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LEX LOCI:
A Survey Of New Hampshire Supreme Court Decisions For The Past Year

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A survey of the decisions of the New Hampshire Supreme Court for the past year show a marked decline in "per curium" opinions, as well as a sharp increase in the number of unanimous opinions. The Court appears to be settling into a smoother phase, although when the occasion arises, sharp disagreements in approach can be seen. There have been so many opinions of note that any attempt to cover them all would simply result in a dusty catalogue of decisions. Instead, an attempt will be made to sift out those decisions that are both important and interesting.

First of all, the decisions of the past year include several that illustrate the Court's skillful and colorful use of the English language to make its point. To be blunt about it, they are writing them better. A good illustration is *Lyle Signs, Inc. v. Evroks Corporation and Travelers Indemnity Company,* (decided August 16, 1989) which the author just loved. This case involved the workings of the mechanics lien statute and cleared up a point not previously determined in New Hampshire. Namely, as concisely put by Justice Thayer, is a materialman's materialman protected under Chapter 447? The issue was whether the claimant was a "materialman's materialman" or a "materialman of a subcontractor", and the issue is an important one. It boils down to a question whether, for example, a computer chip manufacturer can recover under the mechanics lien statute for the chip which the chip manufacturer provides to the fabricator of a part of the computer. The statute clearly protects a materialman of a subcontractor, but not a materialman of a materialman.

The Court specifically ruled that RSA 447:16 does not protect a materialman's materialman. The Court did, however, protect the materialman's materialman anyway by holding that he was a materialman to a subcontractor and not to a materialman. If this language sounds like double talk, you should read the opinion. It is a semantic gem.

Another example of the linguistic pearls to be found in the usual barnyard of dry legal prose is *Eaton v. Rivard,* 131 N.H. 85 (decided November 4, 1988) which is an education in the meaning of "proprietary or common lands" as they relate to early New Hampshire property law. The defendant, the loser in the Superior Court in a strongly-worded decision against him, was vividly described by Justice Batchelder as a defendant who "thus put down, does not have strong jurisprudential winds blowing at his back when he embarks upon an appeal". However, despite these obstacles, Justice Batchelder's opinion was a substantial enough wind shift to bring victory to the defendant.

The Court described proprietary or common lands as dating back to the settlement of New Hampshire in the 17th century. They were created by a grant of a township of a large tract of land to a group of individuals or proprietors who then held the land in

common until, by vote of a majority of them, they partitioned it, developed it, or otherwise disposed of it. The Court ruled that although the defendant's deed contained a right of way running in favor of the proprietors of common land of Seabrook, the plaintiff could not enforce the right of way against the defendant, in the absence of any evidence that he stood in the shoes of the proprietors of the common lands.

The cause of the prevention of child abuse was dealt a surprising setback in the *Petition of Jane Doe,* decided October 6, 1989. The case involved an infant that had been struck on two occasions, causing bleeding and some swelling, although the strikings were not brutal. The Court agreed that "difficult lines between corporal punishment and child abuse must be drawn", but held that child abuse was not proven because in order to constitute child abuse, the alleged abusive act must be "committed under circumstances indicating harm or threatened harm to the child's life, health, or welfare."

Centronics Corporation v. Genicom Corporation, (decided August 16, 1989) is a well reasoned contract law decision dealing with the issue of the limits on discretion in contractual performance. The Court established a rule that "under an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract *raises an implied obligation of good faith to observe reasonable limits in exercising that discretion,* consistent with the parties' purpose or purposes in contracting." (Emphasis added).

In the instant case, the Court held that where the timing of the payment of a multi-million dollar escrow deposit was in question, there was no good faith requirement that the escrow holder make partial payments of undisputed amounts where the contract clearly did not provide for partial payments. The decision contains a helpful discussion of the doctrine of good faith as applied to contract disputes generally.

Seymour v. New Hampshire Savings Bank, (decided July 13, 1989) is an important case for bank attorneys to review case because it involves the question of the liability of a bank in connection with the disbursement of funds of a construction loan. The plaintiffs claimed that the bank was liable to them as a result of its role in authorizing the payment to their contractor for defective and unworkmanlike work. The Court held that there is "nothing inherent in the mere act of lending money to suggest that the lender thereby takes responsibility for spending the proceeds on the stated purpose of the loan, or for the borrower's competence in doing so." This is a clear victory for banks generally, although the Court did point out that it was not holding that the dealings between a commercial lender and it's borrower could never give rise to contractual fiduciary obligations. The Court simply did not find any factual basis for the imposition of liability in the present factual situation.

In re Estate of McCool, 131 N.H. 340 (decided December 30, 1988) is required reading for all probate attorneys. The Supreme Court broke new ground and established a high standard by which executors will be judged in connection with the handling of assets. The facts involved an estate that had as its major asset the volatile stock of a closely-

held corporation. The stock mayor may not have been subject to a first refusal option on behalf of other shareholders. Further complicating the situation was the fact that the decedent was the prime mover of the corporation and his death meant further uncertainty to the stock's value. Add to this pot, the further ingredients that the stock was restricted stock under Rule 144 of the Securities Exchange Commission and that it represented a substantial percentage of the outstanding stock of the corporation and you have a full kettle of trouble.

The attorney executor hired a Boston law firm and a Boston securities firm to help him to appraise the stock that was decreasing in value daily. Some of the stock was eventually sold some 67 months after the date of the executor's appointment at a price far below its market value on the date of the decedent's death and the rest became worthless. The beneficiaries to the decedent's estate demanded that the executor be surcharged for his delay in having the stock appraised and selling it, and the Supreme Court, in a very strong decision, agreed, stating that the stock should have been appraised and sold much earlier.

The Court did not establish a date when the stock should have been appraised and sold, but remanded the case to the probate court for that determination. The case is a clear signal that executors must move quickly to appraise and liquidate assets of the estate (particularly securities), rather than staying in the market. Most administrators do not normally appraise and sell securities until the inventory of the estate is filed, 90 days after appointment of the administrator, but this case seems to assert that if an asset is volatile, the administrator must proceed with unusual speed.

North Bay Council Inc. v. Bruckner, (decided April 7, 1989) should be reviewed by all attorneys who issue title opinions. This is a textbook analysis of the responsibilities and duties taken on by an attorney who issues title opinions. The case involved a legal malpractice action that was brought against a defendant title examiner who rendered a good and marketable title opinion as to certain property.

In analyzing the situation, the Supreme Court for the first time established the guidelines for a legal malpractice action: "The elements of liability in the legal malpractice action...require demonstration of a relationship, as client and attorney, upon the latter of whom the law imposes a duty to exercise care, skill and knowledge in providing legal services to the client; a breach of that duty; and a connection of legally recognized causation between the breach and resulting harm to the client". The Court then went on to find that although the defendant attorney had been exonerated by a jury, a directed verdict against him should have been issued by the trial court based upon his title opinion. The important point in the case, as discussed at length by the Court, is not whether or not the alleged defect in fact created an encumbrance on the property, but whether "a cloud is sufficient to render title unmarketable and a cloud is defined by reference, not to the ultimate enforceability of a third party's demand, but to the reasonableness of a buyer's objection to a potential third party claim."

Two important probate decisions are *Cass v. Ray,* (decided April 7, 1989) and *Stewart*

v. Farrel, (decided March 6, 1989). These two decisions involve a request for extension of time under RSA 556:28, for presenting claims to administrators within 3 months after appointment and for bringing suit within 12 months after appointment.

In the *Cass* Case, the Court held that where the failure to bring suit within the one year limitation is due to an attorney's "slip up", the statute does not provide relief and the suit is barred, presumably leaving the creditor with a malpractice claim against his attorney. In the *Stewart* Case, the plaintiff brought suit against the estate within the 1 year period required by the statute, but did not provide the executor with notice of the claim within 6 months as RSA 556:3 requires. The plaintiffs brought a petition for extension of time under RSA 556:28 and the Supreme Court reversed the trial court's denial of the extension, finding that because of the nature of the tort basis of the plaintiffs claim, he came within the protection of the extension statute and was not chargeable with "culpable neglect" in the language of the statute.

The Court specifically recognized however, in these cases, that the nonclaim statutory framework of RSA 556: 1 and 3 may be unconstitutional in light of the United States Supreme Court decision in *Tulsa Professional Collection Services v. Pope,* 108 S. Ct. 1340 (1988). This U.S. Supreme Court case should be reviewed by all probate attorneys since it overturned an Oklahoma statutory procedure basically similar to New Hampshire's procedure and held that due process requires estate creditors to be provided *actual notice* of the deadline by which they must file claims with the personal representative.

This past year brought the usual, but dismaying, crop of attorney misconduct cases. *Fitzpatrick's Case,* (decided December 13, 1988), teaches attorneys the lesson that while a suspension may be the result of an attorneys misconduct in handling his client's affairs, lying to the Professional Conduct Committee about it will result in the far heavier punishment of disbarment. *Woiccak's Case,* (decided July 13, 1989). This case is another in the recent proliferation of attorney misconduct cases involving the improper handling of client funds. In this case, the Court recognized that it had previously been inconsistent in its imposing of punishment in cases where attorneys mishandled their client's funds.

The Court took the opportunity to establish a hard and fast rule that disbarment will be the heavy punishment for attorneys in all cases where client's funds are misused: "Since 1985, we have uniformly held that misuse of such funds should result in disbarment..., and it has long been established that 'any use of the client's money by the attorney for his own advantages is a breach of trust that will not be tolerated.'" Translated this means, misuse your clients' funds, and you will be disbarred.

There were many important corporate decisions in the past year. *Palmer v. U.S. Savings Bank of America,* (decided February 6, 1989) establishes the rule that in stockholder derivative actions governed by RSA 293-A:49 there is an unstated requirement that the named plaintiff in a derivative action must "fairly and adequately represent other similarly situated shareholders". This issue had never been decided in New Hampshire

and, the holding was based on the fact that the plaintiff in the present case, who was also suing the corporation on wrongful termination grounds, was in a position of conflict with the other shareholders and thus an inappropriate plaintiff in a derivative action.

Kennedy v. Titcomb, (decided February 6, 1989) involved allegations of a minority stockholder "freeze out". The Supreme Court ruled unequivocally for the first time that "a shareholder who desires to gain control of a corporation is free to pay other shareholders a premium in order to gain such control The shareholder who is attempting to gain control is under no duty to pay all minority shareholders equally as he attempts to amass the controlling interest in the corporation. Indeed, the acquiring shareholder is under no duty to make any offer whatsoever to a minority shareholder".

The Court distinguished cases where a corporation redeems its shares from shareholders paying some a higher price than others, which has been held to be improper. The Court held that the minority shareholder plaintiff had failed to allege any specific acts showing that the majority shareholders had embarked upon a plan to freeze out the minority shareholders from their rightful benefits, the minority shareholder having alleged simply that the majority shareholder had purchased stock from some shareholders at a higher price than offered to the minority shareholder.

Flags I. Inc. v. Kennedy, (decided February 6, 1989) is a companion case to the case immediately above and involved an interpretation of RSA 293-A:19 which provides generally that the corporation must issue shares only for present consideration and cannot issue shares for promissory notes or future services. The corporation was the plaintiff who alleged that the defendant shareholder had failed to pay the consideration for which stock was issued to him and the defendant relied on language in RSA 293-A:19 that states that the judgment of the board of directors of the corporation shall be conclusive as to the value of the consideration received for shares.

The Court rejected the defendant's argument stating that this language was a statutory embodiment of the "good faith" rule of valuation that protects both the directors and the stockholders who received stock by prohibiting suits to recover stock based on the contention that the directors overvalued the consideration given. Here the corporation claimed it never received anything of value in exchange for the stock because the representations made by the defendant as to the consideration were materially false and the promised actions were never performed. The Court held that the plaintiff was entitled to proceed against the defendant on those grounds.

Wilder v. Keene, (decided May 3, 1989) involved a claim by the plaintiffs, parents of a deceased child, for their emotional and physical injuries when they contemporaneously perceived their son's injuries immediately following an accident while viewing him at the hospital while he was alive but just before his death. Relying on a string of its past decisions, the Court reiterated its public policy in favor of the objective of preventing unlimited and burdensome liability, by holding that since the parents were not at the scene of the accident, nor did they see their son actually sustain the injury, there was no cause of action for their claimed injuries. The Court held that it made no difference that

the plaintiff parents suffered direct and provable physical and mental injury, or that they saw their son while he was still alive just prior to death, but rather held there was a requirement of a "contemporaneous sensory perception of the *accident* and not of the *injury"* before a cause of action was created. This decision is an example of the more conservative stand of this Supreme Court in testing the outer limits of current tort law.

Gelinas v. Metropolitan Property & *Liability Insurance Co.,* 131 N.H. 154 (decided December 9, 1988), is a great, blow-by-blow, analysis of a "Dumas Case". Unlike *Dumas* however, the plaintiff was unsuccessful in convincing the Court that the insurance company was negligent in failing to settle the case within the policy limits, even though the verdict was $100,000 over the $100,000 policy limit (a total of $200,000) where the case could have been settled at one point for less than $50,000. Of telling importance in the Court's decision was the highly unusual testimony of the trial judge who testified that during the trial he had recommended to the plaintiff to settle at a figure much lower than the policy limit, but that the plaintiff had refused settlement at that point. The Supreme Court pointed out that there is no statutory or judicial bar to the testimony of a judge, holding that such testimony was governed by *Hale v. Wyatt,* 78 N.H. 214, (1916) where the Court established a rule that a judge may be a called- as a competent witness to prove all "that occurred before him, but may not be compelled to do so".

Miller v. Basbas, 131 N.H. 332 (decided December 30, 1988), involves a classic case of the tensions between the needs of parties to a civil action for testimony and the rights of an allegedly sexually abused youngster. This was a civil suit for damages brought by the parents of a three-year-old child against the defendant for allegedly sexually abusing their daughter. Throughout a long and drawn out discovery process, the plaintiff parents adamantly took the position that they would not allow their daughter to be deposed, even though the superior court provided for a video tape procedure in the presence of the child's therapist and parents. The Court upheld the dismissal of the plaintiff’s action based upon the parents' refusal to comply with the superior court's discovery order, stating that the plaintiffs failed to understand that "a child's inability to remember is certainly relevant to the defendant's defense."

In re "*K",* (decided July 14, 1989), is a discovery case which involves an interpretation of RSA 151:13-a which generally makes confidential the records of a hospital's quality assurance committee. The plaintiff claimed that she had contracted a herpes infection while at the defendant hospital and she sought to obtain the investigative report and committee findings of an investigation undertaken by the hospital's quality assurance committee and its nurse epidemiologist who had undertaken the investigation. The Court upheld the confidentiality of the report and minutes sought, although its language was carefully worded to constrict the protection given by the statute to "what might be considered the work product of the committee" (Batchelder J. concurring specially). All attorneys representing hospitals should read the decision since it is instructive on steps that should be taken by hospitals to assure the protection provided by the statute.

When is a bad loser so frequently bad that it becomes a habit? *Lapierre v. Sawyer,* (decided May 3, 1989), is an evidence case which discusses the fine line between habit evidence and character evidence. Habit evidence is generally considered admissible while character evidence is not. In this case; the plaintiff was severely injured when hit by a racquetball not in play which was hit by the defendant who, the plaintiff alleged, had the habit of striking balls that were no longer in play, particularly when angered by losing. The alleged defendant bad loser was successful in excluding evidence of prior incidences of similar nature, the Court holding that the allegations against the defendant were more in the nature of a character evidence inadmissible under New Hampshire Rules of Evidence, Rules 404(a) and (b) rather than habit evidence admissable under Rule 406.

Several cases can be briefly noted. *Wentworth-Douglass Hospital v. New Hampshire Department of Health and Welfare,* 131 N.H. 364, (decided December 30, 1988), establishes an unequivocable rule that a petition for certiorari for an appeal from an administrative body must be filed no later than 30 days from the date of the order complained about. *Todd v. Romano,* 131 N.H. 91, (decided November 4, 1988), establishes the rule that an impecunious defendant whose only asset is his social security benefit cannot be ordered to make periodic payments to a plaintiff creditor, by virtue of the bar established by 42 V.S.C. § 407 (a), which imposes a broad prohibition against the use of any legal process to reach social security benefits. *In. Bossi v. Bossi,* 131 N.H. 262 (decided December 12, 1988), the Supreme Court extended its recent push to enforce attorney settlement agreements to authorized oral agreements between counsel to settle divorce proceedings. The lesson of this case and its predecessors for attorneys is, if you are authorized to settle a case and then agree to settle it, you will be bound by the agreement.

Newell v. New Hampshire Division of Welfare, 131 N.H. 88 (decided November 4, 1988), is a reminder that although the State has waived its tort immunity in tort actions, it has not waived its contractual immunity and such immunity is an absolute bar to actions against the state for breach of contract. *Campton Crossroads, Inc. v. Wise,* 131 N.H. 193 (decided December 9, 1988), clears up a confusing situation created by the fact that RSA 502-A: 15 requires a request for a jury trial to be made within 5 days of the "entry of the action". In the present case, the defendant filed his request for jury trial long before the return date of the writ, but after its entry date. The Court ruled that the defendant's request for jury trial should have been granted because "a defendant who receives a writ containing a return date, and no other information notifying him that he must act before that date, will have such additional time as the district court may allow, at least up to and including, the return date, to request a trial by jury and transfer to the superior court".

In Re Noah W., 131 N.H. 53 (decided October 31, 1988), established the hard and fast rule that a finding of sexual abuse by a district court is a jurisdictional prerequisite to a petition for termination of parental rights filed in the probate court, where the grounds of termination is the alleged sexual abuse of a parent. *Devaney v. Windham,* decided October 9, 1989, is a rare example of a land owner ordered to

remove substantial additions to a summer home (including a second story and substantial additions to the dimensions of the home) where the landowner continued to renovate and expand his house after his request for a variance was denied, the Court holding that the landowner in such a situation "cannot benefit from ... a knowing disregard of the law.

A criminal case of some importance is *State v. Carroll,* 131 N.H. 179 (1988) which involved the standard to be applied in determining whether probable cause exists for the issuance of a search warrant. The court adopted a "totality of the circumstances" approach, based uniquely upon "our own interpretations of the New Hampshire Constitution, independent of any federal decisions interpreting the totality of the circumstances test applied in Fourth Amendment analysis".

Great Bay School & *Training Center v. Simplex Wire and Cable Company,* (decided June 13, 1989), deals with the important issue of the duration of a right of first refusal contained in a recorded deed. The Court determined that the right of first refusal, referred to by the Court as a "preemptive right", is subject to the rule against perpetuities. Under that rule and its "wait and see" New Hampshire doctrine, the Court held that a preemptive right that poses a substantial restraint on alienation is subject to the rule against perpetuities. In this case the right involved a corporation, and the Court held that the relevant period of duration was 21 years.

Kellison v. McIsaac, (decided June 13, 1989), is an adverse possession case involving the question whether the 20 year adverse holding period required by the adverse possession doctrine is interrupted when title is held during that period by a municipality holding title to the land through tax foreclosure proceedings. The Court held that there was an interruption of the 20-year prescriptive period and the ownership by the municipality prevented the running of statute of limitations in such cases. The Court specifically did not decided the question whether title by a municipality in a proprietary capacity (as opposed to title in a governmental or public capacity) would operate to interrupt the running of the period.

Knox Leasing v. Turner, (decided August 9, 1989), is another in the long line of "Settle Cases" and is another look by the Court at the issue of the unauthorized practice of law by other than licensed attorneys. The Court dealt a defeat to the established bar who sought to limit the *pro se* appearances of certain party defendants. The Supreme Court specifically established a narrowly drawn rule that all of the members of a small general partnership, *consisting of no more than three persons,* may appear *pro se* to represent their individual partnership interests so long as the individual partner's interests are themselves consistent. The Court clearly noted the concerns of the Attorney General's office that if the rules were expanded to allow *pro se* appearances by partnerships having a multitude of members, mass confusion would reign. The Court also recognized that "pro se appearances by lay litigants frequently result in awkwardly drafted pleadings, inarticulately presented motions and proceedings that are needlessly multiplicative". However, the Court held that pro se appearances should not be barred in all circumstances, such as the

present case. The Court's ruling will no doubt mean more of the hopelessly protracted litigation that unnecessarily burdens our courts brought about by the new breed of non-lawyer "hired guns" who take a financial interest in their client's action.

Erin Food Services v. Derry Motel, Inc., 131 N.H. 353 (decided December 30, 1988), involved a bill for specific enforcement of a land contract by the buyer for property worth millions of dollars, the property having increased in value tremendously since an option was granted to the buyer at a much lower price. Because of the increase in value of the land, the seller sought to avoid specific performance of the contract and the case is a textbook exposition of the complicated steps taken by the buyer to enforce the contract. The major holding of the case is that a purchaser may specifically enforce a contract for the purchase of land even though there is a dramatic and unforeseen increase in the value of the property between the time the contract was made and the time performance is demanded. The Court carefully distinguished this case from an earlier decision which involved a substantial disproportion in price between the value of the property and the purchase price at the time the contract is made*. See Wehringer,* 120 N.H. 446 (1980).

Foster v. Town of Henniker, (decided August 9, 1989) is a warning to all property taxpayers who have claimed the current use exemption that they must use care not to inadvertently change the use of the property. If the use is changed, they will incur the change of use penalty. Here, the property owner claimed and received current use status as forest land. The taxpayer subsequently engaged in clear cutting or "liquidation cutting" of a portion of property, which the town claimed reduced the land to a "lunar landscape." Even more graphically, an expert witness testified that "a woodchuck would starve to death" on the taxpayer's land. The Supreme Court upheld the town's imposition of the 10% change of use penalty for the entire parcel, holding that the taxpayer had failed to follow accepted silvicultural practices required to qualify as forest land.

Finally, *Petition of Sprague,* decided October 6, 1989, is a good example of the perils encountered by an attorney representing someone pressing a complaint before one of the professional boards of registration of the State of New Hampshire. The plaintiff sought to impose sanctions against her psychiatrist for the treatment he rendered to her, in a complaint filed before the State Board of Registration and Medicine. The Supreme Court found that the Board committed 5 substantial errors of law in conducting the hearing, but still found no evidence of bias by the Board and remanded the case for a rehearing in light of the Court's opinion. A substantial question remains whether the plaintiff can get a fair hearing before the Board. The evidence showed that the Board conducted one single 12 hour hearing during which 5 errors of law were committed by the Board. The most egregious error was to severely limit the plaintiffs cross-examination of the psychiatrist, the Court finding that the Board "displayed a lack of understanding... as to the important role of cross-examination in ferreting out the truth" by substantially limiting the scope of the cross-examination. Even the Board's counsel agreed at the time of the hearing that the Board decision limiting the cross examination was wrong, as the Supreme Court pointed out.

The plaintiff also sought to show that of the 137 malpractice writs served against physicians in New Hampshire since 1985, the Board has taken action against none of them. The Plaintiff further sought to show that a physician member of the Board had testified before the Commission on Tort Law Reform concerning the "medical malpractice crisis" which the plaintiff, to no avail, claimed showed his bias. The decision illustrates the length to which the Court will go to leave the complainant at the mercy of an administrative board, even in a situation which may to the plaintiff give all the appearances of being like David, thrown into the lion's den.