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OPINIONS

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PLJ

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Opinions

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Edward Smith and Nancy Smith v. Casey J. Bonincontro and Stephanie Bonincontro

Prescriptive Easement—Statute of Limitations—Expert Testimony—Hearsay—Pleadings

Court ruled removal of expanded prescriptive easement beyond the easement found and assessed costs for removal charging the encroaching party. Encroaching party appealed to Appellate Court. A number of issues were addressed by the trial judge in his opinion.

No. GD 15-13214. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—November 10, 2021.

OPINION

Plaintiffs Edward Smith and Nancy Smith have owned their home in Collier Township, known as 1086 Gregg Station Road, since 1985. Defendants Casey J. Bonincontro and Stephanie Bonincontro purchased land next to the Smiths in 2012 and began constructing their home, known as 1090 Gregg Station Road, in 2015. Both properties are part of an unrecorded plan of lots that shows a twenty foot wide alley running along the northern boundary of both properties. This alley provides the only access from the Bonicontros property to Gregg Station Road. Mr. and Mrs. Smith initiated this litigation in August of 2015 after Mr. and Mrs. Bonincontro recorded a sanitary sewer easement that crossed the twenty foot wide alley. The relief requested in the Smiths' complaint included a declaration that the sanitary sewer easement is invalid due to the Smiths' property rights in the alley that it crossed.

When Mr. and Mrs. Bonincontro purchased their land in 2012, there was a very narrow, unpaved driveway, cartway or "cart path" connecting it to Gregg Station Road. Mr. and Mrs. Bonincontro subsequently placed geo mesh and gravel over the cart path and also widened it. After Mr. and Mrs. Smith had a survey done of their land that showed the widened cart path encroached on to their land by at least 12.6 feet, they were permitted to file an amended complaint with a trespass court. Mr. and Mrs. Smith dismissed claims against three defendants (the parents of Casey Bonincontro and Joseph Cooper) and agreed to the entry of summary judgment in favor of a fourth (Collier Township Municipal Authority). The case having been assigned to me following recusals by two other judges, I presided over the non-jury trial of the dispute that became exclusively about the trespass claim against Casey J. Bonincontro and Stephanie Bonincontro.

My July 28, 2021 verdict requires Mr. and Mrs. Bonincontro to, at their expense, remove and restore four feet of the encroaching driveway/cart path and remove encroaching shrubs and stones from their southern and western boundaries with Mr. and Mrs. Smith. Mr. and Mrs. Bonincontro filed a motion for post-trial relief, which I denied. They then entered judgment on my verdict, filed an appeal to the Superior Court of Pennsylvania and filed a concise statement of errors complained of on appeal ("concise statement" hereafter). In accordance with Pennsylvania Rule of Appellate Procedure 1925(a), this opinion addresses each error that I supposedly made.

The Bonincontros first contention is that I made an error by ordering them to remove and restore a 4'x120' portion of the cart path because it is part of their prescriptive easement. See concise statement ¶s a and b. I agree that a prescriptive easement exists for the cart path as it was configured before the Bonincontros purchased their land in 2012. However, when they widened it they encroached on the Smiths' property. Both Mr. and Mrs. Smith credibly testified the Bonincontros used geo mesh and gravel to significantly widen the cart path that runs to their property. See transcript of nonjury trial, May 20, 2021 ("T." hereafter), pp. 58, 60, 122, 123 and 124-125. On the other hand, Mrs. Bonincontro's denial that the cart path moved or changed (see T., p. 166) was not credible. Clearly the area of the cart path to be removed is not within the twenty foot wide alley shown in the unrecorded plan but instead is on the Smiths' side of their boundary line. See trial exhibit 1, boundary survey by John R. Smoker of Mackin Engineers & Consultants dated November 2020. Mr. and Mrs. Bonincontro had no right to expand the cart path on to the Smiths' land, and the Smiths' right to have this encroachment removed and the land restored to its previous condition is absolute. See Dodson v. Brown, 70 Pa. Super. 359 (1918) and Ochroch v. Kia-Noury, 345 Pa. Super. 161, 497 A. 2d 1354 (1985). Hence, I correctly ordered the removal and restoration of a portion of the cart path.

The Bonincontros next contention is that I made an error by ordering them to pay for the removal and restoration of the 4'x120' portion of the cart path and the optional relocation of it into the twenty foot wide alley. See concise statement, ¶s a, b and c. They argue "Pennsylvania law requires the cost of relocation to be borne by the party that seeks the relocation, i.e. Plaintiffs/Appellees." Id. This flawed argument appears to be premised on the ruling in Soderberg v. Weisel (455 Pa. Super 158, 687 A.2d 839 (1997)) that the beneficiary of the relocation bears its cost. This reliance on Soderberg is mistaken. In Soderberg the parties agreed there was an easement by prescription for farm equipment that ran next to the Soderbergs' home. They were granted relocation of the easement to an area of their land away from their home to reduce the risk to their young children but were required to bear the entire cost of the relocation. In the dispute between the Smiths and the Bonincontros the Bonincontros do not have a prescriptive easement over the 4'x120' portion of the cart path that must be removed. Unlike the Weisels' easement in Soderberg, the Bonincontros had no right to expand the cart path on to the Smiths' property and the Smiths have an absolute right to have this encroachment removed. See Dodson and Ochroch, supra. Therefore, I was correct to order the Bonincontros to pay for the removal, restoration and optional relocation of the encroaching 4'x120' portion of the cart path.

The Bonincontros next contention is that I made an error "by refusing to dismiss Plaintiffs' Trespass Claim that was barred by the statute of limitations. "Concise statement, ¶ d. The statute of limitations for trespass of real property is two years. See 42 Pa.C.S. §5524(4). Mrs. Smith testified the widening of the cart path on to the Smiths' land via the geo mesh and gravel had not been done as of the time Mr. and Mrs. Bonincontro started building their home. See T., pp. 80-81. Mrs. Bonincontro was not challenged in testifying that the home's foundation was constructed in September of 2015. See T., p. 161. Hence, the widening of the cart path occurred no earlier than September of 2015, giving the Smiths until at least September of 2017 to make the trespass claim. Since the Smiths' amended complaint with the trespass count was filed in February of 2017, the claim for trespass for widening the cart path was not barred by the statute of limitations.

The Bonincontros next contention is that I made an error by ordering removal of the shrubs and stones because this relief was not requested in the amended complaint. See concise statement, ¶ e (i). The available scope of a party's proof will be extended when objections are not made to general pleading allegations. See Reynolds v. Thomas Jefferson University Hosp., 450 Pa. Super 327, 676 A.2d 1205 at 1209 (1996). The amended complaint states in general terms that "the Plaintiffs are seeking the reclamation

of their rightful property boundaries...." ¶s 94 and 95. While the Bonincontros filed preliminary objections, they were nullified because the Bonincontros failed to submit them to the court for a decision. Therefore, this is a situation where objections were not made to general pleading allegations and the Smiths are permitted to extend their proof to the encroachment by the shrubs and stones. The modern rules of pleading and practice emphasize "the determination of cases based upon their merits rather than based on mere technicalities, which policy, for example, may allow a party to cure a variance by offering, during or after trial, to amend the pleadings to conform to the proof." Reynolds, supra. During the trial in the subject dispute, when counsel for the Bonincontros objected that encroachment by the river rocks had not been pled, counsel for the Smiths offered to amend the complaint again. See T., pp. 72-73. Therefore, it was appropriate for me to determine the merits of the claim of encroachment by the shrubs and stones. In addition, "if the defendant is not misled, and the variance does not in any way affect the trial on its merits, or set up a different cause of action, or impose any different burden on the defendant, the variance will not be considered material." Higgins Lumber Co. v. Marucca, 59 Pa. Super. 405, 48 A.2d 48, 49-50 (1946). Rather than being misled, the Bonincontros had to be on notice that encroachment by the shrubs and stones would be at issue during the trial. Mrs. Smith testified to informing the Bonincontros' attorneys at her first deposition that their clients planted trees on a portion of the property in question. See T., p. 61. In October of 2020 when surveyor John Smoker initially met with the Bonincontros, their attorneys and Mr. Smith, Mr. Smoker was asked to determine if shrubbery and river rocks were encroaching on the Smiths' property. See T., pp. 4-5. The parties agreed to accept Mr. Smoker's boundary locations and use them for the purpose of trying to reach a global settlement. See T., pp. 24-25, 35 and 159. Since the other conditions set forth in Higgins Lumber, supra. were also clearly satisfied, I was correct in ordering removal of the shrubs and stones.

The Bonincontros also contend that my ordering removal of the shrubs and stones was erroneous because the Smiths offered insufficient evidence at trial to support this form of relief. See concise statement, ¶ e(ii). However, Mr. Smoker's survey (trial exhibit 1) indisputably shows that the shrubs and stones are on the Smiths' property, and Mrs. Bonincontro agreed the survey shows they are on the Smiths' property. See T., pp. 183-184. Mrs. Bonincontro also admitted the shrubs and stones were installed by a corporation owned by the Bonincontros or by Mr. Bonincontro. See T., p. 185. With undisputed evidence the shrubs and stones encroach on the Smiths' property and the Bonincontros installed them, there was sufficient evidence for me to order their removal.

The Bonincontros next contention is that I made an error by "refusing to strike from the record and by considering points raised for the first time in Plaintiffs' post-trial submissions, such as Plaintiffs Proposed Findings of Fact, which cited to no trial evidence and relied exclusively on inadmissible hearsay and deposition transcripts that were never offered or admitted into evidence at trial." Concise statement, ¶ f. Plaintiffs' proposed findings of fact, which is document 116 in the Department of Court Records electronic docket, consists of proposed findings of fact signed by Plaintiffs' attorney, three surveys that were admitted into evidence during the trial, the affidavit of Edward Smith, the Smith Family request for judgment relief, the transcript of the April 23, 2021 deposition of Case Bonincontro and the transcript of the April 22, 2021 deposition of Stephanie Bonincontro. The proposed findings of fact and affidavit of Edward Smith portions of document 116 for the most part contain facts supported by testimony and other evidence from the trial. The Smith Family request for judgment relief informed me of all of the relief requested. I had asked the Smiths for this at the end of the trial. See T., pp. 189-191. In arriving at the verdict, I carefully considered all of the relief requested in this portion of document 116. I did not grant the majority of the relief requested, but the Smith Family request for judgment relief provided me with those remedies contained in the verdict. While the deposition transcripts were not offered into evidence during the trial, testimony from the depositions was referenced at least two times during the trial. See T., pp. 122-123 and 127-128. Since I do not find any of the information in document 116 scandalous or impertinent, there is not basis to strike it from the record. Also, in reaching my verdict, I considered only facts put forth at the trial and did not consider the deposition transcripts or inadmissible hearsay. At the time the Bonincontros objected, document 116 had not been served on me and I had not had the opportunity to read much of it. See transcript of emergency status conference of June 30, 2021, pp. 10 and 14. I informed counsel that I would have to read the document before deciding whether I would consider anything in it. See Id., pp. 14-15. Once I read it, I only considered the Smith Family request for judgment relief in reaching my verdict. Therefore, I made no error relative to Plaintiffs' proposed findings of fact.

The Bonincontros final contention is that I made an error "by admitting into evidence during trial inadmissible hearsay and opinion testimony from a non-expert lay witness." Concise statement, ¶ g. In Defendants' motion for post-trial relief, trial transcript pages 54-55, 61-62, 117-118 and 122-123 supposedly have this inadmissible hearsay being admitted into evidence by me. See Defendants' motion for post-trial relief, ¶ 5g. At pages 54-55, the hearsay objection is to statements by the Collier Township Municipal Authority. However, I had earlier sustained that hearsay objection (see T., p. 53). The witness apparently did not understand my ruling and kept trying to testify to these statements. Since I previously ruled it was hearsay, I ignored the witness testimony as to the statements by the Collier Township Municipal Authority. At pages 61-62, the hearsay objection is to Mrs. Smith testifying that at her first deposition she mentioned to the Bonincontros counsel that their clients planted trees on a portion of the property that is in question. Since this statement is offered to prove the Bonincontros had notice of this claim and not for the truth of the matter asserted, it is not hearsay. See Pennsylvania Rule of Evidence 801(c)(2). At pages 117-118 Mr. Smith began to testify about a conversation between the predecessor owners of the parties' properties, but I sustained the hearsay objection. See T., pp. 117-119. At pages 122-123, the hearsay objection is to Mr. Smith testifying as to Mr. Bonincontro's testimony during his deposition. As I explained (see T., pp. 127-128), the testimony falls within the hearsay exception for an opposing party's statement. See Pennsylvania Rule of Evidence 803(25). As to the opinion testimony from a non-expert lay witness, Defendants' motion for post-trial relief identifies transcript pages 55 and 57. Mrs. Smith testified sewage backed up into the Smiths' basement when debris went down a manhole in the cart path. However, consistent with Pennsylvania Rule of Evidence 701 ("Opinion Testimony by Lay Witnesses"), I ruled that Mrs. Smith could testify only as to her observations and could not give an expert opinion. See T., pp. 52-57. In any event, the testimony ultimately was not relevant to my verdict that awarded the Smiths no monetary damages and gave the Bonincontros a prescriptive easement over the existing cart path in the vicinity of the manhole. Therefore, I made no errors relative to hearsay or expert testimony.

BY THE COURT:
/s/Hertzberg, J.

Date: November 10, 2021

Commonwealth of Pennsylvania v. Vincent Smith

Criminal Appeal—Legality of Sentence—Discretion of Court at Sentencing—Consecutive Sentences—Waiver—Unit of Prosecution

Trial court sentenced defendant to consecutive sentences for arson where subsection charged permitted separate sentences for each individual harmed or placed at risk as a result of the offense conduct. Defendant appealed arguing that the Court could only impose a single sentence for the offense of Arson.

No. CC 8964-2018. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—April 6, 2022.

OPINION

This is a direct appeal wherein the defendant, Vincent Smith, appeals from the judgment of sentence of June 30, 2021 which became final on September 20, 2021 when post-sentencing motions were denied. Pursuant to a negotiated guilty plea, the defendant pled guilty to two counts of voluntary manslaughter and four counts of Arson, in violation of 18 Pa.C.S.A. §3301(a)(1)(i). This Court sentenced the defendant to consecutive terms of not less than five years nor more than ten years in prison relative to the Voluntary Manslaughter convictions. Four consecutive terms of not less than four years nor more than eight years in prison relative to the Arson convictions. The aggregate term of imprisonment imposed in this case was not less than 26 years nor more than 52 years in prison. Post sentencing motions were filed and were denied by this Court. A timely appeal followed and the defendant raises the following lone issue:

> This Honorable Court erred in imposing multiple sentences for [the defendant's] convictions for arson pertaining to multiple endangered persons where the statute providing for the offense, properly construed according to the rules of statutory interpretation, provide for a single sentence regardless of the number of victims.

The facts of this case, as admitted by the defendant during his guilty plea colloquy, are as follows:

On February 26, 2018, two officers from the Swissvale Police Department and two officers from the Allegheny County Police Department reported to a residence at 103 Penfield Place in the City of Pittsburgh in an effort to locate a missing person. The officers entered the residence to perform a welfare check. As they entered through the basement, the officer heard someone from upstairs say, "Steve's not here." The officers walked toward the voice and observed the defendant striking matches and tossing them on the floor. The matches started an instant fire and the fire began traveling down the stairs toward the officers. The officers immediately exited the residence and took positions on the outside of the residence. The defendant was eventually rescued by firemen and taken to the hospital to be treated for smoke inhalation. The dead bodies of two males were recovered from the residence, including the person the officers were seeking as a missing person. Both persons had obvious trauma to the back of their heads and their deaths were ruled as homicides.

While in the hospital, the defendant was interviewed by detectives. The defendant admitted that he got into an altercation with the two men found in the residence. He statedthat he was attacked by the men and he fought back. He further admitted that he through them down a flight of steps and assaulted them by banging their heads on the steps and basement floor. He covered them with blankets and bags. He further told the detectives that he wanted to kill himself so he took some pills and spread lighter fluid all over the residence.

The defendant levels a legal challenge to the consecutive sentences imposed at the arson counts on the basis that the arson statute permits one sentence regardless of the number of victims who are endangered by the defendant's conduct. This Court does not believe that the defendant raised this specific issue in his post-sentencing motions though it was addressed during the argument on the motions. Where an issue is not raised during the sentencing proceedings or in a timely post-sentence motion, it will be waived. See Commonwealth v. Shugars, 895 A.2d 1270, 1274 (Pa.Super.1992). Issues regarding the legality of a sentence are never waived and may be reviewed on appeal. See Commonwealth v. Hughes, 986 A.2d 159, 161 (Pa. Super. 2009).

Recently, the Pennsylvania Supreme Court addressed an issue similar to that raised in this case in Commonwealth v. Satterfield, 255 A.3d 438 (2021). The defendant in Satterfield had been convicted of multiple counts of Accident Involving Death or Personal Injury for leaving the scene of an accident that resulted in the death of three victims. Satterfield was sentenced to three consecutive terms of not less than three but not more than six year's imprisonment at those convictions. Satterfield argued that the three separate sentences were illegal because the crime of which he was convicted encompassed only the act of not remaining as the scene of an accident regardless of the number of victims. The Superior Court affirmed Satterfield's sentence. The Supreme Court, however, reversed the Superior Court and vacated two of the sentences. The Pennsylvania Supreme Court explained that the central inquiry is the "unit of prosecution:"

> We must therefore determine what our General Assembly fixed as the unit of prosecution for a violation of Section 3742(a). The unit of prosecution is the actus reus that the General Assembly intended to punish. Put otherwise, the unit of prosecution is the minimum conduct that must be proven to obtain a conviction for the statute in question. Only a single conviction and resulting punishment may be imposed for a single unit of prosecution. As this Court has indicated, "[t]o determine the correct unit of prosecution, the inquiry should focus on whether separate and distinct prohibited acts ... have been committed." Commonwealth v. Davidson, 595 Pa. 1, 938 A.2d 198, 216 (2007).
>
> To determine the intended unit of prosecution, we must engage in statutory interpretation. Commonwealth v. Wisneski, 612 Pa. 91, 29 A.3d 1150, 1152–53 (2011). The best expression of legislative intent appears in the plain language of a statute. Commonwealth v. Peck, —— Pa. ——, 242 A.3d 1274, 1279 (2020) (citation omitted). Words of a statute "shall be construed according to rules of grammar and according to their common and approved usage." 1 Pa.C.S. § 1903(a). "[W]hen the words of a statute are clear and unambiguous, there is no need to look beyond the plain meaning of the statute under the pretext of pursuing its spirit." Commonwealth v. Brown, 603 Pa. 31, 981 A.2d 893, 897 (2009).

Id. at 445-446.

The Satterfield Court further explained that

> The unit of prosecution for a Section 3742(a) conviction does not depend upon the results of the accident, including the number of victims or the severity of their injuries. Section 3742(a) makes it a criminal offense for the "driver of any vehicle involved in an accident resulting in injury or death of any person" to remain at the scene until the duties set forth in Section 3744 are fulfilled. 75 Pa.C.S. § 3742(a) (emphasis added). Related provisions of the Vehicle Code, including Sections 3743 and 3745, likewise require every driver to stop if "involved in an accident" that results in any damage or injury whatsoever. Pursuant to Section 3743, the driver of a vehicle "involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person" must stop and perform her duties under Section 3744, and Section 3745 imposes the same obligations on a driver who "collides with or is involved in an accident with any vehicle or other property which is unattended resulting in any damage to the other vehicle or property." 75 Pa.C.S. §§ 3743, 3745 (emphasis added).
>
> Based upon this statutory language, it is solely involvement in an accident that triggers the obligation to stop and remain at the scene. Wisneski, 29 A.3d at 1153. This obligation applies to every driver involved in an accident, and in no respect does the obligation depend upon whether the driver caused the accident (directly or indirectly). The relevant statutory language in Section 3742(a) includes no indication that the General Assembly intended for a violation to be based upon consideration of who caused an accident or its results. To the contrary, the phrase "involved in an accident" is repeatedly used without exception in the "hit-and-run" statutes (Sections 3742, 3743 and 3745). In contrast, we note that Section 3742.1 of the Vehicle Code18 makes it a criminal offense if a driver without a valid driver's license "caused an accident resulting in injury or death of a person." 75 Pa.C.S. § 3742.1(a)(1) (emphasis added). By using the word "involved" in Section 3742(a) rather than "caused," the General Assembly's clear intent was to have the statute apply to every driver with a nexus to the accident, not just the driver who caused it. See Commonwealth v. Lowry, 55 A.3d 743, 750 (Pa. Super. 2012) (citing Wisneski).

Id. at 448-449 (emphasis in original).

Considering the Pennsylvania Supreme Court's guidance in Satterfield, this Court believes that the consecutive sentences imposed on the defendant in this case were proper. The statute at issue in this case, 18 Pa.C.S.A. §3301(a)(1)(i) provides:

> (a) Arson endangering persons.—
>
> (1) A person commits a felony of the first degree if he intentionally starts a fire or causes an explosion, or if he aids, counsels, pays or agrees to pay another to cause a fire or explosion, whether on his own property or on that of another, and if:
>
> (i) he thereby recklessly places another person in danger of death or bodily injury, including but not limited to a firefighter, police officer or other person actively engaged in fighting the fire; or
>
> (ii) he commits the act with the purpose of destroying or damaging an inhabited building or occupied structure of another.
>
> (2) A person who commits arson endangering persons is guilty of murder of the second degree if the fire or explosion causes the death of any person, including but not limited to a firefighter, police officer or other person actively engaged in fighting the fire, and is guilty of murder of the first degree if the fire or explosion causes the death of any person and was set with the purpose of causing the death of another person.

The Arson Endangering Persons statute at issue in this case is specifically focused on the individual risk of death or serious injury caused to the individual persons identified in the statute by the defendant's conduct. This Court believes that the unit of prosecution for this offense is the commission of an arson that specifically recklessly places another person in danger of death or bodily injury. The unit of prosecution is not limited solely to the commission of an arson, otherwise subsection (A)(1)(i) would be superfluous. On the contrary, the legislature intended that the unit of prosecution include consideration of the individual risk of harm caused by arson. As set forth in Satterfield, it was "solely the involvement in an accident that triggers the obligation to stop and remain at the scene". Id. at 448. In this case, it isn't the arson that triggers the crime. To be found guilty to Arson Endangering Person, the statute specifically requires proof of both an arson and that an enumerated person be placed in danger of death or bodily injury from the arson. Accordingly, the unit of prosecution provides for separate counts if multiple persons are victimized by an arson. The proper interpretation of the statute, therefore, permitted this Court to impose separate sentences for each victim endangered by the defendant's conduct.[1]

To find otherwise would yield an absurd result. For example, section (2) of that statute specifically informs that a person who commits Arson Endangering Persons specifically commits Murder of the Second Degree if the death of any person results. The Commonwealth of Pennsylvania could not be limited to file only one murder count if multiple persons died as a result of an arson.

For the foregoing reasons, the judgment of sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: April 6, 2022

[1] The facts of this case demonstrate that the defendant was aware of the presence of multiple first responders before he started the fire. In addition, it is reasonable to infer that anyone setting a fire to a building would know that multiple first responders would likely appear at that location.