

LEX LOCI: A Survey of Recent New Hampshire Supreme Court Decisions
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In a case that harkens back to the author's bar review course teaching days, *Hilco, Inc. v. Lenentine*, decided August 14, 1997, involved a challenge to New Hampshire's race-notice recording system of real estate titles. In the somewhat complex factual context of the case, the defendants, sellers of real property to a third party, financed the sale themselves by taking back a second mortgage on the property and a fourth mortgage on the buyer's other and unrelated property located in another town. The buyer defaulted on the payment of the notes and the property was foreclosed by the first mortgage holder, leaving the defendants unpaid. In a restructuring of the still outstanding indebtedness, the three mortgages prior to the defendant's fourth mortgage on the unrelated property were discharged and two different mortgages were recorded to take their place, the refinancing parties intending them to be first and second mortgages. The refinancing bank inexplicably did not have actual mortgage of the defendant's fourth mortgage: amazingly, the plaintiff's fourth mortgage was not discovered in two separate title searches, although, of course, all parties were given constructive notice of the defendant's properly recorded mortgage.

It was clear that the defendant's fourth mortgage was now entitled to first mortgage status under the law as set forth in our race-notice recording system. However, the holders of the new mortgages sought to be prior to the defendant's mortgage, claiming that equitable intervention was appropriate in this case and the trial court agreed, ordering the defendant's mortgage subordinated to the mortgages held by the refinancing parties. On appeal, the Supreme Court reversed, stating that

We must guard the integrity and reliability of our recording system, viewing claims to circumvent the established order of priority, through resort to equity, with trepidation. Our recording statutes serve an essential purpose, ensuring notice to the public of property interests, thereby protecting both those who already have interests in land and those who would like to acquire such interests.

The Court then turned to the plaintiff's claim to invoke equity and held first that the plaintiff's claim must rise and fall on the strength on the plaintiff's case for equitable intervention "and not upon any supposed weakness" of the defendant's equitable position. Next, the Supreme Court held that it could find no "excusable" ignorance here and ruled that the plaintiffs "had constructive notice of the [defendants] recorded mortgage...and we hold that the trial court abused its discretion when it allowed the plaintiffs to be shielded by equity from the consequences of their agent's negligence in not discovering" the defendant's mortgage. This is a result that any title abstractor or land conveyancer would applaud.

A.J. Cameron Sod Farms, Inc. v. Continental Insurance Company, decided September 18, 1997, is a dismaying example of an insured business' worst nightmare: lots of liability insurance but no liability insurance for a plain vanilla personal injury claim. The business, the plaintiff in this declaratory judgment action, had two insurance agents and at the time the accident occurred had \$7,000,000 worth of liability insurance, including two \$500,000 business automobile liability policies, one with American Insurance, and one with the defendant, Continental Insurance, a \$1,000,000 "comprehensive general liability policy" from Continental, and a \$5,000,000 umbrella insurance from U.S. Fire. Unfortunately for the plaintiff business, the umbrella coverage required the plaintiff to have 1.5 million dollars of underlying business automobile liability coverage to prevent a gap in coverage but, as a result of a change of insurance carriers, the plaintiff ended up with only \$500,000 worth of business automobile liability coverage. When the change of carriers was made, the plaintiff erroneously raised his umbrella coverage to \$5,000,000 instead of increasing the underlying automobile liability coverage, apparently upon the advice of one of the agents. However, the 1.5 million "attachment point" of the umbrella policy was not changed. It would appear to the author that perhaps there was some negligence on the part of the insurance agent[s] not only was there a gap in coverage, but the plaintiff seems to have duplicate and unnecessary business automobile policies from two different companies.

With all of this coverage, one would think that somehow the Supreme Court could find some liability coverage for the plaintiff in the overflowing ink of these endless pages of insurance policies, but *au contraire*. In a unanimous opinion by Justice Horton, the New Hampshire Supreme Court denied coverage under Continental's comprehensive general liability policy and refused to reform the umbrella policy, leaving the hapless plaintiff with a \$1,000,000 gap in coverage. The moral of this story is that in this complex world, it's prudent for a business person to engage the services of an insurance consultant, not insurance company agents or independent agents who both are in the business of selling insurance, to review and make recommendations concerning appropriate liability coverage. Furthermore, this decision and other recent decisions of the Court appear to be the tip of an iceberg of a trend by the members of the present New Hampshire Supreme Court to avoid going out of their way to find coverage when none can easily be found.

Lorette v. Peter-Sam Investment Properties, decided July 23, 1997, was a second look by the Supreme Court at RSA 215-A:34 regulating the use of off-highway recreational vehicles (OHRVs) which provides, (as the Supreme Court had earlier decided in the same case at 140 NH 209), immunity of a landowner from negligence. However, in the present appeal, after the case had been remanded to the superior court after the first appeal, the Court had before it the issue of whether or not the statute immunized a

landowner who engaged in **reckless** conduct. The majority of the Supreme Court held that the statute "provides immunity to landowners for their reckless conduct relating to inherent risks of OHRV operation[s]". However, picking up the mantle of Justice Batchelder who had dissented in the earlier appeal, Justice Broderick argued that it was questionable "to assume that the legislature intended to excuse a landowner's reckless conduct" and would read the OHRV statute to provide protection "only for negligent acts". Justice Broderick, in his first opinion, seems to be displaying an easy acceptance of plaintiff claims not very surprising to those who knew him as a trial lawyer.

The author's ear, for some unknown reason, seems lately to be tuned to issues of retirement planning. In *Keshishian v. CMC Radiologists'*, decided July 15, 1997, is an example of some premature retirement planning by a physician who looked too far ahead and made definite plans to retire early. The plaintiff radiologist was a founding member of the defendant partnership. In late 1987, he informed his partners that he planned to retire in four years in 1991 and to relocate to another state. Soon thereafter, the partnership executed a five (5) year radiology service agreement with the hospital where the physicians practiced. This agreement, to which the plaintiff partner acquiesced, expressly provided that the plaintiff would withdraw from the partnership as of June 30, 1991. Prior to that date arriving, the plaintiff "began to have second thoughts about his pending retirement due to a change in his economic circumstances" and wanted to remain as a partner but his partners refused. They did agree, however, that they would enter into a two (2) year consulting agreement with him and the plaintiff radiologist grudgingly agreed, selling his partnership interest to his former partners and agreeing to provide his professional services to the partnership for two years at a fixed salary. The plaintiff was very displeased about the consulting agreement and expressed his dissatisfaction early in its term. However, he took no action to correct what he felt was unfair treatment by his former partners. A new partnership was formed without the plaintiff. After two years and as the consulting agreement was about to expire, the plaintiff radiologist sought to negotiate a return to partnership but failed at which time he filed a petition for equitable relief and legal damages in the superior court, claiming fraud and negligent misrepresentation in the 1988 agreement and seeking to rescind the 1991 consulting agreement which flowed from it, claiming that the 1991 agreement was the product of duress.

The Supreme Court accurately described the case as presenting "a tangled web of facts and procedural maneuvers", to the author almost Byzantine in nature. Sifting through the factual situation, the Supreme Court first held that a contract made under duress and ordinarily voidable can be deemed to be ratified "if the aggrieved party fails to repudiate the agreement within a reasonable time after the duress has dissipated." The Court found that the delay by the plaintiff radiologist in pursuing his claim of rescission while continuing to work under the agreement constituted a ratification of the contract,

citing to other cases which hold that "grumbling acceptance" of a contract does not prevent the formation of a binding contract.

The plaintiff radiologist also sought to pursue both his legal claims and his equitable claims at the same time and in the end, the Court held that this dual pursuit was based upon "a tactical decision" that resulted in a "failed strategic gamble". The Court then upheld the trial court's determination that the legal claims of the plaintiff were barred by the three-year statute of limitations. The retirement planning lesson the author draws from this case is (1) don't plan to retire early; or (2) if you do plan to retire early, don't tell your partners--just surprise them!!

Two workers' compensation cases are of interest. *Appeal of Robert Gelinis*, decided August 11, 1997, involved a retired Manchester firefighter's claim for disability benefits after he suffered a heart attack while playing tennis in Florida some four years after his retirement. The Court held that, insofar as disability benefits were concerned, the claimant had a lack of earning capacity due to his voluntary retirement from work and, therefore, he had not suffered a compensable disability loss under the Workers' Compensation Act: "Where a claimant's lack of earning capacity is due not to his disability, but to his voluntary retirement from the work force, he has not suffered a loss that our Workers' Compensation Act was intended to remedy". In another workers' compensation case, *Appeal of Jackson*, decided July 23, 1997, the Court held that where a worker's benefits were terminated retroactively based upon a "change in condition", the Workers' Compensation Board has the burden of proving a change of condition rather than placing upon the worker "the burden of proving continued disability."

K&J Associates v. City of Lebanon, decided October 1, 1997, answers a question often confronted by zoning practitioners who must file an appeal of a decision of the planning board "within thirty (30) days after the filing of the decision in the office of the planning board". RSA 677:15, I. This statute has since been amended slightly to read "within thirty (30) days after the decision of the planning board has been filed and first becomes available for public inspection in the office of the planning board or its clerk or secretary". RSA 677:15, I. Neither statute defines "decision". A divided Supreme Court held that the "triggering event" for the running of the thirty (30) day period is the date that the **signed** "notice of action" is filed in the office of the planning board. The Court specifically found that the time does not run when the planning board actually votes and makes its decision, nor does it run from the date that an unsigned notice of decision is prepared by the planning board secretary and filed with the board. Rather the time for filing an appeal to the superior court runs from the date that the notice is filed and duly signed by the planning board chairman. Justices Horton and Thayer, in dissent, would hold that the majority had grafted an unintended additional requirement upon the statute

and that the "decision" of the planning board was made when the site plan application was voted upon at the planning board meeting and that the thirty (30) day period should run from that date.

When is a "write-in" candidate a write-in candidate? *Kibbe v. Town of Milton*, decided September 18, 1997, makes clear that the use of stickers bearing a particular candidate's name and affixed to a ballot as a write-in vote in a town election did not conform with the statutory requirements of RSA 659:65,II (b). The "sticker" candidate won (counting both write-ins and stick-ons) and an appeal to the superior court followed. The superior court found that the statutory provisions should not invalidate an election because the "clear intent of the voters" should prevail over the statute prohibiting the attachment of stickers to ballots, but the Supreme Court, on appeal, held that the explicit provisions of the statute prohibiting the use of stickers on ballots was mandatory.

New Hampshire Challenge, Inc. v. Commissioner, New Hampshire Department of Education, decided August 11, 1997, involved the right to attorney's fees under the New Hampshire Right To Know Law, RSA 91-A. The Supreme Court, interpreting the attorney's fees provision of the Right To Know Law (RSA 91-A:8,I), reversed the superior court which had denied fees to the plaintiff even though the superior court had found that the plaintiffs were entitled to the information requested and to which they were improperly denied. The Supreme Court established the rule that the trial court must make two findings for an award of attorney's fees under the Right To Know Law:

- (1) That the plaintiff's lawsuit was necessary to make the information available; and
- (2) that the defendant knew or **should have known** that his conduct violated the statute (emphasis added).

In the case before it, the Supreme Court remanded to the superior court for a finding whether or not the defendants **should have known** that their conduct violated the statute, a finding that would require the plaintiff to be allowed its legal fees.

Finally, *Johnson v. Coe*, decided July 15, 1997, is a domestic relations case in which the plaintiff husband's "displeasure with the Divorce Decree" resulted in his former wife's struggle to secure the husband's "compliance with the Divorce Decree [which] spanned many years and numerous court proceedings, including a trip to bankruptcy court to challenge the [husband's] attempt to discharge his outstanding obligation under the divorce decree". There was no way that the divorced husband was willingly going to pay his divorced spouse if he didn't have to (the Supreme Court was very indulgent in describing his actions as "recalcitrance in meeting his obligations under the divorce decree") and he made many "attempts to painstakingly avoid" his obligations. He

claimed that a key element of his obligation had been discharged in his bankruptcy after his divorce, but the trial court and the bankruptcy court ruled that the obligation "was in the nature of a temporary spousal support payment and **not** a property settlement" and, therefore, was not a dischargeable debt under the bankruptcy code.

The plaintiff husband, still obdurate and now saddled with an order to pay his former wife's attorney's fees in connection with the bankruptcy fight, appealed to the Supreme Court where the husband was, at long last, brought to bay although his "displeasure with the Divorce Decree" was not presumably changed. The husband's claim that the divorce provision in contest was discharged in the bankruptcy court was rejected by the Supreme Court, based upon the lower court's finding that the provision was in the nature of a temporary spousal support payment. The Court went on to uphold the award of attorney's fees to the wife and denied the husband's claim that the attorney's fees were discharged in his bankruptcy proceeding, "because the attorney's fees were incurred in the acquisition of support, they 'should take on the character of [the] obligation and be non-dischargeable". The Supreme Court went on to rule that "the award of counsel fees sought to deter the plaintiff [husband] from continued failure to obey the mandates of the divorce decree, [and] under all the circumstances of this case we found no error in the attorney's fees award". Now' the former wife has the no small task of getting her former husband to pay up in accordance with the Supreme Court's ruling. It could be a tough job. Good luck.

ENDNOTES

1, The author's firm represented a party to the action and, therefore, the author's views may be colored.