

Supreme Court At-a-Glance – October 2005

By: **Edited by John-Mark Turner**

Domestic Relations

Berg v. Berg No. 2005-002
Interlocutory Appeal from Hillsborough – North, October 18, 2005

Holdings:

- (1) Parental rights do not automatically override child's privacy interests in confidential therapy records.
- (2) Children may claim therapist-client privilege, RSA 330-A:32.
- (3) In custody dispute, trial court, not custodial parent, has authority to determine whether to waive child's therapist-client privilege.

A divorced father without physical custody of his children filed a motion for contempt, contending the mother alienated the children and interfered with his visitation. The mother cross-moved for modification of visitation. A guardian ad litem was appointed. The father requested the records of the children's therapists, asserting they would demonstrate the mother's interference with visitation. After the therapists opined that releasing the therapy records to the father was not in the children's best interests, the GAL moved to seal the records. The father objected. The Superior Court denied the motion to seal, reasoning a custodial parent's rights to his children's medical records overrode the children's privacy interests, even if the parent's access would be harmful to the children.

On interlocutory appeal, the Supreme Court, Duggan, J., the Supreme Court *reversed*. The Court rejected the father's argument that his constitutional rights to raise his children as he saw fit trumped his children's privacy rights in their therapy records. In particular, when the Superior Court determines a parent's access is not in the best interests of the child, the court has the authority to seal the records. The Court went on to an extensive discussion of the therapist-client privilege in RSA 330-A:32, concluding that the statute does grant the privilege to children, and that, in the context of a custody dispute, the trial court has discretion to determine whether assertion or waiver of the privilege is in the child's best interest. The Court outlined several factors for the trial court to examine when considering waiver of the privilege.

Arvenitis v. Arvenitis No. 2004-887
Appeal from Strafford County, October 18, 2005

Holdings:

- (1) Voluntary retirement twelve years after divorce decree may constitute unanticipated or unforeseeable change in circumstances warranting modification of alimony award.
- (2) *Laflamme v. Laflamme*, 144 N.H. 524, 527 (1999), clarified. Only change that is *both* actually anticipated *and* foreseeable is excluded from definition of "changed circumstances."
- (3) Whether change was "actually anticipated" is a factual finding that must be based on evidence.
- (4) Party who voluntarily retires prior to the age of sixty-five must carry "significant burden" to demonstrate changed circumstance warranting alimony modification.

The parties divorced in 1992. The final stipulation provided for alimony to the wife of \$500 per week. In 2004, ex-husband planned to retire and petitioned to terminate the alimony payments. The Superior Court denied the petition, reasoning that the husband could not claim that his eventual retirement was not foreseeable at the time of the divorce.

The Supreme Court, Nadeau, J., *vacated* and *remanded* for factual findings on whether the husband's retirement was "actually anticipated" at the time of divorce. The Court noted that in *Laflamme* it had ruled

that if a change in a party's condition is "both anticipated and foreseeable at the time of the decree" it does not constitute a "changed circumstance" that would warrant revisiting the alimony award. The Court held that the trial court erred by ruling, in essence, that a voluntary retirement would never constitute changed circumstances because it is always "reasonably anticipated to occur." Instead, the trial court should have heard evidence on whether the husband actually anticipated retiring at the time of the decree. Finally, the Court provided several factors to guide a decision on whether an unforeseeable or unanticipated voluntary retirement constitutes a changed circumstance. Citing Florida precedent, the Court noted, however, that a party retiring before the age of sixty-five carries a significant burden to demonstrate he or she has experienced changed circumstances justifying alimony modification.

McCarthy v. Wheeler No. 2004-777
Appeal from Plymouth Family Division, October 18, 2005

Holdings:

- (1) Failure to hold hearing on ex parte domestic violence TRO within five days as required by RSA 173-B:4, I, results in dismissal of the temporary order, unless the delay was caused or requested by the defendant.
- (2) Failure to hold hearing on domestic violence petition within thirty days as required by RSA 173-B:3, VII, results in dismissal of the petition, unless the delay was caused or requested by the defendant.

Plaintiff secured an ex parte domestic violence temporary restraining order against Defendant on August 13, 2004. An August 26 hearing on the TRO was continued because the presiding judge recused himself. The hearing on the TRO was merged with an October 12 hearing on the merits of the domestic violence petition. The Defendant moved to dismiss the temporary order and the petition on the ground that the hearing was untimely. The trial court denied the motion.

Justice Dalianis, for the Court, *reversed*. The Court ruled that the time limits established in RSA 173-B:3, VII, and 173-B:4 are mandatory. Unless the delay is caused or requested by the Defendant, trial court's failure to hold a hearing within five days (in the case of an ex parte TRO) or thirty days (for a hearing on the merits) must result in dismissal. The Court observed, however, that a domestic violence petition based on the same allegations could be refiled after such a dismissal.

Broderick, C.J., joined by Galway, J., dissented. The dissent agreed that the time limits were violated, but would have ruled that dismissal is not the appropriate remedy, absent a showing of prejudice, given the importance of the statutory goal of protecting victims of domestic violence.

Wrongful Injunction/Damages

Mahoney v. Town of Canterbury No. 2004-507
Appeal from Merrimack County, October 18, 2005

Following a remand from Mahoney v. Town of Canterbury, 150 N.H. 148 (2003), the parties appealed the trial court's calculation of damages for wrongful injunction. In particular, the defendant contended the trial court should have awarded it overhead expenses; the plaintiff argued the trial court erroneously reinstated an award of lost profits without first holding an evidentiary hearing.

The Court, Dalianis, J., *affirmed in part, vacated in part, and remanded*. The Court clarified that its holding in *Mahoney I* did not preclude an award of overhead that was "specifically attributable to the interruption of its logging operations," and remanded for factual findings on that issue. The Court affirmed on plaintiff's cross-appeal, reasoning that *Mahoney I* did not call into question the trial court's award of lost profits, which was not clearly erroneous in light of previously submitted evidence.

Wills

In re Estate of Fischer No. 2004-719
Appeal from Hillsborough County Probate Court, October 19, 2005

Holding:

(1) The Probate Court's finding that the witnesses signed the will in the testatrix's presence was clearly erroneous.

The testatrix, dying of cancer and bedridden, executed her will in November 2002. The witnesses signed the will on a porch outside the testatrix's house, not in her presence. A daughter and granddaughter of the testatrix contested the validity of the will. The probate court ruled the will was validly executed.

Justice Galway, for the Court, *reversed and remanded*, concluding that the only evidence presented at trial demonstrated that the witnesses signed the will on the porch, not in the room where the testatrix lay in bed. Because the evidence did not establish that (1) the testatrix could have "readily . . . seen and heard what the witnesses were doing, had she been so disposed" or (2) the witnesses were so near the testatrix that she was conscious of where they were or what they were doing, the probate court's finding of valid execution was clearly erroneous.

Negligence/Motor Vehicles

Appeal of New Hampshire Department of Transp. No. 2004-119
Appeal from New Hampshire Board of Claims, October 28, 2005

Holdings:

- (1) Yellow warning lights on State-owned snow plow are "emergency lights" for purposes of the right-of-way provision in RSA 265:6-a, II.
- (2) State-owned snowplow correctly using warning lights had right of way.

At the end of a snowstorm, the claimant, in a private vehicle, collided with a plow. The claimant filed in the Board of Claims for \$3000 in property damage. At the time of the accident, the plow had its yellow warning lights on and was as far to the right on the road as was possible. The Board eventually determined that the point of impact was on the center line and that claimant was at least partially at fault for failing to take adequate evasive action. Nevertheless, the Board held the State liable for a portion of the property damage.

The Court, Broderick, C.J., *reversed*. The Court first ruled that the warning lights constituted "emergency lights" as that term is used in RSA 256:5-a, II, which provides that private drivers must yield the right-of-way to official vehicles working on the highway and displaying emergency lights. Since the claimant had a duty to yield, and since the collision occurred on the center line, the State was not at fault.

Criminal

State v. Gubitosi No. 2004-110
Appeal from Belknap County, October 28, 2005

Holdings:

- (1) Defendant did not have a reasonable expectation of privacy in his cell phone records.
- (2) Without reasonable expectation of privacy in phone records, Defendant did not have standing to challenge overbreadth of subpoena issued to cell phone company
- (3) Sufficient evidence existed to support a guilty verdict on a stalking charge.
- (4) Course of conduct element of stalking, RSA 633:3-a, I(a), is satisfied by a communication intended to be imparted to victim, even if communication is not directly with victim.

The Defendant was charged with one count of stalking his ex-girlfriend. Prior to trial, the prosecution subpoenaed the Defendant's cell phone records from the cell phone company. The State presented the phone records to show Defendant made a telephone call to a restaurant where his ex-girlfriend was eating. The State also presented testimony that Defendant's car was seen circling the parking lot. The Defendant was convicted.

The Supreme Court *affirmed*, with Justice Duggan writing for the majority. First, the Court rejected the Defendant's argument that the phone records should be suppressed as an unreasonable, warrantless search. Applying the reasonable expectation of privacy framework it adopted in *State v. Goss*, 150 N.H. 46, 47 (2003), and relying on its pen-register case, *State v. Valenzuela*, 130 N.H. 175 (1987), the Court ruled that the Defendant had no reasonable expectation of privacy in phone records he never possessed. Second, the Court refused to allow Defendant to challenge the scope of the subpoena, which sought all phone records in a four-month period prior to the day of the alleged stalking. The Court reiterated that a defendant has standing to challenge the introduction of evidence when (1) possession of the evidence is an element of the charged crime, or (2) the defendant has a reasonable expectation of privacy in the place searched or thing seized. Since Defendant had no reasonable expectation of privacy in his phone records, he did not have standing to challenge their introduction. Third, the Court ruled the evidence was sufficient to support the conviction. Fourth, the Court rebuffed Defendant's contention that his telephone call to the restaurant did not satisfy the intimidating "course of conduct" element of RSA 633:3-a, 1(a), since he never actually spoke to his girlfriend, but rather her friend. Relying on the plain language of the statute, the Court held that any communication intended to impart a message to the victim satisfies the "course of conduct" element.

Chief Justice Broderick specially concurred to voice his continued disagreement with the result in *State v. Goss*, 150 N.H. 46 (2003), which held that the defendant in that case had a reasonable expectation of privacy in the contents of his garbage, and to invite the Legislature to consider whether telephone billing records should be exempt from prosecutorial subpoenas.

Justices Nadeau and Galway, dissenting, would have ordered that the phone records be suppressed. The Justices opined that "when a person communicates information to the telephone company in order to use its services, that person has a reasonable expectation of privacy in the information conveyed." The dissent would have overruled *Valenzuela*.

State v. Barkus No. 2004-742
Appeal from Salem District Court, October 31, 2005

Holdings:

- (1) Notwithstanding Defendant's post-trial request for findings of fact and rulings of law, District Court did not err in not providing findings and rulings when neither party requested them before trial.
- (2) "Fruit of the poisonous tree" doctrine is constitutional in application, so that a preliminary breath test ruled inadmissible because of statutory violation would not be considered a "poisonous tree."
- (3) Defendant's voluntary consent to full breath test prevented test from being tainted by prior inadmissible inculcating statements given in violation of *Miranda*.
- (4) State was not obligated to prove I-93 was a public way; trial court could take judicial notice.

The Defendant was charged with DUI. Without Miranda warnings she gave several incriminating statements. The officer administered a preliminary breath test, though he did not give the advisory required by RSA 265:92-a, 1. Defendant subsequently consented to a breath test at the Windham police station, which she failed. The State conceded the results of the preliminary breath test were inadmissible, and the District Court suppressed the incriminating statements. The Defendant was convicted based on the Windham breath test results.

Justice Dalianis, for the Court, *affirmed*. Defendant first contended the trial court should have issued written findings of fact and rulings of law under RSA 491:15. The Court disagreed, observing that Defendant did not request findings and rulings prior to the trial. The Court then rejected Defendant's argument that the results of the Windham test were "fruit of the poisonous tree" of the inadmissible preliminary breath test and incriminating statements. The Court disagreed, ruling that that the preliminary breath test was inadmissible only because of a statutory violation that could not trigger the poisonous tree doctrine. As for the incriminating statements, the Court held that the voluntariness of the Windham test cut-off any taint from the earlier *Miranda* violations. The Court distinguished *State v. Gravel*, 135 N.H. 172 (1991), where *Miranda* violations led to a search warrant that turned up incriminating evidence,

because in that case there was no intervening act of free will on the part of the defendant. Finally, the Court dismissed summarily Defendant's claim that District Court Rule 1.22 required the State to prove that I-93 was a public way, finding that the trial court could take judicial notice of the fact.

Lawyer Discipline

Wolterbeek's Case No. LD-2005-002
Original Jurisdiction, October 31, 2005

Holdings:

- (1) Where an attorney engaged in multiple business dealings with a client, without disclosing his interest to the client, and then filed a false and misleading bankruptcy petition for the client, the appropriate sanction was disbarment
- (2) The passage of time since occurrence of the misconduct is not a mitigating factor in discipline cases.
- (3) Prior disciplinary offenses constitute an aggravating factor, even if the charged misconduct occurred before the prior disciplinary offenses.
- (4) Court was not bound by agreement for two-year suspension negotiated between respondent and the Attorney Discipline Office ("ADO")

The respondent-attorney represented a client in a divorce. The client was awarded the family business, a convenience store and gas station, which were mortgaged. After the divorce, the mortgagee foreclosed upon the store and station. Without disclosing his interest, respondent purchased the mortgage from the bank through a partnership and had his client quitclaim the property to the partnership in satisfaction of the mortgage. The respondent later took several loans out on the property, cashing out significant equity. In addition, prior to the issuance of the quitclaim deed, when the client was still record owner of the property, the respondent filed a bankruptcy petition on behalf of the client. In the accompanying schedules, respondent did not disclose that the client still owned the store, nor did he disclose that his partnership had acquired the mortgages on the property. He made other false and misleading statements in the bankruptcy pleadings. The respondent and the ADO stipulated to five violations and agreed to a two-year suspension.

On review of the recommended sanction, the Supreme Court, Duggan, J., *ordered disbarment*. The Court, applying the ABA Standards for Imposing Lawyer Sanctions, first classified respondent's misconduct and noted in each instance that respondent intended to enrich himself or his family at the expense of his client. Such an intent, the Court ruled, warranted disbarment.

The Court then examined the mitigating and aggravating factors. It concluded that the respondent demonstrated true remorse for his behavior, as evidenced by the stipulation entered into with the ADO. The Court declined to consider the passage of time since the misconduct (eight or nine years) as a mitigating factor and went on to find several aggravating factors, including multiple offenses and past disciplinary infractions (though they occurred after the misconduct charged). The Court observed that while it "accorded considerable weight" to the agreement reach between the ADO and the respondent, it was not bound by the agreement. Given the seriousness of the violations and the aggravating factors, disbarment was appropriate.

Contracts—Ambiguity

Greenhalgh v. Presstek, Inc. Nos. 2004-576, -716
Appeal from Hillsborough – South

Plaintiff is former CEO of Defendant. Upon beginning work for Defendant, Plaintiff signed a "Split Dollar Agreement," whereby Defendant would pay the premium for life insurance on Plaintiff, but upon Plaintiff's death would be reimbursed for the premiums out of the death benefit. The Agreement terminated when "[Plaintiff] terminates his employment with Presstek, Inc. for any other reason but retirement." Plaintiff was later removed as CEO and negotiated a Separation Agreement. The parties disputed whether Defendant remained obligated to continue paying the life insurance premiums or whether the Split Dollar

Agreement had terminated when Plaintiff left his employment. Plaintiff brought a declaratory judgment action. The Defendant counterclaimed for refund of the premiums it had already paid. The Superior Court ruled that the Split Dollar Agreement had terminated upon Plaintiff's separation from the Company. It denied the counterclaim. The parties filed cross-appeals.

The Court, Dalianis, J., *affirmed*, rejecting Plaintiff's argument that the termination provision was only triggered when Plaintiff initiated the separation from employment. The Court found the provision ambiguous. Noting that under his employment agreement, Plaintiff would not be entitled to any benefits if terminated for cause, the Court observed that Plaintiff's construction of the Split Dollar Agreement led to the contradictory and, thus absurd, result that he would be entitled to life insurance benefits even after a for-cause dismissal. On the cross-appeal, the Court agreed with the Superior Court that Defendant had not articulated a legal theory or presented any evidence that would entitle it to a refund of the premiums it paid.