

# COMMON GOOD

REFORMING AMERICA'S LAWSUIT CULTURE

CONTACT: Danielle Rhoades – Goodman Media  
(212) 576-2700 x 242

## COMMON GOOD HONORS FIVE JUDGES WITH ITS FIRST ANNUAL "GATEKEEPER AWARDS"

### The Awards Highlight The Often Overlooked Role Of Judges In Determining Who Can Sue For What

New York, NY – March 10, 2004 - Common Good, the bi-partisan legal reform coalition, announced today the recipients of its first annual "Gatekeeper Awards." The Awards highlight the appropriate role of judges in determining who can sue for what. They honor judges whose decisions restore public confidence that reasonable actions will be supported by the courts, even when they result in unintended consequences.

"In today's legal climate, not enough judges are acting as gatekeepers. Anyone can sue for almost anything," said Philip K. Howard, Chair of Common Good. "Legal fear is transforming America from a can-do nation into one where people are nervous about even ordinary daily activities."

The judges being honored are:

- **Chief Justice Ralph J. Cappy of the Supreme Court of Pennsylvania - Pittsburgh, PA**
- **Justice Barbara Milano Keenan of the Supreme Court of Virginia - Richmond, VA**
- **Chief Judge Anthony J. Scirica of the United States Court of Appeals for the Third Circuit - Philadelphia, PA**
- **Judge Morris Sheppard Arnold of the United States Court of Appeals for the Eighth Circuit. - St. Louis, MO**
- **Judge Nancy A. Becker of the Supreme Court of Nevada – Carson City, NV**

They are being honored for writing the decisions in the following cases decided in 2003:

- **Chief Justice Ralph J. Cappy**  
(Carl R. Grady v. Frito-Lay, Inc., No. 43 WAP 2002, Supreme Court of Pennsylvania, Western District, December 31, 2003.)

**"Junk Science" excluded in claim that Doritos are inherently dangerous.** In April of 1995, Carl and Diana Grady sued Frito Lay claiming that Dorito chips stuck in Charles Grady's throat and tore his esophagus. The Gradys wanted to present "expert" testimony of Dr. Charles Beroes to support their claim that Doritos are inherently dangerous. Beroes' research included pressing Doritos onto a pad-covered gram scale until the tip snapped off, and measuring the amount of time it took saliva to soften the Doritos. None of Beroes' tests involved chewing. The trial court excluded Beroes' testimony and dismissed the case. That would have been the end of it, but the

mid-level Superior Court of Pennsylvania reinstated the case and Dr. Beroes' testimony. Fortunately, the Pennsylvania Supreme Court threw it out again, noting that Dr. Beroes' tests "smacked of a high school science fair project." Honorable mention goes to Justice Saylor whose concurring opinion pointed out "the common sense notion that it is necessary to properly chew hard foodstuffs prior to swallowing."

- **Justice Barbara Milano Keenan**  
(Donna P. Thurmond v. Prince William Professional Baseball Club, Inc., No. 020116, Supreme Court of Virginia, January 10, 2003.)

**Baseball spectator cannot sue after getting hit by a baseball.** Donna Thurmond went to see a baseball game. After passing numerous warning signs urging her to stay alert, she settled into her seat in the bleachers on the third base side of the stadium. During the eighth inning, Thurmond unfortunately got hit by a line drive foul. Thurmond sued the ball club over her injury, arguing that the club was negligent, the stadium unsafe, and the warnings (including the warning on the back of her ticket) inadequate. Applying a good dose of common sense, Justice Milano Keenan affirmed the trial court's dismissal of the case and made clear that in Virginia, if you attend a baseball game, you assume the risk that you might get hit by a ball. No one with "ordinary intelligence" could watch a baseball game without "coming to a full realization" that batters cannot always control the direction of the ball. Fans can expect the game of baseball to continue in Prince William County-it won't be bankrupted by lawsuits over line drives.

- **Chief Judge Anthony J. Scirica**  
(Amanda Walker-Serrano v. Donald Leonard, et. al., No. 01-4098, United States Court of Appeals for the Third Circuit, April 15, 2003.)

**A public school third-grader cannot sue for being prevented from soliciting classmates' signatures for a petition opposing a voluntary class trip to the circus.** Amanda Walker-Serrano, age 9, believes circuses are cruel to animals and wanted to solicit signatures on her petition opposing the trip. Her teacher felt the petition was disruptive but did let her pass out coloring books and stickers that dealt with cruelty to animals. That didn't stop Walker-Serrano's parents from making a federal case out of the petition. They sued the president of the school board, the superintendent of schools, the principal of the school and Amanda's teacher under the federal civil rights statute. After four years of litigation and an unknown amount of taxpayer dollars, the Third Circuit Court of Appeals agreed with District Judge A. Richard Caputo that the case had no merit. "[T]he special responsibilities of elementary school educators, and our deference to the choices they make in operating schools, precludes elevating this dispute to the level of a constitutional violation." Honorable mention to Judge Greenberg's concurring opinion emphasizing that the other children's interests have to be taken into account in these kinds of cases.

- **Judge Morris Sheppard Arnold**  
(In re: Aircraft Accident at Little Rock, Arkansas on June 1, 1999, No. 03-1073, U.S. Court of Appeals for the Eighth Circuit, December 16, 2003.)

**Survivor of crash cannot sue airline for punitive damages where pilots did not intentionally crash plane.** At midnight on June 1, 1999, during a severe thunderstorm, a fully loaded

American Airlines jet crashed while trying to land in Little Rock, Arkansas. Eleven people died, including the pilot, Capt. Richard Buschmann. Most of the 129 survivors settled with the airline for undisclosed amounts within a year of the crash. Two passengers sued seeking compensatory and punitive damages. U.S. District Judge Eisele ruled that "uncontroverted evidence" showed the pilots had a good faith belief that the plane could be landed safely. He threw out the claim for punitive damages, which are intended to punish active wrongdoing, but allowed the plaintiffs damages to compensate them for injuries and pain and suffering. One plaintiff appealed. Upholding Judge Eisele's decision, Judge Arnold said, in essence, no reasonable jury could find that the members of the flight crew crashed the plane on purpose. "Stated differently, we hold that no reasonable jury could find that the members of the flight crew knew, or ought to have known, in light of the surrounding circumstances, that their conduct would naturally and probably result in injury."

- **Judge Nancy A. Becker**

(Paola Najgrodski v. Joseph A. Volpe, and Pardee Construction Co. of NV, No. 39732, Supreme Court of the State of Nevada, November 4, 2003.)

**Passenger cannot sue homeowner for injuries sustained when car crashed into a flowerbed.**

Sixteen-year-old Ross Duran was driving at 75 miles per hour in a 25 mile-per-hour zone in Las Vegas when he failed to negotiate a turn and crashed through a cinder block wall and into a flowerbed in Joseph Volpe's backyard. Paola Najgrodski, also 16 years old, was a passenger in the car and suffered severe injuries. She was not wearing a seatbelt. Najgrodski decided to sue Volpe (the homeowner), the contractor who built Volpe's flower bed and Daimler Chrysler (which settled out of court). Najgrodski claimed that "Volpe turned the wall into a hidden deathtrap by adding the flowerbed." District Court Judge Michael Cherry granted summary judgment (a form of dismissal) to Volpe and the contractor, and Judge Nancy Becker of the Nevada Supreme Court upheld that decision: "It was unforeseeable that Najgrodski would be traveling seventy-five miles per hour in a residential neighborhood, . . . zoom past a stop sign, . . . and crash into the wall of Volpe's backyard. . . . Imposing liability on residential landowners for injuries or fatalities suffered by motorists who leave the roadway would place an undue burden on landowners."

*Common Good is a bi-partisan legal reform coalition dedicated to overhauling America's lawsuit culture. Its board is composed of leaders in a wide range of fields: former government officials, including Griffin Bell, Newt Gingrich, Eric Holder, George McGovern, Diane Ravitch, Alan Simpson, and Richard Thornburgh; current and former university presidents, including Tom Kean, George Rupp, and John Silber, and numerous other leaders in education, healthcare, law, business and public policy. The Chair of Common Good is Philip K. Howard, a lawyer and author of *The Death of Common Sense* and *The Collapse of the Common Good*.*

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