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with Reports of Important Cases in other Counties

KAREN L. SAXTON, EDITOR

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EDITOR'S NOTE

Please note that, in Volume 120, the cases of McLaughlin, Brian L. v. Graham Engineering Corp and Pasch Equities, L. P. v. Bd of Super of Springfield Township were both inadvertently published as appearing on page 52. The McLaughlin case appeared in Edition Number 24 of Volume 120 and the Pasch case appeared in Edition Number 27 of Volume 120. When binding, please place the McLaughlin case before the Pasch case.

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AGENCY LAW

1. Appellant appeals from School Board hearing that resulted in his expulsion as a result of his hacking into and compromising the school computer system. The court upheld the decision finding that the Board had discretion to impose such a penalty even though the written computer policy prescribed only a suspension for a violation as that was only a guideline nor is it too severe given the nature of appellant's actions. Furthermore, appellant's due process rights were not violated as the Superintendent did not mix functions of prosecutor and judge as she had no vote in the matter, the letter charging appellant specifically enumerated the charges and gave notice almost a week in advance, and appellant asked for and received a continuance.

- MARYANN TRAN, Plaintiff v. CENTRAL YORK SCHOOL DISTRICT, Defendant, 91

CHILD SUPPORT

1. Mother filed a petition seeking to require father to contribute toward parochial school tuition for their daughter. The court found that there was a reasonable need for the child to attend private school as the public school she would attend was troubled and that the child benefited from the education despite struggling. Furthermore, the court found that the tuition is consistent with the father's income and therefore is consistent with the parties' standard of living and that his contribution toward tuition is not forced endorsement of a particular religion but merely an aid to financing the child's education. It therefore directed that the tuition be allocated between the parties in proportion to their net incomes.

- JENNIFER GIBBONS, Plaintiff v MATTHEW KUGLE, Defendant, 10

CIVIL PROCEDURE

1. Plaintiff filed an appeal from a default judgment in favor of defendant entered by a District Justice, but failed to file a complaint until two and one half years later. Defendant filed a motion to strike the complaint because it was not filed within 20 days of the date of the appeal. The court overruled the objection finding that the appeal remained open as defendant failed to file a praecipe to mark the appeal stricken as required by Pa.R.C.P.D.J. 1006.

- KHUAN KHID DIPIETRO, Plaintiff v. CHARLOTTE MUGGIO, Defendant, 5

1. Plaintiff, a temporary worker, was injured by a machine made by defendant. During discovery defendant learned that inadequate training may have contributed to the accident and sought to add the company at which he was working as an additional defendant. The court permitted the joinder finding that it was unclear by whom Plaintiff was employed and that joinder will expedite the determination as to who was plaintiff's statutory employer. Furthermore, the joinder is based on proper grounds; defendant acted promptly upon discovering that additional defendant may have contributed to the accident; and that neither plaintiff nor additional defendant will be prejudiced by the joinder.

- BRIAN LEE MCLAUGHLIN, Plaintiff v. GRAHAM ENGINEERING CORPORATION, Defendant, 52

1. Defendant sought to amend its joinder complaint to add claims for contribution and indemnification and additional defendant moved for summary judgment. The court denied the motion for summary judgment and allowed the amendment for contribution only. The court found that contribution is appropriate between joint tortfeasors but it is not yet factually established that defendant and additional defendant are joint tortfeasors and permitted the amendment. It further found that the pleadings establish that defendant and additional defendant did not have a relationship between them whereby defendant could be held secondarily or vicariously liable for wrongful conduct of additional defendant that would give rise to a claim for indemnification.

- MEMORIAL HOSPITAL, Plaintiff v. HOUCK SERVICES, INC, Defendant v. WAGMAN CONSTRUCTION, INC., Additional Defendant, 62

CONTRACT

1. Plaintiff instituted this action for specific performance of a contract to purchase real estate and entered a lis pendens against defendants' farm. Plaintiff then moved to disqualify defendants' counsel and defendants moved for judgment on the pleadings and to lift the lis pendens. The court denied the motion to disqualify counsel, finding that while another member of the same law firm had represented plaintiff in some other real estate matters between 1994 and 2001, the relationship had ended at least two years prior to any negotiations in this matter in which the firm had no involvement so that no confidences it might have gained in old transactions could be used to plaintiff's detriment. The court also granted the motion to lift the lis pendens against defendants' homestead lot finding that any agreement regarding that lot was oral and therefore not subject to specific performance.

- GARY C. WESNER, Plaintiff v. ELLSWORTH AND LEONA GEMMILL, Defendants, 23

CRIMINAL LAW

1. Defendant was charged with driving under the influence and other summary driving related offenses and filed an application for acceptance into the ARD program. She received a letter from the District Attorney outlining the requirements and

completed them, but then received another letter from the District Attorney refusing admittance into the program because of the other summary offenses. She then filed this motion to compel admission into the program alleging that the District Attorney knew that she would not qualify at the time it sent her the requirements. The Court granted the motion finding that it was a denial of due process by the District Attorney to require her to expend funds for treatment without disclosing in advance that she would be ineligible for admission to the ARD program.

- COMMONWEALTH OF PENNSYLVANIA, Plaintiff v. KATHERINE LEIGH, Defendant, 1

1. After being convicted of second degree homicide, defendant brought this action pursuant to the Post Conviction Relief Act alleging that trial counsel was ineffective for numerous reasons. The court denied the petition finding: 1) failure to disqualify co-defendant's counsel because of certain preliminary discussions involving defendant was not ineffective assistance because defendant agreed to it at the time and could not show that the outcome would have been different or any other prejudice as a result of the continued representation; 2) failure to object to defendant's sentence because of other defendants receiving lesser sentences was not ineffective assistance because he was convicted of second degree homicide and they pled guilty to lesser offenses; and 3) he could not show how jury instructions regarding credibility of witnesses and accomplice liability prejudiced the outcome.

- COMMONWEALTH OF PENNSYLVANIA, Respondent v. ROBERT N. MESSERSMITH, Petitioner, 66

1. Defendant, a constable at the time, was charged with numerous offenses arising out of a boating incident, and was subsequently admitted to, and completed, the ARD program. The District Attorney now opposes defendant's motion to expunge his criminal record. The court granted the motion to expunge finding that an isolated incident of a terroristic threat is not the type of offense that is inappropriate for ARD consideration, especially in light of his approval for admission into the program.

- COMMONWEALTH OF PENNSYLVANIA v. MILTON G. DECKER, 85

CUSTODY

1. Mother filed a petition for contempt alleging that father violated the stipulated custody order in which he had agreed that the children should be "raised Catholic" by failing to take them to mass. The court denied the petition finding that the provision was vague and does not provide an objective basis for enforcement and further would interfere with father's right to choose what religion he practices without showing that such practices constitute a grave threat to the health, safety or welfare of the children.

- BRIDGET S. HUMPHREY, Plaintiff v. DAX A. HUMPHREY, Defendant, 17

1. Plaintiff filed a custody complaint after his relationship with defendant mother, who at all times was married to another man, had ended. Defendant filed preliminary objections and plaintiff sought paternity testing. The court denied the preliminary objections and granted the petition to establish paternity finding that in this day and age of the relatively exact science of DNA testing, the continued application of judicial presumptions based on the legal fiction of preservation of marriage rather than the quest for truth is bad social and legal policy. The first step in sorting out the myriad of interpersonal relationships presented to the courts for resolution, including that of "parent" and child, is to know what relationship the parties are to each other, first biologically, then otherwise.

- ROBERT M. HAMERSLEY, Plaintiff v. LORI ANN BROWN, Defendant, 29

1. Father had primary custody of the children for five years when he was diagnosed with terminal brain cancer. Father and stepmother filed a Petition for Majority Custody as a result and mother objected on the ground that stepmother has no standing to petition and father cannot petition on her behalf. The court found that a third party may have standing in custody matters if he or she stands in loco parentis to the child, but that the issue is a factual one that cannot be determined solely from the pleadings. It therefore scheduled the hearing and deferred a ruling on the objections to standing.

- EDWARD D. SMILEY and JILL A. SMILEY, Plaintiffs v. DEBORAH L. SMILEY Defendant, 49

EMPLOYMENT LAW

1. Plaintiff brought this action for breach of an employment agreement and a separation agreement after her employment by Defendant ITP had been terminated. Defendants filed preliminary objections. The Court granted individual defendants objections to the counts for breach of the agreements finding that as authorized agents for a disclosed principal, they could not be held liable in the absence of a showing that personal responsibility was incurred, but dismissed the objections to the count for violation of the WCPA finding that individual directors and officers are subject to personal liability under the WCPA if they were policy and decision makers for the entity. Finally, the court dismissed all objections of defendant ITP finding that plaintiff averred sufficient facts to establish causes of action for breach of the agreements and violation for the WCPA.

- CYNTHIA BOOHER, Plaintiff v. INNOVATIVE TECHNOLOGY PARTNERS, KEVIN DEUTSCH, JOHN MCGREEVY, and PAUL LEGERE, Defendants, 55

INSURANCE

1. Plaintiff brought this action seeking a declaratory judgment that It had no duty to defend a wrongful death action brought against Defendant M&S Landis Corp. and others arising from the death of a patron. The court granted plaintiff's motion for sum-

mary judgment, finding that the events leading to the decedent's death do not constitute an "occurrence" as defined by the policy as the conduct complained of was not an "accident" and there is no allegation that the resultant injury was "intended" or "expected". Furthermore, the assault and battery exclusion in the policy would apply in any event thereby releasing plaintiff from any obligation to defend or indemnify a defendant.

- QBE INSURANCE CORPORATION, Plaintiff v. M&S LANDIS CORPORATION t/d/b/a FAT DADDY'S NIGHT CLUB, ET AL, Defendant, 14

1. Defendants moved for summary judgment alleging that plaintiff did not suffer a serious injury that would justify recovery of non-economic or punitive damages since he had chosen the limited tort option. The court found that plaintiff's injuries have not had a substantial impact in the professional and personal ventures that he engaged in prior to the accident and granted the motion to dismiss the claim for non-economic damages. The court further found that even though punitive damages are a form of non-economic damages, allowing plaintiff to recover punitive damages does not contravene public policy or the Motor Vehicle financial Responsibility Law because any punitive damages awarded will be recovered directly from defendants and not from any insurance carrier and it therefore denied the motion with respect to punitive damages.

- CRAIG BECKER, Plaintiff v. JUDY M. FRANKOVICH and HARRY W. SHAUCK, Defendants, 81

1. Plaintiff brought this action to ascertain its obligation to defend and indemnify defendant Mummert in a legal action brought against him by defendants Falk for claims including breach of contract, negligence, breach of implied warranty and habitability, and misrepresentation. Plaintiff initially provided counsel, filed pleadings, initiated discovery, and attended pre-trial conferences on defendant Mummert's behalf. However, it had also sent a reservation of rights letter several months after initially providing defense counsel. The court granted plaintiff's motion for judgment on the pleadings, finding that the underlying lawsuit sounded in breach of contract rather than tort although there were allegations of negligence. Furthermore, the fact that plaintiff continued to defend the action after reserving its rights does not act as a waiver of its right to raise the issue of coverage.

- NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, Plaintiff v. LESTER MUMMERT BUILDER, JOHN R. FALK, SR., AND DIANE M. FALK, Defendants, 97

JUDGMENT NON PROS

1. Plaintiffs were injured in an auto accident but returned to Japan before trial. After numerous continuances were granted, the court scheduled the matter for several terms ahead to give sufficient time for counsel to prepare and for plaintiffs to make arrangements to return. When plaintiffs failed to appear for trial, the court granted defendant's motion for judgment of non pros which plaintiffs now petition to open. The court found that financial hardship pending plaintiff's return at some point in the future was not sufficient reason to open the judgment. To allow a plaintiff to file a case, demand a jury trial, move away and postpone a trial indefinitely until it is more convenient to return prejudices defendant's interest in having the case promptly resolved.

- THOMAS CHUNG and ASUKA ISHI CHUNG, Plaintiffs v. MARY K. RIDINGS, Defendant, 26

JUVENILE LAW

1. Children and Youth Services filed a petition for dependency after the child missed appointments for treatment of mental problems alleging the child was without proper parental care or control. The child had been living with her aunt and uncle for about five years and her parents resided abroad. All parties agreed that the child needed treatment and that appointments were missed and that parents have tried to cooperate with the agency. Furthermore numerous witnesses testified that the parents love and care for the child. The court therefore, denied the petition finding that since the child has parents who are ready, willing, and able to care for her, the child by definition is not dependent.

- INTEREST OF K.B., 58

LAND USE

1. Appellants appealed the denial of a land development plan for a swine finishing barn operation on their farm. Although the Township cited several minor correctable deficiencies, the denial centered on the fact that Appellants failed to prove that there is an adequate water supply for the operation and that the operation would deplete the water supply of others due to spreading of swine manure on the farm. The court reversed finding that the denial was based solely on the general statements contained in the ordinance even though neither the York County Planning Commission report nor the Township Engineer's report objected to or raised questions about the report of water testing and supply that was submitted by Appellants' engineer.

- JOHN W. MARSTELLER, ET AL, Plaintiffs v. BOARD OF SUPERVISORS OF EAST HOPEWELL TOWNSHIP, Defendants, 34

1. Appellant sought a curative amendment to Township's Zoning Ordinance alleging that it excluded mini-storage facilities from the Township and appealed a denial of its petition by the Board of Supervisors. The court affirmed finding that while the ordinance did not mention mini-storage facilities by name, it clearly permitted warehouses in other districts and that the Board of Supervisors determination that the use proposed by appellant is the equivalent of the warehouse use is proper and rea-

sonable in light of the stated purpose of the Village Center District in which appellant sought to construct the facility.

- PASCH EQUITIES, L.P., Plaintiff v. BOARD OF SUPERVISORS OF SPRINGFIELD TOWNSHIP, Appellee, 52

1. The court set a deadline of December 15, 2006 for the filing of pre-trial motions. Both parties filed motions in limine, but condemnees' was filed on December 18, 2006. The court denied condemnees' motion because the grounds were easily ascertainable in time to permit a timely filing and no grounds were specified to justify a late filing. The court further granted condemnor's motion to exclude the testimony of condemnees' expert on valuation as her report failed to mention the value of the property subject to the taking, only referencing the cost of a replacement property.

- REDEVELOPMENT AUTHORITY OF THE CITY OF YORK, Plaintiff v. LARRY PARSLEY AND BOBBY PARSLEY, Defendants, 95

1. The Township condemned approximately 19 acres of condemnee's property for a park, but four months later, filed a Declaration of Relinquishment. In the meantime condemnee filed an inverse condemnation action against the township that also involved the property originally condemned and he now objects to the Declaration of Relinquishment. The court dismissed the preliminary objections finding that the township has the right to relinquish the condemned property within one year pursuant to the Eminent Domain Code and that the action of relinquishment does not affect the separate inverse condemnation proceeding brought by condemnee nor does it affect his right of reimbursement from the township for statutory costs and expenses incurred with the original condemnation.

- IN RE: CONDEMNATION OF LANDS IN CARROLL TOWNSHIP, YORK COUNTY, BY CARROLL TOWNSHIP FOR THE ACQUISITION OF LANDS AND BUILDING FOR USE A RECREATION AREA AND PUBLIC PARK, CARROLL TOWNSHIP, Condemnor v. HAROLD C. WILLIS, Condemnee, 100

1. Petitioners brought this action pursuant to the Act of 1863 seeking access to an otherwise inaccessible part of their land across respondents' land. The Board of View established a 25' wide right-of-way and respondents appealed. The court dismissed the appeal finding that the Board of View correctly determined that there is no current access to a portion of petitioner's land across their other lands because of steep slopes and the necessity to cross a stream and, further, a portion of the proposed road traverses a pre-existing right-of-way granted to a predecessor in title of petitioners so that providing such access will not substantially impact respondents' property and will result in the least injury to their property.

- ROSS McGINNIS AND NORMA McGINNIS, Petitioners v. ROBERT McCARTER AND SUSAN McCARTER, Respondents, 103

MEDICAL NEGLIGENCE

1. Plaintiff filed a single certificate of merit on the last day to do so. At 1:45 PM the next day, defendant Memorial Hospital filed a Praecipe for Judgment of Non Pros and at 4:02 PM the same day Plaintiff filed seven separate certificates of merit. When the Prothonotary refused to enter the judgment of non pros, Defendant Memorial sought a writ of mandamus to force entry of the judgment. The court granted the writ and directed the Prothonotary finding that filing one certificate is not sufficient when the rules require separate certificates. Since the praecipe for non pros was filed before the separate certificates, the Prothonotary should have accepted it and entered judgment.

- SANDRA BAULBLITZ, Plaintiff v. MEMORIAL HOSPITAL, ET AL, Defendant, 20

NEGLIGENCE

1. Plaintiff brought suit for injuries suffered when he slipped in a puddle of oil at defendants' store. After discovery, defendant moved for summary judgment. The court granted the motion finding that deposition testimony showed that defendant had no prior knowledge of the puddle of oil nor did any testimony show that the puddle had been created by the Defendant or its employees. Further, the fact that a procedure was in place to regularly check for spills does not in itself establish that spills were a frequent uncorrected condition.

- ROGER RIVERA, Plaintiff v. TOM'S SHREWSBURY MOBIL AND SHIPLEY STORES, INCORPORATED a/k/a SHIPLEY OIL, Defendants, 7