

days a year for minimal compensation does not violate the U.S. Constitution's Fifth Amendment ban on the taking of property without just compensation.

Here, Scheehle, a lawyer, challenged an Arizona county's arbitrator appointment system, which requires attorneys who have been members of the state bar for at least five years to serve up to two days per year as arbitrators for \$75 a day. Scheehle filed suit against the judges of the state high court, alleging that the arbitrator appointment system amounted to a taking of his property without compensation in violation of the Fifth Amendment. A federal trial court granted defendants summary judgment.

Affirming, the Ninth Circuit first noted that the Fifth Amendment does not prohibit the government from taking private property for the public good, but does place a condition on the government's exercise of that power. Here, plaintiff argued that he has a property interest in his law practice that is taken from him when he is required to take time off from work to serve as an arbitrator, the court said. In this manner, his property is taken, which requires just compensation. The court applied the regulatory takings test expounded in *Penn. C. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978), which lists several factors to consider to determine whether there has been a taking, including the economic impact of the regulation on the claimant and the character of the governmental action. Significant for the analysis, the court noted, is the severity of the burden on private property rights resulting from a taking.

When the test is applied to plaintiff's situation, the compelled conclusion is that there has been no constitutional taking, the court said. Plaintiff was required to arbitrate for only two days out of 365, and he made no showing that those days interfered with existing legal obligations or "distinct investment-backed expectations." In addition, this two-day obligation is a condition for a license to practice law in the state, and the burden it may impose does not remotely outweigh the benefits conferred by admission to the bar, the court said.

The court rejected plaintiff's claim that this was a per se taking. When an owner suffers a permanent physical invasion of property or is deprived of all economically beneficial use of property there is a per se taking, the court pointed out, neither of which occurred here.

Plaintiff's Counsel
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AUTOMOBILE ACCIDENTS

Tractor-trailer crosses median, strikes pickup, SUV: Failure to remain awake: Vicarious liability: Wrongful death: Settlement.

Contreras v. KV Trucking, Inc., U.S. Dist. Ct., E.D. Tex., No. 4:04-cv-00398, Oct. 15, 2007.

Esparza, 39, was traveling in a pickup truck with six relatives and coworkers on a highway. A tractor-trailer driving in the opposite direction crossed the median and collided with the pickup, killing Esparza and four other occupants and injuring the remaining two. The truck then proceeded to collide with an SUV, killing the family of five in it. Esparza had been a roofer earning about \$28,000 annually, and his estate claimed about \$503,600 in future lost earnings. He is survived by his wife and six minor children. The truck driver ultimately pleaded guilty to 10 counts of vehicular manslaughter and is serving a 10-year prison sentence.

Esparza's wife, individually and on behalf of their children and his estate, sued the truck driver, the driver's employer, and the owner of the trailer. Plaintiffs alleged the employer and the trailer owner, because the driver was its statutory employee, were vicariously liable for the driver's negligence. Specifically, plaintiffs alleged that defendants were negligent for the driver's failure to remain awake after working too many hours. They also alleged gross negligence.

The driver and his employer contended that the accident was an act of God, a new and independent cause, and a sudden emergency. The trailer owner asserted that it was not liable for the driver's conduct because it was acting in the role of a transportation broker, not a motor carrier, and that the driver was not its employee.

The parties reached a confidential settlement prior to trial.

Plaintiffs' experts included Dave Stopper, federal motor carrier safety regulations, Broad Run, Va.; Andy Irwin, accident reconstruction, and Scott Hakala, economics, both of Dallas, Tex.; Rodney Isom, life-care planning, Denton, Tex.; and John Trapani, economics, New Orleans, La. Defendants' experts were Glenn Honeycutt, federal motor carrier safety regulations, Houston, Tex.; Stacey Hail, toxicology, Dallas, Tex.; Kenneth Ooms, economics, South Holland, Ill.; and Bob Tynes, trucking regulations, Carrollton, Ga.

Plaintiffs' Counsel

R. Dean Gresham, Dallas, Tex.

Joel M. Fineberg, Dallas, Tex.

Comment: The two injured parties and the families and estates of the remaining victims were also parties to

RECENT CASES

the settlement and were represented by Domingo Garcia and Thomas A. Carse, both of Dallas, Tex.; George Chandler, Lufkin, Tex.; Travis Clardy, Nacogdoches, Tex.; Giles Kibbe, Beaumont, Tex.; Christopher Ewert, Tyler, Tex.; and Michael G. Erskine, Austin, Tex.

A document in this case is available through the Court Documents section in the back of this issue, courtesy of Mr. Gresham.

Woman struck by truck in crosswalk: Failure to maintain proper lookout: Traumatic brain injury: Posttraumatic amnesia: Settlement.

Hurley v. 4G's Truck Renting Co., N.Y., Kings Co. Sup., No. 23217/2004, Sept. 5, 2007.

Hurley, 49, was struck by a truck while crossing a street at an intersection at night. She sustained a traumatic brain injury, requiring a craniotomy, and a fractured ankle. She also suffers from posttraumatic amnesia and thus has no recollection of the accident. Hurley incurred about \$125,000 in medical costs, and her future medical costs are estimated at about \$3.48 million. A nurse earning about \$60,800 annually, Hurley was unable to return to her job because she suffered cognitive and behavioral changes as a result of the accident that permanently disabled her. She claimed approximately \$184,000 in past lost wages, about \$1.7 million in anticipated future lost wages, and approximately \$200,000 in social security income retirement loss.

Hurley filed suit against the truck driver, who failed to appear for trial; the truck rental company; and the truck owner. Plaintiff alleged failure to maintain a proper lookout.

Defendants contended that plaintiff was crossing the street against the light and outside of the crosswalk when she was hit.

The parties settled before trial for \$2.6 million, paid by the truck owner's insurers.

Plaintiff's experts in this case included Yehuda Ben-Yishay, neurology, and Richard D. Schuster, rehabilitation, both of New York, N.Y.; Mark A. Feldman, orthopedics, Lakewood, N.J.; Alan M. Leiken, economics, Stony Brook, N.Y.; and Jane D. Mattson, life-care planning, Norwalk, Conn.

Defendants' experts were Michael J. Carciente, neurology, Brooklyn, N.Y.; Richard Hermance, accident reconstruction, Tillson, N.Y.; and Robert M. Israel, orthopedics, New York, N.Y.

Plaintiff's Counsel

Mitchell Proner, New York, N.Y.

Woman struck by bus in crosswalk: Failure to yield right-of-way: Quadriplegia: Vicarious liability: Settlement.

Doe v. Roe Bus Driver, Ill., Winnebago Co. Cir., confidential dkt. no., Oct. 22, 2007.

Doe, 36, was crossing a street at a crosswalk when she was hit by a bus making a left-hand turn at the intersection. As a result, Doe sustained a spinal fracture to C5-6, rendering her quadriplegic. In addition, Doe suffers from amnesia and is unable to recall the events surrounding the accident. Doe incurred about \$875,000 in medical costs. She claimed about \$10 million, reduced to present value, in future medical and life-care planning costs. Doe made no claim for lost income.

Doe sued the bus driver, the driver's employer, and the bus company. Doe alleged the employer and the company were vicariously liable for the driver's failure to yield the right-of-way to a pedestrian in a crosswalk.

Defendants contended that plaintiff was not in the crosswalk area at the time of impact and that the shadows of the setting sun obstructed the driver's view of the intersection so that plaintiff had a better opportunity to avoid the collision.

The parties settled for \$9 million before trial. The employer's two insurance companies paid \$7.6 million and \$1 million, with the remaining \$400,000 coming from the employer, who was self-insured.

Plaintiff's experts were Gary Yarkony, physical rehabilitation and life-care planning, Elgin, Ill.; Charles Linke, economics, and Mark Strauss, accident reconstruction, both of Champagne, Ill.; Ned Einstein, bus safety, New York, N.Y.; and Richard Fischer, bus and mirror safety, Fort Collins, Colo.

Defendants' experts included Michael Hartzmark, economics, and Mark Hammergen, astronomy, both of Chicago, Ill.; Michael Pepe, accident reconstruction, Indianapolis, Ind.; Michael De Vivo, epidemiology and life expectancy, Birmingham, Ala.; and Richard Katz, neurology and life-care planning, St. Louis, Mo.

Plaintiff's Counsel

Keith R. Clifford, Madison, Wis.

John W. Raihala, Madison, Wis.

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