

# PITTSBURGH LEGAL JOURNAL

## OPINIONS

### ALLEGHENY COUNTY COURT OF COMMON PLEAS

**Steel Center Area Vocational Technical School v. McKeesport Area School District, McCarthy, J.** .....Page 293  
*Pennsylvania School Code 18-1847—Pennsylvania School Code 18-1809*

**Thomas M. Ball and Keystone Fire Apparatus, Inc. v. Agreement of Trust of Penn Prime Trust Dated August 12, 1987, a/k/a Penn Prime Trust, et al., Hertzberg, J.** .....Page 294  
*Insurer’s Obligation Law of the Case Doctrine*

**Borough of McKees Rocks v. Zoning Hearing Board of the Borough of McKees Rocks, Kim Wisnesky and Ron Wisnesky, and Workingmen’s Beneficial Union of West Park, James, J.** .....Page 296  
*Zoning*

**Hazel Baron and Brian K. Marshall v. Zoning Board of the Borough of Pleasant Hills and Borough of Pleasant Hills, James, J.** .....Page 297  
*Zoning*

**Thomas Mills and Ronald Stall v. City of Pittsburgh Zoning Board of Adjustment, Stephen Tobe; and SM Tobe Enterprises, LLC, James, J.** ..Page 298  
*Zoning*

**Loretta J. Wahl v. Drew Perkins, Wecht, A.J.** .....Page 299  
*Recusal*

## CAPSULE SUMMARIES

**Barry P. Kent v. Louise E. Kent Bubash, J.** .....Page 302  
*Equitable Distribution—Alimony—Home Schooling*

**Mahendra Shukla v. Suman Pandey, Hens-Greco, J.** .....Page 302  
*Equitable Distribution—Earning Capacity—Child Support*

# PLJ

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## OPINIONS

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## CAPSULE SUMMARIES

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**Steel Center Area Vocational Technical School v.  
McKeesport Area School District**

*Pennsylvania School Code 18-1847—Pennsylvania School Code 18-1809*

No. GD 08-001036. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.  
McCarthy, J.—November 6, 2009

**OPINION**

This matter came before the Court on competing motions for summary judgment. In January 2008 Plaintiff, Steel Center Area Vocational Technical School (“Steel Center”), entered a complaint in action for declaratory judgment seeking reimbursement of tuition and all associated costs, together with interest and costs of suit for the attendance of a student residing within McKeesport Area School District (“McKeesport”), at Steel Center. Subsequently, McKeesport filed an Answer and New Matter that was met by preliminary objections from Steel Center. McKeesport filed an Amended Answer and New Matter, to which Steel Center timely replied. Thereafter, the parties engaged in discovery, including exchanges of requests for production of documents, interrogatories and admissions.

The complaint alleged that Jeffrey T. Rotharmel (“Rotharmel”), a student residing within the McKeesport Area School District attended Wilson Christian Academy and Steel Center during the 2005-2006, 2006-2007, and 2007-2008 academic years. It is not disputed that Rotharmel attended Wilson Christian Academy and Steel Center during each of those years, that he participated in the Steel Center Electrical Construction and Electrical Maintenance programs and that he graduated from the vocational programs at Steel Center. During each of the three school years in question, Rotharmel attended Steel Center’s Electrical Construction and Electrical Maintenance programs with the consent of the Steel Center Board of Education. In October of each of those school years, Steel Center delivered an invoice to McKeesport representing student tuition attributable to Rotharmel for that academic year.<sup>1</sup> McKeesport made no payment for any year. Rotharmel neither requested nor received permission directly from the McKeesport Board of School Directors to attend Steel Center at the expense of McKeesport.

Following argument, the Court denied McKeesport’s Motion for Summary Judgment and granted Steel Center’s Motion. McKeesport appealed from that Order and timely submitted a statement of matters complained of on appeal. In its statement, McKeesport asserts, principally, that the Court erred in adopting Section 18-1847 of the Pennsylvania School Code (24 P.S. § 18-1827) rather than Section 18-1809 of that Code (24 P.S. § 18-1809) as the controlling provision in this dispute. McKeesport further argues that summary judgment in favor of Steel Center was improper because the record demonstrated: that McKeesport participated in vocational-technical training and, in fact, offered an approved program similar to that provided by Steel Center; that McKeesport did not approve Rotharmel’s attendance at Steel Center; and that Steel Center never made a determination that Rotharmel was eligible under Section 18-1809 for admission to the Steel Center vocational program.

Both McKeesport and Steel Center insist that no genuine issue of material fact remains to be determined. Accordingly, both concur that summary judgment is appropriate in this matter pursuant to Pa.R.Civ.P. 1035.2(1). Indeed, the parties concur that the issue presented is whether the matter is controlled by Section 18-1809 of the Pennsylvania School Code or by Section 18-1847 of that Code. Section 1809 of the Code provides, in pertinent part:

(a) Any resident of any school district which does not maintain an approved vocational industrial, vocational agricultural, vocational homemaking, or vocational distributive occupational education day, part-time, or evening class, school or department, offering the type of training which he desires, may make application to the board of school directors of any other district for admission to such school or department maintained by said board. If the board refuses him admission, he may apply to the State Board for Vocational Education for admission to such school or department. The State Board for Vocational Education may approve or disapprove such application. In making such decision the State Board for Vocational Education shall take into consideration the opportunities for free vocational training in the community in which the applicant resides, the financial status of the community, the age, preparation, aptitude, and previous record of the applicant, and all other relevant circumstances. The decision of the State Board for Vocational Education shall be final.

...

(c) The school district in which the person resides, who has been admitted, as above provided, to an approved vocational industrial, vocational agricultural, vocational homemaking, vocational high or vocational distributive occupational school or department maintained by another school district, shall pay the high school charge provided for by this act. If any school district neglects or refuses to pay for such tuition, it shall be liable therefor, in an action of contract, to the school district or school districts maintaining the school which the pupil, with the approval of the board, attended.

Section 18-1847 of the School Code provides:

On obtaining the consent of the area vocational-technical board operating an area vocational-technical school or technical institute, and with or without the consent of the board of school directors of the district in which the pupil resides, any pupil residing in a nonparticipating district may attend the area vocational-technical school or technical institute. The school district in which the pupil resides shall be charged, for each pupil attending the area vocational-technical school or technical institute, an amount equal to the total approved budget for current expenses, debt service and capital outlay divided by the number of pupils enrolled in the school.

Among the evident distinctions between those two School Code sections is that, although Section 1809 addresses the circumstance of a resident of a school district that *does not maintain an approved program* of vocational education, Section 1847 does not at all address whether the pupil’s resident school district provides a vocational-technical school or technical program, approved or otherwise. Section 1847 considers, rather, whether the pupil resides in a *non-participating district*.

Section 1809 provides opportunities to pupils residing in school districts that do not offer a particular type of training to obtain desired training in other districts, at the expense of the pupils’ home districts. Section 1847 permits pupils who reside within a school district that does not participate in an area vocational-technical school or technical institute to attend the area facility and to have the charges specified under Section 1847 assessed to school district in which the pupil resides, without regard to the nature of vocational-technical programs available within the home school district.

In this matter, McKeesport concedes that it is a non-participating school district in the area vo-tech program. (Answer to Complaint, at ¶9; Responses to Plaintiff's Requests for Admission, at ¶2). McKeesport's insistence that it provides vocational education opportunities comparable with those utilized by Rotharmel at Steel Center is immaterial to the matter of whether Section 18-1847 or Section 18-1809 of the School Code applies to this dispute; because McKeesport does not participate in the area vo-tech program, Section 18-1847 controls this dispute.

Prerequisites to reimbursement pursuant to Section 1847 are: (a) residency within a non-participating school district; and (b) consent of the receiving area vocational board. *See, Bethlehem Area Vocational-Technical School v. Pallsades School District*, 156 Pa. Cmwlth. 120, 625 A.2d 1330 (1993). Steel Center avers, and McKeesport does not deny that Rotharmel attended Steel Center's electrical construction and electrical maintenance programs during the academic years in dispute with the approval of the Steel Center Board. The record contains minutes of the board meetings of the Steel Center Advisory Board that expressly included Rotharmel among non-participating district students approved for participation in the Steel Center program for the 2006-2007 and 2007-2008 school years. Approval is evident, moreover, from the fact of application and attendance by Rotharmel and the fact of Steel Center's invoicing of McKeesport in October of each academic year for Rotharmel's annual tuition.

McKeesport has argued that Rotharmel did not request permission from McKeesport to attend Steel Center and that, in any event, McKeesport never approved Rotharmel's attendance at the area vocational school. Those matters are not material to the area vocational school entitlement to charges permitted under Section 18-1847. The prerequisites of Section 1847 having been met, McKeesport was responsible for the charges allowed under that section to the area vocational-technical school, Steel Center.

BY THE COURT:  
/s/McCarthy, J.

Date: November 6, 2009

<sup>1</sup> Invoiced amounts were: \$8,088.00 for 2005-2006; \$6,221.00 for 2006-2007; and \$7,600.00 for 2007-2008.

**Thomas M. Ball and Keystone Fire Apparatus, Inc. v.  
Agreement of Trust of Penn Prime Trust  
Dated August 12, 1987, a/k/a Penn Prime Trust, et al.**

*Insurer's Obligation Law of the Case Doctrine*

No. GD 08-015006. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.  
Hertzberg, J.—November 13, 2009

**OPINION**

We write this Opinion in support of our declaratory judgment determination that Defendant Penn Prime Trust is not obligated to provide insurance coverage to the Plaintiffs. Plaintiffs have appealed our decision to the Superior Court of Pennsylvania.

Plaintiff, Keystone Fire Apparatus, Inc. ("Keystone"), is in the business of installing fire truck bodies on commercially manufactured truck chassis. Keystone designs the truck bodies to their customers' specifications, who are generally municipal and volunteer fire departments. Plaintiff Thomas Ball is president of Keystone. Defendant, West Park Independent Fire Company, Inc. ("West Park"), is a volunteer fire company in Stowe Township, Allegheny County, Pennsylvania. West Park is a customer of Keystone and West Park paid Keystone to install a fire truck body on a chassis. The Plaintiffs, fire truck made for West Park by Keystone is the subject of this civil action. The truck contains a generator, pumping apparatus and fire hoses. The construction of this fire truck body did not contain any means to secure the fire hoses to the body of the truck. The hoses lay in the bed of the truck, so that when the truck arrived at a fire scene the hose could be unloaded quickly.

On November 13, 2003, Mr. Ball sought permission from West Park to borrow the fire truck to demonstrate it to a prospective customer, in an attempt to make a sale for his company. West Park agreed to let Mr. Ball use the truck for his sales call and Mr. Ball drove the truck to the potential customer's location. While traveling on State Route 43 in Washington County, en route to the potential customer's location, a section of the fire hose separated and fell from the truck and came to rest on State Route 43. Defendant Faith Dolegowski was driving on State Route 43 and struck the section of hose that was on the highway. As a result of striking the hose, Ms. Dolegowski alleges that she suffered personal injuries and filed a lawsuit against Keystone, Mr. Ball and West Park in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 05-019209.

As the insurance carrier for West Park, Defendant Penn Prime Trust is providing West Park with a defense to Ms. Dolegowski's lawsuit. Keystone carried a liability insurance policy with Nationwide Insurance Company and applied to Nationwide for coverage regarding Ms. Dolegowski's claims, but Nationwide refused to cover the claims on Keystone's behalf. Nationwide contended that they would not cover Keystone because the fire truck did not qualify as an insured vehicle. After being denied coverage from their insurer, Keystone and Mr. Ball demanded that Penn Prime provide them coverage for Ms. Dolegowski's claims. Keystone and Mr. Ball contended that under the circumstances of Ms. Dolegowski's suit and the fact that they had no other insurance coverage, the Penn Prime Coverage Document afforded insurance coverage to them.

Mr. Ball and Keystone filed an Action for Declaratory Judgment in the captioned matter on August 7, 2008. On February 19, 2009 Penn Prime filed a Motion for Summary Judgment, but on April 15, 2009 it was denied. On May 15, 2009 Penn Prime filed a Motion to Vacate, Reconsider, Clarify and Certify the April 15, 2009 Order as immediately appealable; this Motion was denied. On May 28, 2009 the parties executed Stipulated Facts in Lieu of Trial. We granted the parties 90 days to file proposed Findings of Fact and Conclusions of Law. After receipt of each party's Findings and Conclusions we issued a Declaratory Judgment on July 24, 2009 finding that Penn Prime owed no obligation to the Plaintiffs or to Ms. Dolegowski. On August 3, 2009 Plaintiffs filed a Motion for Post-Trial Relief seeking a determination that Penn Prime owes the Plaintiffs a duty to provide liability coverage. On August 19, 2009 we denied the Plaintiffs' Motion for Post-Trial Relief. On August 21, 2009 the Plaintiffs served us with their Notice of Appeal and we now write this Opinion in support of our Declaratory Judgment determination that Penn Prime does not owe Plaintiffs a

duty to provide liability insurance coverage.

Plaintiffs allege that we committed five errors when we issued the August 19, 2009 Order of Court. Plaintiffs first complain that we failed to follow “the law of the case.” The Law of the Case Doctrine referred to by Plaintiffs provides that if an appellate court has considered and decided a question on appeal, neither that appellate court, nor any trial court may revisit that question during another phase of the same case. *PPG Indus., Inc. v. Commonwealth Bd. Of Fin.*, 567 Pa. 580, 790 A.2d 261, 267 n. 11 (2001). Plaintiffs attempt to apply this doctrine is misplaced, because the Motion for Summary Judgment was heard at the trial court level, and the Doctrine of the law of the case, “significantly...applies only to the actions of an appellate court...” *Gateway Towers Condominium Ass’n v. Krohn*, 845 A.2d 855, 861 (Pa.Super. 2004). Because an appellate court did not hear or rule on the Motion for Summary Judgment, the law of the case had not been established and we were free to visit the issue of Penn Prime’s obligation to provide coverage to the Plaintiffs.

Although the preceding paragraph is the strict legal meaning of the term “law of the case,” it is likely that Plaintiffs are interpreting the term in a slightly different manner. Plaintiffs likely use the term “law of the case” to mean that the undersigned cannot overturn the ruling of a judge with coordinate jurisdiction. Even assuming Plaintiffs’ looser interpretation of the term, our decision was not in error. A Motion for Summary Judgment is seeking a finding from the court that “no genuine issue of...fact...could be established” or that a “party has failed to produce...facts...to be submitted to a jury.” Pa.R.C.P. No. 1035.2(1-2). However, a Motion for Declaratory Judgment is seeking for the court to determine “rights, status and other legal relations...” in a case. 42 Pa.C.S. §7532. While a different judge at the trial court level determined that Summary Judgment was not appropriate in this case because there could be issues of fact to be decided by a jury, our Declaratory Judgment relating to the rights of Plaintiffs in this case does not contradict or overrule the prior judge’s finding. Therefore, even by an informal definition of the “law of the case,” it had not been established in this case and our ruling did not go against it.

Because the law of the case had not been established, we did not commit an error by failing to follow it.

Plaintiffs’ next four allegations of error are all related to the Penn Prime policy. Plaintiffs’ second allegation of error is that our decision was against the evidence, which showed that the Penn Prime insurance policy contained provisions that could reasonably be interpreted to potentially bring the claims being made against Keystone and Mr. Ball within the terms of the Penn Prime policy. Plaintiffs’ third allegation of error is that our decision was against the evidence, which showed that the Penn Prime insurance policy contained ambiguities regarding coverage of Keystone and Mr. Ball relative to the claims of Ms. Dolegowski. Plaintiffs’ fourth allegation is that we erred in failing to find that the Penn Prime policy contained provisions that could cover Keystone and Mr. Ball for the claims made against them by Ms. Dolegowski. Plaintiffs’ fifth allegation is that we erred by failing to resolve any ambiguities in coverage against Penn Prime.

Plaintiffs allege that there are ambiguities in the Coverage Document and therefore the ambiguities should be resolved to provide coverage for Plaintiffs. (Concise Statement alleged errors Nos. 3 and 5). It is true that when a court determines that ambiguous language exists in an insurance contract, the ambiguity must be resolved against the insurer and be construed to provide coverage to the insured. *Rusiski v. Pribonic*, 511 Pa. 383, 515 A.2d 507 (1986). We disagree that the Coverage Document is ambiguous. Our discussion below of Plaintiffs’ other allegations explains how Plaintiffs clearly and unambiguously are excluded from coverage.

Plaintiffs allege the Coverage Document contains provisions that could cover them. (Concise Statement alleged errors Nos. 2 and 4). They argue the fire truck is covered because it is “mobile equipment” and not an “auto” as those terms are defined in Penn Prime’s Coverage Document. Interpretation of an insurance contract is a task performed by the court, rather than by a jury. *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 735 A.2d 100 (Pa. 1999). Case law guides us that in interpreting an insurance document, we should “...try to read policy provisions to avoid ambiguities...and not torture language to create them.” *Mitsock v. Erie Ins. Exchange*, 909 A.2d 828, 831 (Pa.Super. 2006) citing *Brosovic v. Nationwide Mut. Ins. Co.*, 841 A.2d 1071, 1073 (Pa.Super. 2004). The Auto Liability section of the Coverage Document is the applicable portion of the Coverage Document in this case. Plaintiffs’ own insurance company, Nationwide, denied coverage to Plaintiffs on the basis that the fire truck was a “Non Owned Auto.” (Stipulated Facts No. 57). Further, the fire truck at issue is listed on the Auto schedule of the Coverage Document. (Stipulated Facts No. 69). The fire hose struck by Ms. Dolegowski is not included in the definition of Mobile Equipment in the Coverage Document. (Stipulated Facts No. 74). Considering these facts in concert with the definitions in both the Mobile Equipment and Auto sections of the Coverage Document creates a clear understanding that the fire truck is an auto and the hose was simply a piece of equipment being carried by that auto. Therefore, the Auto section of the Coverage Document is the portion of the document to determine coverage for the Dolegowski suit. To accept Plaintiffs’ position that the Coverage Document is ambiguous regarding the classification of the fire truck would be torturing the language of the Coverage Document to create an ambiguity.

When reading the Auto section of the Coverage Document, the question of whether Penn Prime owes a duty of coverage to Plaintiffs becomes clear. The Penn Prime Coverage Document defines a Covered Party (in addition to West Park) as:

- (1) Anyone else is a Covered Party while using with your permission a Covered Auto you own, hire or borrow except:

...

- (ii) Someone using a Covered Auto while he or she is working in a business of selling, servicing, repairing or parking Autos...

(Coverage Document §V(A)(3)(b)(1)(ii))

It is undisputed that Plaintiffs were driving the fire truck to use as a demonstration in an attempt to make a sale. (Stipulated Facts Nos. 4, 27). Plaintiffs were engaged in the business of selling autos when they took the fire truck on the sales call and therefore are not covered parties within the plain language of the Coverage Document.

The General Liability section of the Coverage Document excludes coverage for any personal injury arising from the “entrustment to others of an Auto.” (Coverage Document §III(A)(2)(g)). However, this exclusion does not apply to injury arising out of the operation of any of the equipment listed in paragraphs (f)(1-3) of the Mobile Equipment definition. (Coverage Document §III(A)(2)(g)(5)). Plaintiffs argue that they are entitled to coverage because the fire hose struck by Ms. Dolegowski is a piece of mobile equipment. We do not need to reach the question of whether the hose is mobile equipment, because the language of the Coverage Document is clear that coverage will only be extended when the injury results from the *operation* of mobile equipment. When Ms. Dolegowski struck the hose it was not in operation, nor was it even attached to the water pumping system, it was simply lying on the highway. (Stipulated Facts No. 8). Clearly, the exclusion regarding entrusted Autos applies to the alleged injuries

in the Dolegowski suit.

Plaintiffs also make the argument that they are entitled to coverage because the General Exclusions do not apply to injuries resulting from the *handling* of property. (Coverage Document §V(A)(5)). However, this exception to the exclusion is not applicable because the hose was not being handled at the time the alleged injuries occurred.

BY THE COURT:

/s/Hertzberg, J.

**Borough of McKees Rocks v.  
Zoning Hearing Board of the Borough of McKees Rocks,  
Kim Wisnesky and Ron Wisnesky, and  
Workingmen's Beneficial Union of West Park**

*Zoning*

No. S.A. 09-000864. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.  
James, J.—April 6, 2010

**OPINION AND ORDER OF COURT**

This appeal arises from the decision of the Zoning Hearing Board of the Borough of McKees Rocks ("Board") dealing with a building on Property located at 1210 Vine Street in the Borough of McKees Rocks, Allegheny County, Pennsylvania. The Property has been owned by the Intervenor Workingmen's Beneficial Union ("WBU") since 1917 and is located in the R-1 district, a quiet residential neighborhood. However, WBU's use predates the Ordinance and is non-conforming since they use the Property as a private club, a C-1 use. Applicants Kim and Ron Wisnesky are purchasing the building subject to zoning approval. They propose to use it as a for profit group daycare for children with hours of operation of 7:00 a.m. to 6:00 p.m. The building would house two groups with 12 children in each group. The evidence establishes that parking is limited and the proposed use will significantly increase traffic in the area.

The Wisneskys filed an application for a special use on or about April 14, 2009. After a hearing on May 29, 2009, the Board granted it citing Ordinance 1330 Sections 5.700-c and 2.123. Both the Borough and WBU intervened. The Board found that a daycare facility is a special use and that it is more compatible with the residential character than the current use. It is from that decision that the Borough appeals.

When the trial court takes no additional evidence, the scope of its review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa. Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637 (Pa. 1983).

Ordinance 1330 Section 5.700-c states that "a non-conforming may be changed to another nonconforming use only if such change is more appropriate to the character of the District in which it is located as determined by the Zoning Hearing Board." Section 2.123 defines special use as "a use which because of its unique characteristics requires individual consideration in each case by the Board before a zoning permit may be issued." Special uses include schools, parks, playgrounds, firehouses, libraries and municipal buildings. The Board determined that daycare centers fall under the category of school, park and playground.

The Borough alleges that the Wisneskys failed to provide sufficient evidence that the proposed use is more appropriate than the former use. Specifically, they claim that they failed to fulfill the special use requirements of 5.106. Section 5.106 provides as follows:

Special uses, as enumerated in Schedule I, shall be permitted only upon authorization by the Zoning Hearing Board subsequent to review by the Planning Commission, provided that such uses shall be found, by the Zoning Hearing Board, to comply with the following requirements and other applicable requirements as set forth in this Ordinance.

- a. That the use is a permitted special use as set forth in Schedule I hereof.
- b. That the use is so designed, located and proposed to be operated that the public health, safety, welfare and convenience will be protected.
- c. That the use will not cause substantial injury to the value of other property in the neighborhood where it is to be located.
- d. That the use will be compatible with adjoining development and the proposed character of the zoning district where it is to be located.
- e. That adequate landscaping and screening is provided as required herein.
- f. That adequate off-street parking and loading is provided and ingress and egress is so designed as to cause minimum interference with traffic on abutting streets.
- g. That the use conforms with all applicable regulations governing the district where located, except as may otherwise be determined for large-scale developments.

The Board erred in finding that the Wisneskys fulfilled the special use requirements of Section 5.106 because a daycare is not a permitted special use in an R-1 District. Therefore, the decision of the McKees Rocks Zoning Hearing Board is reversed.

**ORDER OF COURT**

AND NOW, this 6th day of April, 2010, the decision of the McKees Rocks Zoning Hearing Board is reversed.

BY THE COURT:

/s/James, J.

**Hazel Baron and Brian K. Marshall v.  
Zoning Board of the Borough of Pleasant Hills  
and Borough of Pleasant Hills**

*Zoning*

No. S.A. 09-000015. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.  
James, J.—May 24, 2010

**OPINION**

This appeal arises from the decision of the Zoning Hearing Board of the Borough of Pleasant Hills (“Board”) dealing with Property located at 205 Clairton Boulevard in the Borough of Pleasant Hills, Allegheny County, Pennsylvania. The Property is developed with a two-story building. There is a vacant office on the first floor and a residence on the second floor. It is located along Route 51 in the Borough’s C-1 commercial district. The Property is owned by Appellant Hazel Baron, now deceased. On July 28, 2008, Appellant Brian K. Marshall, Hazel Baron’s nephew, applied for a variance from a provision of the Pleasant Hills Zoning Ordinance (“Ordinance”). Section 374-88(C) of the Ordinance, entitled “Off Street Parking”, states that “[i]n any district, no lot area shall be used for the parking and placing, either permanently or temporarily, of mobile homes, cap trailers, truck trailers, office trailers, house trailers or storage trailers to park trucks on the Property.”

Appellant sought approval to park commercial trucks on the Property. Hearings were held and the Appellant provided testimony and evidence in support of the variance request. Appellant explained that four tractor trailers were being parked on the Property, one belonging to him and two belonging to his employer, Walshak Truck Services. He also testified that he has been parking trucks on the Property for thirty-two years. Appellant claims that he does not need a variance because he has been parking trucks on the Property for thirty-two years. The Board denied the Appellant’s variance request. It is from that decision that the Appellant appeals.

Where the trial court takes no additional evidence, the scope of its review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa. Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637 (Pa. 1983).

Appellant failed to meet the burden imposed by Section 910.2 of the Municipal Planning Code (“MPC”). Section 910.2 provides that a variance applicant must satisfy the following criteria to be successful:

- (1) That there are unique physical characteristics or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
- (2) That because of the physical conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that authorization of a variance is therefore necessary to enable the reasonable use of the property.
- (3) That such unnecessary hardship has not been created by the appellant.
- (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
- (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification of the regulation in issue.

53 P.S. §10910.2.

Appellant did not present any testimony that the Property possesses unique physical characteristics or conditions which create an unnecessary hardship in developing it. Furthermore, Appellant failed to prove that the Property could not be developed in conformity with the Ordinance. To the contrary, the Property has a building on it which houses both a residential and a commercial use. The Appellant did not present evidence that the requested variance would not alter the essential character of the neighborhood. Parking of tractor trailers is prohibited and even though Route 51 is a busy corridor, it would alter the essential character of the neighborhood. The Appellant did not present evidence that the requested variance would represent the least modification necessary to afford relief. The Board correctly denied the variance request finding that the Appellant failed to satisfy the criteria for 53 P.S. §10910.2.

Appellant testified that he has been parking trucks on the Property in good faith for thirty-two years without complaint from the Borough and therefore is entitled to a variance by estoppel.

To establish a variance by estoppel, the property owner must prove:

- (1) The municipality’s failure to enforce the ordinance for a long period of time;
- (2) that the municipality knew, or should have known, of the illegal use and “actively acquiesced” in the illegal use;
- (3) reliance by the owner on the appearance of regularity that the municipality’s inaction has created;
- (4) hardship created by cessation of the illegal use; and
- (5) that the variance will not be a threat to the health, safety or morals of the community.

*Springfield Twp. v. Kim*, 792 A.2d 717, 721 (Pa. Cmwlth. 2002). Factors under the variance by estoppel theory must be established by clear, precise and unequivocal evidence. *Id.* The mere showing that a municipality has failed to enforce the law for a long period of time is insufficient in itself. *Skarvelis, supra*. The Board properly determined that the Appellant is not entitled to a variance under the doctrine of variance by estoppel. A review of the facts shows that the Property has been used for the parking of tractors

and trailers for several years. However, a 1978 Memorandum Opinion of the Pleasant Hills Planning Commission states that the tenant and the Property owner mutually agreed to ensure that the Property would not be used for the parking of tractor trailers. Therefore, Appellant's argument that he innocently relied on the Borough's acceptance of the parking situation, has no merit. Further, Appellant has not claimed to have made any expenditures in reliance of the parking situation.

Appellant also claims that he has established a continuous nonconforming use that started prior to the enactment of the applicable zoning ordinance. However, Appellant has not set forth any evidence that his proposed use of truck parking was ever a permitted use for the Property. Therefore, the Board correctly found that the Appellant was not entitled to any relief.

Based upon the foregoing, the Board's decision is affirmed and the Appeal is dismissed.

#### ORDER OF COURT

AND NOW, this 24th day of May, 2010, based upon the foregoing Opinion, the Zoning Board of the Borough of Pleasant Hills' decision is affirmed and the Appeal is dismissed.

BY THE COURT:  
/s/James, J.

### **Thomas Mills and Ronald Stall v. City of Pittsburgh Zoning Board of Adjustment, Stephen Tobe; and SM Tobe Enterprises, LLC**

#### *Zoning*

No. S.A. 09-001311. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.  
James, J.—June 17, 2010

#### OPINION

This appeal arises from the decision of the City of Pittsburgh Zoning Board of Adjustment ("Board") dealing with Property located at 816 Saint James Street in the Shadyside section of the City of Pittsburgh. Currently located on the Property is a two and one-half story, single-family dwelling owned by Intervenor Stephen Tobe and SM Tobe Enterprises, LLC ("Tobe") and is located in an R1D-VL Zoning District. The Appellants are Thomas Mills and Ronald Stall, owners of adjacent property located at 814 Saint James Street. Tobe purchased the Property in April of 2009 intending to substantially renovate it and was issued a building permit in June of 2009. After partially constructing a ten feet by ten feet and twelve feet high sunroom addition, Tobe was stopped by the building inspector because it violated the setback requirements of the City Zoning Code Section 903.03.A.2. Tobe submitted an application seeking a dimensional variance from that Code section which was granted by the Board. It is from that decision that the Appellants appeal.

Where the trial court takes no additional evidence, the scope of its review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa. Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637 (Pa. 1983).

The Board's findings are not supported by the evidence in this case. Section 903.03.A.2 of the Code sets the site development standard for the minimum rear setback at 30 feet in the R1D-VL Zoning District. The Board determined that the Intervenor presented sufficient evidence to support the granting of a dimensional variance.

Section 922.09.E provides that an applicant must satisfy the following criteria to be successful in securing a variance:

- (1) That there are unique physical characteristics or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
- (2) That because of the physical conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that authorization of a variance is therefore necessary to enable the reasonable use of the property.
- (3) That such unnecessary hardship has not been created by the appellant.
- (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
- (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification of the regulation in issue.

#### Section 922.09.E

The Board determined that Tobe's property contains unique physical circumstances or conditions which cause unnecessary hardship and that the unnecessary hardship is due to those conditions. They concluded:

The existing structure was built before this Code was enacted. The structure had a rear yard setback of 20 ft, where this Code requires 30 ft for new construction. This physical circumstance would create an unnecessary hardship, as the [Applicant] seeks to improve and enhance the structure located on the Subject Property.

See Board's decision Exhibit "A", Conclusion of Law 4a.

The Pennsylvania Supreme Court dealt with similar issue in *Larsen v. Zoning Board of Adjustment of the City of Pittsburgh*, 672 A.2d 286 (Pa. 1996). In that case, there was a similar fact pattern including a rear addition that would encroach upon a 30-foot rear setback. The property owners wanted to build a deck on the rear of their house that would result in a 12 foot setback. The Court determined that “the mere desire to provide more room for a family member’s enjoyment fails to constitute the type of ‘unnecessary hardship’ required by the law of this Commonwealth.” *Id.* at 290. Similarly, in this case, Tobe testified that the sunroom addition would “help sell the property”. This is not “unnecessary hardship.”

Regarding the second requirement, the Board stated that “[t]he [Applicant] would be barred from building a rear addition to his property if he strictly conformed to the rear yard setback requirements found in the Code.” See Board’s Conclusion of Law 4b. However, because there is a usable house on the Property, it is already fully developed in conformity with the Code. Tobe’s only limitation is that his addition may not encroach the setback.

As to the third requirement, the Board found that Tobe did not create the hardship because the property was nonconforming at the time of the Amendment of the Code concerning rear yard setback requirements. However, Tobe testified that the sunroom addition became necessary only after he remodeled the kitchen. Additionally, Tobe partially constructed the sunroom addition before he applied for a variance. The Commonwealth Court has found that an alleged hardship raised after construction is commenced without a variance is the creation of the owner. *Doris Terry Revocable Living Trust v. Zoning Board of Adjustment*, 873 A.2d 57, 64 (Pa. Cmwlth. 2005).

The Board also determined that the variance will not alter the essential character of the neighborhood or be detrimental to the public welfare. However, Appellant Thomas Mills testified that Tobe’s proposed sunroom addition would effect his privacy because he also has a sunroom. Additionally, Tobe’s proposed sunroom addition would reduce the size of his large backyard, a defining characteristic of the neighborhood.

Finally, the Board determined that the variance represents the minimum variance that will afford relief. They explained that because Tobe removed a 5 feet wide deck to build the sunroom, he only seeks 5 more feet which is a minimum dimensional variance. However, the evidence does not support this finding. The record does not state that Tobe’s house had a 5 foot deck. In fact, both Mr. Mills and Mrs. Carol Kamin testified that there was no deck behind the house only a small platform with steps leading to the backyard. Tobe’s contractor, Roman Gluzman testified that he removed a deck that was approximately four to five feet high from ground level.

Based upon the foregoing, the Board incorrectly granted a dimensional variance in this case and their decision is reversed.

#### ORDER OF COURT

AND NOW, this 21st day of June, 2010, based upon the foregoing Opinion, the decision of the City of Pittsburgh Zoning Board of Adjustment is reversed.

BY THE COURT:  
/s/James, J.

### Loretta J. Wahl v. Drew Perkins

#### Recusal

1. Mother sought to transfer a custody action from California to Pennsylvania, alleging that she and the children had moved to Pennsylvania. Litigation was still proceeding, however, in California with the trial court in California declining to relinquish jurisdiction. Mother also requested accommodations under the Americans with Disabilities Act, alleging that she was disabled by “legal abuse syndrome.” She had filed a contest to the registration of the out-of-state order, but never appeared before the Court at the scheduled argument time. She later presented a request to participate in the rescheduled court proceeding by telephone and after the argument, her contest was denied. She scheduled a request for reconsideration but failed to appear at the scheduled argument time.

2. Mother then filed a federal lawsuit against the presiding judge in Allegheny County, alleging that there had been a violation of her Americans with Disabilities rights. She requested that a different judge be assigned to her matter. This request was denied.

3. The issue of recusal requires a determination as to whether or not a substantial reasonable doubt exists as to the judge’s ability to preside impartially in a matter. The determination is left to the assigned judge’s discretion. In the matter before the court, the trial court had never seen either party and did not have a bias for or against either party. He had played no role in determining whether Mother’s request for accommodations was appropriate as this was an administrative decision made by the court administration.

4. The presiding court reminded us that unfounded charges of prejudice or unfairness made against a judge in the trial of a cause must not cause unfair delays in the legal process. The mere institution of a lawsuit against the judge is not a compelling reason for the judge to be disqualified. Misconduct on the requesting party’s part should not result in giving such party the power to select a judge to hear the matter.

(Christine Gale)

Loretta J. Wahl, *Pro Se* for appeal.

C. Kurt Mulzet for Plaintiff/Wife.

Jay A. Blechman for Defendant/Husband.

No. FD 06-9228-003.

In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Wecht, A.J.—April 23, 2010

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**OPINION**

Plaintiff Loretta J. Wahl [“Mother”] submitted a petition styled “Petitioner’s Petition to Disqualify Judge David N. Wecht.”<sup>1</sup> This Opinion addresses Mother’s request.

**Background and Procedural History**

This case first appeared before this Court on January 26, 2006, when Mother’s former attorney presented a “Petition to Seek Transfer of Jurisdiction.” Mother sought to transfer a custody action from California, where she and Defendant Drew Perkins [“Father”] had resided and where the parties’ litigation had been proceeding. Mother alleged that she and the children had now moved to Pennsylvania.

In accordance with the Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa. C.S.A. §§ 5401 et seq. [“UCCJEA”], this Court (with copies to the parties) contacted the California judge, who indicated that litigation was still proceeding in California. On March 10, 2006, Mother’s then-attorney presented a second petition to transfer jurisdiction. Again, this Court (with copies to the parties) contacted the California judge. That judge replied that a hearing was scheduled in California for June 2006, and accordingly declined to relinquish jurisdiction. This Court could not assume jurisdiction over the custody litigation unless and until the California court was willing to relinquish it. 23 Pa. C.S.A. at § 5423 (a).

Neither party sought substantive relief from this Court for over three years thereafter.<sup>2</sup> Apparently, the parties continued litigation in California. Then, in August 2009, a non-lawyer “advocate” working for Mother began approaching various members of the court staff to indicate that Mother wanted some accommodation(s) under the Americans with Disabilities Act, 42 U.S.C.A. §§12101 et seq. [“ADA”]. On her accommodation request submitted to Court administration, Mother alleged that she was disabled by “legal abuse syndrome.”<sup>3</sup> In the meantime, Mother filed several papers with the Department of Court Records, but never presented them in this Court. These filings included a Petition for Custody Contempt (August 3, 2009), a second Petition for Custody Contempt (August 9, 2009), and a praecipe for a hearing to contest the registration of a foreign order (August 26, 2009). On August 19, 2009, court administration informed Mother that she was not entitled to a hearing on her ADA request. Also on August 19, Mother’s then-attorney presented a Petition for Leave to Withdraw. No one appeared to oppose, and this Court granted the Petition.

On September 22, 2009, Mother filed a “Contest to the Validity of Registered Out-Of-State Custody Order” with the Department of Court Records, but never presented it to this Court. Mother gave notice that she would present a “(Proposed) Order Regarding Petitioner’s Application for Hearing Date Pursuant to 23 Pa. C.S.A. 5445 (d)” before this Court in September 29, 2009 Motions session. On that date, Mother failed to appear, but Father’s attorney did. Indeed, Mother has never appeared in person before the undersigned Member of this Court.

On October 27, 2009, court administration advised this Court that it was requesting that Mother be allowed to present a motion via telephone on November 2, 2009, although court administration was not granting specific ADA accommodations for Mother. Although advance leave of Court is required prior to presentation of argument or testimony by telephone,<sup>4</sup> this Court consented to the request, in deference to court administration. Accordingly, on November 2, 2009, Mother presented, via telephone, a “Supplemental Application to Petitioner’s Previous Application for Hearing Date Pursuant to 23 Pa. C.S.A. 5445 (d).” Father’s attorney appeared. After argument, Mother’s “supplemental application,” which sought generally to contest registration of California orders, was denied.

Mother (or someone on her behalf) signed up to present another motion on December 16, 2009. However, on December 6, 2009, Mother informed this Court by fax that she was withdrawing her motion because court administration had not granted her ADA accommodation request. Mother then scheduled herself to present a Motion for Reconsideration on January 5, 2010. However, Mother failed to attend the Motions session, although Father’s attorney did. The motion was denied.

On January 7, 2010, the undersigned member of this Court received a summons for a federal lawsuit commenced by Mother against both the undersigned Judge and the Court of Common Pleas. Mother alleges that there has been a violation of her ADA rights related to an unspecified and unstated disability. A motion to dismiss is pending.

Some time after the federal lawsuit was filed, Mother contacted the President Judge, requesting that a different judge be assigned to her custody case. On February 16, 2010, the President Judge forwarded the request to the undersigned member of this Court in the undersigned’s capacity as Administrative Judge for the Family Division. On February 23, 2010, a staff member wrote to Mother to inform her of the proper procedure for requesting recusal.

Accordingly, on March 17, 2010, Mother or someone on her behalf signed up to present her “Petitioner’s Petition to Disqualify Judge David N. Wecht.” Prior to the Petition’s presentation, Mother hired an attorney who argued the petition and advised that he had been retained for the limited purpose of the recusal motion.<sup>5</sup> This Court heard argument, took the petition under advisement, and now issues this Opinion and Order.

**Discussion and Analysis**

When the issue of recusal is raised by a party, the judge must determine if there is “substantial reasonable doubt” as to the judge’s ability to preside impartially. *Steinhouse v. W.C.A.B.*, 783 A.2d 352, 356 (Pa. Commw. 2001). Only the judge being asked to recuse may properly respond to the request, as recusal is a matter of individual discretion. *Id.* It is the duty of the assigned judge to determine whether that judge can hear and dispose of the case fairly and without prejudice. *Reilly by Reilly v. SEPTA*, 489 A.2d 1291, 1300 (Pa. 1985). The judge’s determination of the issue is final unless there is an abuse of discretion. *Id.* at 1299. Our Supreme Court also has mandated consideration of “the successful administration of justice,” warning that judges must guard against unfounded charges of bias which might cause cases to be “unfairly prejudiced [or] unduly delayed.” *Id.*

This Court has considered its ability to preside impartially and is convinced that it can. This Court has never seen Mother or Father. This Court has no bias for or against either party. To this Court’s knowledge, neither Mother nor Father has ever come before this Court. Mother did appear via telephone on one occasion. She was treated the same as any other party would be treated in Motions session.

This Court realizes, candidly, that there is a credible argument that Mother’s interposition of a federal lawsuit against this Court necessarily creates an appearance that this Court cannot be impartial. This is the principal argument that Mother’s attorney made. After careful consideration, this Court disagrees.

The gravamen of Mother’s federal complaint appears to be that ADA accommodations were not provided to her. This Court played no role in determining Mother’s ADA request as that decision is made by court administration.

In any event, from Mother’s federal complaint, it becomes clear that at least part of Mother’s reason for filing her federal suit is that she was unhappy with this Court’s decision in denying her November 2, 2009 request for relief. If Mother disagreed with

this Court's November 2 Order, Mother could have moved for reconsideration, or, if appropriate, appealed this Court's decision to the Superior Court. Indeed, Mother did in fact sign up to present a motion for reconsideration, but she failed to appear for presentation of that Motion. Instead, Mother filed a federal lawsuit against this state judge and this state court.

Mother's tactic squarely implicates the problem of which our Supreme Court warned in *Reilly*. There, the Court emphasized that:

there is...an important issue at stake; that is that causes [of action] may not be unfairly prejudiced, unduly delayed, or discontent created through unfounded charges of prejudice or unfairness made against the judge in the trial of a cause. It is of great importance to the administration of justice that such should not occur. If the judge feels that he can hear and dispose of the case fairly and without prejudice, his decision will be final unless there is an abuse of discretion. This must be so for the security of the bench and the successful administration of justice. Otherwise, unfounded and oftentimes malicious charges made during the trial by bold and unscrupulous advocates might be fatal to a cause, or litigation might be unfairly and improperly held up awaiting the decision of such a question or the assignment of another judge to try the case. If lightly countenanced, such practice might be resorted to, thereby tending to discredit the judicial system.

*Reilly*, 489 A.2d at 1299.

It is patent and obvious that our judicial process will implode if a litigant can obtain the recusal of a judge simply by filing suit against the judge. The cases are legion. *See, e.g., In re: Disqualification of Hunter*, 522 N.E.2d 461, 462 (Ohio 1988) (litigant named trial judge in two federal lawsuits); *State v. Brown*, 355 S.E.2d 614, 622 (W.Va. 1987) (defendant named trial judge in federal suit); *Smith v. Smith*, 564 P.2d 1266, 1270 (Ariz. App. 1977) (husband in divorce named presiding judge in civil suit for damages).

Allowing a litigant to manufacture a judge's recusal by filing a lawsuit against that judge permits litigants to engage in judge shopping. It permits litigants to avoid adverse rulings without the necessity of engaging in the appellate process. This is a dangerous precedent. It should not be encouraged:

[T]here is a compelling policy reason for a judge not to disqualify himself at the behest of a party who initiates litigation against a judge. In the absence of genuine bias, a litigant should not be permitted to "judge" shop through the disqualification process. The orderly administration of justice would be severely hampered by permitting a party to obtain disqualification of a judge through the expedient of filing suit against him.

*Los v. Los*, 595 A.2d 381, 385 (Del. 1991) (internal citation omitted).

Another Pennsylvania trial court stated:

The greatest possible caution should be exercised before a trial judge recuses himself for factors arising out of conduct initiated by a party or its counsel, particularly where that conduct appears to be deliberate and improper or appears to be calculated to initiate a dispute with the court. Misconduct should not be rewarded by (in effect) giving the wrongdoer the power to select the judge or judges before whom it is willing to appear.

*Sprague v. Walter*, 22 Pa. D&C.3d 564, 580 (C.P. Phila. 1982).

It appears that Mother was unhappy with this Court's denial of her motion and has opted to use a federal lawsuit as a pretext to request this Court's recusal. In a sense, the easier path would be for the undersigned to grant Mother's petition and be done with it. But this Court does not have that luxury. This Court is particularly concerned about the precedent that would arise. Any litigant who is unhappy with a decision could file a lawsuit against the presiding judge in order to fabricate a reason for recusal. In a busy Family Division, such actions would grind the judicial machinery to a halt. Chaos would ensue.

This Court will not contribute to such a result.

Although there is no Pennsylvania litigation pending between the parties currently, this Court is satisfied that it can hear and dispose of such litigation without bias or prejudice if and when Mother returns to this Court. All cards are on the table.

An Order in accordance with this Opinion follows.

#### ORDER OF THE COURT

AND NOW, this 23rd day of April, 2010, following due consideration, and for the reasons set forth in the accompanying Opinion, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff's Petition to Disqualify Judge David N. Wecht is DENIED.

SO ORDERED.  
BY THE COURT:  
/s/Wecht, A.J.

<sup>1</sup> Mother has proceeded *pro se* at most times relevant to this Opinion and Order. Her instant Petition was submitted *pro se*. Prior to argument, Mother retained Kurt Mulzet, Esquire, who indicated he was appearing solely for the purpose of presenting Mother's recusal petition. This Court expresses no opinion herein as to whether a lawyer can limit his or her appearance in such a fashion or whether, instead, a motion for leave to withdraw is required.

<sup>2</sup> Mother did present "Petitions for Issuance of Subpoenas" through her then-attorney on March 18, 2008, December 17, 2008, January 13, 2009, and January 23, 2009. Those petitions requested subpoenas to be issued to take depositions of Pennsylvania residents for use in the California custody litigation. This Court granted those petitions.

<sup>3</sup> Mother's non-lawyer "advocate" claimed to represent an organization styled "Legal Victims Assistance Advocates, LLC." The "advocate's" fax cover sheet referred to the organization's website, [www.lvaallc.com](http://www.lvaallc.com) (last checked April 23, 2010).

<sup>4</sup> *See, e.g., Pa. R.C.P. 1930.3.*

<sup>5</sup> *See supra* note 1.

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## CAPSULE SUMMARIES

### Barry P. Kent v. Louise E. Kent

#### *Equitable Distribution—Alimony—Home Schooling*

1. The parties were married for over seventeen years and were the parents of two minor children. During the marriage, the parties had made a decision for the wife to cease her employment as a public school teacher in order to remain at home and home school the children. The parties made significant changes in their financial lifestyle in order to accommodate this decision.

2. When the parties separated and were divorcing, the wife requested that she receive alimony so as to remain at home and continue home schooling the children. The trial court denied this request and determined that the wife needed to return to the work force and become self-supporting. The court opined that the joint agreement made during the marriage that the wife would be unemployed and remain home to home school the children was a decision that was made based on the fact that the parties enjoyed an intact marriage and were able to make sacrifices when only one household was being maintained. This decision was not akin to an enforceable oral contract between the parties. Alimony was awarded based on what the wife's alleged and reasonable needs were and only for a duration that would facilitate her return to the work force. Had the wife's request been granted, her return to the work force would have been delayed for such a significant time that it would render her finding employment at that time much more difficult.

3. The wife's argument that the children had benefited from home schooling was not persuasive as no evidence was presented that the children would suffer academically or socially if they were moved to a traditional educational setting. The wife's request would also render neither party able to accumulate funds for their children's college educations or for the parties to save meaningfully for their own retirement. Based on the fact that the parties were separating and divorcing, the prior decision regarding home schooling was no longer sustainable.

(Christine Gale)

*Avram Y. Rosen* for Plaintiff/Husband.

*Deborah L. Lesko* for Defendant/Wife.

No. FD 05-009452-008.

In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Bubash, J.—February 3, 2010.

### Mahendra Shukla v. Suman Pandey

#### *Equitable Distribution—Earning Capacity—Child Support*

1. The parties were married in India in 1998 and their child was born in 1999. They separated in 2005 when the wife took the child to India for several months and returned without the child as the child's passport had expired. The husband retrieved the child and returned with the child to the former marital residence. A divorce decree was issued in 2007, with the wife remarrying and obtaining employment with an annual salary of \$90,000. She then bore another child with her second husband and quit her employment. She testified that her earning capacity was more than a prior earning of \$25,000 that she enjoyed but less than the most recent earning of \$90,000. The husband also remarried and then moved to Norway. He had enjoyed earnings of approximately \$85,000 but was unemployed at the time of trial.

2. Both parties testified as to their present difficulties in obtaining lucrative employment with the court determining that each enjoyed earning capacities of approximately \$30,000. An equal distribution of the marital estate was ordered. The wife's purported dowry payments were not considered as a large portion of the payment was allegedly made to the husband's parents with the remainder being reflected in the parties' investments that were considered in equitable distribution.

3. The wife's request for the application of the nurturing parent doctrine so as to avoid imputing her with any earning capacity was denied as the wife had enjoyed a long employment history and admitted to an earning capacity. There was no evidence as to the unavailability of third parties who could provide child care while the wife would be employed. Further, the wife was engaged in an active employment search and intended to return to the work force. The wife's request for reimbursement of summer camp fees for the child while the child was in India was denied after consideration of the husband's expense in traveling to and from India to retrieve the child.

(Christine Gale)

*Timothy J. Gricks* for Plaintiff/Husband.

*Hilary Kinal* for Defendant/Wife.

No. FD 05-00812-004. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Hens-Greco, J.—May 4, 2010.