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3rd Circuit Judge Sloviter Takes Inactive Status

BY P.J. D'ANNUNZIO
Of the Legal Staff

Senior Judge Dolores K. Sloviter, the first woman to serve on the bench of the U.S. Court of Appeals for the Third Circuit, will no longer be hearing cases due to a "serious medical condition" involving her eyes, the court's chief judge announced Monday.

Sloviter, 83, who was appointed to the appellate bench in 1979 by President Jimmy Carter, was described by Third Circuit Chief Judge Theodore A. McKee as a "trailblazer."

"Judge Sloviter is a true legal giant," McKee said in a statement. "Her contribution to the court and the legal profession cannot be diminished. I speak for the entire court family in wishing Judge Sloviter good health, and in thanking her for all she has done for the Third Circuit."

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High Court Denies Wal-Mart's Appeal of $187.6M Class Action

BY BEN SEAL
Of the Legal Staff

The U.S. Supreme Court on Monday denied Wal-Mart Stores' petition for certiorari seeking to overturn a $187.6 million class-action damages award against the company over wage-and-hour violations.

The denial lets stand a 4-1 ruling by the Pennsylvania Supreme Court in December 2014 in *Braun v. Wal-Mart Stores* and *Hummel v. Wal-Mart Stores* that affirmed the award. The majority found that despite the size of the 188,000-member class, the methods used to extrapolate liability and damages to each member did not constitute an improper "trial by formula" that deprived the retail giant of its due process rights.

"In this case, where systemic wage-and-hour violations were asserted, evidence was presented by appellees that, if believed, supported an inference that Wal-Mart managers companywide were

DONOVAN

pressured to increase profits and decrease payroll by understaffing stores through the preferred scheduling system, and that these factors, including the managers' annual bonus compensation program, impeded the ability of employees, across the board, to take scheduled, promised, paid rest breaks," the majority opinion said. "The lack of proof of class commonality present in [*Wal-Mart Stores v.*] *Dukes* is not present here."

Michael Donovan of Donovan Litigation Group in Berwyn, who represented the class at the Pennsylvania Supreme Court, said he was gratified by the U.S. Supreme Court's decision.

"We're hopeful that our clients will finally be paid the back wages that

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Deposition of Wife In Suit Over Sexual Harassment Denied

BY P.J. D'ANNUNZIO
Of the Legal Staff

A federal judge presiding over a sexual harassment case has applied proportionality under recently revised federal rules in determining that the deposition of the wife

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For Cosby, Kane Criminal Cases, Montco Court Dusts Off 'Playbook'

BY LIZZY MCLELLAN
Of the Legal Staff

It's not often that any courthouse is host to a criminal case that captures national attention, let alone two at once. But the administration and staff at the Montgomery County Courthouse in Norristown are currently living that reality, after the Montgomery County district attorney announced criminal charges last year against comedian Bill Cosby and Pennsylvania Attorney General Kathleen Kane.

As the criminal cases against Cosby and Kane play out simultaneously, members of both the Pennsylvania press corps and the national media have become familiar

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entitled. It is not limited to fraudulent activity. Overpayments must be repaid, whether caused by intentional error or not. Repayments by providers and suppliers may be made by applicable claims adjustments, self-reported refunds or other appropriate means.

The Final Rule also states that providers and suppliers continue to be responsible for the acts of their agents. This includes third-party billing companies. As the Final Rule states in its summary, its requirements are meant to ensure compliance with applicable statutes, promoting the furnishing of high-quality care, and protecting the Medicare trust funds against fraud and improper payments.

This Final Rule provides needed clarity and consistency in the reporting and returning of self-identified overpayments. •

Real Estate

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awarding a plaintiff specific performance is discretionary and not as of right. Second, specific performance will not be granted if by doing so hardship or injustice will result. Third, the Pennsylvania Supreme Court, citing a line of cases dating from 1897 to 1994, has "consistently determined that specific performance is an appropriate remedy to compel the conveyance of real estate where a seller violates a realty contract and specific enforcement of the contract would not be contrary to justice."

It is black-letter law that once a real estate sales contract is formed, equitable title vests in the buyer, placing the seller as a trustee of the property for the benefit of the buyer. Consequently, as an equitable titleholder, the purchaser may request a court of equity to enforce the contract and compel specific performance. The court cited to the Restatement (Second) of Contracts (Section 360) for the proposition that sales of land hold a special place in the law because "a specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money."

The fact that the sellers did not argue that they would suffer an ensuing hardship or injustice proved fatal to their claim that money damages constituted an adequate remedy. The court rejected the trial court's and sellers' contention, based on *Boyd & Mahoney v. Chevron U.S.A.*, 614 A.2d 1191, 1194 (Pa. Super. 1992), that specific performance is only available when the characteristics or location of land is of such importance to the buyer that no other property can duplicate its value. More specifically, the court emphasized that *Boyd & Mahoney* does not stand "for the proposition that land itself is not unique and specific performance is only available if some characteristic of or structure on the land, or the location of the itself, is of such importance to a buyer that no other property can duplicate its value." The question of whether a structure must present unique considerations to the buyer rather than the land was not an issue before the court. Although the *Boyd* court noted the ownership of the land at issue would have allowed Boyd & Mahoney to control the architectural design and future development of an area where it already owned properties, the court did not suggest that the element of uniqueness is exclusive to a buyer. The *Boyd* court affirmed a trial court order that specific performance was appropriate, in addition to an award of damages for lost rental income, in a case when an optionee was not given the opportunity to exercise a right of first refusal.

The court also took issue with the sellers' contention that *Wagner v. Estate of Rummel*, 571 A.2d 1055 (Pa. Super. 1990), appeal denied, 588 A.2d 510 (Pa. 1991), stands for the proposition that an adequate remedy at law at law exists for the breach of a real estate sales contract. In *Wagner*, the Superior Court disallowed the purchase of 16 acres and a home valued at $55,000 to $60,000 for the measly sum of $550—a result that would have created an "injustice, circumstances under which equity could not afford relief." It should be noted that the allegation of price unconscionability was first raised on the exceptions to the court order. Yet in the interest of equity, the issue was considered and was outcome-determinative in reversing the specific performance decree.

The *Oliver* decision should serve as a warning to those who choose to ignore the sanctity of real estate contracts in this state. Buyer counsel will find a wealth of precedent to buttress a specific performance prayer when a client desires to pursue such relief. The reaffirmation that land is objectively unique is critical. Seller's counsel would be wise to plead, when appropriate, unconscionability, misrepresentation, capacity, undue influence and other defenses relating to fundamental fairness to defeat a specific performance claim on the basis of hardship or injustice. Sellers should reconsider disregarding such contractual commitments lest they find themselves on the receiving end of specific performance litigation. •

Cookie

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Trader Joe's has chosen to package and advertise the infringing product is likely to cause confusion, mistake and/or deceive purchasers, potential purchasers, and the relevant public and trade at the time of the purchase, as well as post purchase as to the source or sponsorship of approval of the infringing product, and/or as to its affiliation with Pepperidge Farm, thereby causing harm to Pepperidge Farm's reputation and good will," according to the lawsuit.

Milanos have been sold since 1956, and neither the shape of the cookie nor the packaging has changed significantly since then. Pepperidge Farm claims that the shape of the cookie makes it instantly recognizable and "due to their popularity, have appeared in pop culture and TV shows like 'Frasier,' 'Will and Grace,' 'Seinfeld,' and 'Two-and-a-Half Men,'" according to the federal lawsuit.

According to the suit, Pepperidge Farm (which is owned by the Campbell Soup Co.) told Trader Joe's of its potential infringement in 2015. The Connecticut company sought to block future sales of the Crispy Cookies and be paid undisclosed damages, including punitive. Pepperidge Farm says it has generated "hundreds of millions of dollars" in Milano cookie sales in the past 10 years.

But a judge dismissed the case March 9 after Pepperidge Farm filed notice that it was withdrawing the lawsuit.

Megan Spicer reports for The Connecticut Law Tribune, an ALM affiliate of The Legal. •

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they've been due for over 16 years," Donovan said.

Robert S. Peck of the Center for Constitutional Litigation in Washington, D.C., class counsel before the U.S. justices, said he was pleased by the decision and felt it was presaged by the court's recent ruling in *Tyson Foods v. Bouaphakeo*, which affirmed a class-action award for Tyson Foods workers in Iowa who contended they were underpaid.

Gibson, Dunn & Crutcher attorney Theodore J. Boutrous Jr. represented Wal-Mart. Company spokesman Randy Hargrove said in a statement that Wal-Mart was disappointed by the court's decision not to review the case.

"While we continue to believe these claims should not be bundled together in a class-action lawsuit, we respect the court's decision," he said. "We will now determine how we move forward in the trial court."

Hargrove also said the company has taken steps in the past decade, since most of the claims were filed, including enhancing its timekeeping systems and additional training, "to make sure all our associates understand the importance of those policies and comply with them."

A jury in 2006 had awarded the plaintiffs in *Braun* and *Hummel* $187.6 million in damages for claims that Pennsylvania employees were not properly compensated for off-the-clock work and missed rest breaks. Although the state Superior Court in 2011 upheld the award, it determined that a $33.8 million award for attorney fees needed to be recalculated by the trial court.

While Wal-Mart argued in the Superior Court that the proof offered by the class only showed individual proof, not classwide proof, the intermediate appellate court said the commonality of the class was demonstrated through Wal-Mart's own business records to show that class members missed breaks, had too few breaks or had their breaks truncated. Wal-Mart had additionally argued that individual employees would

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have to be questioned to determine if they were forced by managers to work through or truncate their breaks.

In a dissent, then-Justice Thomas G. Saylor said he felt the majority's decision relaxed the approach to class action law.

"Here, the appellee class was permitted to effectively project the anecdotal experience of each of six testifying class members upon 30,000 other members of the class at large, to extrapolate abstract data concerning missed and mistimed 'swipes' from 16 Pennsylvania stores to 139 others, to overlay discrete data taken from several years' experience across a distinct four-year period, and to attribute a single cause to missed and mistimed swipes, all despite indisputable variations across store locations, management personnel, time, and other circumstances," Saylor said.

Saylor added he felt the subject should be "of overt consideration in the political branch."

The majority focused its decision on the proof at trial, and whether the proceedings relieved the plaintiffs of their burden to produce common evidence on the key elements of the claims.

Although Wal-Mart argued the trial process had been disapproved of by the U.S. Supreme Court in its 2011 decision in *Dukes* and 2013 decision in *Comcast v. Behrend*, the plaintiffs argued Wal-Mart had not faced a "trial by formula," but rather a "replicated proof"-style class action, in which underlying evidence proves each class member's claim as if each class member had proceeded alone.

According to the opinion, the "trial by formula" outlined in *Dukes* consisted of a master determining whether backpay was warranted, and how much should be due to a sample set of class members. The master would then multiply the average backpay amount by the number of claims the master determined to be valid.

The majority opinion, however, said that, because the liability in *Braun* and *Hummel* was not determined by a formula, *Dukes* did not apply.

"Instead, the extrapolation evidence Wal-Mart challenges in this appeal involves the amount of damages to the class as a whole," the opinion said. "By contrast, the evidence of Wal-Mart's liability to the entire class for breach of contract and [Pennsylvania Wage Payment and Collection Law] violations was established at trial by presentation of Wal-Mart's own universal employment and wage policies, as well as its own business records and internal audits."

The justices likewise found the *Behrend* decision to be dissimilar, as the *Braun* and *Hummel* plaintiffs had offered data and analysis to support that their damages were related to "systematic wage-and-hour violations."

The *Behrend* decision further recognized, according to the opinion, that, "where a theory of liability is capable of classwide proof, calculations of damages need not be exact."

"The essence of Wal-Mart's appeal is its assertion that the class action device, in this instance, had 'run amok,'" the opinion said. "In our view, this was not a case of 'trial by formula' or of a class action 'run amok.'"

Donovan said at the time that interest on the award continued to accrue since the 2006 verdict, and would bring the total award to approximately $244 million.

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Ponzi

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The banks, according to the complaint, further failed to adhere to regulations aimed at identifying fraud and money laundering practices, such as the Financial Industry Regulatory Authority's "Know Your Customer" standards. The complaint also said that in 2014 the Federal Reserve issued Fulton Bank a cease-and-desist, mandating improvement of its anti-money laundering and compliance procedures.

Gitomer declined to comment.

An official with the Dauphin County court said attorneys have not yet entered their appearances for the defendants.

An Ameriprise spokeswoman said the company could not yet comment on the lawsuit as it has not yet received a copy of the complaint. Officials at both Fulton Bank and Riverside Bank did not return a message seeking comment.

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with the courthouse on Swede Street in Norristown. Meanwhile, court administration at the county and state levels have been working to control the ripple effects of the increased attention.

Kane's trial is set to start Aug. 8, and Cosby's has yet to be scheduled. But Kane's two preliminary hearings and a two-day hearing related to Cosby's charges provided a sneak peek of how much attention these cases will get if they make it to trial.

Reporters and photographers crowded the hallway outside Courtroom B, standing shoulder-to-shoulder so they could photograph Kane as she entered for her first preliminary hearing in August. And as Cosby's SUV drove away from the courthouse Feb. 2, the first day of his hearing on a petition to have his charges dismissed, television reporters scattered the courthouse lawn shooting segments for the evening news, while photographers were gathered along the outside of the courthouse, and a number of onlookers ran in the street, shouting to Cosby as he waved out the window.

But just one block down Swede Street, it appeared to be a normal day in Norristown. Montgomery County Court Administrator Michael Kehs said the court's goal has been to keep the story in the courtroom as much as possible, preventing problems in the courthouse that would steal away focus.

"We need to make sure that it's pretty much business as usual," Kehs said, and that requires both planning and flexibility.

Some of that planning was tailored specifically to Kane's and Cosby's cases, and to the Norristown venue. But the Administrative Office of Pennsylvania Courts had started drawing the blueprints long before Kane and Cosby were on the radar.

THE PLAYBOOK

It all started with *Bush v. Gore*. The 2000 election case out of Florida may seem far-removed from Pennsylvania court procedure. But at the 2004 national meeting of the Conference of Court Public Information Officers, a public information officer from Florida gave a presentation about his experience with *Bush*. That got the AOPC thinking about how to handle high-profile cases.

"Our colleague in Florida ... was kind of doing it by the seat of his pants, but there were a lot of lessons learned," AOPC communications director Jim Koval said.

Election results are generally unpredictable in Pennsylvania, Koval said, so the AOPC began working on a plan for dealing with a high-profile election case like *Bush*. It looked at Florida's experience, as well as how courts dealt with criminal proceedings in O.J. Simpson's case and Kobe Bryant's case.

The plan had three "vital" aspects, Koval said: support of the judge and related court staff, a decorum order and a Web page for gathering information about the case of interest.

"We had this plan on the shelf for an election case," Koval said. And there it sat, he said, "gathering dust" until Pennsylvania became the venue for a criminal case that grabbed national attention—*Commonwealth v. Sandusky*.

In preparing for the Sandusky proceedings, Koval said, the courts already had a "playbook" for communicating with the public and the press. The playbook had been formulated based on an election proceeding in the Commonwealth Court, but it was conformed to the Centre County Courthouse in Bellefonte, he said.

"Once that blueprint is there ... it works," Koval said. But there was still a need to tweak it somewhat throughout the Sandusky proceedings.

For instance, AOPC assistant communications director Amy Kelchner said, at Jerry Sandusky's first preliminary hearing, "we overworked the credentialing."

In other states, members of the public had forged credentials to gain access to high-profile cases. Once that appeared to be a nonissue in the Sandusky case, the AOPC "backed way off," Kelchner said.

LESSONS LEARNED

During the Sandusky proceedings, Koval said, Judge John M. Cleland made a point of meeting with the media and explaining the case to the press and the public. That set a tone that has carried through in the Cosby and Kane cases, he said.

The courts have also benefited recently from their coordination during the Sandusky trial with the Pennsylvania NewsMedia Association and the Pennsylvania Association of Broadcasters, Koval said. Those organizations have helped the courts communicate to the press. For example, they gathered information on how many members of the press were planning to attend proceedings.

"We pretty much followed the lead of the AOPC," Kehs said. "By the time *Cosby* hit, we already had established those relationships and we simply built on those," he said.

Kehs said his court had some forewarning last year that a criminal case against Kane was possibly on its way, thanks to media reports about the grand jury investigating her. Later in the year, he said, there was a noticeable increase in media coverage about Cosby. But the court didn't know when those charges were going to be filed.

Preparing for the proceedings has required coordination with county commissioners, the county sheriff's office, the Norristown police and others, Kehs said. The court also reached out to local businesses, notifying them that they might be getting an influx of customers for breakfast and lunch on those days.

Since Kane appeared in court before Cosby was even charged, her proceedings had helped the courthouse to prepare, Kehs said. The decorum order from Kane's preliminary hearing was easy to adapt to Cosby, he said.

But there was a difference in the volume of public interest, Kehs noted. So the court made an overflow courtroom available with video transmission of the Cosby hearing, and it worked with the press organizations to coordinate credentials and seating for each courtroom.

It also arranged for a pool of photographers to cut down on the number of cameras crowding the courthouse hallways. There were 10 to 12 cameras outside the courtroom for Kane's preliminary hearings, Kehs said, and that was on "the borderline of what's manageable."

As for scheduling, the court made sure not to have any new jury selection on the day of the Cosby hearing, Kehs said, since the jury parking lot was open to the press, and the courthouse would already have more people coming through the door than usual. But any other scheduling adjustments—such as the relocation of a drug court graduation on the second day of Cosby's hearing—were not specific to the Cosby case. Those kinds of last-minute changes happen every day, Kehs said.

Overall, the challenges in coordinating the proceedings in Kane's and Cosby's cases have been manageable, Kehs said. But one of the vital aspects of the playbook—maintaining the website—has been a challenge, he admitted.

Filings late in the day, and often late on a Friday, have become routine. And those filings have to be scanned and verified before they are posted online.

"The court doesn't have control," Koval said, over what hour of the day the parties file documents. "It drives us crazy here in the press office … it has to drive [the press] crazy too when these filings come in at the end of the day."

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