

Lex Loci: A Survey of New Hampshire Supreme Court Decisions

by Charles A. DeGrandpre

It was the American satirist Ambrose Bierce who defined an appeal as: "In law, to put the dice into the box for another throw."¹ This witticism might well describe the feelings of appealing parties (and, for that matter, the trial judges below) when confronted with an appeal to the current supreme court. This is a court that is not afraid of reversing, in whole or in part, the decision of the lower tribunal from which the appeal is made. To the author, there seem to be a surprising number of reversals in the supreme court's recent decisions. In June for example, although not a typical month, out of six decisions, four were reversals, either in whole or in part. Whether this is an aberration, or, as Bierce would have it, simply a run of the dice, is a development that will stand watching. Indeed, in a couple of instances in the last few months, the court has, in effect, "reversed itself," by wholly withdrawing (instead of writing a revised opinion upon rehearing) opinions that it had previously issued. See *Simpson v. Calivais*, decided November 23, 1993 and *State v. Fahy*, decided June 22, 1994.

An unexpected example of the court's second-guessing tendency is *In Re: Gina D.*, decided July 21, 1994. The court had taken an appeal from a squalid abuse and neglect proceeding under RSA 169-C where the superior court had found that the two-year and ten-month-old infant had been abused and that the father was the perpetrator of the abuse. The district court had earlier found that the child had been abused by the father and the superior court, at a *de novo* civil hearing, agreed. The superior court judge relied, in part, upon the testimony of a child and adolescent therapist, holding a master's degree, who concluded that the respondent had sexually abused his daughter. The therapist based her conclusions on observations of the daughter's behavior, her emotions, and verbal and non-verbal disclosures made by the daughter during the therapist's evaluation. There was, of course, conflicting expert opinion in the superior court and a three judge majority of the supreme court ruled that the trial judge had erroneously admitted the therapist's conclusionary testimony because "[e]xperts in the field of behavioral science dispute the reliability and validity of diagnoses of sexual abuse based on behavioral characteristics of the child." Justice Johnson, a former trial judge himself, writing for he and Justice Horton, would have admitted the evidence, pointing out that this was a judge tried civil case and not a criminal proceeding decided by a jury (see *State v. Cressy*, 137 N.H. 402 (1993)) and concluding that "[he was] of the firm opinion that in abuse and neglect proceedings our superior court can separate the wheat from the chaff in accepting or rejecting an expert's conclusion."

In *Shafmaster v. Shafmaster*, decided May 16, 1994, a split supreme court reversed a trial court's decision in an appeal that asked the court "to review the unhappy circumstances of a divorce property settlement." The usual rule, not surprisingly relied upon by the trial court, would not have allowed the reopening of the property settlement agreement but the supreme court held that the wife had been defrauded by out-of-date financial information given to the wife by the defendant. The divorce was a no-fault

divorce proceeding settled without litigation. The majority placed a great deal of emphasis on the unique circumstances of the case where the wife had met with the defendant's attorney (a social friend of the plaintiff and the defendant for several years) and had relied upon his recommendation to "work out a settlement with the defendant to avoid having the divorce deteriorate into litigation." Subsequently, in the course of the proceedings, the defendant's attorney put the plaintiff's attorney on notice that she should not rely on the values placed upon the defendant's assets in the disclosed financial statements but he did not provide updated financial information. Because the parties obtained a waiver of the financial disclosure statements required by superior court rule 158, the defendant's fraud did not come to light until much later. The court ruled that the defendant had committed fraud since "[o]pinions of value, if made to mislead, are fraudulent representations." The majority also held that in all future cases "the full disclosure provisions of superior court rule 158 are mandatory and may not be waived by parties or the court." The court's decision seems to hinge upon "[r]he unique circumstances involved in ending a marriage on 'no-fault' grounds and equitably dividing their property by agreement [which] enhance the parties' obligation to deal with each other fairly and truthfully." Justice Thayer, speaking for himself and Justice Horton, would have precluded any reopening of the property settlement agreement, particularly because the plaintiff's own attorney testified that she had taken "as a red flag" the refusal of the defendant's attorney to stand by the value of assets in the financial information given to the plaintiff.

An unexpected affirmance, instead of a reversal, is the case of *Breagy v. Stark*, decided May 19, 1994. This is a case that is a moral on why attorney professionalism has gone the way of the buggy whip. In a highly contested automobile collision case in which the plaintiff had a claim for loss wages, the plaintiff authorized the defendants, subject to several restrictions, to obtain **limited** portions of his employment records. However, in violation of those restrictions, the defendants issued a subpoena to the employer, obtaining the entire employment records. The plaintiff was never given notice by the defendants of the subpoena, which in fact required the employer to appear as if for a deposition. The defendants argued that notice to the plaintiff was not required and they boldly stated at oral argument before the supreme court that they did not intend to, nor did they ever, conduct a deposition in connection with the subpoena, but only used it as a sham to obtain possession of the documents. In any event, the sham worked and evidence from the restricted portions of the employment was admitted. The supreme court surprisingly affirmed, reasoning that the evidence from the employment records was relevant and could have been otherwise obtained upon valid discovery in any event. It is not clear if any sanctions were imposed by the trial court upon the defendants' attorneys, but there is no language in the supreme Court opinion condemning the defendants' unprofessional practice. Even if sanctions other than suppressing the evidence were imposed, the defendants' ruse worked and the evidence was tellingly used against the plaintiff.

A few cases can be noted in passing. *State v. Reynolds*, decided May 24, 1994, establishes the rule that a statutory change which increased the number of years from 2 to 4 under RSA 651 :20 (which permits prisoners to petition for sentence suspension)

enacted after the date of the defendant's crime and sentencing is a violation of the *ex post facto* law (New Hampshire Constitution, part I, article Z3). In *In re Sky D.*, decided June 7, 1984, the supreme court held that where a natural father of a child is, in fact, known to the mother of the child, the father must be given notice before the adoption of the child can be legally approved, even though the father did not file a timely notice of his claim of paternity under RSA 170-B:5-a, I (c). The case of *In The Matter Of Unamed Attorney And Unamed Title Company*, decided July 27, 1994, arose from a petition filed by the Committee on Professional Conduct to demand a financial audit of a title company under supreme court Rule 50A:4 relating to audits of attorneys' financial records. The title company was wholly owned by an attorney and his spouse, who are the only members of the board of directors of the company as well as the only officers. The court held that the audit rule applied because there was a "substantial nexus between the New Hampshire lawyer and the entity in question so that it is reasonable that the committee be permitted to audit the entity's records."

The arcane jargon of "neither party docket markings" was before the court in *Cathedral of the Beachwoods, Inc. v. Pare*, decided March 31, 1994, where the court held that a docket marking of "Judgment for neither party. No interest. No costs. No further action for the same cause" precludes further litigation involving the same factual situation under the doctrine of *res judicata*. The author can well remember the first time he ever heard the full phraseology of neither party docket markings and it seemed to him then, as it still does now, to be a magical incantation to the gods of litigation.

The changing membership of the court resulted in a changed rule in *Rooney v. Fireman's Fund Insurance Company*, decided July 6, 1994. The question was whether the defendant insurance company had a valid workman's compensation lien on the proceeds received under the uninsured motorist provision of the plaintiffs automobile insurance. The supreme court distinguished its earlier opinion in *Merchants Mutual Insurance Group v. Orthopaedic Professional Association*, 124 N.H. 648 (1984) and now held that "when an employee receives uninsured motor's benefits including compensation, medical, hospital, or other remedial care already paid or agreed or awarded to be paid. . . under [the Workers' Compensation Law]'. . . such a recovery **is a double recovery**" (emphasis added). The court based its decision mainly on statutory changes since its earlier decision. See RSA 281-A: 13, I.

In a May 11, 1994 *Opinion of the Justices*, the supreme court torpedoed a proposed bill to limit SLAPP (Strategic Lawsuits Against Public Participation) suits. SLAPP suits "are civil lawsuits filed against non-governmental individuals in groups, usually for having communicated with a government body, official, or the electorate, on an issue of some public interest or concern." SLAPP suits are often filed in zoning cases, taxation cases, civil liabilities cases, etc. and "seek to retaliate against political opposition, attempt to prevent future opposition and intimidate political opponents, and are employed as a strategy to win an underlying economic battle, political fight, or both." Such suits are becoming increasingly frequent and many states have enacted SLAPP suit laws to limit or end quickly such lawsuits and SLAPP suit legislation is pending in many states. The proposed New Hampshire statute would allow the judge, upon motion, to dismiss a

SLAPP suit without a hearing unless the judge determines that this is a probability that the plaintiff would prevail on the merits. Relying upon our strong New Hampshire constitutional provision guaranteeing a right to jury trial found in part I, article 20 of the New Hampshire Constitution which speaks of the right to a jury trial as being "sacred," the court held that the proposed bill would violate this constitutional provision. The court did acknowledge the problems raised by such suits and expressed its "profound concern with abuse of the judicial system by lawsuits designed to intimidate citizens and exact a price for participation in the democratic process" but the court ringingly held that the proposed "solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group." Are the benefits of an appointed lifetime judiciary free from the pressure of politicians and the electorate?

State v. Carroll, decided July 22, 1994, is a murder case in which the defendant was "buried" by his own mother, a policewoman. The issue before the supreme court was whether the defendant's confession was voluntary. Admittedly, the circumstances in this case are unique. The 19 year old defendant's confession occurred at the hands of a ruthless cross examination by his mother, a municipal police officer who participated in her son's interview at a local police station which was being conducted by a state police sergeant and a local municipal police officer. The defendant asked for his mother's presence [his big mistake!] and the officers made clear at the beginning that the mother's participation in the interview was to be as the "defendant's mother, not as a police officer, and that, although she was not to assist the police in their interrogation, she was free to do anything she wanted as the defendant's mother." Participate she did. She began "to aggressively question her son," using a raised voice. The son began to cry and one of the police officers testified that it was one of the most emotional and intense interrogations that he had ever witnessed. The supreme court later described the mother's action as "overbearing questioning that precipitated the crucial admissions during the interrogation...Without [the mother's] frenzied, emotional and insistent questioning of her son, the defendant may well not have confessed...Our constitution would not tolerate such conduct by a state actor, but here [the defendant's mother] conducted herself in her private capacity as a mother. . ." Since there was no state action, the supreme court upheld the voluntariness of the defendant's confession.

Remember the series of Perry Mason mysteries titled "The Case of the..."? *State v. Little*, decided July 14, 1994, might well be titled "The Case of the Reluctant Prosecutor." As do many television audiences, the author disagrees with the outcome of this case which involved a prosecutor's conduct in connection with a plea bargain. The case began when the defendant attempted to negotiate a plea bargain with the prosecutor and reached an agreement, which was then rejected by the superior court before the defendant entered into any guilty plea. The prosecutor then promised the defendant that he would make the same recommendation as before if the defendant would plead guilty (a "naked" plea), leaving his fate to the mercies of the trial judge. The defendant accepted the bargain, pleaded guilty, but at the sentencing hearing the prosecutor broke his agreement and recommended, and the court imposed, a higher sentence' then the sentence previously agreed upon by the prosecutor. The defendant appealed and in an earlier decision, the supreme' court sent the case back to the trial

court for re-sentencing, directing the prosecutor to "make the sentencing recommendation agreed to during negotiations for defendant's 'naked plea.'"

At the second sentencing hearing, the prosecutor formally recommended the agreed upon prison term but did everything he could to undercut the recommendation forced upon him by the supreme court. The prosecutor, in fact, referred to the supreme court's order when making his recommendation thereby inferring that he was doing only what he was ordered to do. He pointed out that the victim thought that the defendant should "get 18 and a half thousand years." He referred to certain mitigating factors in the following phrase: "I guess you would consider [these other considerations] mitigating factors" and otherwise distanced himself from the plea bargain. He presented a long list of aggravating factors and described the defendant's crimes as "very serious ones" deserving "very serious punishment" and the trial judge complied. The supreme court took a surprisingly tolerant view whether the prosecutor failed to honor the plea bargain holding that the evidence at the sentencing hearing, taken as a whole, did not support a finding of prosecutor misconduct. Almost acknowledging that it was caught between a rock and hard place, the court's decision reaffirms the old chestnut that hard cases make bad law.

Endnote

1. Bierce, *The Devil's Dictionary* 9 (1991).