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2019

BCLJ: 3/15/19 Vol. 27 No. 33

BEINING V. ZABLOCKI ET AL
(AD No. 15-10406, December 18, 2018, Yeager, J.)
Exclusive possession of oil and gas by a co-tenant does not require for a well to physically be drilled on the property.

MOLLICA ET UX V. WINEGARDNER-HAMMONS, INC. ET AL
(AD No. 16-10655, December 19, Doerr, P.J.)
When Plaintiff fails to notify Defendant of possible litigation and a duty of preservation of evidence, Defendant cannot be obligated to preserve evidence. When no other evidence is presented of negligence by Plaintiff, summary judgment in favor of Defendant is appropriate.

MITCHELL V. MITCHELL ET AL
(AD No. 16-10655, December 19, 2018, Doerr, P.J.)
A Shareholder has the right to review the books of a corporation, even when said shareholder is an Estate.

SPINK V. COUNTY OF BUTLER ET AL
(MsD. 18-40111, November 5, 2018, Doerr, P.J.)
An appeal nunc pro tunc is permissble when Plaintiff was in a medically induced coma during the appeal period.

WALKER V. KRESS
(FC No. 17-90586-C, October 1, 2018, Streib, J.)
A desire for pure 50/50 testimony can cause inconsistencies in testimony and place the other party in a light more negative than facts can support. Parents should work toward harmony to support the children, not just 50/50 custody.

HEDGES V. HEDGES
(FC No. 17-906186-C, October 1, 2018, Streib, J.)
Sole legal custody may be necessary in order to benefit the child. A history of conflict among parties and mental illness of a party may lead to sole legal custody being given to one parent.

BCLJ: 3/8/19 Vol. 27 No. 32

WARBURTON V. GAUDINO
(FC No. 04-90068-C, February 19, 2019, Valasek, J.)
A child's preference for relocation can be taken into account if child's reasons are articulate and not forced by either party.

FRNDAK-SUDER V. REISER
(FC No. 2012-90560-C, January 31, 2019, McCune, J.)
Court may consider the opinion of the evaluator, but it is not required to accept the conclusions when sufficient evidence exists to the contrary.

WATER STOPPERS, INC., V. SMITH ET AL
(AD No. 2018-10996, December 31, 2018, Doerr, P.J.)
An employment agreement that ended upon earlier termination is not binding upon future rehire of an employee.

IN RE: L.M.L.
(MsD. 18-40270, January 3, 2018, Doerr, P.J.)
The party requesting the name change of a minor child has the burden of showing by preponderance of the evidence that a name change is in the child's best interest. Matching mother's surname, when mother has sole legal and physical custody, is in the child's best interest in order to prevent confusion for the child during appointments and activities.

CUNNINGHAM V. MEHALICK ET AL
(AD No. 2018-10718, December 11, 2018, Doerr, P.J.)
Punitive damages, if sufficiently pled in a complaint, cannot be stricken via Preliminary Objection if all inferences reasonable deducible therefrom can lead to a question of fact.

TAMAYO V. TAMAYO
(FC No. 2017-90107-C, December 4, 2018, McCune, J.)
When half-siblings pose a danger to a minor child, custody may be appropriately awarded to the other party.

2018

BCLJ: 9/7/18 Vol. 27 No. 06

SKERTICH, ET AL. v. BUTLER AMBULANCE SERVICE COMPANY
(AD No. 2018-10193, July 12, 2018, Horan, A.J.)
When no evidence of emergency medical care is established, the Court cannot dismiss a case based upon the immunity accorded by the Emergency Management Services Act at thre preliminary objection stage. Preliminary objections as a demurrer alleging governmental immunity may only be granted when, on its face, the entity shows it is related to a political subdivision.

MITCH v. XTO, INC.
(AD No. 16-10505, July 4, 2018, Yeager, J.)
When the language of a contract is unambiguous, the court must affirm the clear language of the contract.

HANAK V. WOO'DN IT STUDIOS, INC.
(AD No. 17-10866, June 29, 2018, Horan, A.J.)
A corporate officer who participates in wrongful and injury producing conduct can be personally liable for his or her actions.

ADAMS v. WILDPRET, ET AL.
(AD No. 17-11044, June 21, 2018, Horan, A.J.)
The failure of an opposing party to file preliminary objections to preliminary objections which assert erroneous defenses, constitutes waiver of the procedural defect and allows the trial court to rule on the preliminary objections.

ADAMS v. WILDPRET, ET AL.
(AD No. 17-11045, June 21, 2018, Horan, A.J.)
When a patient seeks voluntary mental health treatment which is denied him or her by the treating physician or authorized person, the treating physician or authorized person cannot be sued for negligence provided there is no willful misconduct or gross negligence.

DAVISON V. KNIGHT
(FC No. 12-90312-C, May 16, 2018, Streib, J.)
Physical condition of a parent may have an impact on custody. But limitations on physical ability ,without more, may not necessarily impair ability to act as primary caregiver.

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BERNAUER V. FRISHKORN
(FC No. 16-90653, March 28, 2018, Streib, J.)
When both parties in a custody action are equally fit to parent, and no other circumstances lean toward one parent or another, the court shall award shared legal custody and shared physical custody.

PRINGLE V. YWCA USA, INC. ET AL.
(AD No. 17-10343, December 20, 2017, Horan, J.)
When no agency relationship exists between national organization and local organization, the national organization cannot be held vicariously liable.

VAN HOUTTE V. VAN HOUTTE
(FC No. 17-90028-C, November 16, 2017, Doerr, P.J.)
When parent and child no longer reside in County where action originated, it is appropriate for the court to transfer venue to an appropriate court of any other county where the action could originally have been brought or could be brought.

STEPANIAN V. BROOKSTONE CONDOMINIUM ASSOCIATION
(AD No. 15-10458, November 16, 2017, Horan, J.)
When Defendant is responsible for maintenance, repair, and replacement of Plaintiff's driveway due to it being a common area, it can be held liable for failure to maintain, repair, and replace said area under the Pennsylvania Uniform Condominium Act.

SCHERER V. WALL
(FC No. 17-90532-C, November 14, 2017, Doerr, P.J.)
When relocation will result in emotional betterment of the children and no adverse motivation is present from either party, relocation will be allowed.

RUMINER V. ROCKWELL
(FC No. 15-90803-C, October 23, 2017, Doerr, P.J.)
When relocation will provide no benefit to the children and could negatively influence the relationship between parent and child, the court will not grant relocation.

SNOW V. EMERY, ET AL.
(AD No. 13-10595, October 20, 2017, Horan, J.)
When land did not meet the requirements of being seated, since there was no development or production of profit from the land, it is considered unseated land. Unseated land, at the time of Treasurer's sale of the property, was not required to be tracked by the county, and the duty to notify the commissioners of the change of ownership fell to the owners, prior and subsequent. When subsurface interests were severed, the duty to notify the County again fell to the landowners. As such, when the landowners failed to report to the county the severance of the subsurface rights, and the property was sold at tax sale, and assumed to be wholly intact, the tax sale was procedurally correct and title transferred to the purchasers at tax sale. Even if the advertisement in the paper failed to identify the correct current owner, the advertisement was valid so long as it identified a person who had been connected with the land, and since the two year redemption period for tax sales of unseated land had passed, the correct property owners had ample time to protect their interests.

2017

BCLJ: 11/3/2017 Vol. 26 No. 14

PITTSBURGH LOGISTIC SYSTEMS v. FREIGHT TEC., ET AL.
(AD 17-10242, August 24, 2017, Horan, J.)
When a corporation has no place of business, employees or bank accounts within Pennsylvania, have not distributed product in Pennsylvania, are not qualified to do business in Pennsylvania or have not owned real or personal property in Pennsylvania, a Pennsylvania Court cannot exercise general jurisdiction over said corporation. When a corporation knows, or reasonably should have known of the existence of employment contracts between employees and a Pennsylvania Corporation, and averments are made that the encroaching corporation intended to interfere with said employment contract, the first prong of the Calder test is met and the Court can exercise specific jurisdiction over the foreign corporation.

CROWE v. CROWE
(FC No. 13-90616-C, September 7, 2017, Streib, J.)
When a parent has an alleged history of drug addiction and fails to participate in a Custody Trial, that parent's custody may be limited.

PIEROTTI ET AL. v. EQT PRODUCTION COMPANY ET AL.
(AD No. 13-90616-C, September 7, 2017, Streib, J.)
When a party does not purchase, buy, or otherwise consume anything, a claim under the UTPCPL by an oil and gas lessor against an oil and gas lessee will not survive preliminary objections.

FLEEGER v. FLEEGER
(FC No. 11-90666-C, September 1, 2017, Streib, J.)
When there is no evidence to suggest that a parent's participation in non-traditional sexual practice is deleterious to the children in any way, participation is not relevant to a custody dispute.

BCLJ: 10/27/2017 Vol. 26 No. 13

BAYVIEW LOAN SERVICING v. DAHL, ET AL.
(AD No. 10-10720, June 27, 2017, Horan, J.)
When a party files no objection or answer to a Motion for Summary Judgement, any asserted procedural errors are waived by that party.

McCONNELL v FINDLEY ET AL.
(AD No. 17-10098, July 18, 2017, Horan, J.)
When tort claims arise solely from the duties expressed in a contractual relationship between parties and are grounded in the contract itself, then the gist of the action doctrine is a bar to tort claims arising from said contract. When parties freely enter into an agreement that contains a forum selection clause, then a court will not invalidate the clause so long as the contract is enforceable.

GARDNER v KAMER
(AD No. 07-10732, July 24, 2017, Horan, J.)
When a complaint in ejectment fails to make any references to the metes and bounds of property, adjoining property, or any landmarks, the action in ejectment fails to state a claim upon which relief can be granted. The Statute of Frauds as a defense must be raised as new matter and is not by preliminary objections.

ELLENBERGER v ELLENBERGER, ET AL.
(AD No. 17-10153, August 3, 2017, Horan, J.)
A claim for fraudulent inducement will not lie when an averment of the existence of an oral contract fails to note falsity, recklessness as to truth, or fails to show intent of misleading reliance. The Orphans' Court has jurisdiction over the administration and distribution of real property of a decedent, and the Civil Division lacks jurisdiction to adjudicate claims arising therefrom.

GREENERT v GREENERT
(FC No. 11-90058-C, August 16, 2017, Streib, J.)
When one parent is unwilling to accept responsibility and onus for personal challenges that contribute to the parties' inability to co-parent, and the other custodial party has shown willingness to seek help and improve for the benefit of the child, the action of the latter parent warrants the latter parent having primary custody, when viewed along with the other factors of custody.

BCLJ: 6/2/17 Vol. 25 No. 44

RIPPEE v. RIPPEE
(FC No. 10-90410-D, April 25, 2017, Doerr, P.J.)
When a Master's report is well reasoned and a thorough analysis of the facts, and is not an abuse of discretion, the court will not disturb the Master's credibility findings.

WRIGHT v. DESANZO
(FC No. 12-90472-C, April 28, 2017, Streib, J.)
When a party fails to comply with court ordered custody evaluations, the court will draw a negative inference from the repeated failure to comply.

DONALDSON v. CITY OF BUTLER, ET AL.
(AD No. 16-11011, May 5, 2017, Horan, J.)
When indispensable parties are not named in a case, it is proper to sustain preliminary objections for failure to join an indispensable party but grant plaintiff leave to amend in order to join the indispensable parties. In determining whether a party is indispensable, there is a four part test: (1) Do absent parties have a right or interest related to the claim? (2) If so, what is the nature of that right or interest? (3) Is that right or interest essential to the merits of the issue? And (4) Can justice be afforded without violating due process of absent parties? When city firefighters vested property right in their promotion are the subject of litigation, they are indispensable parties to the litigation. A current council member has an interest in the case when the remedy is for the current council to reverse promotions of said firefighters. Finally, the union has an interest because of the collective bargaining agreement and its relationship to the civil service rules.

BCLJ: 5/26/17 Vol. 25 No. 43

BABAY, ET AL. v. GRAZIER, ET AL
(AD No. 16-10760, April 10, 2017, Horan, J.)
A landowner cannot acquire an easement by implication based upon a depiction on a recorded plan when the purported dominant parcel is not a lot within said plan.

EPPINGER v. EPPINGER
(FC No. 16-90261-C, April 12, 2017, Streib, J.)
A right of first refusal that limits a parent's time but negatively impacts the children must be modified in order to ensure that the children are not negatively harmed.

BEALL, ET AL. v. GPX v. PITTSBURGH REAL ESTATE, ET AL.
(AD No. 15-10844, April 19, 2017, Horan, J.)
Section 386 of the Restatement (Second) of Torts imposes potential liability for harm caused by dangerous conditions on "any person, except the possessor of land or a member of his household or one acting on his behalf who creates or maintains upon the land a structure or other artificial condition which he should recognize as involving an unreasonable risk of physical harm to others upon or outside of the land". Allegations that meet this standard present genuine issues of material fact as to whether a tort duty is owed.

THEBERGE v. THEBERGE
(FC No. 16-90520-D, April 25, 2017, Doerr, P.J.)
When an agreement is intended to be a full and final settlement of all marital issues, the court can find that the use of the term "spousal support" encompasses alimony pendente lite and alimony as well as spousal support.

BCLJ: 3/31/17 Vol. 25 No. 35

ALHUMOUD v. ZAVILLA, ET AL.
(AD No. 14-11018, January 19, 2017, Horan, J.)
The element of actual possession for adverse possession of woodlands can be demonstrated by enclosing and cultivating without residence. Enclosing and cultivation without residence can be established, for purposes of overcoming a motion for summary judgment, by building and maintaining trails and access gates, as well as building tree stands.

SCHRIVER v. SCHRIVER
(FC No. 13-90730-C, January 26, 2017, Doerr, P.J.)
When all of the other factors are generally equal but one parent is more likely to attend to the educational and special needs of the children, said parent shall be granted primary physical custody in order to promote the best interest of the children.

2016

BCLJ: 12/9/16 Vol. 25 No. 19

ERKENS v. PENVOSE
(FC No. 10-90643-C, October 13, 2016, Doerr, P.J.)
When the parties create a difficult and confusing environment for the children, it is sometimes advantageous to grant one parent primary physical custody in order to avoid needless confusion during the school year, even if both parents are nearly equivalent pursuant to analysis of the custody factors.

McCASLIN v. McCASLIN
(FC No. 11-90353-C, October 13, 2016, Doerr, P.J.)
When a minor child has numerous connections in the area to which he or she may locate and the minor child demonstrates an ability to adapt well to change, it can be appropriate to shift primary physical custody from one parent to another.

SCHILLING v. KELLNER'S FIREWORKS
(AD No. 14-10774, October 20, 2016, Horan, J.)
In products liability actions, in order to establish the affirmative defense of assumption of the risk, the defendant must show that the buyer knew of a defect and yet voluntarily and unreasonable proceeded to use the product in conscious disregard for the attendant risks. When there is no evidence that plaintiff had any knowledge of a defect or irregularity in a product, summary judgment cannot be granted on the defense of assumption of the risk. The comparative fault of a co-defendant may not be used to reduce the responsibility of a strict liability defendant to the plaintiff. However, a strict liability defendant may still seek contribution from another defendant on the basis of causal negligence.

PLYLER v. PLYLER
(FC No. 11-90820-C, October 21, 2016, Doerr, P.J.)
If a parent learns to keep the child's best interest foremost and not involve the child in custody issues, it is appropriate for the court to expand the parent's physical custody. In order for co - parenting counseling to be successful, the parties need to accept that they are not the expert and do not get to control counseling sessions.

QUAIL v. LANCER INSURANCE
(AD No. 15-10991, November 17, 2016, Horan, J.)
When an insurance company proves a reasonable basis for denying insurance payments, plaintiff's claim of bad faith cannot succeed. However, when there is a question of fact concerning timeliness and disclosure, summary judgment is not appropriate.

BCLJ: 11/11/16 Vol. 25 No. 15

SMARETSKY v. CRAWFORD
(FC No. 2015-90532-C, September 27, 2016, Doerr, P.J.)
When a custodial party has issues with sobriety, less parental responsibility will provide the party with issues time to focus on his or her rehabilitation, and thus, primary physical custody may be granted to one party with an expectation to return to shared custody upon at least a one year commitment to sobriety.

PENNYMAC v. NEFF, ET AL v. PNC BANK
(AD Nos. 11-10829, 12-11119; 16-10379, September 15, 2016 Horan, J.)
Any counterclaim asserted by defendants in a mortgage foreclosure action must arise as part of, or incident to, the creation of the mortgage, and assignment of mortgage deals only with the ownership of the lien, and not the creation of the mortgage lien itself. One cannot be liable for a breach of contract unless one is a party to the contract. An agent of the corporation is not a party to a contract unless specifically listed in the contract. A republication of a slanderous statement by a third party does not reset the one-year statute of limitations for the original slanderous statement so long as the original slandering party has no involvement with the publication due to assignment of the property. A publication of an assignment of mortgage does not republish an alleged slanderous statement in a mortgage since the assignment of mortgage deals only with the current ownership of the lien and not the creation of the lien itself.

BCLJ: 11/4/16 Vol. 25 No. 14

COUNTY OF BUTLER v. CENTURY LINK COMMUNICATIONS, ET AL. (AD No. 2015-11007, August 11, 2016, Horan, J.)
When a state agency has the exclusive statutory power and duty to regulate state law, enforcement action by the state agency is the exclusive statutory remedy for violations of the state law. When an exclusive statutory remedy is present, § 1504 of the Statutory Construction Act precludes any common law claims arising out of the same set of facts.

TRUCHE v. TRUCHE
(FC No. 2009-90101-C, August 22, 2016, Doerr, P.J.)
A problematic relationship between siblings presents a compelling reason for separate custody of said children. When one parent continually disobeys court orders and is inattentive to the needs of the child, it is proper to grant the sole legal custody to the other parent in order to provide for the best interests of the child.

COMMONWEALTH v. BERAN (CONSOLIDATED)
(CA Nos. 569-2015, 207-2016, 979-2016, September 13, 2016, Shaffer, J.)
Motorists who refuse to consent to a requested chemical test of his or her blood alcohol concentration by way of a warrantless blood draw may not be subjected to the enhanced criminal penalties set forth in Vehicle Code § 3803 and 3804 based solely on their refusals to submit to a blood draw absent a warrant. However, evidence of the refusal to submit to chemical testing may still be admitted at trial.

TEITELBAUM v. TEITELBAUM
(FC No. 2015-90511-C, June 10, 2016, Doerr, P.J.)
When a minor child of mature age conveys mature reasoning in stating their preference for custody, significant weight may be given to the child's preference. When a court finds it necessary to have different custody schedules for children from the same marriage, the court must weigh the best interests of each child individually in conjunction with their relationship with each other.

CARNEY v. SLIPPERY ROCK UNIVERSITY OF PENNSYLVANIA, ET AL.
(AD No. 2012-10092, July 1, 2016, Horan, J.)
When a court has previously ruled on specific termination claims in an employment law case, re- litigation of specific claims is barred by res judicata and collateral estoppel. However, alternative claims may be brought under a separate statutory authority, eg., the Pennsylvania Whistleblower Law. In addition, determination of an employment case that does not address constitutional issues does not serve as a bar to litigation regarding infringements by the employer on constitutional rights.

HANIWALT, ET AL. v. MILL RUN CAMPGROUND
(AD No. 2014-10627, July 20, 2016, Horan, J.)
Under the no-duty rule, an amusement facility will be responsible for injuries to patrons only where it fails to use reasonable care in the construction, maintenance and management of the facility, having regard to the character of the exhibitions given and the customary conduct of patrons invited. A question as to whether verbal permission from a park attendant that may or may not deviate from reasonable care in defendant's management of the water park is a question of fact and should be submitted to the jury.

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BCLJ: 9/9/16 Vol. 25 No. 6

BRENCKLE GREENHOUSES, L.P. v. GGS STRUCTURES, INC., et al.
(AD No. 13-10830; May 26, 2016)
Courts are reluctant to find limitation of damages provisions to be unconscionable on the grounds that they are inconspicuous in cases which deal with contracts between merchants. Under Pennsylvania Law, contracts limiting damages in commercial settings are generally enforced. A remedy fails of its essential purpose where it deprives either party of the substantial value of the bargain. Liability must be established before a party is required to pay any damages whether they are limited or not.

JESSUP v. ZIEGLER
(FC No. 14-90566-C; May 26, 2016)
In a child custody case, the Court's primary concern is the child's best interest made on a case by case basis. The Court, in a "close" case, will pay particular attention to the factors that measure which parent can provide the best stability and on-going contact with both parents.

BCLJ: 9/2/16 Vol. 25 No. 5

EMERICK v. McCLURE, et al.
(FC No. 02-90058-C; May 10, 2016)
In a child custody case, the Court's primary concern is the child's best interest made on a case by case basis. When determining physical custody, it is important to consider the relationship between siblings when custody of the siblings results in them being apart most of the time.

DEWEY HOME AND INVESTMENT PROPERTIES, LLC., et al. v. DELAWARE RIVERKEEPER NETWORK, et al.
(AD No. 15-10393; May 25, 2016)
An individual is and must be immune to liability from the exercise of his or her rights under the Petition Clause of the First Amendment to the U.S. Constitution to influence governmental agencies to adopt change or reform. The only exception to this doctrine, referred to as the Noerr-Pennington Doctrine, exists where a defendant uses the petition process as a means of harassment such that the defendants' actions are a "sham". When a defendant is held to have "made a strong showing" in a case, their actions cannot be considered a "sham".

BCLJ: 5/27/16 Vol. 24 No. 43

ROSENSTEEL v. INTEGRACARE CORPORATION, et al.
(AD No. 2015-11027; April 4, 2016)
Deliberate alteration of medical records to reflect that care was provided, when it had not been provided, is sufficient outrageous conduct to support the imposition of punitive damages and a finding that defendant acted with reckless disregard of the rights of the deceased.

Nursing homes and related entities can be subject to potential direct liability for corporate negligence in regard to the treatment of a resident if requisite resident-entity relationship existed.

ALLEN, et al. v. WOJICHOWSKI, et al.
(AD No. 2010-11463; April 8, 2016)
Courts will liberally grant leave to parties to amend their pleadings in order to secure a decision on the merits, unless the amendments violate the law or unfairly prejudice the rights of the other party.

PITTSBURGH LOGISTICS SYSTEMS, INC. v. BURKS
(AD No. 15-10412, CP No. 15-21790; May 2, 2016)
Improper or defective service constitutes sufficient cause to open a judgment.

RUPERT v. RUPERT
(FC No. 11-90813-D; May 3, 2016)
When Antenuptial Agreement is silent as to the definition of "income" and is: (1) governed by the laws of Pennsylvania; and (2) uses statutorily defined terms such as alimony and support, the definition of income is controlled by the Pennsylvania Domestic Relations Code, 23 Pa. C.S.A. § 4302.

In ruling on a claim for alimony pendente lite the Court will consider the following factors: the ability of the other party to pay; the separate estate and income of the petitioning party; and the character, situation, and surroundings of the parties.

BCLJ: 4/29/16 Vol. 24 No. 39

GALANTE v. COUNTY OF BUTLER, et al.
(AD No. 15-10398; March 4, 2016)
A promise to vote a certain way during legislative proceedings would violate positive law and is not enforceable. As such, promissory estoppel does not provide plaintiff with the means to enforce such a contract.

NICHOLAS, et al. v. PEOPLES TWP
(AD No. 15-10561; March 15, 2016)
A grant of injunctive relief is appropriate in situations where a governmental entity's actions constitute a continuing trespass on a plaintiff's property. Where defendant has not secured permission from plaintiff property owners for the continuing intrusions by their employees and equipment upon the surface of the plaintiff's property, a continuing trespass exists.

BCLJ: 4/22/16 Vol. 24 No. 38

CRANBERRY DFK, LLC v. CRANBERRY TOWNSHIP
(AD No. 12-11398; February 29, 2016)
Defendant cannot have actual notice of pitting and corrosion in pipe that was in a different location than a prior break. Notice of a latent defect that cannot be discerned upon reasonable inspection cannot be imputed to a government entity even if the defect created the dangerous situation. When plaintiff produces no evidence that defendant failed to produce or preserve inspection and maintenance records, no spoliation inference can be drawn.

FERRONE v. HUNTINGTON BANCSHARES, et al.
(AD No. 14-10463; March 2016)
Where contract language is not ambiguous and plaintiff has not alleged facts to support a question of latent ambiguity, the court must determine the parties' intent solely from the language of the contract. Plaintiff cannot support a promissory estoppel claim by merely alleging that they reasonably relied upon the terms of a written contract which contain two explicit conditions precedent to the effectiveness of the agreement, where said conditions are not alleged to occur. A breach of the duty of good faith and fair dealing is subsumed in a breach of contract action and is not a separate cause of action. Ordinary breach of contract claims may not be recast as tort claims under the "gist of the action" doctrine.

BCLJ: 3/4/16 Vol. 24 No. 31

NICHOLAS v. PEOPLE'S TWP, LLC
(January 2016)
The defense of prescriptive easement fails when Defendant cannot prove that entry and continued occupation of the property has been adverse. When Defendant had initially entered the property pursuant to consent of the prior predecessor in title, and there is no hostility due to continued use past the initial lease term and no notice of encumbrance to title is given. Court also dismisses the defense of presumptive grant since the property was initially entered on by a recorded right of way that was not in dispute.

DEMATTEIS v. ANDREASSI, ET AL.
(January 2016)
A Motion to Open/Strike a Confessed Judgment pursuant to Statute of Limitations will be denied when a payment was made in 2014 on a Note dated 1990, since Defendants had revived the Note by making payment. Motion to Open/Strike pursuant to laches will be denied when Defendants acknowledge the debt and paid on it over time. Motion to Open/Strike due to lack of knowledge and voluntariness of their consent to a Confession of Judgment will be denied when Defendants admit that they were given opportunity to consult with counsel, and Note was executed with a plainly visible Confession of Judgment clause.

BCLJ: 2/19/16 Vol. 24 No. 29

McNAIR v. McNAIR
F.C. 90103-D (Dec. 2015)
Equitable distribution of limited marital assets shall, just like equitable distribution of a case with "typical" assets or substantial assets, take place without regard to marital misconduct, in such percentages and in such manner as the court deems just after consideration of all relevant factors.

NORTHWEST SAVINGS BANK v. FIDELITY NATIONAL
TITLE INSURANCE COMPANY, ET. AL.
AD 13-11107 (Dec. 2015)
An insurer to a party to a contract is not liable for the fraud of an agent acting on behalf of both parties to the contract.

BENEC v. ARMSTRONG CEMENT & SUPPLY CORP., ET. AL.
AD 14-10943 (Jan. 2016)
A mistake as to the status of the law at the time an act occurs constitutes a "mistake of fact" for which contract reformation is available. On the other hand, when an alleged mistake does raise an issue of misinterpretation or misunderstanding of the status of the law or any other fact in existence or presumed to be in existence in the outside world at the time of the contract, the mistake constitutes a "mistake of law" for which reformation is not available.

TRESKY v. TRESKY
F.C. 14-90322-C (Jan. 2016)
A child's best interest is paramount in a custody case. Court is required to consider the opinion of court appointed experts, but is not bound by those opinions; the court has a responsibility to make its own determinations. Shared custody is not in best interest of the child in the presence of considerable hostility between parents coupled with negative issues with alcohol, among other factors.

BCLJ: 2/12/16 Vol. 24 No. 28

DELAWARE RIVER KEEPER NETWORK, ET. AL. v. MIDDLESEX TOWNSHIP ZONING HEARING BOARD, ET. AL. v. R.E. GAS DEVELOPMENT, LLC, ET. AL.
A.D. 15-10429 (Nov. 2015)
The scope of review for the appeal to a court of the determination of a substantive validity challenge to a zoning ordinance is whether the zoning hearing board committed an error of law and whether its findings are supported by substantial evidence; a court cannot substitute its judgment for that of the zoning hearing board. Pursuant to 65 Pa. C.S.A. § 1103(j) of the Pennsylvania Sunshine Act, when a majority of members of an agency are unattainable due to abstention, then such members may vote upon disclosure of the conflict or potential conflict. Although formal rules of evidence do not apply of zoning hearing board hearings, zoning hearing boards may not rely on untested hearsay to support its findings and conclusions. There exists a legitimate state interest in promoting economic growth and development, so long as it is not at the expense of the degradation of natural resources; the inquiry is directed to the community as a whole and justified by a balancing of community costs and benefits.

GALANTE v. COUNTY OF BUTLER, ET. AL.
AD 15-10398 (Nov. 2015)
A breach of contract action does not lie against the County for the abolishment of an elected office because no contract was formed, as the Bureau of Elections has no discretion in what questions it can and cannot include on the ballot. No detrimental reliance could be found in relying on the Commissioners' previous votes to not abolish the position since it is an exercise of their legislative function. County Commissioners are high public officials and, as a general rule, are immune to fraud, misrepresentation, emotional distress, and negligence claims. A County Bureau of Elections director has immunity from suit when no specific exceptions to official immunity are pled.

MAINHART v. MASTROCESARE
F.C. 14-90316-C (Nov. 2015)
A child's best interest is paramount in a custody case. Sole legal and primary physical custody in one party is appropriate where other party, former convict, has failed to resolve anger and violence issues and has limited contact with the child, among other factors.

2015

BCLJ: 12/4/15 Vol. 24 No. 18

STEINMAN v. WORLD RACHING GROUP, INC., ET. AL.
A.D. 14-10039 (2015)
As to the interpretation of exculpatory clauses, the following standards apply: 1) the contract language must be construed strictly, since exculpatory language is not favored by the law; 2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties; 3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and 4) the burden of establishing the immunity is upon the party invoking protection under the clause. In addition, a court must look to an agreement as a whole to determine whether the parties' intent is clearly set forth.

DEFFENBAUGH v. GIANCOLA, ET.AL.
A.D. 15-10559 (2015)
With regard to the validity of forum selection clauses, the modern and correct rule is that a court in which venue is proper and which has jurisdiction should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation. Such an agreement is unreasonable only where its enforcement would, under all circumstances existing at the time of litigation, seriously impair plaintiff's ability to pursue his cause of action. Mere inconvenience or additional expense is not the test of unreasonable since it may be assumed that the plaintiff received under the contract consideration for these things. If the agreed upon forum is available to plaintiff and said forum can do substantial justice to the cause of action then plaintiff should be bound by his agreement. Moreover, the party seeking to obviate the agreement has the burden of proving its unreasonableness.

BCLJ: 11/6/15 Vol. 24 No. 14

SPEED ET. AL.v. RAVASIO, M.D., ET. AL.
A.D. 14-11020 (2015)
A cause of action for negligent infliction of emotional distress is restricted to four factual scenarios: (1) situations where the defendant had a contractual or fiduciary duty toward the plaintiff; (2) the plaintiff was subjected to a physical impact; (3) the plaintiff was in a zone of danger, thereby reasonably experiencing a fear of impending physical injury; or (4) the plaintiff observed a tortious injury to a close relative.

To recover under the bystander theory of liability, where there is a separateness in time between the alleged negligence and the resultant traumatic injury, a plaintiff must allege that she witnessed both. A plaintiff does not "witness" a traumatic injury for purposes of the bystander theory of liability when that plaintiff learns of the loved ones' injury or demise via a third party.

DILLON MCCANDLESS KING COULTER & GRAHAM, ET. AL. v. RUPERT
A.D. 12-10019 (2015)
A personal injury claim and a loss of consortium claim are separate and distinct claims. Although a loss of consortium claim hinges on the success of the underlying claim of the spouse, the loss of consortium claim in still considered to be a spate and distinct claim from the injured spouse's claim, as the non-injured spouse suffers injuries in her own right.

BCLJ: 10/30/15 Vol. 24 No. 13

BENEC v. ARMSTRONG CEMENT & SUPPLY CORP., ET. AL.
A.D. 14-10943 (2015)
The applicability of the parol evidence rule may be raised by preliminary objections. The parol evidence rule is not a rule of evidence, but a matter of substantive law. The parol evidence rule, in general, is invoked when there is an attempt by one party to introduce a prior agreement or understanding, or at least a representation, by the other party that may impact the parties' written contract. The parol evidence rule seeks to preserve the integrity of written agreements by refusing to permit the contracting parties to attempt to alter the import of their contract through the use of contemporaneous oral declarations. Where alleged oral representations are inconsistent with the parties' written agreement, said representations are barred by the parol evidence rule.

S-2 PROPERTIES v. BUCKLEN
A.D. 14-10610 (2015)
According to the Manufactured Home Community Rights Act, a manufactured home community owner may evict a tenant where there have been two violations occurring within six months of each other. Where eviction is based upon breaches of a lease or rule violations, the tenant must be provided notice of said breaches or rule violations. The notice provided to the tenant must be a written description of the breach or violation complained of, and must be delivered via certified or registered mail.

PENNYMAC CORP. v. NEFF, ET. AL.
A.D. 11-10829 (2015)
With regard to Plaintiff's demurrer to Count I of the Defendants' counterclaim, arguing counterclaims in mortgage foreclosure actions are not permitted when said counterclaims arise from incidents that occur after the creation of the mortgage or from a separate contract.

Any counterclaim, asserted by defendants in a mortgage foreclosure action, must arise as part of, or incident to the creation of the mortgage.

In a mortgage foreclosure action, the entry of summary judgment is proper if the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the obligation, and that the recorded mortgage is in the specific amount.

BCLJ: 9/4/15 Vol. 24 No. 5

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668, AFL-CIO V. BUTLER COUNTY REGISTER OF WILLS & CLERK OF ORPHANS' COURT,
MsD 15-40103 (2015) AND COUNTY OF BUTLER, MsD 15-40139 (2015)
The standard of review of grievance awards is a two-pronged "essence test." Under this test, the court shall first determine if the issue, as properly defined, is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement, and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the collective bargaining agreement. That is, a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically, flow from, the collective bargaining agreement. A petition to vacate an arbitration award shall be made within 30 days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud, misconduct or other improper means, it shall be made within 30 days after such grounds are known or should have been known to the applicant. 42 Pa.C.S.A. § 7314(b). If an application to vacate the arbitration award is denied, and no application to modify or correct the award is pending, the court shall confirm the award. 42 Pa.C.S.A. § 7314(d).

BCLJ: 8/14/15 Vol. 24 No. 2

BELL v. KARNS CITY AREA SCHOOL
A.D. 15-10221 (2015)
The Pennsylvania Supreme Court has held that section 508 of the Public School Code (24 Pa. C.S.A. 5-508) bars a subcontractor's authorized contact, even though the expenses were incurred at the direction of the school directors. The contract much be approved by the School Board to bind a school district.

It is also the law of Pennsylvania that the Commonwealth or its subdivisions and instrumentalities cannot be estopped "by the acts of its agents and employees if those acts are outside the agent's

powers, in violation of positive law, or acts which require legislative or executive action." As a result, persons contracting with a governmental agency must, at their peril, know the extent of the power of its officers making the contract. Therefore, the doctrine of promissory estoppel is inapplicable.

BCLJ: 7/31/15 Vol. 23 No. 53

LASAVAGE v. LIQUIFIX, INC., ET. AL.
A.D. 12-11027 (2015)
It is fundamental contract law that one cannot breach a contract that one is not a party to. Moreover, it is well established agency law that an authorized agent for a disclosed principal is not liable on a contract between the principal and a third party unless the agent agrees with the third party to be liable.

KNAPPENBERGER v. NEXTIER BANK
A.D. 13-11170 (2015)
To survive a motion for summary judgment in an age discrimination case, the Plaintiff must first establish all elements or a prima facie age discrimination claim by showing that the plaintiff (i) belonged to a protected class, i.e., was at least 40 years of age; (ii) was qualified for the position; (iii) was dismissed despite being qualified; and (iv) suffered dismissal under circumstances giving rise to an inference of discrimination, such as the fact that the plaintiff was replaced by someone substantially younger or that she suffered dismissal despite the defendant's need for someone to perform the same work after plaintiff left.

BCLJ: 7/24/15 Vol. 23 No. 52

PATTERSON v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, ET.AL.
A.D. 10-11008 (2015)
A union is guilty of unfairly representing an employee if its refusal to carry a grievance through to arbitration is due to arbitrariness, discrimination or bad faith. Claims alleging a violation of the duty of fair representation against a union are governed by a two-year statute of limitations. In Pennsylvania, the statutory period commences at the time the harm is suffered or, if appropriate, at the time the alleged malpractice is discovered. Thus, the statute of limitations begins to run as soon as the plaintiff's right to file and maintain a suit against the Union arises.

O'DONNELL v. SCHNUR ESTATE
A.D. 14-10978 (2015)
The Vehicle Code provides that a police report, generated from an investigation of an accident scene, shall not be admissible as evidence in any action for damages or criminal proceedings arising out of a motor vehicle accident. 75 Pa.C.S.A. § 3751(b)(4). The Superior Court has also held that a police report, prepared by an officer who is not a witness to the accident, is inadmissible hearsay evidence, and should not be admitted into evidence. A police officer may testify as to his observations, but no as to what others told him, unless those persons are also testifying.

SPEED v. RAVASIO, ET.AL.
A.D. 14-11020 (2015)
In Pennsylvania, a cause of action for negligent infliction of emotional distress is predicated on the principle that an alleged wrong-doer is responsible for the natural and proximate consequences of his acts. Said cause of action is restricted to four factual scenarios: (1) situation where the defendant has a contractual or fiduciary duty toward the plaintiff; (2) the plaintiff was subjected to a physical impact; (3) the plaintiff was in a zone danger, thereby reasonably experiencing a fear of impending physical

injury; or (4) the plaintiff observed a tortious injury to a close relative. Physical harm to a fetus cause physical harm to the mother and the impact theory is applicable. The zone of danger theory will apply when a mother's health is endangered because of the pregnancy and still-born process.

BCLJ: 7/10/15 Vol. 23 No. 50

PAULAT v. PROFESSIONAL CODE SERVICES, INC.
A.D. 14-10119 (2015)
An indispensable party is one whose rights are so connected with the claims of the litigants that no decree can be made without impairing those rights. A party is indispensable where justice cannot be done in the absence of him or her. If the Court dismisses a defendant on the basis of governmental immunity, said defendant is no longer considered an indispensable party.

BENEC v. ARMSTRONG CEMENT & SUPPLY CORP, ET. AL.
A.D. 14-10943 (2015)
Detrimental reliance is another name for promissory estoppel. Pennsylvania has adopted the doctrine as set forth in the Restatement (Second) of Contracts Section 90(1), provides that, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only be enforcement of the promise. The remedy granted for breach may be limited as justice requires." Restate (Second) of Contracts § 90(1). Whether an estoppel results from established facts is a question for the court.

SCHICK v. IARRAPINO MUFFLER & BRAKE SHOP, ET.AL.
A.D. 14-10863 (2015)
When either party takes an appeal from a judgment entered by a district magistrate, the entire matter must be heard de novo by the court of common pleas. To do otherwise would work an injustice to either or both parties. Any party may join another in an appeal already instituted by another without filing a separate appeal.

BCLJ: 2/13/15 Vol. 23 No. 29

SLOBODA v. KENNEDY
A.D. 14-10706 (2015)
Where a plaintiff files a quite title action pursuant to R.C.P. § 1061(b)(1), the plaintiff's possession of the disputed property is a jurisdictional prerequisite to the Court granting relief. To prevail in an action to quiet title under § 1061(b)(1), a plaintiff must prove that it is in possession of the dispute as to the title of land in question. If the plaintiff can establish these three elements, the court can grant relief under Pa.R.C.P. § 1061(b)(1) by ordering defendant to commence an action of ejectment. The merits of the dispute, the title, and the right to possession are not determined in an action brought under § 1061(b)(1). The issue to be decided is simply whether or not either of the parties claiming an interest in the land was in actual possession at the filing of the complaint.

WOOD v. ZONING HEARING BOARD OF CRANBERRY TOWNSHIP, ET.AL.
A.D. 12-10049 (2014)
Spot zoning is the "unreasonable or arbitrary classification of a small parcel of land dissected or set apart from surrounding properties, with no reasonable basis for the differential zoning." In a reverse spot zoning case, the property owner must establish that his property has been held static or "frozen" while the surrounding property is rezoned more permissively with less restriction.

POLY-COR ENTERPRISES, L.P. v. CASCIOLA, ET.AL.
A.D. 14-10652 (2014)
In reviewing a motion to dismiss a case for lack of in personam jurisdiction, the Court must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff. Title 42 Pa.C.S.A. § 5322(a)(4) provides that a court may exercise jurisdiction over anyone outside of the Commonwealth who has "[c]aus[ed] harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth." In addition, a "special situation occurs where this is an intentional tort in one state calculated to cause harm in the forum state." Where such intentional conduct is involved, jurisdiction over the defendant is proper in the forum state, based on the effects of acts committed in another state.

MAHR, ET.AL. v. ZONING HEARING BOARD OF CRANBERRY TOWNSHIP, ET.AL.
A.D. 12-11181 (2014)
The Court's scope of review in a Zoning Appeal case is restricted to reaching a determination as to whether the local zoning agency committed an error of law and whether its necessary findings are supported by substantial evidence; the court may not substitute its judgment for that of the local agency unless the Zoning Board manifestly abused its discretion. The Board has abused its discretion only if its findings are not supported by substantial evidence. Substantial evidence can be defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

BCLJ: 1/23/15 Vol. 23 No. 26

NEBEL & HESIDENZ v. GOLEC, ET.AL.
A.D. 13-10296 (2014)
Laches bars relief in equity whenever, in the court's discretion, a party has, by his delay, disentitled himself to the unusual remedies equity affords to those who desire him. Laches may be raised in the pleadings by preliminary objections, answer or reply; but, even where laches is no pleaded at all as a defense, the Court may, in its discretion, and on its own motion, grant relief where the fact of laches appears in the evidence or on the face of the bill. Where laches is raised by preliminary objection, if the fact of laches appears on the face of the pleadings, relief may be denied on this ground. The party asserting the defense of laches bears the burden of proving that the other party failed to exercise due diligence and caused a delay which resulted in prejudice.

O'MARA v. O'MARA
F.C. 10-90044-D (2014)
It is well established that the master's report and recommendation, although only advisory, is to be given the fullest consideration by the Court, particularly on the question of credibility of witnesses, because the master has the opportunity to observe and assess the behavior and demeanor of the parties. While the trial court is obligated to conduct a complete and independent review of the evidence when ruling on exceptions, its scope of review is limited to the evidence received by the master. The master's report is not controlling on the reviewing court and it does not come to the court with any preponderate weight or authority which must be overcome.

BRUNKEN v. N. LEE LIGO & ASSOCIATES, ET.AL.
A.D. 13-11092 (2014)
A Court's standard of review of claims regarding opening a default judgment is well-settled. A petition to open a default judgment is an appeal to the equitable powers of the court. The decision to grant or deny a petition to open a default judgment is within the sound discretion of the trial court, and the Court will not overturn that decision "absent a manifest abuse of discretion or error of law. An abuse of discretion is not a mere error of judgment, but if in reaching a conclusion, the law is overridden or

misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record, discretion is abused. Generally, a default judgment may be opened when three factor coalesce. The moving party must have 1) promptly filed a petition to open; 2) shown a meritorious defense; and 3) provided a reasonable excuse for the failure to file a responsive pleading.

BCLJ: 1/2/15 Vol. 23 No. 23

OLIVER v. BALL v. HARMON, ET.AL.,
A.D. 09-12349 (2014)
From the moment an agreement of sale of real estate is executed and delivered it vests in the grantee what is known as an equitable title to the real estate. Thereupon the vendor is considered as a trustee of the real estate for the purchaser and the latter becomes a trustee of the balance of the purchase money for the seller. Hence, if the terms of the agreement are violated by the vendor, the vendee may go into a court of equity seeking to enforce the contract and to compel specific performance.

PAULAT v. PROFESSIONAL CORE SERVICES, INC., ET.AL.,
A.D. 14-10119 (2014)
Damages are either general or special. General damages are those that are the usual and ordinary consequences of the wrong done. Special damages are those that are not the usual and ordinary consequences of the wrong done but which depend on special circumstances. General damages may be proven without specifically pleading them; however, special damages may not be proved unless special facts giving rise to them are averred.

PATTERSON v. OTTAVIO, ET.AL.,
A.D. 08-11557 (2014)
The statute of limitations for defamation claims in one year from the date of publication. A "publication" is the communication of an allegedly defamatory or slanderous statement by the defendant to a third person.

2014

BCLJ: 11/7/14 Vol. 23 No. 15

PUCCIARELLI v. DEMETER
F.C. 11-90554-D (2014)
In general, property given to both husband and wife as a wedding gift is part of the marital estate. However, if that gift was expended entirely on wedding/honeymoon expenses before the parties separated it is not available for equitable distribution.

HOUSEHOLD FINANCE CONSUMER DISCOUNT COMPANY v. GRAMZ
A.D. 10-11586 (2014)
The formation of a Mortgage Reaffirmation Agreement must comply with the Bankruptcy Code. Specifically, a Reaffirmation Agreement must be formed in accordance with the procedures mandated by the Code in 11 U.S.C. § 524(c). It is critical that the Reaffirmation Agreement be filed with the Bankruptcy Court. In a Chapter 7 bankruptcy, a discharge of a debtor's personal liability in connection with a mortgage does not adversely affect the bank's mortgage lien against the debtor's personal residence.

FERGUSON v. CLAYPOOLE
A.D. 11-11492 (2014)
The mere happening of an accident does not establish negligence, raise an inference or presumption of negligence, or make out a prima facie case of negligence. Thus, in the absence of proof, the mere happening of an accident will not permit a case to be submitted to a jury on the doctrine of res ipsa loquitur. With respect to unexplained fires, at least one Pennsylvania court has noted that it is common knowledge that fires occur frequently without anyone being at fault, and that the rule of res ipsa loquitur is generally given limited application in such cases.

BCLJ: 10/31/14 Vol. 23 No. 14

PATTERSON v. OTTAVIO, ET. AL.
A.D. 08-11557 (2014)
All affirmative defenses must be raised in New Matter, and not by preliminary objection. However, where an affirmative defense is apparent on the face of the challenged pleading, the court may consider the defense at the preliminary objection stage. A court may address affirmative defenses at the preliminary objection stage if the defense is apparent on the face of the challenged pleading.

DONALDSON v. BUTLER COUNTY
A.D. 13-10728 (2014)
In evaluating the decision of a local agency (such as Butler County), where a complete record is made before that agency, the Court's standard of review is whether the agency committed an error of law and whether the material findings of fact are supported by substantial evidence. Assuming the record demonstrates the existence of substantial evidence, the court is bound by the local agency's findings. An agency's decision must not represent a manifest and flagrant abuse of discretion or a purely arbitrary execution of its duties or functions but must be in accordance with law.

HODAK v. HODAK
A.D. 13-10075 (2014)
It is fundamental contract law that one cannot be liable for a breach of contract unless one is a party to that contract. Therefore, where a complaint is based upon a written contract that does not clearly show plaintiffs as parties thereto, and the complaint does not explain the privity of contract between plaintiffs and defendants, the complaint then fails to show how and why plaintiffs are entitled to the relief they are seeking.

BCLJ: 10/24/14 Vol. 23 No. 13

PATTERSON v. OTTAVIO, ET. AL.
A.D. 08-1157 (2014)
A claim under federal law (42 U.S.C. 1983) for violation of a person's civil rights must allege that the conduct complained of was committed by a person acting under color of state law and that this conduct deprived the Plaintiff of rights, privileges, or immunities secured by the Constitution or the laws of the United States. An individual has a property right in continued public employment, and the Fourteenth Amendment requires due process where the deprivation of this right is implicated. Due process requires that an individual be given adequate notice of the charges against him and an opportunity to be heard.

R.E. GAS DEVELOPMENT, LLC v. BARHART, ET. AL.
A.D. 11-10008 (2014)
The signing, sealing, acknowledging, and recording of a deed constitute prima facie evidence of its delivery. This presumption is rebuttable. The burden lies with the grantor to prove clearly that the appearances were not consistent with the truth. The declarations of the intention or understanding of a grantor, different from the intent apparent on the face of the deed, must be made at the time of executing it. The presumption is against him, and the task is on him to destroy that presumption by clear and positive proof that there was no delivery, and that it was so understood at the time.

CRAWFORD v. MAKOZY
A.D. 12-22108 (2014)
Pennsylvania Rule of Civil Procedure 3118 is designed to maintain the status quo of the judgment debtor's property as of the time the proceedings were initiated. Said rule authorizes summary proceedings in aid of execution solely for the above purpose. There are two predicates to an issuance of relief under Rule 3118: First, there must be an underlying judgment. Second, the debtor must possess property subject to execution.

BCLJ: 10/17/14 Vol. 23 No. 12

NOGACEK v. DUNCAN
A.D. 13-10788 (2014)
The Pennsylvania Supreme Court acknowledged that the establishment of a boundary line by acquiescence has long been recognized in Pennsylvania. There exist two elements to said cause of action: 1) each party must have claimed and occupied the land on his side of the line as his own; and 2) such occupation must have continued for the statutory period of twenty-one years.

DAHL ET.AL. v. KUBOTA CREDIT CORP. ET. AL.
A.D. 13-10565 (2014)
Pennsylvania favors the enforceability of agreements to arbitrate. A two-part test is employed to determine whether arbitration may be compelled by a party to a civil action. First, a trial court must determine whether a valid agreement to arbitrate exists between the parties. Second, if such an agreement does exist, the court must determine if the dispute involved is within the scope of the arbitration provision.

TURNER v. BROERMAN
A.D. 13-10028 (2014)
With respect to a Complaint for specific performance for conveyance or purchase of property, a definite present agreement in regard to a specific piece of land is essential for the issuance of such a decree. To prevail in an action for specific performance, the person requesting said remedy has the burden of showing that there is a valid agreement, that the agreement has been violated, and that said person does not have adequate remedy at law. To be an enforceable contract, the nature and extent of the parties' obligations must be certain and the parties themselves must agree upon the material and necessary details of the bargain.

BCLJ: 2/21/14 Vol. 22 No. 30

BAPTISTE v. GUMBERG ASSOCIATES - CRANBERRY MALL, ET.AL.
A.D. 09-11807 (2013)
The Pennsylvania Supreme Court has noted that traditional landlord-tenant law held that where the owner of real estate leased various parts of that real estate to several tenant, but retained possession and control of the common passageways and aisles, which were to be used by business invitees of the tenants, the duty to keep the common aisles safe for the business invitees was imposed upon the landlord and not the tenants, unless a contract provision in the lease provided otherwise. And these principles equally apply to liability for accidents occurring in shopping malls.

BANKS v. SECURITY & FIRE SYSTEMS OF PA, INC. v. GUARDIAN PROTECTION SERVICES
A.D. 99-11112 (2013)
Spoliation of evidence is the non-preservation or significant alteration of evidence for pending or future litigation. The key considerations in determining whether a sanction for spoliation of evidence is appropriate should be: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. A spoliation instruction is often granted because it is considered the least onerous penalty commensurate with one party's degree of fault and the other party's prejudice.

2013

BCLJ: 10/18/13 Vol. 22 No. 12

FLUGH v. FLUGH
F.C. 11-90297-D (2013)
A participant may be awarded reasonable counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter. Conduct is 'dilatory' where the record demonstrates that counsel displayed a lack of diligence that delayed proceedings unnecessarily and caused additional legal work.

LEWIS v. COUNTY OF BUTLER
A.D. 13-10541 (2013)
Claims for wrongful discharge do not fall within any exception to sovereign immunity from suit and therefore will not lie against a government entity. A local government unit may be liable for damages only where a plaintiff's damages are caused by a negligent act of the local agency that falls within one of eight enumerated exceptions.

FAUSTI v. ERIE INSURANCE EXCHANGE
A.D. 13-10002 (2013)
To support a claim that an insurer acted in bad faith, a Plaintiff must be able to prove that an insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim.

MILLER v. BUTLER HEALTH SYSTEM, INC. ET. AL.
A.D. 11-10912 (2013)
In a slip and fall negligence legal action, the Hills and Ridges doctrine clarifies the duty a possessor of land owes to its invitees in the case of snowy and icy conditions. The doctrine protects an owner of land from liability for generally slippery conditions resulting from ice and snow where the owner has not permitted the ice and snow to unreasonably accumulate in ridges or elevations.

ECKEL v. HOGUE
F.C. 09-90174-C (2013)
In a custody case involving relocation of a minor child, neither party may relocate the minor child, unless every individual who has custody rights to the minor child consents to the proposed relocation, or the Court approves the proposed relocation. Notice of the proposed relocation must be given and a Counter-Affidavit must be served on every individual who has custody rights to the minor child. Relocation, for the purposes of a Custody Order, is defined as a move which would necessitate a change in the visitation schedule or significantly impair the ability of the non-relocating party to exercise custody, change of school district for the child, or exceed a twenty-five (25) mile radius.

BCLJ: 9/6/13 Vol. 22 No. 6

VALENTINI V. ZAMPERINI ET.AL.
A.D. 12-11308 (2013)
There is no duty to control the conduct of a third person to prevent him from causing physical harm to another unless:

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

The relations which define when an actor has a duty to control a third person's conduct are: §316, the duty of a parent to control the conduct of a child; §317, the duty of a master to control the conduct of a servant; §318, the duty of a possessor of land or chattels to control the conduct of a licensee; and §319, the duty of those in charge of persons having dangerous propensities to control those persons.

VENTURA V. WEST PENN POWER,
A.D. 12-10213;
Nationwide Mutual Fire Insurance Co., et.al. v. West Penn Power, A.D. 12-11103;
State Farm Fire & Casualty Company v. West Penn Power, A.D. 12-11104;
Allied Dental Group, LTD v. West Penn Power, A.D. 12-11108 (2013)
While electricity is being transmitted, liability is controlled by standards of negligence and not strict liability, since any injury sustained as a result thereof is causally connected only to the transmission or transportation service and is unrelated to the ultimate sale of the product. Once electricity passes through the meter into the stream of commerce, it becomes a product and is subject to strict liability.

CRANBERRY PROMENADE, INC. ET.AL. V. CRANBERRY TOWNSHIP, ET.AL.,
A.D. 08-12419 (2013)
Except where an amendment to a pleading is allowed as of course under the Rules of Civil Procedure, or granted as of right under other provisions of the Rules, or where the consent of the adverse party has been obtained, the allowance of amendments is within the sound discretion of the trial court. A trial court acts within its discretion in denying a request to amend pleadings to make them more specific, where the party offers no additional facts to establish a claim, and does not suggest that any defect in pleading can be cured by the amendment. An amendment is properly refused

where it appears the amendment is futile.

MILKO V. RASSAU,
A.D. 12-11331 (2013)
There is no fraud in the execution of a written contract and parol evidence of representations is inadmissible as to a matter covered by a written agreement with an integration clause unless the parties agreed that those representations would be added to the written agreement but they were omitted because of fraud, accident or mistake.However, if fraud induced the agreement, no valid agreement came into being and parol evidence is admissible to show that the alleged agreement is void. Nevertheless, the case law clearly holds that a party cannot justifiably rely upon prior oral representations yet sign a contract denying the existence of those representations.

BCLJ: 5/17/13 Vol. 21 No. 42

SOUTH BUTLER COUNTY SCHOOL DISTRICT V. KUSEVICH CONTRACTING, INC., ET.AL.
A.D. 10-11484 (2013)
A crossclaimant may assert claims for contribution and indemnity against a crossclaim defendant, by alleging that the crossclaim defendant is solely liable or liable over to the crossclaimant on the underlying cause(s) of action asserted by the plaintiff. Underlying causes of action are determined by the damages allegedly suffered by the plaintiff.

OLIVER V. BALL V. HARMON,
A.D. 09-12349 (2013)
With regard to time is of the essence provisions, the Pennsylvania Supreme Court has found that the party who contributes to the cause of a delay in the performance of a time is of the essence clause may not benefit from another party's failure to comply with such clause.

BORGHOL V. BORGHOL,
F.C. 12-90519-D (2013)
Foreign judgments are recognized and enforced in this country because of the comity due by one nation to another and to its courts and decrees. A decree issued by a foreign court with jurisdiction over the matter is entitled to great respect and will ordinarily by upheld in Pennsylvania absent a showing of fraud or violation of policy may be collaterally attacked for lack of jurisdiction only by a divorce defendant who was not personally served or did not appear for the proceeding.

BCLJ: 5/10/13 Vol. 21 No. 41

WESTERN-SOUTHERN LIFE ASSURANCE COMPANY V. ALLEN, ET.AL.
A.D. 12-11094 (2013)
Before a Court will invoke the substantial compliance doctrine and award the proceeds of a life insurance policy to a divorced spouse who was named the beneficiary thereof prior to the divorce, there must be established three requirements. First the decedent's intent to change his beneficiary designation must be clearly established by the evidence. Second, the desired beneficiary must be clearly identifiable from the evidence. Third, the defendant must have substantially complied with the procedures required to effectuate the change in beneficiary.

HAWK V. AMERICAN TOOL COMPAIES, INC.,
A.D. 01-10746 (2013)
Whether a product is defective, because of a failure to give an adequate warning, is initially a question of law to be decided by the trial court. With regard to a Strict Liability, Failure to Warn, defect, a plaintiff must show that the product was unreasonably dangerous due to a latent defect. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

LIGO V. PA. INTERSCHOLASTIC ATHLETIC ASSOCIATION,
A.D. 13-10290 (2013)
The decision by the P.I.A.A. to deny a transfer high school student's request for a waiver under Article VIII, Section 6-13 (Severe and Unusual Personal Hardship) was arbitrary and capricious discrimination as it was unpredictable and determined by individual discretion rather than by fixed rules and procedures.

BCLJ: 3/15/13 Vol. 21 No. 33

SIEMINSKI v. NORTHEAST TRANSFER, INC. v. VERIZON WEST VIRGINIA, INC.
A.D. 08-12265 (2013)
The doctrine of fraudulent concealment is an exception to the requirement that a complaining party must file suit within the statutory period. Where, through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the statute of limitations. The defendant's conduct need not rise to fraud or concealment in the strictest sense, that is, with an intent to deceive; unintentional fraud or concealment is sufficient; mere mistake, misunderstanding or lack of knowledge is insufficient however, and the burden of providing such fraud or concealment, by evidence which is clear, precise and convincing, is upon the asserting party.

RAIDA v. KUSNER,
A.D. 07-10418 (2013)
The plaintiff's burden in an action of ejectment is clear: he must establish a right to immediate exclusive possession. In order to recover in an ejectment action, the plaintiff must show title at the commencement of the action and can recover, if at all, only on the strength of his own title, not because of weakness of deficiency of title in the defendant. This rule places upon the plaintiff the burden of proving a prima facie title, which proof is sufficient until a better title is shown in the adverse party. The plaintiff in an ejectment suit, as in other cases, need not go further than to make out a prima facie case. Until and unless the plaintiff has made a prima facie case by showing title sufficient upon which to base a right of recovery, the defendant is not required to offer evidence of his title.

PIETROPOLA v. PIETROPOLA,
F.C. 10-90461-D (2013)
Generally, res judicata must be raised as responsive pleading under the heading "New Matter" and may not be raised in preliminary objections. However, an exception to the responsive pleading requirement exists in those circumstances where the complaint makes repeated references to a prior action and contains facts and issues pleaded by the prior action; in that case, the affirmative defense of res judicata is properly raised by preliminary objections.

BCLJ: 1/25/13 Vol. 21 No. 26

BROOKS, ET.AL. V. GEOSPATIAL HOLDINGS, INC., ET.AL.
A.D. 12-10436 (2012)
The elements of a Negligent Misrepresentation cause of action are as follows: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. While R.C.P. 1019(b) does not apply to Negligent Misrepresentation because it is a claim based in negligence rather than fraud, Plaintiffs' Complaint must give Defendants notice of what the plaintiffs' claims are, the grounds upon which they rest, and summarize the facts essential to support Plaintiffs' Negligent Misrepresentation claims.

CARNEY V. SLIPPERY ROCK UNIVERSITY, ET. AL.,
A.D. 12-10092 (2012)
A claim of violation of the Whistleblower Act resulting in termination of employment must be brought in the Commonwealth Court of Pennsylvania which has original jurisdiction.

DANNIC ENERGY CORPORATION V. STOUGHTON, ET.AL.,
A.D. 08-10518 (2012)
A claim for punitive damages in a legal action under the Declaratory Judgments Act or in a legal action for Injunctive Relief in Equity in improper and will be dismissed.

BCLJ: 1/18/13 Vol. 21 No. 23

NEXTIER BANK, N.A. V. LOYAL HANNA HEALTH CARE ASSOCIATES, ET. AL.,
A.D. 11-10911 (2012)
With regard to interpretation of contract language where an issue of ambiguity is raised, the Commonwealth Court has held that, an ambiguity exists is to be determined by the Court as a question of law. Additionally, the Superior Court noted that a contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction.

HILDERBRAND V. HAPPY HUNTERS SPORTSMEN'S CLUB, ET. AL.,
A.D. 11-11572 (2012)
An irrevocable license is not strictly an easement, it is in the nature of one; it really is a permission or license, express or implied, to use the property of another in a particular manner, or for a particular purpose and where this permission has led the party to whom it has been given to treat his or her own property in a way that such person would not otherwise have treated it, as by the erection or construction of permanent improvements thereon, it cannot be recalled to his or her detriment. While the license may not be recalled to the detriment of the licensee, there is no law in this Commonwealth to support expanding the prior use to grant title to the Plaintiff.

MCKINNEY V. MCKINNEY,
F.C. 09-90216-D (2013)
The Superior Court has determined that in an appropriate case, if the record established the likelihood that a property distribution order might be circumvented through bankruptcy proceedings, such

a fact might be relevant in determining whether alimony is appropriate. If the Court finds that an equitable distribution award is thwarted through bankruptcy proceedings, it is appropriate for the Court to consider the property actually acquired by a spouse in determining whether an order for alimony may be modified.

PATTERSON V. AFSCME, ET. AL.,
A.D. 10-11008 (2012)
With regard to the elements of a retaliation cause of action, the Commonwealth Court has held that a prima facie case of retaliation requires a complainant to show that: (i) she was engaged in a protected activity; (ii) her employer was aware of the protected activity; (iii) subsequent to participation in the protected activity complainant was subjected to an adverse employment action; and (iv) there is a causal connection between participation in the protected activity and the adverse employment action.

BCLJ: 2/17/2012 Vol. 20 No. 07

Preservation Partners v. Miller,
A.D. 11-10834 (2011)
A provision in an Agreement of Sale for real estate which provides that in the event of default by the Buyer, the Seller's sole remedy is to retain the earnest money paid which the Agreement states is adequate liquidated damages is valid and the Seller has no legal right and no cause of action to claim any other damages or losses.

Lelunan Brothers Holdings, Inc. v. Dahl
C.P. 11-21466 (2011)
The Prothonotary is not authorized under the Rules of Civil Procedure to enter a default judgment in response to a Praecipe because no Reply was filed to New Matter, and any judgment entered thereon is void ab initio.

Lee v. Estate of Anna Pearl Reimer, et al.
A.D. 10-12020 (2011)
Where the compensation of a lessor of an oil and gas lease is subject to the volume of production, the period of active production of the lease is the measure of the duration of the lease, and production means commercial production in such amounts that would yield a profit to the lessee.

BCLJ: 3/09/2012 Vol. 20 No. 10

Patterson v. Demarco, et al.,
AD. 11-10669 (2012)
An action to recover damages arising from a home inspection report must be commenced within one (1) year after the date the report is delivered, otherwise that action is barred by the Statute of limitations under the Home Inspection Law.

Kenmaur Investments, Inc. v. Penndot,
A.D. 11-11258 (2012)
A landowner and Lessor has standing to claim damages for a de facto taking to its property interests where the condemnation causes injury to its business operations and is suffered by the tenant.

Claycomb et al. v. Boring, Adm.,
AD. 10-10801 (2012)
A Plaintiff may not amend her Complaint after the Statute of Limitations has expired to add allegations of willful, wanton, gross negligence and extreme reckless behaviors by virtue of new factual allegations and also add a claim for punitive damages.

Tallon v. Trinty Development Co., et al.,
AD. 10-11346 (2012)
The duty of a possessor of land to anticipate harm despite an invitee's knowledge of a dangerous condition or the obviousness of a dangerous condition may arise where the possessor has reason to expect that the invitee's attention may be distracted so that he will not discover what is obvious or will forget what he has discovered or fail to protect himself against it.

BCLJ: 3/16/2012 Vol. 20 No. 11

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BCLJ: 7/27/2012 Vol. 20 No. 30

WOLFE v. ROSS v. STATE FARM FIRE & CASUALTY CO.,
A.D. 04-10651 (2012)
An issue arising under an insurance policy can be resolved by a motion for summary judgment if the facts are not in dispute and the court's only task is to determine whether the facts of the case fall within the terms ofthe insurance contract. Thus, questions concerning the parties' respective rights under an insurance policy can be disposed of on a motion for summary judgment if the rights of the parties are clearly spelled out in the policy and the material facts are undisputed.

LESSER v. BLAUSER, ET.AL,
A.D. 11-11169 (2012)
The test for deciding whether a party may amend his pleading to correct the name of a defendant is whether the right party was sued but under a wrong designation, in which case the amendment should be allowed, or whether a wrong party was sued and the correction would simply substitute another distinct party, in which case the amendment should not be allowed.

WIRELESS DEVELOPMENT GROUP, LLC v. PENN TOWNSHIP ZONING HEARING BOARD v. TOWNSHIP OF PENN, A.D. 11-10819 (2012)
Exclusionary zoning ordinances take two forms: de jure and de facto. De facto exclusion exists where an ordinance permits a use on its face, but when applied acts to prohibit the use throughout the municipality. Exclusionary impact can invalidate an ordinance; exclusionary intent is not necessary. A zoning ordinance which totally excluded a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality.

BCLJ: 8/24/2012, Vol. 21 No. 04

South Butler County School District v. Kusevich Contracting, Inc., et.al.
A.D.10-11484 (2012)
Pennsylvania law provides that claims for indemnification arise only when the party seeking indemnity has made a payment on the underlying claim, and before the right of indemnification arises, the indemnitor must in fact pay damages to a third party. Any action for indemnification before such payment is premature unless the claim is predicated on the same series of occurrences as those underlying the Plaintiffs claim for relief.

Wisener v. Nowack,
F.C. 09-90274-C (2012)
Under the rule of civil procedure governing the filing of legal papers, a mailed document is filed with the Prothonotary's office when it is received by the Prothonotary, regardless of when it is later time-stamped; time-stamping of the document is nothing more than a ministerial act following the actual filing of the document. Perfection of an appeal does not depend in any way on payment of the filing fee.

Groner v. Kasmoch, et.al,
A.D. 09-12284 (2012)
It is not within the power of the Legislature to invest either an individual or a corporation with the right to take the property of a private owner for the private use of some other individual or corporation, even if a method is provided for ascertaining the damages and paying what shall be deemed just compensation. For the taking of private land to be constitutional under the PA Private Road Act, the public must be the primary and paramount beneficiary of the proposed private road.

Ball v. Eat 'N Park Hospitality Group, et al.,
A.D. 11-11201
As a general rule, a landlord out of possession is not liable for injuries incurred by third parties on the leased premises because the landlord has no duty to such persons. This general rule is based on the legal view of a lease transaction as the equivalent of a sale of the land for the term of the lease. Thus, liability is premised primarily on possession and control, and not merely on ownership.