reasons for the differential treatment: "[H]umans ordinarily can communicate about their own symptoms with a doctor via electronic means, whereas animals cannot." Additionally, "humans typically understand human physiology better than animal physiology." Hines rejected these reasons by identifying inconsistencies such as the fact that some humans, like infants, are also unable to speak.

But as the Circuit noted, a classification may be underinclusive or overinclusive and yet survive rational-basis review. "When a legislature has a choice of means, each rationally related to its legislative purpose, it may constitutionally choose any of them. Its choice of one does not render the others irrational." The majority agreed with the State here that it is rational to distinguish between humans and animals based on the species' differing capabilities, and affirmed dismissal of he equal protection claim.

DISSENT: Judge Jennifer Elrod disagreed in part, finding that Hines had presented at least enough evidence on the equal protection issue to survive a motion to dismiss:

> If a pediatrician can use telemedicine to treat a three-month old infant—based upon medical records, the parent's description of external symptoms and a visual examination of the child— the Court cannot adduce why a veterinarian cannot do the same for a dog, cat, or hamster. As Dr. Hines argues, "[i]t simply is not rational to allow telemedicine without a physical examination for babies but deny the same form of telemedicine for puppies on the ground that puppies cannot speak."

As she put it in closing, "although the rational basis test is deferential, it does not require us to accept 'nonsensical explanations for regulation.'"

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Religion: Order Closing All Elementary and Secondary Schools, including Private Religious Schools, Avoids Preliminary Injunction

Commonwealth of Kentucky ex. rel. Danville Christian Academy, Inc. v. Beshear, No. 20-6341 (6th Cir. Nov. 29, 2020).

Citing the material contrasts between the Beshear order--which only addresses schools and treats religious institutions in exactly the same manner as other public or private schools--and orders like the one recently stricken by the Supreme Court in Roman Catholic Diocese, which applied differential burdens on businesses and houses of worship, the Sixth Circuit grants a stay of preliminary injunction pending appeal.

On November 18, 2020, Kentucky Governor Andrew Beshear (Beshear) issued Executive Order 2020-969 (Order), which prohibits in-person instruction at all public and private elementary and secondary schools in Kentucky. While elementary schools may, under certain circumstances, reopen for in-person instruction between December 7, 2020 and January 4, 2021, middle and high schools are prohibited until at least January 4, 2021. Preschools and colleges or universities are exempt. Beshear's rationale is that elementary and secondary schools pose unique COVID-19 challenges, because masking and social distancing requirements are difficult to maintain. Kentucky is particularly vulnerable to these problems, as it "leads the nation in children living with relatives other than their parents – including grandparents and great-grandparents, who are especially vulnerable to the disease," and has high rates of comorbidities.

Plaintiffs, a group of private religious schools, filed a complaint asserting that the Order violates the Free Exercise and Establishment Clauses of the First Amendment and the Kentucky Religious Freedom Restoration Act (RFRA). They were joined by Daniel Cameron, the (Republican) Attorney General of Kentucky. On November 25, 2020, the

district court granted plaintiffs' motion for preliminary injunctive relief, enjoining Beshear from enforcing the Order against any private religious school in Kentucky.

While a litigant would normally move first in the district court for a stay pending appeal, the religious schools were scheduled to begin in-person classes the following Monday morning, requiring expedited action by the Circuit on Sunday November 29. It applied the four factors traditionally considered in evaluating the granting of a preliminary injunction: likelihood of success on the merits, irreparable harm to movant if the stay isn't granted, harm to others if the stay is granted, and public interest in granting the stay.

The injunction failed under the first factor; it had no significant likelihood of success on the merits. As the Circuit phrased it "Executive Order 2020-969 applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise; it is therefore neutral and of general applicability and need not be justified by a compelling governmental interest." Moreover, "[t]he contours of the order at issue here also in no way correlate to religion, and cannot be plausibly read to contain even a hint of hostility towards religion."

Recent Supreme Court authority did not compel a contrary result. The much-publicized COVID-19 order in *Roman Catholic Diocese of Brooklyn v. Cuomo*, ___ S. Ct. ____, 2020 WL 6948354 (Nov. 25, 2020) (per curiam), "treated schools, factories, liquor stores, and bicycle repair shops, to name only a few, 'less harshly' than houses of worship." For example "while many of the houses of worship in *Roman Catholic Diocese* could seat well over 500 people, they were subject to attendance caps of ten or twenty-five persons, while retail businesses were not."

The religious schools' ministerial exception argument failed. As the Circuit admonished, "The ministerial exception protects a church's autonomy with respect to matters of doctrine and church government, but those are not affected here" and the exception "does not mean that religious institutions enjoy a general immunity from secular laws."

Because the Circuit found the Order to be neutral and generally applicable, it did not need to assess Beshear's argument it was narrowly tailored to advance a compelling governmental interest. It also found no need to rely on two topical High Court precedents--*South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Mem.) (Roberts, C.J., concurring), or *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

Stay of preliminary injunction pending appeal was granted.

LINK

Public Duty: Legislative Intent that Individual Property Owners be Protected Overrides Public Duty Doctrine

Perillo v. Island County, no. 80055.8.1 (Ct. App. Wa. Nov. 30, 2020).

While the public duty doctrine typically shields municipalities from liability for failure to render generally available services to specific individuals, legislative intent that any every individual receive the benefit of a specific service will vitiate that protection; a purchaser of a home that had been a notorious meth lab could bring a negligence action against a county health department for failure to inspect for toxic residues based on the wording of the applicable legislation.

In 2017, Diane and Ted Perillo (Perillos) bought a home on Camano Island, Washington for $479,000. As they prepared to move into their new home, neighbors informed them it had a long history as a "drug house." Testing revealed levels of methamphetamine contamination so high that the house was not habitable. After they spent $85,000 to demolish the home, the Perillos learned that the Sheriff's Office and Public Health Department of Island County (County) had been aware of drug activity at the home for years. The Perillos sued View Sun Investments LLC, the seller of the property, for breach of contract, fraud, and violation of the Consumer Protection Act, chapter 19.86 RCW. The Perillos also brought a claim for negligence against Island County for breaching its statutory duty to inspect the property and inform potential occupants of hazardous chemical contamination. The trial court found that, as to the County, the negligence claims was barred by the public duty doctrine.

On appeal, the court recounted the elements for a negligence action: a plaintiff must show (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause, and summary judgment is proper if a plaintiff cannot meet any one of these elements. While the threshold question--whether the defendant owes a duty of care to the injured plaintiff--is a question of law, summary judgment is inappropriate where the existence of that legal duty depends on disputed material facts.

The Perillos argued that the County's duty of care to them arose under RCW 64.44.020, which provides, in pertinent part:

> Whenever a law enforcement agency becomes aware that property has been contaminated by hazardous chemicals, that agency shall report the contamination to the local health officer. The local health officer shall cause a posting of a written warning on the premises within one working day of notification of the contamination and shall inspect the property within fourteen days after receiving the notice of contamination. . . . .
>
> A local health officer may enter, inspect, and survey at reasonable times any properties for which there are reasonable grounds to believe that the property has become contaminated. If the property is contaminated, the local health

> officer shall post a written notice declaring that the officer intends to issue an order prohibiting use of the property as long as the property is contaminated.

The County first argued that under the plain language of the statute, law enforcement must have "actual knowledge of contamination" to trigger its mandatory duty to report to a local health officer, and that there was no requirement to report "potential contamination." This required the court to adduce the plain meaning of "become aware," which was clearly less than the standard argued by the County: "the dictionary definition of 'become' is 'to come to exist or occur.' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 195 (2002). The dictionary defines 'aware' as 'marked by realization, perception, or knowledge : conscious, sensible, cognizant.' WEBSTER'S, at 152. Thus, the plain meaning of the statute does not demand "actual knowledge" of contamination to trigger law enforcement's duty to report the contamination to local health officers."

The court concluded that the plain meaning of RCW 64.44.020 imposed a duty on law enforcement to report to County health officers when it has information that "causes it to realize or perceive" that hazardous chemicals are polluting a property. Whether that degree of information existed was a question of fact—but certainly subject to enough debate that summary judgment was inappropriate.

The more obscure question involved the duty of public health officers to the Perillos. As a general matter, once the County health officer receives a report of potentially contaminated property from law enforcement, a number of processes are to follow, including "posting of a written warning on the premises within one working day of notification of the contamination" and "inspect[ing] the property within fourteen days after receiving the notice." Upon a finding of contamination, the County health officer must issue an order "declaring the property unfit and prohibiting its use."

The County contended that any duty of care it owed under RCW 64.44.020 was solely to the public at large, "not individual occupants of property." True, under the public duty doctrine, "[t]o establish a duty in tort against a governmental entity, a plaintiff must show that the duty breached was owed to an individual and was not merely a general obligation owed to the public."

However, there are four named exceptions to the public duty doctrine: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) special relationship. The first of these was salient here. "The legislative intent exception [to the public duty doctrine] recognizes that the legislature may impose legal duties on persons or other entities by proscribing or mandating certain conduct." The exception applies when the terms of a statute show "a clear legislative intent to identify and protect a particular class of persons." Here, RCW 64.44.005 articulated the legislative intent behind the statutes pertaining to contaminated properties:

> The legislature finds that some properties are being contaminated by hazardous chemicals used in unsafe or illegal ways in the manufacture of illegal drugs or by

> hazardous drugs contaminating transient accommodations regulated by [DOH]. Innocent members of the public may be harmed by the residue left by these chemicals when the properties are subsequently rented or sold without having been decontaminated.

As the court saw it "RCW 64.44.005 clearly identifies "members of the public" who "subsequently" rent or purchase contaminated properties as the "particular and circumscribed" class of people protected by the statute. This required reversal: "The Perillos are innocent purchasers of a contaminated property and clearly within the class of people that chapter 64.44 RCW protects. The public duty doctrine does not bar their negligence claim."

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THIS JUST IN:

Marcel Pratt Returns to Private Practice as Managing Partner – IMLA salutes our colleague Marcel Pratt, formerly Philadelphia City Solicitor, on his return to private practice as Managing Partner of Ballard, Spahr.

LINK

And in a less exemplary note about the legal profession….

As *The Guardian* reports in a November 27, 2020 article: "A partner in a City law firm who had a sexual encounter with a junior solicitor has overturned a £35,000 disciplinary fine after the high court criticised professional regulators for delving too far into his private life.

Ryan Beckwith, who was with Freshfields Bruckhaus Deringer, was found guilty last year of breaching rules laid down by the Solicitors' Regulation Authority (SRA) on the grounds that his conduct affected the profession's reputation. He was also ordered to pay £200,000 in costs.

On Friday Dame Victoria Sharp, president of the Queen's bench division, and Mr Justice Swift in effect rebuked the legal regulators, redefining the narrow disciplinary line dividing professional performance from private behaviour."

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