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SUPREME COURT OF PENNSYLVANIA HOLDS THAT INDIVIDUALS HAVE A CONSTITUTIONAL RIGHT TO PRIVACY IN THEIR HOME ADDRESSES AND OTHER PRIVATE INFORMATION

Pennsylvania State Education Association v. Commonwealth, 2016 Pa. LEXIS 2337, 2016 WL 6087684, (Pa. Oct. 18, 2016) ("PSEA"). The Supreme Court of Pennsylvania recently held that individuals have a constitutional right to privacy in their home addresses under Article 1, Section 1 of the Pennsylvania Constitution and that individuals have a right to "informational privacy" which may not be violated unless this right is outweighed by a public interest favoring disclosure.

SUMMARY AND FACTUAL BACKGROUND

On July 23, 2009, after receiving numerous Right to Know Law ("RTKL") requests for the names and addresses of public school employees, the Pennsylvania State Education Association and several member public school employees sought preliminary and permanent injunctive relief to prevent the release of home addresses of public school employees, and a declaration that the home addresses of public school employees are exempt from public access. On July 28, 2009, the Commonwealth Court entered an order granting PSEA's request for a preliminary injunction prohibiting the disclosure of the home addresses of its members.

The case progressed through the court system for several years. During this time, the preliminary injunction remained in place. On February 17, 2015, the Commonwealth Court held that that neither the Pennsylvania Constitution nor the RTKL protects the home addresses of public school employees from disclosure in response to a RTKL request.

On appeal, the Pennsylvania Supreme Court ("Court") reversed, holding that the right to informational privacy is guaranteed by Article 1, Section 1 of the Pennsylvania Constitution, and may not be violated unless outweighed by a public interest favoring disclosure.

DISCUSSION

The right to privacy is embodied in multiple sections of the Pennsylvania Constitution. It is most frequently discussed in the context of protection against unreasonable searches and seizures under Article 1, Section 8, which is entitled "Security from searches and seizures."

To receive protection under this section, a person must 1) establish a subjective expectation of privacy and 2) demonstrate that the expectation is one that society is prepared to recognize as reasonable and legitimate.'" In *Commonwealth v. Duncan*, 572 Pa. 438, 817 A.2d 455 (Pa. 2003), the Court indicated that, under Article 1, Section 8, a criminal defendant's name and address were entitled to no constitutional protection, since "in this day and age where people routinely disclose their names and addresses to all manner of public and private entities," and are thus readily available to the public, there can be

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no reasonable expectation of privacy in that information. Relying on this language, the Commonwealth Court held that, in the RTKL context, there is no right to privacy in one's home address.

However, in *PSEA*, the Court held that in identifying rights to informational privacy under the Pennsylvania Constitution, it applies the broader array of rights granted to citizens under Article 1, Section 1, which is entitled "Inherent rights of mankind:"

> *All men are born and equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.*

Pa. Const. art. 1, § 1. The Court explained that Article 1, Section 1 of the Pennsylvania Constitution provides even "more rigorous and explicit protection for a person's right to privacy" than does the United States Constitution. Under the prior Right to Know Act, 65 P.S. §§ 66.1-66.4 (repealed, effective January 1, 2009) ("RTKA"), the Court had on three occasions in *Sapp Roofing*, *Penn State* and *Bodack* ruled that certain types of information, including home addresses, implicated the right to privacy under Article 1, Section 1 of the Pennsylvania Constitution, and thus required a balancing to determine whether the right to privacy outweighs the public's interest in dissemination. Based on this precedent, The Court concluded that the right to informational privacy is guaranteed by Article 1, Section 1 of the Pennsylvania Constitution, and may not be violated unless outweighed by a public interest favoring disclosure.

In the *PSEA* case, the Court concluded that the balancing test established in *Sapp Roofing*, *Penn State* and *Bodack* applied and found that the public school employees had strong privacy interests in protecting their home addresses from disclosure and that there was no public benefit or interest in disclosure of perhaps tens of thousands of addresses of public school employees. Moreover, the Court indicated that there was no public interest in procuring personal information about private citizens.

PRACTICAL ADVICE

It is clear that school districts must withhold the home addresses of an employee when responding to a request under the RTKL unless the public interest outweighs the privacy interest. In most cases, when responding to RTKL request for an employee's address, the right to privacy will most likely prevail.

The interesting and undecided issue is what other rights are recognized under the undefined "right to informational privacy" guaranteed by Article I, Section 1 of the Constitution and when will the public's interest in that information outweigh that privacy right. The Court indicated that there is little to no public interest when the RTKL is used to procure personal information about private citizens or to be a generator of mailing lists. The Court did not limit this portion of the opinion to employees, possibly applying this holding to RTKL requests beyond employee addresses, such as lists of tax liens and payments, for example.

Therefore, against this backdrop of uncertainly, school districts should work with their Solicitor before responding to a RTKL request that implicates the right to informational privacy protected by Article 1, Section 1 of the Pennsylvania Constitution, especially if the purpose of the request seeks information about private individuals and the purpose of the request is to generate a mailing list or some other commercial purpose.

RETIRED TEACHER AWARDED POST-RETIREMENT BENEFITS FOR SAME-SEX SPOUSE

In Re: Souderton Area Education Association and Souderton Area School District, Arbitration Award of August 7, 2016 (Arbitrator Joan Parker). Under Pennsylvania law a teacher was not able to legally marry her same-sex spouse until 2014, at which point the teacher had already been retired for two years. The retiree requested that the school district add the spouse to the retiree's health insurance coverage. The school district denied the request, citing past practice. The retiree grieved the school district's decision and an arbitrator directed the school district to provide the requested coverage.

SUMMARY AND FACTUAL BACKGROUND

Susan Roncoroni was a French teacher employed by Souderton Area School District. She was in a long-term relationship with another woman, Judith Mantle, and in 1993 the couple held a symbolic marriage ceremony during which they exchanged wedding rings and vows. Although Pennsylvania did not recognize same-sex marriages in 1993, Roncoroni and Mantle held themselves out as a couple over subsequent years. They co-mingled assets and jointly owned property, insurance and pets.

In 2012 Roncoroni retired from the School District and received individual post-retirement medical coverage through the District's group insurance program, pursuant to the Pennsylvania School Code, 24 P.S. § 5-513. Mantle retired from her job in 2015.

In 2014 Pennsylvania legally recognized same-sex marriage and in July 2015 Roncoroni and Mantle were legally married. After their marriage, Roncoroni requested that the district add Mantle as a dependent on Roncoroni's health insurance coverage. The district denied Roncoroni's request and she filed a grievance challenging the denial.

DISCUSSION

In its defense, the district argued it had established a practice of prohibiting post-retirement additions to health insurance coverage. The district pointed to a previous instance in which a retiree divorced his spouse and then remarried. In this situation the district denied coverage for the retiree's new spouse, and the matter was not grieved. The district insisted its decision with regard to Roncoroni and Mantle had nothing to do with their personal relationship, but instead had to do with the economics of the request and the district's interest in preserving past practice.

However, the arbitrator sustained the grievance and required the district to add Mantle to Roncoroni's coverage. The arbitrator pointed out the inequity of the circumstance, explaining that "when Grievant retired, she could not have legally elected to bring a same-sex spouse onto her health insurance plan."

The arbitrator also pointed out that neither the district's collective bargaining agreement nor the Pennsylvania School Code prohibited a retiree from adding a family member. The arbitrator relied on previous arbitration decisions allowing retirees to add family members in the absence of collective bargaining language to the contrary. In response to the district's argument regarding the economics of insurance coverage, the arbitrator pointed out that additions to coverage are balanced by subtractions from coverage. She noted that health insurance is not static, and explained, "Spouses die, and children grow up, and dependents are just as likely to be removed from coverage as they are to be added to coverage, even in retirement."

PRACTICAL ADVICE

Given that same-sex marriage was not recognized in Pennsylvania until 2014, arbitrators may require school districts to provide coverage for a retiree's newly-married same-sex spouse, even if doing so would conflict with past practice.

PRIVATE SALE OF REAL PROPERTY VOIDED WHERE DISTRICT REJECTED "SUBSTANTIALLY HIGHER" OFFER FROM CHARTER SCHOOL

In re: Private Property Sale by the Millcreek Township School District, 143 A.3d 1037 (Pa. Commw. Ct. 2016) (Decided July 20, 2016). The Commonwealth Court of Pennsylvania reversed the decision of the trial court which had approved a private sale of District property where the District has been presented with a substantially higher offer from a charter school.

SUMMARY AND FACTUAL BACKGROUND

Millcreek Township School District ("District") owned a 7.9 acre parcel of land ("Property") upon which the District operated an elementary school for over 60 years. The elementary school was closed in 2013. In July 2014, the District listed the Property for sale.

The first offer that the District received came from Montessori, the only charter school in Millcreek Township. Montessori offered the District $1.1 million. The District rejected the offer. A few months later, VNet Holdings, LLC ("VNet") matched the Montessori offer, contingent on a re-zoning of the Property so that VNet could use the school building for a commercial business. After receiving the offer from VNet, the District subdivided the Property into three lots: Lot 1, which contained 5.9 acres and the school building and parking

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lots, and Lots 2 and 3, each of which consisted of approximately 1 acre of vacant land.

Montessori made a second offer to purchase the entire Property (Lots 1, 2 and 3) in January of 2015 for $1.1 million, and in addition, Montessori would convey other real property owned by Montessori to the District as part of the deal. The assessed value of the Montessori property to be included in the deal was $689,000. As part of the deal, Montessori would lease back the former Montessori property from the District for up to five years. The District rejected Montessori's second offer.

The District's School Board voted to accept an offer of VNet to purchase only Lot 1 for $1.1 million in February 2015. Shortly thereafter, the District placed a restrictive covenant on Lot 1 to prohibit the sale or lease of the school building on Lot 1 to a charter school. Montessori challenged the deed restriction by filing a declaratory judgment action in the Erie County Court of Common Pleas.

In July of 2015, the District petitioned the trial court for approval of the private sale of Lot 1 to VNet as required by the Pennsylvania School Code. Included with the District's petition were two affidavits from real estate appraisers who opined that the price offered by VNet was "fair and reasonable and was a better price than the School District could obtain at public sale." Montessori intervened in the proceeding and moved to stay the sale to VNet because the offer was conditioned on a re-zoning of Lot 1 and also because Montessori's challenge to the deed restriction was still pending.

At the public hearing on the District's petition for approval of the sale, the Superintendent of the District testified that the District accepted the offer from VNet because, among other things, the District wanted to return Lot 1 to the tax rolls, to maintain Lots 2 and 3 as a buffer and green space for the neighborhood and because the charter school would reduce the student population of the District and negatively impact the District's budget and would be detrimental to taxpayers.

During his testimony, the CEO of Montessori disputed the District's position that selling the Property to Montessori would affect the District's budget and would be detrimental to taxpayers since only 17% of Montessori's students come from the District and Montessori's enrollment was capped at 600 students. Montessori's CEO also testified that Montessori was willing to increase its offer to purchase the Property to $1.6 million in cash with an immediate closing.

The trial court approved the sale to VNet, finding that the sale was in the public interest. The court refused to consider Montessori's offer of $1.6 million because it was submitted "last minute" and the offer was not memorialized in writing. Four days after the order was issued by the trial court, the District and VNet amended their sales agreement to extend the closing date for 2.5 years. Montessori presented a motion to the trial court seeking to supplement the record to include evidence of this revision and to submit its $1.6 million offer in writing. The trial court denied the motion, finding that the amendment to the sales agreement was a collateral matter that was irrelevant to the court's analysis and that the written offer was submitted too late to be considered.

Montessori filed an appeal of the trial court's decision arguing that the court abused in its discretion 1) by refusing to consider Montessori's substantially higher offer to purchase the Property; and 2) by denying Montessori's motion to supplement the record with evidence that the District and VNet had extended the closing date for 2.5 years.

DISCUSSION

The Commonwealth Court began by reviewing the School Code requirements for the sale of unused and unnecessary land and buildings. The Court summarized the requirements of Section 707 of the School Code as follows:

> [S]chool districts are expected to sell their unused property to the highest bidder. They are also expected to sell their unused property at a public auction, after extensive notice to the public, or by sealed bids. A private sale will be allowed so long as there is a public hearing before a trial court, which determines whether the price offered in the private sale is "fair and reasonable" and a "better price than could be obtained at public sale."

The Commonwealth Court acknowledged that there are instances where a private sale may be approved despite another higher offer: 1) when the difference in price is small, or 2) "where other circumstances regarding the sale…appeal to the court's sound discretion."

Comparing the offers from Montessori and VNet, the Commonwealth Court characterized the difference in price ($500,000) as "substantial" and found that the fact that Montessori's offer included the purchase of Lots 2 and 3 was irrelevant. The Court stated that the higher offer submitted by Montessori at the public hearing should have stopped the proceedings and that the trial court should have either ordered the District to conduct further negotiations or, preferably, ordered a public sale of the Property – or at least Lot 1 in the event that the District wanted to keep Lots 2 and 3.

Rejecting the trial court's conclusion that the sale was "in the public interest," the Commonwealth Court noted that such phrase does not appear in Section 707 of the School Code and that the overriding consideration for the trial court should have been whether the District was obtaining a "better price than could be obtained at public sale." The Court further explained that where the difference in price is not substantial, a court could take into account equitable considerations to determine whether the interests of the public would be served by approving the lesser offer.

Based on the foregoing, the Commonwealth Court remanded the case and directed the trial court to order a public sale of the Property.

PRACTICAL ADVICE

When selling district property at a private sale, the district will generally be required to take the highest offer presented. Where the difference between two offers is not substantial, the district may look at other factors to determine whether the sale to one party or the other is in the public interest. Alternatively, the District may sell the property by way of public auction or sealed bids as provided in Section 707 of the School Code.

THE THIRD CIRCUIT COURT OF APPEALS DENIES TEACHER QUALIFIED IMMUNITY UNDER THE "STATE-CREATED DANGER" THEORY WHERE THE TEACHER RELEASED A KINDERGARTEN STUDENT TO AN UNIDENTIFIED ADULT

L.R. v. School Dist. of Philadelphia et. al. No. 14-4640 (3rd. Cir. Sept. 6, 2016). The Third Circuit Court of Appeals affirmed an Order from the U.S. District Court for the Eastern District of Pennsylvania denying Defendants' motion to dismiss a Section 1983 claim alleging a violation of a minor student's Fourteenth Amendment rights, holding that a teacher who released a kindergarten student to an unidentified adult was not protected by qualified immunity under the "state-created danger" theory.

SUMMARY AND FACTUAL BACKGROUND

A five-year old girl ("Jane"), was a kindergarten student in Reginald Littlejohn's class at W.C. Bryant Elementary School in Philadelphia, Pennsylvania (the "School"). In January 2013, Christina Reguster ("Reguster") entered the School, proceeded to Jane's classroom and asked Mr. Littlejohn to take Jane from the classroom.

In accordance with School policy, Mr. Littlejohn ("Littlejohn"), asked Reguster to show him identification and verification that Jane had permission to leave the School. Reguster failed to do so. Despite this failure, Littlejohn allowed Jane to leave his classroom with Reguster. Later that day, Reguster sexually assaulted Jane off school premises, causing her significant physical and emotional injuries.

Jane's mother filed a complaint under 42 U.S.C. § 1983 against the Defendants alleging that Littlejohn deprived Jane of her Fourteenth Amendment substantive due process rights by releasing Jane to an unidentified adult; thus creating a danger that resulted in Jane's physical and emotional harm. The Defendants filed a motion to dismiss arguing the complaint did not allege a constitutional violation and, if it did, Littlejohn was entitled to qualified immunity.

The District Court denied Defendants' motion to dismiss explaining that "ordinary common sense and experience dictate that there is an inherent risk of harm in releasing a five-year old to an adult stranger who had failed to produce identification and authorization for release despite being asked to do so." The Defendants appealed the District Court's Order to the Third Circuit Court of Appeals.

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DISCUSSION

The primary purpose of qualified immunity is to shield school officials from undue interference with their duties and from potentially disabling threats of liability. However, qualified immunity can be lost when public officials violate clearly established constitutional rights of which a reasonable person would have been aware. To decide whether a school employee is protected by qualified immunity, a Court must decide whether: 1) the plaintiff sufficiently alleged a violation of a constitutional right, and 2) the right was clearly established at the time of the official conduct.

The threshold question in any §1983 lawsuit is whether the plaintiff has sufficiently alleged a violation of a constitutional right. The due process clause of the Fourteenth Amendment does not require the state to protect the life, liberty and property of its citizens against invasion by private actors. However, the so-called "state created danger" exception to this rule applies when a state actor uses its authority to create a danger for its citizens.

There are four elements to a state-created danger claim: 1) the harm caused was foreseeable and fairly direct; 2) a state actor acted with a degree of culpability that shocks the conscience; 3) a relationship between the state and the plaintiff existed such that the plaintiff was a member of a discrete class of persons subjected to the potential harm brought about by the state's actions; and 4) a state actor affirmatively used its authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

The Court concluded that the complaint satisfied all four elements. First, the risk that Jane would be harmed by releasing her to a complete stranger was obvious and the harm that occurred was directly caused by Littlejohn's action. Second, Littlejohn was deliberately indifferent because he consciously disregarded a substantial risk of serious harm that was so obvious that it should have been known. Third, Jane was a foreseeable victim because she was a member of the discrete class of kindergarten children for whose benefit the School's release policy had been instituted. Fourth, Littlejohn affirmatively misused his authority in a way that created a danger to Jane when he permitted her to leave with Reguster. If Littlejohn had not acted at all, she would have remained safe in her classroom.

Having determined that the complaint sufficiently alleged a violation of Jane's substantive due process rights, the Court then considered whether Jane's right (i.e., the right to not be removed from a safe environment and placed into one in which it is clear that harm is likely to occur) was clearly established when the incident occurred. The Court concluded that the status of the law in 2013 was sufficiently clear to place Littlejohn on notice that permitting a kindergarten student to leave his classroom with an unidentified adult could lead to a deprivation of that student's substantive due process rights. Accordingly, the Third Circuit Court of Appeals affirmed the District Court's Order that Littlejohn was not entitled to qualified immunity.

PRACTICAL ADVICE

School employees and officials must not use their positions of authority to either create a dangerous environment for students or expose students to obvious harm. As this case illustrates, when a teacher's actions (or inactions) expose a student to a danger that he (or she) would not have otherwise encountered, the teacher may be liable under the state-created danger theory. This is especially true when the teacher is caring for young children who are vulnerable and the teacher's actions (or inactions) have a likelihood of creating danger for their students. As the Court noted, "[e]xposing a young child to obvious danger is the quintessential example of when qualified immunity should not shield a public official from a suit."

A. SCOTT ENTERPRISES, INC. V. CITY OF ALLENTOWN, 142 A.3D 779 (PA. 2016)

Pennsylvania Supreme Court held that a jury finding of bad faith does not mandate a trial court to award penalties and attorney fees under the Pennsylvania Procurement Code.

SUMMARY AND FACTUAL BACKGROUND

The City of Allentown contracted with A. Scott Enterprises, Inc., to construct a new public road. After arsenic-contaminated soil was discovered at the worksite, Allentown suspended work on the project. Following testing, it was determined construction could resume if precautions were taken. Allentown instructed ASE to obtain revised permits and to proceed with the project. However, the existing contract did not include terms regarding the potential for contaminated soil, despite the fact Allentown was aware there might be contamination prior to entering into the contract, and ASE declined to proceed, explaining it would incur substantial additional costs due to the contaminated soil. The parties made several attempts to reach an agreement in which ASE would continue the construction, but to no avail.

Consequently, ASE sued Allentown to recover its losses on the project, as well as interest and a statutory penalty and attorneys' fee award for violations of the prompt pay provisions of the Procurement Code. The Procurement Code is a statute that governs construction project contracting by public bodies, including school districts. Section 3935 of the Procurement Code provides that, upon a finding that payments have been withheld from a contractor by a public body acting in bad faith, the court may award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith and the contractor's attorneys fees.

After a trial, a jury found Allentown breached its contract with ASE and also withheld payments in bad faith. Despite this finding of the jury, the trial court declined to award penalties or attorneys' fees. ASE argued that the ruling effectively disregarded the jury's finding of bad faith. While acknowledging that the amount of a Procurement Code award is discretionary, ASE asserted that the trial court could not deny outright a penalty and fee award where bad faith was determined.

On appeal, the Pennsylvania Commonwealth Court agreed with ASE's interpretation of the Procurement Code, reasoning that the trial court's failure to award penalties and attorneys fees rendered the jury's finding of bad faith a meaningless exercise with no consequence. On further appeal, the Supreme Court disagreed with and reversed the Commonwealth Court's decision.

DISCUSSION

The Supreme Court concluded that, upon a finding of bad faith conduct by a public body, the award to a contractor of penalties and attorneys fees is discretionary, not mandatory, pursuant to the Procurement Code. The Supreme Court explained that "Although 'may' can mean the same as 'shall' where a statute directs the doing of a thing for the sake of justice, it ordinarily is employed in the permissive sense."

The court noted that the use of the term "may" within Section 3935 of the Procurement Code contrasts with a similar provision contained in the Contractor and Subcontractor Payment Act, a statute that governs prompt payment by contractors of their subcontractors. The relevant provision of CASPA states that a court "shall" award penalties and legal fees upon a finding of bad faith withholding, which the court noted indicated a deliberately different legislative intent.

The court stressed that its holding that Section 3935 does not mandate an award in every case where bad faith has been established does not mean a court can arbitrarily decline to issue an award. Thus, a court refusing to award penalties and legal fees must provide a rational basis for that decision. Furthermore, given the extreme conduct necessary to support a finding of bad faith, the court offered its observation that instances where a finding of bad faith is deemed not to require a Section 3935 award at all presumably will be rare.

PRACTICAL ADVICE

The Procurement Code requires that school districts comply with the payment terms established by their construction contracts. The withholding of monies from payments otherwise due to contractors must be justified by a contractor's failure of performance and be commensurate in amount with the actual loss or cost of correction resulting from the contractor's default. An arbitrary withholding of monies from a contractor payment or the withholding of an amount more than is required to protect the school district's interests can result in a finding of bad faith, for which the Procurement Code allows an assessment of penalties and legal fees.

Although the A. Scott Enterprises, Inc. v. City of Allentown decision establishes that the imposition of penalties and fees is within the discretion of the court, as cautioned by the Supreme Court, unique circumstances would be required to avoid such an award. Accordingly, the withholding of monies from payments otherwise due to contractors must be carefully weighed and calibrated in consideration of the extent and actual impact of a contractor's default.

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Tucker Arensberg's Municipal and School Law Group represents local school districts and municipalities in a variety of legal matters. Our attorneys are solicitors or special counsel for several school districts/jointures and municipalities in Western Pennsylvania. In addition, our attorneys serve as special labor counsel to numerous school districts and municipalities in Western Pennsylvania and have held appointments as special counsel to school boards, zoning boards, civil service commissions and other municipal sub-entities.

The range of services called for in our representation of public bodies is quite broad. Included in that range are: public and school financing, including the issuance of bonded indebtedness; labor, employment and personnel issues; public bidding and contracting; school construction and renovation; taxation, including real estate, earned income and Act 511; pupil services and discipline; zoning and land use and litigation and appellate court work.

The Tri-State Area School Study Council at the University of Pittsburgh was established in 1948 as a continuing partnership between school districts and the University. We are the third oldest and second largest Study Council in the country. We seek to work with you to address the issues of practice we all face as we lead educational organizations to improve focus and build organizational capacity. Priorities established by the membership include: 1) timely information dissemination on current research and exemplary practices; 2) research and development technical assistance on projects to meet district needs; 3) professional development programs and workshops on current topics; 4) participation in District clinical experiences to prepare future school leaders and; 5) practitioner participation in academic preparation programs. For more information, please contact Dr. Diane Kirk, Director, 412.648.1716.