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with Reports of Important Cases in other Counties

DAVID C. KEITER, EDITOR

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ADOPTION

1. Mother filed a petition to terminate father's rights after he refused consent to do so voluntarily. Although they had lived together, mother and father had never married, and father is now, and previously had been, incarcerated. Father did occasionally write to the children, more frequently after he refused to consent to the termination, but the letters were mostly inappropriate for the children and directed at the mother. Father never sought custody and never requested a phone number or called the children and never provided any support for them, nor did his family maintain contact, and furthermore, he fathered three other children with another woman during the same time. The court found that, while incarceration itself is not necessarily grounds for termination, father clearly failed to perform his parental duties and did not provide love, care, or support for the children and it therefore terminated his parental rights.

-IN RE: ADOPTION OF A.L.S, A MINOR & E.T.S, A MINOR, 78

CIVIL PROCEDURE

1. Defendants demurred to the complaint alleging that plaintiffs had pleaded inconsistent causes of action without specifically pleading that they were "in the alternative". The court found that Rules of Civil Procedure 1020(c) and 1020(d) specifically permit pleading of inconsistent causes of action in the alternative in separate counts but do not require that the words "in the alternative" must specifically appear. However, the demurrer is sustained because the verification does not comply with the requirements for pleading inconsistent causes of action in that it does not state that the signer is unable to ascertain which of the inconsistent averments are true.

-HAZELTON HOTEL ASSOCIATES v. NITIN & BALBIR CHHIBBER, 118

1. Plaintiffs sought to open a judgment of nonpros filed by defendant Sedor. Plaintiffs had alleged numerous counts against him including professional negligence, but had inadvertently neglected to file the Certificate of Merit required by Rule of Civil Procedure 1042.3 The court found that when plaintiff fails to file the certificate of merit in an action alleging professional negligence, only those claims based on professional negligence should be dismissed and other claims should not thereby be affected. The court therefore granted the petition to open judgment as to all claims against defendant Sedor except the professional negligence claim.

-JACKSON, MILLER, FILIPEELI v. SWEITZER, U.S. MORTGAGE FINANCE CORP., SEDOR & MEAGHER & ASSOC, INC., 57

1. Plaintiff brought an action in mortgage foreclosure and subsequently moved for summary judgment In the pleadings and discovery, defendant did not dispute that a default exists and he had further signed a forbearance agreement and stipulation agreeing to the amount owed. Defendant here failed to file any counter-affidavits or response to the motion for summary judgment and included no evidence of the amount he claimed he owed. Therefore, the court granted the motion finding that by failing to file any counter-affidavit or response to the motion for summary judgment, defendant has admitted the amount due and owing and it is therefore required to ignore controverter facts appearing only in the pleadings as a general denial.

-MANUFACTURERS & TRADERS TRUST COMPANY v. OWEN, 96

CONTRACTS

1. A construction dispute arose between plaintiff and defendant. Defendant counterclaimed and added plaintiff's performance bond holder as an additional defendant, which now filed preliminary objections to the part of the complaint against it seeking liquidated damages and attorneys' fees. The court dismissed the objections finding that the language in the bond that the school district may recover "all" damages related to a default may include liquidated damages and is therefore for the trier of fact. Similarly the phrase "all damages" does not expressly rule out attorney's fees so plaintiff is entitled to present evidence on that issue as well.

-FREY MECHANICAL GROUP, INC. v. SOUTHERN YORK COUNTY SCHOOL v. ONE BEACON INSURANCE CO.; RETTEW ASSOCIATES, INC.; E1 ASSOCIATES, ARCHITECTS & ENGINEERS, P.C.; & LOBAR, INC., 42

1. Plaintiff hired defendant to ensure that there was a functioning septic system on the property he was purchasing and that it was an adequate distance from the well. Defendant billed plaintiff for such an inspection, but after moving in plaintiff discovered that the property had no septic system at all and that sewage was polluting the well. Plaintiff brought suit and defendant filed numerous preliminary objections The court found that plaintiff pled sufficient facts that, if proven, would rise to the level of willful, wanton, or reckless conduct necessary to support a claim for punitive damages; that the complaint obviously pled an oral agreement so that amending it to state specifically that the agreement was oral is unnecessary; and that sufficient facts were alleged to put defendant on notice of a claim of fraud It therefore overruled all objections.

-GROVE v. HOMECHEK, INC., 54

CRIMINAL LAW

1. Defendant was charged as a juvenile with,

inter alia, Homicide by Vehicle and Involuntary Manslaughter following an accident in which he collided with another vehicle that caused the death of the other driver. Testimony showed that he was operating the vehicle at a high rate of speed and was crossing the center line several times prior to impact and also appeared to be distracted. The court found that defendant was guilty of the charges by continuing to drive in a distracted manner after previously crossing the center line which rises to the necessary level of gross negligence or recklessness, especially when couple with excessive speed.

-IN THE INTEREST OF A.R.D., JR., A MINOR, 33

1. After stopping a vehicle for speeding, the officer told the driver that he was free to go, but then asked his consent to search the vehicle during which marijuana and other items were found on the defendant. Defendant now moves to suppress the evidence found during the search. The court suppressed the evidence, finding that once the officer told the drive he was free to go, the request to search the vehicle became a second stop. However, there were no facts of record indicating that the officer had or could have had a reasonable suspicion of criminal activity on the driver's part so that the second stop was therefore unlawful and proscribed the Fourth Amendment.

-IN THE INTEREST OF E.S.C., A MINOR. 1

1. After being called to the principal's office during lunch, defendant returned to the noisy school cafeteria and angrily made threats against teachers and the school to some of his friends. Defendant was ultimately charged with making terroristic threats but there was no evidence from anyone other than his friends who testified that defendant was angry and that they were not frightened by his remarks. The court therefore dismissed the charges since the crime requires that the remarks be made with the intent to terrorize and that the victim actually be placed in fear and there was no evidence of either. Furthermore the statute is not meant to penalize spur of the moment threats that result from an angry outburst

-IN THE INTEREST OF M.R.W., A MINOR, 24

1. While defendant was being questioned by a police officer on his front porch, a crowd gathered, and at the conclusion of the interview, defendant uttered a profanity at the officer. Defendant then ran into the house and was pursued by the officer and two others who had arrived on the scene who ultimately subdued him. Defendant was charged with disorderly conduct and resisting arrest. The court upheld the disorderly conduct charge, finding that while the mere utterance of a profanity to a police officer may not constitute disorderly conduct where it can be construed as "fighting words" as here in front of a crowd, it does constitute disorderly conduct. The court, however, dismissed the charge of resisting arrest finding that entry into the home was unnecessary after a warrantless arrest since the officer knew defendant's identity and address and could have later cited defendant for the summary offense of disorderly conduct.

-IN THE INTERESTS OF Y.O.R.O., A MINOR, 28

1. Defendant was convicted of homicide and sentenced to death. After numerous appeals, the matter was returned for re-sentencing. The Commonwealth moved to schedule a sentencing hearing and defendant objects on the ground of his mental retardation being a complete bar to the imposition of capital punishment. The court found that, although the legislature has not established a procedure, defendant bears the burden of proving his mental retardation by a preponderance of the evidence and that the Court rather than a jury shall make the determination as to whether he is or is not mentally retarded since mental retardation is a factual issue that operates to reduce rather then increase the maximum punishment. The court then decided that mental retardation should be as defined by the American Association on Mental Retardation and the American Psychiatric Association rather than as defined in the Mental Health and Mental Retardation Act, 50 P.S. Sec. 4101 et seq. If he is found not to be mentally retarded, the sentencing jury may consider his mental status as a mitigating factor

-CMWLTH OF PA v. CHAMBERS, 91

1. Defendant was found guilty of unauthorized copying of music and counterfeiting of trademarks and appealed. The court reconsidered and agreed that his Motion for Acquittal should be granted finding that 18 Pa.C.S. Sec. 4116(b) prohibiting unauthorized transfer of sounds on recording devices does not apply to sound recordings fixed after February 15, 1972 as federal copyright law preempts all state "records piracy" laws except insofar as they cover sound recordings fixed before that date. Furthermore, defendant should not have been convicted of violating 18 Pa.C.S. Sec. 4119 as the Commonwealth failed to prove that the items offered for sale bore a "counterfeit mark" as defined by the statute. (Note: This decision was upheld by the Superior Court in a non-precedential decision)

-CMWLTH OF PA v. PEREZ, 100

CUSTODY

1. Mother sought to relocate to Florida with the child to be nearer to her family. Although she was the primary custodial parent, no prior order of court had awarded her custody Therefore, the court first reached that issue and granted her primary physical custody of the child. It then denied her petition to relocate with the child since it would not be in the best interest of the child to deprive it of substantial contact with the father when mother was employed locally and failed to demonstrated a significant advantage flowing to the child from the relocation and since there are not adequate substitute custodial arrangements available to accommodate the best interests of the child. (Note: This is part of a lengthy opinion delivered from the bench and then edited by Judge Renn.)

-BETZ JR. v. NUNEZ IZA, 111

1. Mother and father were divorced in York County in 1996, with mother being granted primary physical custody of the children. Mother and children moved to Maryland in 1997 and have lived there since. Father filed this action in 2004 seeking to modify custody along with a Petition for Contempt. Mother then filed a custody action in Maryland and challenged the jurisdiction for the court to hear the matter further The court found that it had jurisdiction to deal with the petition for contempt of it previous order since it had not been modified by a court of any other jurisdiction However, the court declined to exercise jurisdiction to modify the existing order since Pennsylvania is no longer the home state of the children nor do they have a significant connection with the state to the degree that would divest the jurisdiction of a Maryland court.

-BLACKBURN v. BLACKBURN n/k/a MATTISON, 84

1. Mother filed a Petition for Emergency Relief seeking to have custody of the parties' child transferred to her as the father, who had sole legal custody and primary physical custody, was to be deployed overseas by the National Guard. Father requested a stay of proceedings pursuant to the Servicemembers Civil Relief Act, 50 U.S.C ß501 et seq. The court found that the father was in active service in response to a national emergency and therefore denied the petition for emergency relief and stayed all proceedings against father and further ordered that since stepmother will have custodial rights she should be given appropriate notice of the action pursuant to Rule of Civil Procedure 1915.6(b).

-HOFF v. FLOWERS, 108

1. Maternal grandparents sought custody rights after mother's parental rights had been terminated. The children are the subject of a juvenile dependency proceeding that resulted in the termination and a further hearing is scheduled to terminate father's parental rights. The court found that maternal grandparents had standing in a custody action even though mother's parental rights had been terminated. However, the court will stay the custody proceeding pending the outcome of the juvenile dependency proceeding since it would significantly interfere with the statutory juvenile "system" if collateral actions could be maintained by individuals seeking custody of children who are wards of the court

-LONG v. WHOLAVER & MARTINEZ, 115

1. Father filed an emergency petition in a custody action to which mother filed a responsive pleading and counterclaim. The court thereupon scheduled a hearing and allotted one and one-half hours. The hearing started late, but father completed his case in 40 minutes. Mother then presented numerous witnesses and could not complete everything she wanted to present even though the court extended the time because of the late start. Mother now appeals the time limitation. The court found that it was within its discretion to limit the time of hearing and that it did not abuse that discretion since it appeared that mother wanted to take a hearing on an emergency petition and contempt and turn it into a full blown custody modification trial by short cutting the local rules and running roughshod over the court's scheduling order. (Note: This case and opinion were affirmed by the Superior Court by memorandum decision filed September 15, 2004 to 110 MDA 2004.)

-SIPE JR., v. SIPE, 76

1. Defendant father filed a petition to modify custody, seeking majority physical custody of the children. The court exhaustively reviewed all factors to be considered and refused the petition finding, inter alia, that father's character was severely lacking in that he made inappropriate remarks to the children and used excessive force with them and refused to admit that he has an anger management problem Furthermore, the children are in a stable home with mother and each expressed a desire to continue living with her and not with father, and father also refused to acknowledge the existence of extended family on both sides.

-WOLFE f/k/a BOWERS v. BOWERS, 67

DAMAGES

1. Plaintiff sought to amend a complaint for medical malpractice to include a claim for punitive damages. Defendant allegedly failed to order x-rays that might have detected plaintiff's lung cancer and allegedly altered plaintiff's medical records to indicate that plaintiff had refused the x-rays. The court denied the motion finding that: 1) defendant's alleged failure to recommend or order chest x-rays may constitute negligence, but it does not rise to the level of willful, wanton or reckless behavior to support a claim for punitive damages; and 2) the alleged document alternation occurred after the conduct constituting the alleged malpractice was completed and did not aggravate the injury or otherwise cause harm to the plaintiff and is therefore a separate cause of action for spoliation of evidence to which punitive damages cannot attach without actual damages being plead and for which traditional remedies are adequate if proven.

-DUMAIS v. NICKLES, D.O., 13

DISCOVERY

1. Plaintiff sued defendants for malpractice and defendants filed a motion to compel discovery of her mental health records. Plaintiff claims that the records are privileged since her mental health is not as issue in this action. The court agreed finding that the privilege is not waived where there is no independent psychological injury and recovery is sought only for the normal pain and suffering damages that commonly accompany personal injury

actions nor did plaintiff's mere discussion of this action with her psychiatrist constitute a waiver of the privilege.

-MIKULAS v. BURDETTE, NGUYEN, WOMEN'S HEALTH SPECIALISTS OF YORK, LTD & UROLOGY ASSOCIATES OF YORK, P.C., 56

DIVORCE

1. Wife appealed an equitable distribution order that awarded the marital residence to husband and filed a petition to stay the order pending appeal. The court found that petitioner has not made strong showing that the Court abused its discretion and that she will prevail on the merits and has not shown that she will suffer irreparable harm since the residence is an asset that will not dissipate during the pendency of the appeal. Furthermore, husband is not in possession of the residence and would suffer substantial harm if he were prevented from returning to it. It therefore refused the petition to stay but directed husband not to dispose of the residence while the appeal is pending.

-GIUFFRIDA v. GIUFFRIDA v. GIUFFRIDA & GIUFFRIDA, 74

1. Wife sought to challenge the marital settlement agreement that she had executed along with a consent to a divorce. Wife acknowledged receiving $161,059.29 at the signing and subsequently sold her home and purchased a new one. She now challenges the agreement on the grounds that it was not accompanied by a full disclosure of husband's assets and that she was too emotionally distraught to make a proper legal decision. Wife signed the agreement without legal review, and it contained a clause acknowledging full and fair disclosure. The court, therefore, refused to set aside the agreement particularly since wife could have had it reviewed and requested an appraisal of the assets since there is no duty to obtain a valuation of an asset that is disclosed. Furthermore, since wife's emotional state did not affect her ability to sell and purchase homes, she could not have been so devastated as to sign the agreement unknowingly.

-SNEERINGER v. SNEERINGER, 48

EQUITY

1. Defendants sold their business to plaintiff in an agreement of sale that provided that defendants would not compete with plaintiff for a period of five years except for operating a similar business in a fixed location. Subsequently, defendants opened a second fixed location, which the buyer patronized, and later purchased a bus to transport children to the fixed location. Plaintiff now seeks an injunction to prevent operation of the second fixed location and bus as being in violation of the covenant not to compete. The court refused to enjoin operation of the second fixed location finding that plaintiff's request is barred by laches since plaintiff was aware of the operation and did not object for at least seven months which created a reasonable expectation of endorsement of the operation. However, use of a bus to transport children from day care centers to the fixed locations clearly does violate the terms of the agreement of sale and will be enjoined as the injunction was sought immediately upon plaintiff's becoming aware of defendants' intent.

-BEV'S TUMBLE BUS, LLC v. PARR, ET. AL., 20

JUVENILE LAW

1. Children and Youth Services filed a petition to determine visitation rights of J.M., the alleged father, and to change the goal of the family service plan to include him The child was born when J.M. lived with the mother and J.M. was listed as the father; however, in a later support proceeding, it was determined that he is not the biological father, although he continues to pay support and wishes to keep seeing the child. Therefore, J.M. has reaped no benefit from his prior denial of paternity and he is not equitably estopped from asserting paternity despite the prior finding, since his conduct indicates otherwise and the child considers J.M. to be his father. The court therefore granted the petition providing for visitation for J.M. and amending the family service plan to allow J.M. to become part of it with the goal of reunifying the family.

-IN THE INTEREST OF C.M., A MINOR, 63

LAND USE

1. Appellants appealed after their subdivision plan to create a .247 acre lot to be combined with another lot of theirs was rejected by the Township for four stated reasons including their failure to submit a completely signed merger agreement to create on lot after the combination. The court found that the increased setback required on the remainder lot, showing the driveway location as a "right-of-way", and "confusion" regarding access to the lots were not proper grounds for rejecting the plan. However, the Township could validly require a singed merger agreement to prevent a separation by mortgage foreclosure, but rather than reject the plan because all parties had not yet signed the agreement the Township should have been approved subject to the condition that a valid, signed merger agreement be provided.

-GROVE v. INNERST & ANDERSON, MAJORITY OF BD OF SUPERVISORS OF N. HOPEWELL TWP, 71

1. Appellants appealed the decision of the Zoning Hearing Board dismissing their appeal of a zoning ordinance amendment as untimely. The intended effective date of the amendment was January 10, 2004 but the procedural challenge was not filed until May 14, 2004 The court upheld the decision finding that 42 Pa.C.S. Sec. 5571(c)(5) as amended in 2002 bars the procedural challenge since it was filed more than 30 days after the

intended effective date of the ordinance. Furthermore there is no evidence of fraud or bad faith on the part of the township that prevented a timely appeal from being filed as proper notification of the proposed amendment was given and there is no requirement that the township notify the public of discussions with landowners or potential beneficiaries of any amendment.

-CITIZENS FOR RESPONSIBLE DEVELOPMENT-WINDSOR TWP, INC. v. WINDSOR TWP ZONING HEARING BD, HEINDEL, DEHOFF, BRYAN & SMITH v. WINDSOR TWP & WAL-MART REAL ESTATE BUSINESS TRUST, 87

MUNICIPAL CORPORATIONS

1. Hanover Borough sought to sell a 15' x 15' section of a public park that was donated to the borough in 1890 and a resident objected to the sale. The park contains a monument erected in 1957 upon which is inscribed the Ten Commandments. The court dismissed the resident's protest finding that the Donated and Dedicated Property Act gives the borough discretion to sell land donated for a public park if, in the opinion of the borough, the use of the land as a public park is no longer practical and has ceased to serve the public interest Since the borough has been threatened with expensive litigation, the proposed sale is not unreasonable as it will remain where it is. Furthermore, there is no evidence that the objector will suffer any injury as a result of the sale so that he has no standing to raise constitutional issues.

-IN RE: LANDS OWNED BY THE BOROUGH OF HANOVER, YORK COUNTY, 103

1. After township condemned a strip of defendant's property for road and storm sewer improvements, the parties, without a hearing before a board of view, stipulated to damages of $75,000 which was paid. No board of view proceeding was ever held Township later filed a municipal claim against defendant for its share of the cost of the improvements. Defendant filed an Affidavit of Defense to the claim alleging that its property was not benefited by the improvements and moved for summary judgment. The court granted the motion, finding that under the Eminent Domain Code, the benefits and damages should have been determined and assessed at the same time which was when the $75,000 was offered and accepted. Therefore defendant cannot be liable for any further assessments.

-PENN TWSHP v. HANOVER FOODS CORP., 120

MUNICIPAL LAW

1. Plaintiff, owner of an airport located in defendant township, brought an action in mandamus pursuant to the Airport Zoning Law, 74 Pa.S.C. Sec. 5911 et seq. after the township refused to amend its zoning ordinance to provide an airport overlay zone. Both parties moved for summary judgment. The court concluded that the law is mandatory and that the legislature intended that municipalities with airports shall adopt airport hazard zoning regulations, but that the Act allows for discretion in the content of such an ordinance so long as it is reasonably necessary to effectuate the purpose of the Act. The court therefore directed defendant to adopt an appropriate ordinance within six months.
-BAUBLITZ, t/a BAUBLITZ AIRPORT v. CHANCEFORD TWP BD OF SUPERVISORS, 6

NEGLIGENCE

1. Minor plaintiff was injured while playing in defendants' yard when a vine used to swing from a tree house to a platform broke. Defendants filed a motion for summary judgment to the personal injury action alleging that minor plaintiff assumed the risk of swinging on a vine. The court denied the motion finding that minor plaintiff and defendants' children had used the vine several times without incident and that she was told by the other children that their father and teenaged brother used it as well. Furthermore, the children were unsupervised even though defendants had told their children not to swing without adult supervision. Since defendants owed a duty of care to invitees, the matter should be judged by negligence principles and should go to the jury as a matter of comparative negligence.

-CADWALLADER v. MISTOVICH, 59