

# Adams County Legal Journal

Vol. 40

June 5, 1998

No.2, pp. 5-10

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## CONTINUING LEGAL EDUCATION PROGRAMS

1. *Representing Residential Landlords and Tenants.*

Thursday, June 11, 1998—9:00 a.m.

Room 307, Adams County Courthouse

Credits: Substantive Law—4, Ethics—0

2. *Pennsylvania Workers Compensation Practice and Procedure.*

Monday, June 15, 1998—9:00 a.m.

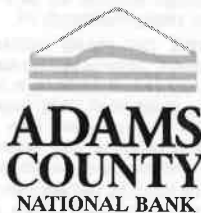
Room 307, Adams County Courthouse

Credits: Substantive Law—5, Ethics—0.

**Registration through P.B.I. 800-932-4637.**

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ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

Designated for the Publication of Court and other Legal Notices. Published every Friday by Adams County Bar Association, Donald G. Oyster, Esq., Editor and Business Manager.

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SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-354 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 10th day of July, 1998, at 10:00 o'clock in the forenoon at the Court-house in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT CERTAIN piece, parcel or tract of land, situate, lying and being in the borough of Littleton, Adams County, Pennsylvania, more particularly bounded, limited and described as follows, to wit:

BEGINNING for a corner of West Myrtle Street and a 15 foot wide public alley; thence in a Westerly direction along said West Myrtle Street for a distance of 75 feet to a stake; thence in a Southerly direction for a distance of 100 feet to a stake on the Northern boundary line of Lot No. 21-A; thence in an Easterly direction along said Lot No. 21-A for a distance of 75 feet to a 15 foot wide alley; thence in a Northerly direction along said 15 foot wide alley for a distance of 100 feet to West Myrtle Street, the place of beginning.

THE above described lot of ground is comprised of the Eastern one-half of Lot Nos. 23-A, 23, 22-A according to the plan and resurvey made November, 1935, by LeRoy Winebrenner, the same being part of the land included in T.C. McSherry's First Addition to the Borough of Littleton, Adams County, Pennsylvania, and known as "McSherry Park."

UNDER AND SUBJECT, nevertheless, to restrictions as recorded in Record Book 229 at page 446.

BEING Tax Parcel #7-26.

TITLE TO SAID PREMISES IS VESTED IN Cary G. Wireman and Roberta L. Wireman, husband and wife, by Deed from Douglas E. Leppo and Jamie A. Leppo, husband and wife, dated 3/31/95 recorded 3/31/95 in Record Book 1012 page 18.

SEIZED and taken into execution as the property of **Cary G. Wireman and Roberta L. Wireman** and to be sold by me

Raymond W. Newman  
Sheriff

Sheriff's Office, Gettysburg, PA  
April 27, 1998.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 3, 1998, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto

within 10 days after filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.  
6/5, 12 & 19

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 96-S-951 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 12th day of June, 1998, at 10:00 o'clock in the forenoon at the Court-house in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL that tract of land situate in Carroll Valley Borough, formerly Liberty Township, Adams County, Pennsylvania, being Lot No. 164 in Section R1, bounded and described as follows:

BEGINNING at a point in the center of McGaughlin Trail at Lot No. 163; thence by said lot North two (2) degrees thirty-seven (37) minutes twenty (20) seconds East two hundred twenty-five (225) feet to Lot No. 149; thence by said lot and by Lot No. 148 South eighty-seven (87) degrees twenty-two (22) minutes forty (40) seconds East, one hundred (100) feet to Lot No. 165; thence by said lot South two (2) degrees thirty-seven (37) minutes twenty (20) seconds West two hundred twenty-five (225) feet to a point in the center of said McGaughlin Trail; thence in said McGaughlin Trail North eight-seven (87) degrees twenty-two (22) minutes forty (40) seconds West, one hundred (100) feet to the place of BEGINNING.

The above description was taken from a plan of lots labeled "Section R1 of Charnita, Inc." dated May 29, 1970, prepared by Gordan L. Brown, R.S. recorded in Adams County Plat Book No. 1 at page 83.

HAVING THEREON ERECTED A DWELLING KNOWN AS 66 FRUITWOOD TRAIL, FAIRFIELD, PA.

BEING THE SAME PREMISES WHICH A. K. Johnston by deed dated 9/13/95 and recorded 9/22/95 in Adams County Deed Book 1086 Page 105 granted and conveyed unto A. K. Johnston, having an 80% interest and Mary V. Hoilman having a 20% interest.

TO BE SOLD AS THE PROPERTY OF A. K. JOHNSTON A/K/A ALVA K. JOHN-

STON AND MARY V. HOILMAN A/K/A MARY VIRGINIA HOILMAN UNDER ADAMS COUNTY JUDGMENT NO. 96-S-951.

SEIZED and taken into execution as the property of **A. K. Johnson and Mary V. Hoilman** and to be sold by me

Raymond W. Newman  
Sheriff

Sheriff's Office, Gettysburg, PA  
March 12, 1998.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on July 6, 1998, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

5/22, 29 & 6/5

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, in compliance with the requirements of Section 311, of Act 1982-295 (54 Pa. C.S. 311), the undersigned entity (ies) announce their intention to file in the Office of the Secretary of the Commonwealth of Pennsylvania, on approximately 5/9/98, a certificate for the conduct of a business in Adams County, Pennsylvania, under the assumed or fictitious name, style or designation of **GETTYSBURG HERB COMPANY**, with its principal place of business at 777 Baltimore Street, Old Gettysburg Village, Gettysburg, PA 17325. The names and addresses of the persons owning or interested in said business are Michele DeFuso and Jason R. Hoffman, residing at 333 Baltimore Street, Gettysburg, PA 17325. The character or nature of the business is retail sale of herbs and herbal products.

6/5

## TODD VS. TODD

1. The Master's Report is advisory only, even as to matters of credibility.
2. Equitable reimbursement or reimbursement alimony may be ordered when there is not enough property to effect economic justice and alimony is unavailable.
3. Equitable reimbursement may be terminated for reasons of justice, but not simply because of remarriage or cohabitation.
4. Fairness is the only consideration when determining equitable reimbursement.
5. Since equitable reimbursement is utilized only when insufficient property exists, dissipation is the factor really to be considered.
6. Abandonment of property requires an intention to abandon coupled with an act showing that the intention was carried out.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 95-S-587, ROSEMARY TODD VS. RALPH V. TODD.

Sheryl Jackson, Esq., for Plaintiff  
Dann S. John, Esq., for Defendant

### OPINION ON EXCEPTIONS TO MASTER'S REPORT

Spicer, P. J., September 2, 1997.

We deal with plaintiff's exceptions to the Master's Report, which was filed October 2, 1996. Exceptions were filed October 15, 1996. Court action has been delayed because no transcript was prepared, and the parties could not agree who should pay for one. After the transcript was filed, oral argument was scheduled and occurred August 25, 1997. At the same time, we considered and denied defendant's request for termination of alimony pendente lite. Obviously, the case is still in a stage of active litigation.

Although plaintiff has filed several exceptions, her main contention involves some rather interesting issues relating to what is sometimes called equitable reimbursement, and sometimes referred to reimbursement alimony.

Findings by the Master indicate that the parties were married April 11, 1970, and were the parents of four children. All children are over the age of 18, but a son, Mickey, is legally blind and partially deaf. Although there was some dispute about reasons, Mickey resides with and is dependent upon father for maintenance, support and education. Apparently, this son is striving for a college education and plaintiff testified that defendant refused to provide funds unless Mickey resided with him.

Both parties married young and neither graduated from high school. Plaintiff has acquired a G.E.D. Both have developed employment skills. Plaintiff obtained a real estate sales license, but spent most of her time at home. There has always been a large income disparity, with defendant's final earnings falling within the \$60,000.00 range, while

employed in the lamination industry. After an initial period of hardship, however, they settled in a house in New Jersey that was, according to their daughter, Virginia, quite comfortable. In fact, that child said that her friends considered her rich.

Mickey's education in New Jersey was inappropriate. He was enrolled in a program for retarded children, whereas his special needs emanated from purely physical challenges. Both sides of the parties' family were characterized as trouble makers. Two considerations influenced a decision to relocate to Tennessee: a desire to get away from disruptive influences and to obtain appropriate education for Mickey. The move was not without sacrifices. The family was dependant upon defendant's earnings, and he was required to remain in New Jersey.

Although plaintiff pursued various forms of employment, it was generally defendant's salary from his position as plant manager that funded the family's needs.

Curiously, the record indicates that two contracts were signed to purchase 400 acres in Tennessee. However, only one is important and it provided for an installment purchase. The price was \$147,500.00. The parties remortgaged their New Jersey home, obtained an equity loan of \$33,000.00, and applied it to the sales contract. The balance, \$114,500.00, was payable in three installments. The first was due August 22, 1989, in the amount of \$20,000.00. A like amount was due August 22, 1990, and the balance, \$74,500.00, was due August 22, 1991. None of these installments was ever made, nor was any payment made on principal. Instead the parties paid only some interest, apparently with the blessing of sellers. The exact amount of interest is somewhat unclear, but it appears that it was set at \$9,000.00 per year possibly \$12,000.00 was paid. One payment was made possible by the sale of personal property.

Living conditions for plaintiff and family were not good. The house was uninhabitable and she initially stayed in a cabin on other land of sellers. She described working hard in performing and arranging improvements and said she suffered a shoulder injury while working on a post. Defendant commuted on weekends from his job in New Jersey.

Defendant either quit his job, or his position was terminated. He testified that his company downsized and eliminated the position of plant manager. Plaintiff testified that he told her he quit. The Master did not resolve this dispute, considering it irrelevant since it occurred before troubles manifested in the marriage.

Defendant's plans, which proved unsuccessful, were to start a new business in Tennessee. Unable to obtain financing, he was required to work in a variety of low paying jobs, and the family's finances became dire, indeed. An attempt was made to sell the New Jersey home. Plaintiff described some hearsay information that indicated defendant

rejected an offer only slightly less than the listed price of \$184,000.00. He said only \$124,000.00 was ever offered, which would not have paid the mortgage. The Master adopted this version in his report and also accepted defendant's testimony that he was able to rent the home for only three or four months. Concerning a reported appraisal of \$200,000.00 on this property, defendant indicated that the bank said someone would get in trouble because of it, and that the \$33,000.00 equity loan should never have been approved. Ultimately, the bank took the home and apparently waived any deficiency. Marital debts did not include any money owed to the mortgagee.

The land purchase agreement fell into default. Although plaintiff described sellers as grandparent-types, defendant said his attempts to keep the property were rebuffed. He said he even tried to rent the farm, and that seller "even escorted us off the property June 1st, 1991." (N/T. 170) .

Defendant said that he did everything possible to save both the New Jersey residence and the Tennessee farm. Other than the testimony previously mentioned, and general assertions that defendant made all decisions, plaintiff said little to refute her former spouse's version.

Defendant obtained employment in Pennsylvania, and the family moved north. Problems continued and concerned both financial matters and living arrangements. Defendant then left and moved in with a girlfriend. Plaintiff moved in with another couple and began what her counsel has described as an unsatisfactory relationship with the man. Because of this, she did not pursue permanent alimony.

Defendant's earnings have returned to the level before his move to Tennessee. The Master found his earnings to be \$66,000.00 per year. He has no retirement plan or pension. Although plaintiff has been unemployed, the Master found that she "has employment talents and/or abilities in real estate, light industry, home improvement contracting, horse-breeding and general animal husbandry." (Finding 5). Plaintiff has acquired an interest in land in Tennessee, together with the man with whom she has associated, for a modest investment of \$850.00. She described taking a trip to Tennessee in October, 1994, to look at the 400 acre property. She said some of her belongings were in the same location as when she left and that seller wanted to know if she and defendant were coming back. She answered: "no."

Each party retained or consumed personal property that was valued by them. Plaintiff said her property was worth \$2,222.00 and that retained by defendant had a value of \$25,340.00. Defendant maintained that his was worth \$2,130.00 and his former wife's \$27,945.00. No other testimony was received concerning value. The Master fixed amounts of approximately \$28,000.00 for plaintiff and approximately \$25,300.00 for defendant.

One of plaintiff's exceptions concerns these values. While the Master's Report is advisory only, even as to matters of credibility,

Tagnani v. Tagnani, 439 Pa. Super 596, 654 A.2d 1136 (1995), we will accord his determination the fullest consideration. Jayne v. Jayne, 443 Pa. Super 664, 663 A.2d 169 (1995); Plaintiff excepts to the Master's acceptance of defendant's testimony. We have reviewed the record carefully and find it supports the Master's determination. With respect to amounts established for retained property, an owner is competent to testify as to value, and the finder of fact may accept or reject all, part or none of such testimony. Williamson v. Williamson, 402 Pa. Super. 276, 586 A.2d 967 (1991). Exceptions based on determinations of credibility are dismissed.

It is apparent that the parties had very little to show for some twenty-four years of marriage. Even taking into consideration the losses of property and money, it would seem that defendant's earnings have been used to the fullest to maintain the family. The problem, from plaintiff's standpoint, is that the marriage has ended, there is little property to distribute and alimony is unavailable.

Undaunted, plaintiff seeks payments classified in such a manner as to escape the proscription of 23 Pa.C.S.A.3706.

Several appellate cases have held that equitable reimbursement or reimbursement alimony may be ordered when there is not enough property to effect economic justice and alimony is unavailable. Such payments may be terminated for reasons of justice, but not simply because of remarriage or cohabitation. Awards began in cases involving wives who helped husbands acquire degrees substantially increasing earning capacity, Lehmicke v. Lehmicke, 339 Pa. Super. 559, 489 A.2d 782 (1985); Bold v. Bold, 524 Pa. 487, 574 A.2d 552 (1990). The practice has been extended to distribute a share in a pension in installments. Wagoner v. Wagoner, 538 Pa.265, 648 A. 2d 299 (1994), and to help one spouse pay marital debt, Zullo v. Zullo, 531 Pa. 377, 613 A.2d 544 (1994), Most significantly, Superior Court sanctioned reimbursement for equity lost by reason of a husband's failure to make mortgage payments. Twila v. Twila, 445 Pa. Super. 86, 664 A.2d 1020 (1995).

Superior Court's opinion contains few details, and does not indicate when or in what manner Mr. Twila failed to make mortgage payments. We have not found a Crawford County opinion giving any more information, nor have counsel provided any. Therefore, we view the decision as supporting, at least in principle, the kind of reimbursement plaintiff seeks.

Cases previously cited indicate that fairness is the only consideration when determining equitable reimbursement. However, Supreme Court has made it clear that factors in the Divorce Code define fairness. Zullo v. Zullo, supra. It might be argued that fairness demands that plaintiff's position be equalized with defendant's. Both have had relationships with others. Plaintiff is penalized and defendant is not. Although this situation may invite an interpretation that totally abro-

gates section 3706, such a sweeping approach flies in the face of clear statutory language and is not warranted. Instead, we read decisions in this area as emphasizing "reimbursement." Cases involve the following:

1. Payments may be considered deferred distribution when marital property is not in distributable form. *Wagoner v. Wagoner*, supra.

2. When there are no or insufficient assets, relative liabilities may require one party to contribute to payments of debt. sec. 3701(10). *Zullo v. Zullo*

3. The contribution by one party to the education, training or increased earning power of the other party, may justify payments. *id* (6). *Lehmicke v. Lehmicke*, supra.

4. The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker, 3502(7), would seem responsible for the results in *Twila v. Twila*, supra. Since equitable reimbursement is utilized only when insufficient property exists, dissipation is the factor really to be considered.

Plaintiff argues that defendant dissipated her equity in the Tennessee farm and in the New Jersey residence. Based upon her testimony that her property remained in Tennessee, she argues that the parties had a right to specific performance, which defendant failed to pursue.

The Master found that the parties either intentionally or negligently abandoned rights in both properties. Abandonment requires an intention to abandon coupled with an act showing that the intention was carried out. *Quarry Office Park Associates v. Philadelphia Electric Company*, 394 Pa. Super 426, 576 A.2d 358 (1990). Rather than struggle with the question of whether abandonment may be negligently accomplished, we have reviewed the record to determine if it supports a finding that defendant dissipated the properties.

Plaintiff paints herself as a dependant person who acquiesced in decisions made by defendant. Using this, she argues that he was totally responsible for bad decisions made during the course of marriage. In retrospect, many of the choices pursued by the parties were unwise. The only funds available for investment came from heavily mortgaging their New Jersey residence. In the face of economic vicissitudes, during which they were unable to perform under their installment sales agreement, defendant decided to relocate. However, he was not the first to become the victim of what turned out to be misguided optimism, nor will he be the last. Using hindsight, it would seem his plans for his own business ran afoul of inadequate financial resources, the same curse that doomed the Tennessee property purchase.

This factual scenario bears no resemblance to the usual situation

faced by courts, when a spouse with financial means decides that he or she will no longer contribute to equity that might benefit the other.

The Master found that property losses were the results of action or inaction by both parties, and we will not disturb the finding.

Plaintiff further argues that the Master wrongly concluded that her health problems are minor in nature. Evidence in this regard consisted of plaintiff's testimony and, to some extent, that of her daughter, Virginia. No medical evidence was produced. This dispute clearly involved credibility and the Master was in the best position to make that determination.

Finally, plaintiff argues that the Master recommended attorney's fees that were woefully inadequate.

Lest anyone conclude that the Master was unsympathetic to plaintiff's situation, we point out that the following recommendations were made: defendant would be required to pay \$15,000.00 into a fund, from which all marital debts would be paid, \$1,860.00 would be used to pay sixty percent of plaintiff's counsel fees and \$967.72 would be distributed to plaintiff. The master noted that defendant had paid over \$10,000.00 to plaintiff as alimony pendente lite. This last figure has increased significantly since the report was authored October 2, 1996. Despite having employable skills, plaintiff has not worked, claiming that this divorce has claimed all of her attention.

Even so, we agree that the Master saddled plaintiff's counsel with distributing the fund and that the amount awarded for fees merely reflected the sixty/forty distributive scheme. Under the particular circumstances of this case, we feel that defendant should pay the full amount originally claimed, \$3,100.00. Plaintiff has no present means of doing so, nor any prospects of sufficient change in the near future. While alimony pendente lite and counsel fees are both related to providing a party with means of litigating issues of divorce, they address different needs. Plaintiff has obviously shown entitlement for both awards, and the sole question involves amount. Her present situation may seem to justify an award for services past the Master's stage, but we must also consider her decision to remain unemployed.

Our decree will adopt the Master's recommendations except that defendant shall be obligated to pay additional counsel fees of \$1,240.00.

#### DECREE

AND NOW, this 2nd day of September, 1997, all exceptions other than that relating to counsel fees are dismissed. The Master's Report shall be amended to require defendant to pay additional counsel fees of \$1,240.00. As amended, the Master's Report is adopted and approved and distribution ordered in accordance with his recommendations.



## ESTATE NOTICES

**NOTICE IS HEREBY GIVEN** that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

## FIRST PUBLICATION

## ESTATE OF MARIE T. CALHOON, DEC'D

Late of Huntingdon Township, Adams County, Pennsylvania  
 Executrix: Linda Menges, 85 Wright Road, York Springs, PA 17372  
 Attorney: Jane M. Alexander, Esquire, P.O. Box 421, Dillsburg, PA 17019-0421

## ESTATE OF HENRY SCHNEIDER, III, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania  
 Executrix: Katherine P. Schneider, 95 Ridgewood Drive, Gettysburg, PA 17325  
 Attorney: Puhl & Eastman, Attorneys at Law, 16 Lincoln Square, Gettysburg, PA 17325

## ESTATE OF PAUL HENRY SELL JR., DEC'D

Late of Liberty Township, Adams County, Pennsylvania  
 Executor: Paul W. Sell, 2042 Mayberry Road, Westminster, MD 21158  
 Attorney: James T. Yingst, Esquire, Rudsill, Guthrie, Nonemaker, Guthrie & Yingst, 40 York Street, Hanover, PA 17331

## ESTATE OF RALPH W. TYSON, DEC'D

Late of Huntingdon Township, Adams County, Pennsylvania  
 Executrix: Linda T. Goens, 3999 Carlisle Road, Gardners, PA 17324  
 Attorney: John A. Wolfe, Esq., Wolfe & Rice, 47 West High Street, Gettysburg, PA 17325

## SECOND PUBLICATION

## ESTATE OF ELLEN VIRGINIA GREENE FACCHINA, DEC'D

Late of Straban Township, Adams County, Pennsylvania  
 Executrix: Rebecca F. Powell, 175 South Mill Road, Hummelstown, PA 17306  
 Attorney: Walton V. Davis, 116 Baltimore Street, Gettysburg, PA 17325

## THIRD PUBLICATION

## ESTATE OF CALVIN E. HEINTZELMAN, DEC'D

Late of Butler Township, Adams County, Pennsylvania  
 Executor: Raymond E. Heintzelman, 2724 Table Rock Road, Biglerville, PA 17307  
 Attorney: John W. Phillips, Esq., 101 W. Middle Street, Gettysburg, PA 17325

## ESTATE OF ELENORA M. MILLER, DEC'D

Late of Franklin Township, Adams County, Pennsylvania  
 Executrix: Barbara A. Fissel, P.O. Box 96, McKnightstown, PA 17343  
 Attorney: John A. Wolfe, Esq., Wolfe & Rice, 47 West High Street, Gettysburg, PA 17325

## ESTATE OF MARGARET B. TAYLOR, DEC'D

Late of Bendersville Borough, Adams County, Pennsylvania  
 Executrix: Wanda T. Foreman, 9207 Volunteer Drive, Alexandria, VA 22309  
 Attorney: Puhl & Eastman, 16 Lincoln Square, Gettysburg, PA 17325

## INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Non-profit Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania on or about the 8th day of May, 1998, for the purpose of obtaining a Certificate of Incorporation of a proposed nonprofit corporation to be organized under the provisions of the Nonprofit Corporation Law of 1988. The name of the corporation is HARBAUGH/THOMAS FOUNDATION.

The purpose for which it will be organized is: To own real estate and construct thereon a public library.

McNees, Wallace & Nurick  
 100 Pine Street  
 Harrisburg, PA 17101

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## FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that an Application has been filed under the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq., as amended, with the Secretary of the Commonwealth, in Harrisburg, Pennsylvania, on May 8, 1998, for conducting business under the assumed or fictitious name of KEJ EXCAVATING. The address of the principal office or place of business to be carried on under or through the fictitious name is: 585 Knoxlyn-Orrtanna Road, Gettysburg, Pennsylvania 17325. The name and address of the only person who is a party to the registration is: Karen E. Justice, 585 Knoxlyn-Orrtanna Road, Gettysburg, PA 17325

John W. Phillips, Esq.  
 Attorney  
 101 W. Middle Street  
 Gettysburg, PA 17325

6/5

## FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, in compliance with the requirements of Section 311, of Act 1982-295 (54 Pa. C.S. 311), the undersigned entity (ies) announce their intention to file in the Office of the Secretary of the Commonwealth of Pennsylvania, on approximately 5/29/98, a certificate for the conduct of a business in Adams County, Pennsylvania, under the assumed or fictitious name, style or designation of CIVIL-LA-TEA, with its principal place of business at 39 York Street, Gettysburg. The names and addresses of the persons owning or interested in said business are Pat and Bruce Hartman, residing at Gettysburg, PA 17325. The character or nature of the business is: crafts, gifts, antiques and tea parlor.

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## NOTICE

NOTICE IS HEREBY GIVEN that on the 17th day of April, 1998, the Petition of Amy Lynn Weaver, praying for a decree to change her name from Amy Lynn Weaver to Remeé Zoe Klos was filed.

The Court has fixed the 29th day of June, 1998, at 9:00 o'clock A.M., in the Adams County Courthouse, Gettysburg, Adams County, Pennsylvania, as the time and place for the hearing of said Petition when and where all persons interested may appear and show cause, if any they have, why the prayer of said Petitioner should not be granted.

Wilcox & James  
 Clayton R. Wilcox, Esquire  
 Attorney for Amy Lynn Weaver  
 234 Baltimore Street  
 Gettysburg, PA 17325

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# Adams County Legal Journal

Vol. 40

June 12, 1998

No.3, pp. 11- 16

## CONTINUING LEGAL EDUCATION PROGRAMS

### 1. *Pennsylvania Workers Compensation Practice and Procedure.*

Monday, June 15, 1998—9:00 a.m.

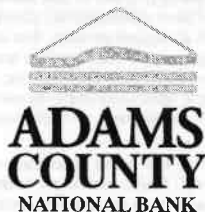
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Credits: Substantive Law—5, Ethics—0.

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#### SHERIFF'S SALE

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ALL THAT CERTAIN piece, parcel or tract of land, situate, lying and being in the borough of Littletown, Adams County, Pennsylvania, more particularly bounded, limited and described as follows, to wit:

BEGINNING for a corner of West Myrtle Street and a 15 foot wide public alley; thence in a Westerly direction along said West Myrtle Street for a distance of 75 feet to a stake; thence in a Southerly direction for a distance of 100 feet to a stake on the Northern boundary line of Lot No. 21-A; thence in an Easterly direction along said Lot No. 21-A for a distance of 75 feet to a 15 foot wide alley; thence in a Northerly direction along said 15 foot wide alley for a distance of 100 feet to West Myrtle Street, the place of beginning.

The above described lot of ground is comprised of the Eastern one-half of Lot Nos. 23-A, 23, 22-A according to the plan and resurvey made November, 1935, by LeRoy Winebrenner, the same being part of the land included in T.C. McSherry's First Addition to the Borough of Littlestown, Adams County, Pennsylvania, and known as "McSherry Park."

UNDER AND SUBJECT, nevertheless, to restrictions as recorded in Record Book 229 at page 446.

BEING Tax Parcel #7-26.

TITLE TO SAID PREMISES IS VESTED IN Cary G. Wireman and Roberta L. Wireman, husband and wife, by Deed from Douglas E. Leppo and Jamie A. Leppo, husband and wife, dated 3/31/95 recorded 3/31/95 in Record Book 1012 page 18.

SEIZED and taken into execution as the property of **Cary G. Wireman and Roberta L. Wireman** and to be sold by me

Raymond W. Newman  
Sheriff

Sheriff's Office, Gettysburg, PA  
April 27, 1998.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 3, 1998, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto

within 10 days after filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

6/5, 12 & 19

#### SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-327 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 7th day of August, 1998, at 10:00 o'clock in the forenoon at the Court-house in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL that certain tract of land situate partly in Germany Township and partly in Mt. Joy Township, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at an iron pin driven on the North side of a public road sometimes known as the "Fish and Game Road"; thence through the original tract now or formerly of Mary A. Strickhouser, North sixteen and one-fourth (16-1/4) degrees West, two hundred sixty-two (262) feet to an iron pin; thence through the same, South seventy-five and one-half (75-1/2) degrees East, eighty-seven and five-tenths (87.5) feet to an iron pin at Walnut tree; thence continuing through the same, South sixteen and one fourth (16-1/4) degrees East, two hundred seventeen (217) feet to an iron pin driven on the Northern side of said public road; thence running along the Northern side of said public road which runs in a curve to the right to the above described place of BEGINNING, the direct course and distance to which is South seventy-three and three fourths (73-3/4) degrees West seventy-five (75) feet to said above described place of BEGINNING. CONTAINING 65.97 square perches. The above description was taken from a draft of survey made by Curvin A. Wentz, Reg. Surveyor, based upon a survey made for Mary A. Strickhouser on September 22, 1964.

BEING the same premises which Mildred E. Stump and Ralph N. Stump, her husband, by Indenture bearing date the 2nd day of August, 1988, and recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania, on the 2nd day of August, 1998,

In Record Book 496, Page 637, granted and conveyed unto Daniel Mark Yohe.

For further title reference see Deed Book Volume 995, page 296.

MAP #H-17-38.

SEIZED and taken into execution as the property of **Daniel M. and Loretta L. Yohe** and to be sold by me

Raymond W. Newman  
Sheriff

Sheriff's Office, Gettysburg, PA  
May 28, 1998.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 31, 1998, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

6/12, 19 & 26

#### CHANGE OF NAME NOTICE

NOTICE IS HEREBY GIVEN that on the 28th day of May, 1998, the Petition of Olivia Tatiana Da Silva, a minor, by her natural mother Katherine L. Peters, was filed in the Court of Common Pleas of Adams County, Pennsylvania, praying for a decree to change the name of petitioner Olivia Alexandra Peters.

The Court has affixed the 29th day of June, 1998 at 9:00 a.m., in Courtroom No. 1, Fourth Floor, Adams County Court-house, Gettysburg, Pennsylvania, as the time and place for the hearing of said petition, when and where all persons interested may appear and show cause, if any they have, why the prayer of said petitioner should not be granted.

Bernard A. Yannetti, Jr., Esq.  
Attorney for Petitioner  
Hartman & Yannetti  
126 Baltimore Street  
Gettysburg, PA 17325

6/12

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION VS.  
CROMER

1. Where a licensee has filed a statutory appeal from a one-year suspension imposed by DOT in compliance with the mandate set forth in 75 Pa. C.S. §1547(b) (1), as a consequence of a reported chemical test refusal, DOT bears the initial burden of proof at the statutory appeal hearing.

2. Once DOT has made out its prima facie case at the hearing on the appeal from a license suspension as a consequence of a chemical test refusal, the burden then shifts to the licensee to establish that refusal was not knowing and conscious or that the licensee was physically incapable of successfully performing the requested chemical test.

3. A refusal to submit to a chemical test for driving under the influence need not be expressed in words but can be implied from a driver's actions and anything less than an unqualified, unequivocal consent constitutes a refusal.

4. One cannot ignore what is being said to him and then complain that he was not properly warned.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 97-S-7, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION VS. SCOTT ALAN CROMER.

Matthew X. Haecker, Esq., for Plaintiff

Gregory L. Lensbower, Esq., for Defendant

OPINION PURSUANT TO  
PA. R.APP.P. 1925(a)

Kuhn, J., September 4, 1997.

This case involves Appellant's appeal of a suspension of his driver's licence for violating Section 1547 of the Vehicle Code, 75 Pa. C.S.A. §1547.

Testimony before the undersigned revealed the following facts.

On November 30, 1996, Officer William T. Hartlaub of the Conewago Police Department was on routine patrol heading westbound on Third Street (S.R. 116) when he observed a pickup truck pull out in front of him, cross entirely over the center line and swerve back into the correct lane with the right tires hitting the curb. The truck pulled into a Turkey Hill parking lot where the driver, Appellant, exited the vehicle and was observed staggering. When the officer approached Appellant, whom he knew personally, he could detect a strong odor of an intoxicating beverage on Appellant's breath, red glassy eyes and a staggering gait. The officer twice warned Appellant not to drive off the premises or he would be arrested for driving under the influence.

Within 10 minutes Appellant drove past the officer on Elm Avenue (SR 2008). The truck was observed swerving from the center line to the right berm over a distance of approximately 0.7 miles. Appellant was stopped and when he exited his vehicle he was unsteady and staggering. Appellant was asked to take three field sobriety test which he failed. Appellant was then arrested for driving under the influence and transported to the Hanover Hospital for a blood alcohol test.

Outside the hospital the officer advised Appellant of the Implied Consent Law off of Department of Transportation form DL-26 (PX 1). At that point Appellant responded "Fuck you. I'm not taking it. Some 'fuckin' relative you are." (N.T. 11). The officer called for back up and told Appellant he could refuse inside the hospital. After entering the hospital Appellant continued his profanity. The officer again began to read the Implied Consent form but Appellant jumped out of his seat and threatened to assault the officer. Despite three requests to clam down, Appellant became more aggressive. After two warnings that if he did not clam down it would be considered a refusal, Appellant continued his threats. The officer than removed Appellant from the hospital.

Appellant admitted using profanity and threatening the officer but denied being advised of the Implied Consent Law. The Court did not find Appellant credible in that regard.

The law is clear that,

... Where a licensee has filed a statutory appeal from a one-year suspension imposed by DOT in compliance with the mandate set forth in 75 Pa. C.S. §1547(b)(1), as a consequence of a reported chemical test refusal, DOT bears the initial burden of proof that (sic) at the statutory appeal hearing. In order to satisfy that burden and establish a *prima facie* case, DOT must present evidence showing that: (1) the licensee was arrested for a violation of 75 Pa. C.S. §3731; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned of the consequences of refusing the chemical test, i.e., the suspension of the licensee's operating privilege . . .

Once DOT has made out its *prima facie* case, . . . the burden then shifts to the licensee to establish that refusal was not knowing and conscious or that the licensee was

physically incapable of successfully performing the requested chemical test. *Id.* The specific issue of whether a licensee's refusal of a chemical test was knowing and conscious is one of fact for determination by the trial court and must be supported by substantial evidence. *Ponce v. Commonwealth, Department of Transportation*, 685 A.2d 607, 610-11 (Pa. Comlth. Ct., 1996).

Here it is clear that DOT sustained its initial burden. Appellant was arrested for DUI, he was asked to submit a blood test, he refused and he was warned of the consequences. Although Appellant did not expressly state that he refused the blood test, his actions clearly implied a refusal. *Feathers v. Commonwealth, Department of Transportation*, 682 A.2d 1359, 1361 (Pa. Comlth. Ct., 1996), *Cert. den.* 693 A.2d. 590. (A refusal to submit to a chemical test need not be expressed in words, but can be implied from a driver's actions.) Anything less than an unqualified, unequivocal consent constitutes a refusal. *Commonwealth, Department of Transportation v. Renwick*, 543 Pa. 122, 131, 669, A.2d 934, 939 (1996).

The Court further concludes that Appellant failed to offer credible testimony to sustain his burden of showing that his refusal was not knowing and conscious. One cannot ignore what is being said to him and then complain that he was not properly warned.

## BECKER VS. NESTLE, ET AL.

1. Summary judgement shall be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgement as a matter of law.
2. Liability attaches to a master by reason of a servant's negligent injury of a third person only when the servant is acting within the scope of his employment.
3. An employee who is using his personal car for transportation is acting within the scope of employment at the time of an accident if he was directed by the employer to use the car for the purpose of traveling from place to place or if the circumstances are such that it was reasonably necessary for him to so travel instead of by common carrier.
4. An employee must also be furthering the employer's business at the time of the accident for respondeat superior to apply.
5. An employee who is on his way home from a special mission for the employer is still furthering that employer's business.
6. An agency issue should reach the jury when any reasonable inference from the facts supports the finding that the employee was acting in furtherance of his employer's business.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 94-S-233, TAMARA BECKER AND JON BECKER VS. HAROLD NESTLE AND LEFEBURE CORPORATION.

R. Elliot Katherman, Esq., for Plaintiffs  
D. Holbrook Duer, Esq., for Defendant Nestle  
Michael B. Scheib, Esq., for Defendant LeFebure

### MEMORANDUM OPINION

Kuhn, J., September 10, 1997.

On March 18, 1994, Plaintiffs, Tamara Becker and her husband Jon, filed a complaint against Defendants, Harold Nestle and LeFebure Corporation ("LeFebure"). LeFebure filed a Motion for Summary Judgment on May 23, 1996. For the reasons set forth below, the motion is denied.

### STATEMENT OF FACTS

On April 27, 1993, Defendant Nestle and Plaintiffs were involved in a car accident in Berwick Township, Adams County. Plaintiff Tamara Becker allegedly suffered personal injuries and her husband, Jon Becker, claimed loss of consortium.

At the time of the accident, Mr. Nestle was employed by LeFebure as a sales engineer. LeFebure provides financial equipment to various financial institutions. Mr. Nestle's duties included, among other things, prospecting for customers, overseeing installation of equipment, and training customers.



Mr. Nestle was responsible for sales and service in eight counties of central Pennsylvania and worked out of his home in Lancaster. When going to installation sites Mr. Nestle used his personal car as transportation and averaged 500 to 550 miles per week in business related travel. Approximately 90 percent of the car's use in 1992 was business related, as claimed on Mr. Nestle's 1992 tax return. LeFebure had no direct control over the routes used by Mr. Nestle to reach the installation sites.

At approximately 5:07 p.m. on April 27, 1993, Mr. Nestle was on his way home from an installation project at Farmers Bank and Trust on Eisenhower Boulevard in Hanover when he collided with the car in front of him, causing his own vehicle to cross into the southbound lane of on-coming traffic. Plaintiffs' car was traveling southbound at this time and collided with Mr. Nestle's car in the southbound lane.

### LEGAL DISCUSSION

Summary judgment shall be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2, 42 Pa. C.S.A. An entry of summary judgment may be granted only in cases where the right is clear and free from doubt. In ruling on such a motion, the record must be viewed in the light most favorable to the non-moving party. *Demmler v. Smithkline Beecham Corp.*, 448 Pa. Super. 425, 430, 671 A.2d 1151, 1153 (1996).

The sole issue raised in the Motion for Summary Judgment is whether LeFebure may be held liable for Mr. Nestle's actions under a theory of respondeat superior. The determination of liability rests on whether Mr. Nestle was acting within the scope of his employment at the time of the accident. Liability attaches to a master by reason of a servant's negligent injury of a third person only when the servant is acting within the scope of his employment. Restatement (Second) of Agency §219 (1957). An employee who is using his personal car for transportation is acting within the scope of employment at the time of an accident if he was directed by the employer to use the car for the purpose of traveling from place to place or if the circumstances are such that it was reasonably necessary for him to so travel instead of by train or other common carrier. An employee must also be furthering the employer's business at the time of the accident for respondeat superior to apply. *Kadlecik v. L. N. Renault & Sons, Inc.*, 156 Pa. Super. 586, 588 A.2d 866 (1945); *Gittleman v. Hoover Co.*, 337 Pa. 242, 244, 10 A.2d 411, 412 (1939).

In the case at hand, Mr. Nestle was apparently not directed by LeFebure to use his own car; however, viewing the facts in the light most favorable to the non-moving party, it may be inferred that it was reasonably necessary. Mr. Nestle is expected to service eight counties in central Pennsylvania and is required to be present during installations. Thus, it is fair to say that it was reasonably necessary for him to use his car in order to perform his employment duties as established by LeFebure. Compare, *O'Callaghan v. Allstate Insurance*, 8 D&C 3d 775, 778 (1978) (insurance salesman's use of personal car was, in effect, required to perform his employment duties).

Mr. Nestle may also be found to have been furthering LeFebure's business at the time of the accident. In *Kadlecik*, the Court analogized vicarious liability to workers compensation law and held that an employee who is on his way home from a special mission for the employer is still furthering that employer's business. *Kadlecik v. L. N. Renault & Sons, Inc.*, 156 Pa. Super. at 588 (citing *Kelling v. Froemming Bros., Inc.*, 287 Pa. 471, 136 A. 129 (1926)). In the case at hand, the jury may determine that Mr. Nestle was furthering LeFebure's business even though he was on his way home because he had been at an installation project that was beneficial to LeFebure.

At a minimum, it is clear that there remains a genuine issue of material fact regarding whether it was reasonably necessary for Mr. Nestle to use his personal car for transportation and as to whether he was acting within the scope of his employment at the time of the accident. Additionally, it should be noted that an agency issue should reach the jury when any reasonable inference from the facts supports the finding that the employee was acting in furtherance of his employer's business. *Pillo v. Mohan*, 410 Pa. 417, 189 A.2d 850 (1963). Thus, Defendant LeFebure's Motion for Summary Judgment is denied. Accordingly, the attached Order is entered.

#### ORDER OF COURT

AND NOW, this 10th day of September, 1997, Defendant LeFebure's Motion for Summary Judgment is hereby denied.

**ESTATE NOTICES**

**NOTICE IS HEREBY GIVEN** that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

**FIRST PUBLICATION**

**ESTATE OF JOHN C. BUCHER, DEC'D**  
Late of 810 Old Route 30, Cashtown, Franklin Township, Adams County, Pennsylvania

Co-Executors: J. Gregg Bucher, 890 Georgetown Road, Littlestown, PA 17340; Sue Ann Wentz, P.O. Box 395, Cashtown, PA 17310

Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, Attorneys at Law, 126 Baltimore Street, Gettysburg, PA 17325

**ESTATE OF MARLENE K. CONGLETON A/K/A MARLENE K. THOMPSON, DEC'D**

Late of Mt. Pleasant Township, Adams County, Pennsylvania

Executor: William C. Congleton, 2494 Old Harrisburg Road, Gettysburg, PA 17325

Attorney: Roy A. Keefer, Esq., Swope, Heiser & McQuaide, 104 Baltimore Street, Gettysburg, PA 17325

**ESTATE OF ARLENE I. REEM, DEC'D**

Late of Adams County, Pennsylvania  
Executrixes: Cynthia T. Reem; Marianne Sipe, c/o 4620 Custer Drive, Harrisburg, PA 17110

**SECOND PUBLICATION**

**ESTATE OF MARIE T. CALHOON, DEC'D**

Late of Huntington Township, Adams County, Pennsylvania

Executrix: Linda Menges, 85 Wright Road, York Springs, PA 17372

Attorney: Jane M. Alexander, Esquire, P.O. Box 421, Dillsburg, PA 17019-0421

**ESTATE OF HENRY SCHNEIDER, III, DEC'D**

Late of Cumberland Township, Adams County, Pennsylvania

Executrix: Katherine P. Schneider, 95 Ridgewood Drive, Gettysburg, PA 17325

Attorney: Puhl & Eastman, Attorneys at Law, 16 Lincoln Square, Gettysburg, PA 17325

**ESTATE OF PAUL HENRY SELL JR., DEC'D**

Late of Liberty Township, Adams County, Pennsylvania

Executor: Paul W. Sell, 2042 Mayberry Road, Westminster, MD 21158

Attorney: James T. Yingst, Esquire, Rudsill, Guthrie, Nonemaker, Guthrie & Yingst, 40 York Street, Hanover, PA 17331

**ESTATE OF RALPH W. TYSON, DEC'D**

Late of Huntington Township, Adams County, Pennsylvania

Executrix: Linda T. Goens, 3999 Carlisle Road, Gardners, PA 17324

Attorney: John A. Wolfe, Esq., Wolfe & Rice, 47 West High Street, Gettysburg, PA 17325

**THIRD PUBLICATION**

**ESTATE OF ELLEN VIRGINIA GREENE FACCHINA, DEC'D**

Late of Straban Township, Adams County, Pennsylvania

Executrix: Rebecca F. Powell, 175 South Mill Road, Hummelstown, PA 17306

Attorney: Walton V. Davis, 116 Baltimore Street, Gettysburg, PA 17325

**CERTIFICATE OF AUTHORITY**

**NOTICE IS HEREBY GIVEN** that Application for Certificate of Authority has been filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania by HEARNE CONSTRUCTION SERVICES, INC., a foreign corporation formed under the laws of the State of Maryland, where its principal office is located at 4239 Old Hanover Road, Westminster, MD 21158. The proposed registered office of said corporation in the Commonwealth of Pennsylvania will be located at 836 Gettysburg Road, Littlestown, PA 17340.

Mary S. Stonesifer  
President  
Hearne Construction Services Inc.  
P.O. Box 92  
Littlestown, PA 17340-0092

6/12

**CHANGE OF NAME NOTICE**

**NOTICE IS HEREBY GIVEN** that Articles of Amendment-Domestic Business Corporation were filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on May 20, 1998, for the purpose of changing the name of AMM Acquisition, Inc., a business corporation organized under the Business Corporation Law of 1988.

The new name of the corporation is: **AGGREGATES MINING AND MINERALS, INC.**

Steven J. Schiffman, Esquire  
Serratelli, Schiffman, Brown & Calhoon, PC

Suite 201, 2080 Linglestown Road  
Harrisburg, PA 17110

6/12

**IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA**

**CIVIL ACTION—LAW  
NO. 98-S-479**

**IN RE: Sarah Lorraine Gladys Eversole, by her natural guardian, Dennis P. Warehime**

**CHANGE OF NAME PROCEEDING**

**NOTICE IS HEREBY GIVEN** that on the 29th day of April, 1998, the Petition of Sarah Lorraine Gladys Eversole, by her natural guardian, Dennis P. Warehime, praying for a decree to change her name from Sarah Lorraine Gladys Eversole, to Sarah Lorraine Warehime.

The Court has fixed the 29th day of June, 1998, at 9:00 o'clock A.M., in Courtroom No. 1, Adams County, Pennsylvania, as the time and place for the hearing of said Petition when and where all persons interested may appear and show cause, if any they have, why the prayer of said Petitioner should not be granted.

David K. James, III, Esquire  
Attorney for  
Sarah Lorraine Gladys Eversole  
Wilcox & James  
234 Baltimore Street  
Gettysburg, PA 17325

6/12

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# Adams County Legal Journal

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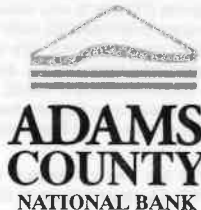
June 19, 1998

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## IN THIS ISSUE

### TAYLOR VS. THERIT, ET AL.

In times like these,  
you and your clients need  
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provided by a trust professional.



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## ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

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## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-354 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 10th day of July, 1998, at 10:00 o'clock in the forenoon at the Court-house in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT CERTAIN piece, parcel or tract of land, situate, lying and being in the borough of Littletown, Adams County, Pennsylvania, more particularly bounded, limited and described as follows, to wit:

BEGINNING for a corner of West Myrtle Street and a 15 foot wide public alley; thence in a Westerly direction along said West Myrtle Street for a distance of 75 feet to a stake; thence in a Southerly direction for a distance of 100 feet to a stake on the Northern boundary line of Lot No. 21-A; thence in an Easterly direction along said Lot No. 21-A for a distance of 75 feet to a 15 foot wide alley; thence in a Northerly direction along said 15 foot wide alley for a distance of 100 feet to West Myrtle Street, the place of beginning.

THE above described lot of ground is comprised of the Eastern one-half of Lot Nos. 23-A, 23, 22-A according to the plan and resurvey made November, 1935, by LeRoy Winebrenner, the same being part of the land included in T.C. McSherry's First Addition to the Borough of Littletown, Adams County, Pennsylvania, and known as "McSherry Park."

UNDER AND SUBJECT, nevertheless, to restrictions as recorded in Record Book 229 at page 446.

BEING Tax Parcel #7-26.

TITLE TO SAID PREMISES IS VESTED IN Cary G. Wireman and Roberta L. Wireman, husband and wife, by Deed from Douglas E. Leppo and Jamie A. Leppo, husband and wife, dated 3/31/95 recorded 3/31/95 in Record Book 1012 page 18.

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Raymond W. Newman  
Sheriff

Sheriff's Office, Gettysburg, PA  
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ALL that certain tract of land situate partly in Germany Township and partly in Mt. Joy Township, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at an iron pin driven on the North side of a public road sometimes known as the "Fish and Game Road"; thence through the original tract now or formerly of Mary A. Strickhouser, North sixteen and one-fourth (16-1/4) degrees West, two hundred sixty-two (262) feet to an iron pin; thence through the same, South seventy-five and one-half (75-1/2) degrees East, eighty-seven and five-tenths (87.5) feet to an iron pin at Walnut tree; thence continuing through the same, South sixteen and one fourth (16-1/4) degrees East, two hundred seventeen (217) feet to an iron pin driven on the Northern side of said public road; thence running along the Northern side of said public road which runs in a curve to the right to the above described place of BEGINNING, the direct course and distance to which is South seventy-three and three fourths (73-3/4) degrees West seventy-five (75) feet to said above described place of BEGINNING. CONTAINING 65.97 square perches. The above description was taken from a draft of survey made by Curvin A. Wentz, Reg. Surveyor, based upon a survey made for Mary A. Strickhouser on September 22, 1964.

BEING the same premises which Mildred E. Stump and Ralph N. Stump, her husband, by Indenture bearing date the 2nd day of August, 1988, and recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania, on the 2nd day of August, 1988, in Record Book 496, Page 637, granted and conveyed unto Daniel Mark Yohe.

For further title reference see Deed Book Volume 995, page 296.

MAP #H-17-38.

SEIZED and taken into execution as the property of **Daniel M. and Loretta L. Yohe** and to be sold by me

Raymond W. Newman  
Sheriff

Sheriff's Office, Gettysburg, PA  
May 28, 1998.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 31, 1998, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.  
6/12, 19 & 26

## NOTICE BY THE ADAMS COUNTY CLERK OF COURTS

NOTICE IS HEREBY GIVEN to all heirs, legatees and other persons concerned that the following accounts with statement of proposed distribution filed therewith have been filed in the Office of the Adams County Clerk of Courts and will be presented to the Court of Common Pleas of Adams County—Orphans' Court, Gettysburg, Pennsylvania, for confirmation of accounts and entering decrees of distribution on Monday, June 29, 1998, at 9:00 o'clock a.m.

**STOOPS**—Orphans' Court Action Number OC-43-98. The First and Final Account of Adams County National Bank, Executor of the Last Will and Testament of Minnie I. Stoops, deceased, late of Straban Township, Adams County, Pennsylvania, including accounting of said bank as Attorney-in-Fact for Minnie I. Stoops, deceased, under P.E.F. Code Sec. 3501.2.

**STUDY**—Orphans' Court Action Number OC-57-98. The First and Final Account of Richard K. Bish and Chester S. Byers, Executors of the Estate of Elsie M. Study, deceased, late of Straban Township, Adams County, Pennsylvania.

**MYERS**—Orphans' Court Action Number OC-58-98. The First and Final Account of Lloyd G. Myers, Executor of the Estate of Alma M. Myers, deceased, late of the Borough of Fairfield, Adams County, Pennsylvania.

Peggy J. Breighner  
Clerk of Courts

6/19, 26

## TAYLOR VS. THERIT, ET AL.

1. Liability is imposed on a broker who procures insurance that is materially defective through the broker's fault.

2. On a motion for summary judgment, it is not the Court's function to resolve issues of fact, only to determine if there would be issues for a jury to decide and must give the plaintiff the benefit of all well pleaded facts.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 92-S-1024, HENRY L. TAYLOR D/B/A HENRY TAYLOR, TRUCKING AND STORAGE SERVICES VS. WILLIAM M. THERIT, JR. T/D/B/A WILLIAM M. THERIT, JR. INSURANCE AGENCY AND EASTERN SHORE CORPORATION.

Matthew Battersby, Esq., for Plaintiff

Bruce McLaughlin, Esq., for Plaintiff

David L. Rohae, Esq., for Defendant

G. Thomas Miller, Esq., for Defendant

Roann Pope Brown, Esq., for Defendants

### OPINION ON EASTERN SHORE CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Spicer, P.J., September 10, 1997.

We revisit this case to consider another motion for summary judgment, this time filed by Eastern Shore Corporation.

Facts have been recited several times in prior opinions. A condensed version is that plaintiff was in the business of transporting goods. Around 1987, he decided he needed additional insurance coverage because product lay around at his place of business, sometimes up to four months. A commercial grade of potato starch<sup>1</sup> was included among things that he transported. Plaintiff stored some of this in a steel warehouse, but overflow went outside. He covered that which was placed outside with tarpaulins, after putting the product in an extra bag.

Plaintiff approached an insurance person, William Therit, for insurance coverage. Therit, in turn, engaged Eastern Shore, a broker, to obtain a policy. The record clearly supports findings that plaintiff relied upon Therit to inform Eastern Shore of storage practices, to obtain appropriate coverage and that Therit knew how and where goods were stored.

Therit, however, in his deposition, said he assumed that product would at least initially be stored within a building, but did not consider

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<sup>1</sup>Our former Vice President might be gratified to know that in several exchanges of correspondence between parties to this suit, potato was spelled "potatoe."

this too important, since the policy that was issued did not have a specific building description. Thus, when he contacted a representative of Eastern Shore, he did not specify whether material would be stored inside or outside a building.

Starch that was stored outside was damaged by moisture. Citing a specific exclusion, the carrier which issued an insurance policy denied coverage. Based upon specific language in the policy, we previously granted summary judgment in favor of the carrier.

Relying on the rule that imposes liability on a broker who procures insurance that is materially defective through the broker's fault, *Laventhol & Horwath v. Dependable Insurance Associates Inc.*, 396 Pa. Super 553, 579 A.2d 388 (1990), plaintiff has pursued actions against Therit and Eastern Shore.

Discovery has been completed in this case and it has become our duty to review the entire record and determine if plaintiff would be entitled to have his case submitted to a jury, were the case being tried. Pa. R.C.P. 1035.2; *Ertel v. Patriot News Co.*, 544 Pa. 92, 674 A.2d 1038 (1996). It is not our function to resolve issues of fact, only to determine if there would be issues for a jury to decide. We must give the plaintiff the benefit of all well pleaded facts which have been bolstered by his, and in this case, Therit's deposition.<sup>2</sup> We cannot grant judgment on the basis of statements made by Eastern Shore's witnesses. *Garcia v. Savage*, 402 Pa. Super. 324, 586 A.2d 1375 (1991); *RTC v. Urban Redevelopment Authority*, 536 Pa. 219, 638 A.2d 972 (1994); *Troy v. Kampgrounds of America, Inc.*, 399 Pa. Super. 41, 581 A.2d 665 (1990).

As a preliminary matter, we find that plaintiff must proceed on a contract theory. We pointed out in an opinion issued December 2, 1996, that distinctions between contract and tort are often blurred in this type of case. However, there are important distinctions and it is clear that different statutes of limitations apply. *Fiorentino v. Rapoport*, \_\_\_ Pa. Super. \_\_\_, 693 A.2d 208 (1997). Tort claims are clearly time barred in this case.

Plaintiff's case will be assessed pursuant to the terms of his oral contract with Eastern Shore to obtain insurance. Although defendant argues that no contract existed, since the record fails to support any finding of a meeting of the minds and consideration, it is patently clear

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<sup>2</sup> The cause of action against Therit is not presently before us for decision. In his suit against Eastern Shore, plaintiff must rely on what Therit said because plaintiff did not deal with Eastern Shore. Instead, he relied on Therit to communicate with that party, as plaintiff's deposition makes clear.



that Eastern Shore agreed to and did obtain an insurance policy. Plaintiff argues that the record justifies a finding that Eastern Shore was aware of his peculiar needs and failed to obtain proper insurance.

We find it unnecessary to explore whether Eastern Shore failed to perform its contract according to standards applicable to members of the insurance brokerage community. See *Id.* No expert opinions appear in the record and this issue has not been argued. The sole question presented is what Eastern Shore knew or should reasonably have known concerning the exposure against which plaintiff was seeking protection. If it undertook to obtain insurance guarding against damage for property stored outside, it would be liable to the same extent as if a policy was issued covering such a peril. Laventhol, *supra*.

Unfortunately for plaintiff, the record does not show that Eastern Shore's knowledge extended beyond the fact that goods were stored in a building. Two documents, among others, were introduced during Therit's deposition. The first was a letter written by Therit after the carrier had rejected coverage. (Therit Deposition Exhibit 4.) In this document, he asked Stephen King, the person who acted on behalf of Eastern Shore and with whom he dealt, to outline the following:

1. When we talked in December, 1986, about adding Terminal Coverage who would you have talked to?

2. Did you mention to him what the coverage was needed to cover. Example: Potatoe (sic) Starch insured was storing in his warehouse until he was instructed by customers to deliver it.

3. Do you recall our discussion about Henry picking up the potatoe (sic) starch from the ocean marine Lines and then storing it in his warehouse until his customer requested items to be shipped?

4. Do you recall my 1/21/87 memo where I requested that coverage be increased because out-going shipments were slow and more commodity was being kept in storage at this time?

5. Also, if you could outline any other item you may recall, please list them.

The letter ended with Therit saying he thought it was absurd for the carrier to think one of their underwriters would have allowed additional coverage without requiring that a long list of questions be asked.

In Therit's Deposition Exhibit 3, King replied saying, *inter alia*, "I recollect you asking me such questions as, what was being stored

where it was on the location, as well as what type of structure it was being stored in.”

Plaintiff argues that these exhibits indicate that King knew that plaintiff was storing starch outdoors. However, the two documents clearly indicate that Therit stated that material was stored within plaintiff’s warehouse, and not outside. King’s response can only be read to agree with this, while expressing knowledge of the “type of structure it was being stored in.”

No other information appears in the record that would justify an inference that King, or any other representative from Eastern Shore, was personally familiar with plaintiff’s storage practices.

All that the record establishes is that Eastern Shore agreed to procure insurance covering goods temporarily stored within a building. The exclusion related to damage caused by moisture, which in this case involved rain or snow. Neither would be expected inside a warehouse. Eastern Shore performed its contract by obtaining the type of insurance discussed and did not, therefore, breach its undertaking with plaintiff.

#### **ORDER ON EASTERN SHORE CORPORATION’S MOTION FOR SUMMARY JUDGMENT**

AND NOW, this 10th day of September, 1997, summary judgment is entered in favor of Eastern Shore Corporation and against plaintiff.

## ESTATE NOTICES

**NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.**

## FIRST PUBLICATION

## ESTATE OF THELMA K. BROWN, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania  
 Executor: Lee Krout, 425 Glenwyn Drive, Littlestown, PA 17340  
 Attorney: David K. James, III, Esquire, 234 Baltimore Street, Gettysburg, PA 17325

## ESTATE OF TAKAKO FAIR, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania  
 Administrator: James M. Fair, 355 Table Rock Road, Gettysburg, PA 17325  
 Attorney: Roy A. Keefer, Esquire, Swope, Heiser & McQuaide, 104 Baltimore Street, Gettysburg, PA 17325

## ESTATE OF HELEN V. KRICHTEN, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania  
 Executrices: Geraldine M. Staub, 5544 Hanover Road, Hanover, PA 17331; Rose A. Bevenour, 1 Walnut Lane, New Oxford, PA 17350  
 Attorney: Donald W. Dorr, Esquire, Buchen, Wise & Dorr, 126 Carlisle Street, Hanover, PA 17331

## ESTATE OF RUSSELL A. PEIFER, DEC'D

Late of Straban Township, Adams County, Pennsylvania  
 Executrix: Mary E. Houck, 314 Fourth Street, Hanover, PA 17331  
 Attorney: James T. Yingst, Esquire, 515 Carlisle Street, Hanover, PA 17331

## ESTATE OF ELEANOR J. SCHOLL, DEC'D

Late of Oxford Township, Adams County, Pennsylvania  
 Executrices: Eleanor Jane Eisner, 29 Lee Street, Hanover, PA 17331; Rose Ann Ziegler, 93 Ege Drive, Carlisle, PA 17013  
 Attorney: Donald W. Dorr, Esquire, Buchen, Wise & Dorr, 126 Carlisle Street, Hanover, PA 17331

## SECOND PUBLICATION

## ESTATE OF JOHN C. BUCHER, DEC'D

Late of 810 Old Route 30, Cashtown, Franklin Township, Adams County, Pennsylvania  
 Co-Executors: J. Gregg Bucher, 890 Georgetown Road, Littlestown, PA 17340; Sue Ann Wentz, P.O. Box 395, Cashtown, PA 17310  
 Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, Attorneys at Law, 126 Baltimore Street, Gettysburg, PA 17325

## ESTATE OF MARLENE K. CONGLETON A/K/A MARLENE K. THOMPSON, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania  
 Executor: William C. Congleton, 2494 Old Harrisburg Road, Gettysburg, PA 17325  
 Attorney: Roy A. Keefer, Esq., Swope, Heiser & McQuaide, 104 Baltimore Street, Gettysburg, PA 17325

## ESTATE OF ARLENE I. REEM, DEC'D

Late of Adams County, Pennsylvania  
 Executrices: Cynthia T. Reem; Marianne Sipe, c/o 4620 Custer Drive, Harrisburg, PA 17110

## THIRD PUBLICATION

## ESTATE OF MARIE T. CALHOON, DEC'D

Late of Huntingdon Township, Adams County, Pennsylvania  
 Executrix: Linda Menges, 85 Wright Road, York Springs, PA 17372  
 Attorney: Jane M. Alexander, Esquire, P.O. Box 421, Dillsburg, PA 17019-0421

## ESTATE OF HENRY SCHNEIDER, III, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania  
 Executrix: Katherine P. Schneider, 95 Ridgewood Drive, Gettysburg, PA 17325  
 Attorney: Puhl & Eastman, Attorneys at Law, 16 Lincoln Square, Gettysburg, PA 17325

## ESTATE OF PAUL HENRY SELL JR., DEC'D

Late of Liberty Township, Adams County, Pennsylvania  
 Executor: Paul W. Sell, 2042 Mayberry Road, Westminster, MD 21158  
 Attorney: James T. Yingst, Esquire, Rudsill, Guthrie, Nonemaker, Guthrie & Yingst, 40 York Street, Hanover, PA 17331

## ESTATE OF RALPH W. TYSON, DEC'D

Late of Huntington Township, Adams County, Pennsylvania  
 Executrix: Linda T. Goens, 3999 Carlisle Road, Gardners, PA 17324  
 Attorney: John A. Wolfe, Esq., Wolfe & Rice, 47 West High Street, Gettysburg, PA 17325

# Legal Malpractice...

## IT DOES HAPPEN



*For some attorneys, legal malpractice is not an area of practice.*

*I have been doing legal malpractice on a referral basis for Pennsylvania and Delaware attorneys for a number of years.*

*If a case comes up and you wish to avoid involvement, I will be glad to assist. Referrals paid as allowed by law.*

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# Adams County Legal Journal

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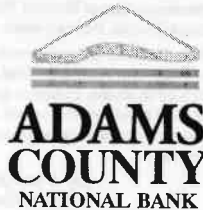
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and  
FLEMING, ET AL. VS. CARBAUGH, ET AL.

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ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

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SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-327 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 7th day of August, 1998, at 10:00 o'clock in the forenoon at the Court-house in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL that certain tract of land situate partly in Germany Township and partly in Mt. Joy Township, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at an iron pin driven on the North side of a public road sometimes known as the "Fish and Game Road"; thence through the original tract now or formerly of Mary A. Strickhouser, North sixteen and one-fourth (16-1/4) degrees West, two hundred sixty-two (262) feet to an iron pin; thence through the same, South seventy-five and one-half (75-1/2) degrees East, eighty-seven and five-tenths (87.5) feet to an iron pin at Walnut tree; thence continuing through the same, South sixteen and one fourth (16-1/4) degrees East, two hundred seventeen (217) feet to an iron pin driven on the Northern side of said public road; thence running along the Northern side of said public road which runs in a curve to the right to the above described place of BEGINNING, the direct course and distance to which is South seventy-three and three fourths (73-3/4) degrees West seventy-five (75) feet to said above described place of BEGINNING. CONTAINING 65.97 square perches. The above description was taken from a draft of survey made by Curvin A. Wentz, Reg. Surveyor, based upon a survey made for Mary A. Strickhouser on September 22, 1964.

BEING the same premises which Mildred E. Stump and Ralph N. Stump, her husband, by Indenture bearing date the 2nd day of August, 1988, and recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania, on the 2nd day of August, 1988, in Record Book 496, Page 637, granted and conveyed unto Daniel Mark Yohe.

For further title reference see Deed Book Volume 995, page 296.

MAP #H-17-38.

SEIZED and taken into execution as the property of Daniel M. and Loretta L. Yohe and to be sold by me

Raymond W. Newman  
Sheriff

Sheriff's Office, Gettysburg, PA  
May 28, 1998.

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6/12, 19 & 26

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Peggy J. Breighner  
Clerk of Courts

6/19, 26

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, 54 Pa. C.S.A. §§301, et seq., that an Application to conduct business in Adams County, Pennsylvania, under the assumed or fictitious name, style or designation of White Oak Orchards was filed in the Office of the Secretary of the Commonwealth of Pennsylvania, in Harrisburg, Pennsylvania, on May 27, 1998. The business is located at P.O. Box 55, 1705 Center Mills Road, Aspers, Pennsylvania 17304. The name and address of the persons who are party to the registration is Paul Wendell Wetzel, P.O. Box 55, 1705 Center Mills Road, Aspers, Pennsylvania 17304 and Douglas L. Wetzel, P.O. Box 55, 1705 Center Mills Road, Aspers, Pennsylvania 17304.

Robert E. Campbell  
Campbell and White  
Attorney  
122 Baltimore Street  
Gettysburg, PA 17325

6/26

NOTICE

The Business Office of the Adams County Legal Journal has moved and is now at the following address:

Adams County Legal Journal  
Adams County Courthouse  
Room 305 (Law Library)  
111-117 Baltimore Street  
Gettysburg, PA 17325  
(717) 334-6781 Extension 336

Please direct all future advertising, correspondence and telephone calls to Cecelia Brown, Assistant Business Manager.

There is a box in the Prothonotary's Office (above the attorney mail boxes) especially marked for Adams County Legal Journal in which advertisements and correspondence can be placed.

Donald G. Oyler  
Editor

6/26, 7/3

## NATIONSBANK OF FLORIDA, N.A. VS. PAPPAS

1. If all the material terms of an Oral Settlement Agreement are agreed upon, the Agreement of settlement will be enforced.

2. Ambiguities and undetermined matters which render an Oral Settlement Agreement impossible to understand and enforce require that the Agreement be set aside and the matter remanded for a trial on the merits.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 93-S-307, NATIONSBANK OF FLORIDA, N.A. VS. HARRY C. PAPPAS D/B/A SYGNET LEASING COMPANY C/O KRYSTAL CADILLAC, 1510 YORK ROAD, GETTYSBURG, PA 17325.

Michele M. Bradford, Esq., for Plaintiff

William C. Cramer, Esq., for Defendants

### OPINION ON PLAINTIFF'S MOTION TO TO ENFORCE SETTLEMENT

Kuhn, J., September 22, 1997.

On April 22, 1993, Plaintiff, Nationsbank of Florida, N.A., filed a Complaint against Defendants, Harry C. Pappas, d/b/a Sygnet Leasing Company, c/o Krystal Cadillac. On August 14, 1995, the parties appeared for trial at the Adams County Courthouse but commenced negotiations and orally agreed on a settlement. By Order dated August 14, 1995, this Court acknowledged the tentative settlement. No written settlement agreement was ever reached and on November 17, 1995, the Plaintiff filed a Motion to enforce the oral settlement.

### STATEMENT OF THE FACTS

On November 25, 1987, Defendant executed a note, security agreement, and disclosure statement promising to pay Plaintiff \$13,520.40 plus interest. The Defendant defaulted by failing to make the scheduled monthly payments. Plaintiff filed a complaint seeking repaying plus costs and interest.

The parties met at the Adams County Courthouse on the day of trial and proceeded to enter into negotiations. The negotiations were between Mr. Pappas and Ms. Armstrong, an administrative analyst for Nationsbank. The parties entered into an oral settlement agreement which this Court acknowledged as being tentative (Order of August 14, 1995). No terms of the initial settlement were put on the record at that time. After the oral agreement, Plaintiff drafted a stipulation for settlement but it was never signed by the parties.

Included in the record are two depositions, one from the Defendant, Mr. Pappas, and one from Plaintiff's witness, Ms. Armstrong. It is clear from these depositions that the parties cannot agree upon what the terms of the oral agreement were supposed to be.

### LEGAL DISCUSSION

The court in *Miller v. Clay Twp.*, 124 Pa. Commw. 252, 555 A.2d 972 (1989), summarized the law of oral settlement agreements as follows:

Principles of contract law govern the enforceability of settlement agreements. If all the material terms of the bargain are agreed upon, the agreement of settlement will be enforced. An agreement will be considered sufficiently definite and enforceable if the parties intended to make a contract and there is a reasonably certain basis upon which the court can grant a proper remedy. However, ambiguities and undetermined matters which render a settlement agreement impossible to understand and enforce require that the agreement be set aside and the matter remanded for a trial on the merits.

*Id.* At 974 (citations omitted).

Plaintiff, citing *Compu Forms Control, Inc. v. Altus Group, Inc.*, 393 Pa. Super. 294, 574 A.2d 618 (1990), argues that the parties' oral settlement agreement is enforceable, even though never formally reduced to writing, because the parties intended it to be mutually binding. However, in that case, and in ones like it where the oral settlement agreement was held to be binding on the parties, the essential terms were placed on the record at the time of the oral settlement agreement.

In the case at hand, no terms were placed on the record when the parties orally agreed on a settlement. The Court Order simply states that a settlement was tentative. Additionally, as evidenced by the depositions, the essential terms of the settlement are disputed, even to the extent of the amount to be repaid. Therefore, because it is unclear what the parties agreed upon, this Court will not enforce the oral settlement agreement. Accordingly, the attached Order is entered.



## ORDER OF COURT

AND NOW, this 22nd day of September, 1997, Plaintiff's Motion to Enforce Settlement is hereby denied.

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### FLEMING, ET AL. VS. CARBAUGH, ET AL.

1. Any party may move for judgment in whole or in part.
2. An entry of summary judgment may be granted only in cases where the right is clear and free from doubt and in ruling on such a motion, the record must be viewed in the light most favorable to the non-moving party.
3. The doctrine of *res judicata* holds that "a final judgment upon the merits by a court of competent jurisdiction bars any further suit between the same parties or their privies on the same cause of action.
4. The purposes behind the doctrine of *res judicata*, which bars the relitigation of issues that either were raised or could have been raised in the prior proceeding, is to conserve limited judicial resources, establish certainty and respect for court judgments, and protect the party relying upon the judgments from vexatious litigation.
5. Where a settlement agreement was reached between the parties, there could not have been any judgment on the parties legal rights in the easement that would bar any future suit between the same parties or their privies on the same cause of action.
6. Where Plaintiffs could not have raised, nor could the equity court have determined, the parties legal rights in the easement in the equity proceeding, *res judicata* is inapplicable.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 95-S-727, HELEN N. FLEMING, HERBERT F. MCCOLLOM, JR. AND JOAN E. MCCOLLOM, HUSBAND AND WIFE, AND JOSEPH B. BOLLINGER AND LILLIAN B. BOLLINGER, HUSBAND AND WIFE VS. ERIC J. CARBAUGH AND ELECIA CARBAUGH, HUSBAND AND WIFE AND RICHARD M. SIEGMAN AND TERRIE J. SIEGMAN, HUSBAND AND WIFE.

Harold A. Eastman, Jr., Esq., for Plaintiffs  
Douglas H. Gent, Esq., for Defendants

### OPINION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Kuhn, J., September 22, 1997.

On August 9, 1995, Plaintiffs filed an Action to Quiet Title against Defendants. On October 24, 1995, Plaintiffs were awarded a default judgment against Defendants, Richard M. and Terrie J. Siegman. On October 15, 1996, the remaining Defendants, Eric J. and Elicia Carbaugh (hereinafter "Defendants"), filed a Motion for Partial Summary Judg-

ment against Plaintiffs, Helen N. Fleming, Herbert F. and Joan E. McCollom (hereinafter "Original Plaintiffs"). For the reasons set forth below, the Motion is denied.

### STATEMENT OF THE FACTS

All of the parties involved in this action own neighboring properties located in Hamilton Township, Adams County. The dispute is over a right-of-way which runs directly in front of Defendants' home. This right-of-way allows Plaintiffs access to their properties from Boy Scout Road. The access was apparently used for many years by the Plaintiffs until approximately 1987 when the Carbaughs began partially blocking the entry and interfering with its use.

In September of 1990, the Original Plaintiffs filed an action in equity to enjoin Defendants from blocking, or otherwise interfering, with use of the right-of-way. A settlement was reached whereby the Defendants granted Plaintiffs an alternate right-of-way. This alternate was recorded in the Recorder of Deeds for Adams County on March 11, 1992, and on this same day the Original Plaintiffs filed a Praecepto to Discontinue the Action.

Construction on the alternate right-of-way began after settlement; however, the ground proved unsafe for use as an access. Therefore, the Original Plaintiffs, as well as the additional Plaintiffs, Joseph B. Bollinger and Lillian B. Bollinger, brought an action to quiet title to the original right-of-way claiming an easement by grant or prescription.

### LEGAL DISCUSSION

Summary judgment shall be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Allstate Insurance Co. v. McFadden*, 407 Pa. Super. 537, 540, 595 A.2d 1277, 1278 (1991); *Alloc. den.* 602 A.2d 855 (1991) (citations omitted). Any party may move for judgment in whole or in part. Pa. R.C.P. 1035.2, 42 Pa. C.S.A. An entry of summary judgment may be granted only in cases where the right is clear and free from doubt. In ruling on such a motion, the record must be viewed in the light most favorable to the non-moving party. *Demmler v. Smithkline Beecham Corp.*, 448 Pa. Super. 425, 671 A.2d 1151, 1153 (1996). In Defendants' Motion for

Partial Summary Judgment they argue that the Original Plaintiffs are estopped from bringing suit under the doctrine of res judicata.<sup>1</sup> The doctrine of res judicata holds that “[a] final judgment upon the merits by a court of competent jurisdiction bars any future suit between the same parties or their privies on the same cause of action.” *Dempsey v. Cessna Aircraft Co.*, 439 Pa. Super. 172, 653 A.2d 679, 680-81 (1995). The doctrine applies when there is concurrence of the following four elements: (1) identity of the things sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity of the quality in the persons for or against whom the claim is made. In *Re Private Road in Union Twp.*, 148 Pa. Commw. 522, 611 A.2d 1362, 1364 (1992)(citations omitted). “The purposes behind the doctrine, which bars the relitigation of issues that either were raised or could have been raised in the prior proceeding . . . is to conserve limited judicial resources, establish certainty and respect for court judgments, and protect the party relying upon the judgments from vexatious litigation . . .” *McArdle v. Tronetti*, 426 Pa. Super. 607, 627 A.2d 1219, 1222 (1993), *Alloc. den.* 641 A.2d 587 (1994).

It is this Court’s determination that a “final judgment on the merits of a court of competent jurisdiction” was not obtained in the case at hand. Although the settlement between the parties is viewed as having the same effects as a final judgment, e.g., *Kaiser v. 191 Presidential Corp.*, 308 Pa. Super. 301, 454 A.2d 141, 144 (1982), there could not have been any judgment on the parties’ legal rights in the easement.

Plaintiffs’ original suit was an action to quiet title and is considered an action at law. *Kister v. Commw.*, 77 Pa. Commw., 430, 465 A.2d 1333, 1334 (1983). As our Supreme Court stated in *Brodts v. Brown*, 404 Pa. 391, 172 A.2d 152, 154 (1961) (citations omitted), “where the asserting party’s legal right to the easement is not clear, or is in substantial dispute, equity lacks jurisdiction to determine the issue.” Additionally, in *McArdle v. Tronetti*, the Court cited the Restatement (Second) of Judgments §65 cmt. e, as follows:

When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdic-

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<sup>1</sup> Defendants also raised a collateral estoppel claim in their Motion; however, neither party briefed this issue and it will, therefore, not be addressed.

tional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. If, however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground . . . then a second action in a competent court presenting the omitted theory or ground should not be held precluded.

McArdle v. Tronetti, 627 A.2d at 1222. Plaintiffs' here could not have raised the issue of legal rights in the easement in the equity proceeding.

Therefore, because Plaintiffs could not have raised, nor could the equity court have determined, the parties' legal rights in the easement, res judicata is inapplicable. Accordingly, the attached Order is entered.

#### ORDER OF COURT

AND NOW, this 22nd day of September, 1997, Defendants' Motion for Partial Summary Judgment is hereby denied.

## ESTATE NOTICES

**NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.**

## FIRST PUBLICATION

## ESTATE OF JOHANNA ELSNER, DEC'D

Late of Cross Keys, Oxford Township, Adams County, Pennsylvania  
Executors: Frank Elsner, Jr., 29 Lee Street, Hanover, PA 17331; Bertram F. Elsner, c/o Elsner Engineering Works, Inc., 675 Fame Avenue, Hanover, PA 17331

Administrator: Jack F. Ream, Esquire, Rhoads and Sinon LLP, 119 East Market Street, York, PA 17401

## ESTATE OF EMMA H. KEMPER, DEC'D

Late of Huntington Township, Adams County, Pennsylvania

Executrix: Darlene F. Hoffman, R.D. #1, Box 910, East Berlin, PA 17316  
Attorney: Sharon E. Myers, Esquire, 29 North Duke Street, York, PA 17401

## ESTATE OF CYRIL N. MCMASTER, SR., DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania

Administrator: Cyril N. McMaster, Jr., c/o 230 York Street, Hanover, PA 17331

Attorney: Judith Koper Morris, Esquire, 230 York Street, Hanover, PA 17331

## ESTATE OF MARY JANE MUMPER, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executors: Katherine J. Lee now Katherine J. Williams, 11688 Cochran Road, Woodstock, AL 35188; John H. Mumper, 62 Allen Crest Drive, Hampden, MA 01036

Attorney: Robert E. Campbell, Esquire, Campbell and White, 122 Baltimore Street, Gettysburg, PA 17325

## ESTATE OF NAOMI F. SANDERS, DEC'D

Late of Littlestown, Adams County, Pennsylvania

Executrix: Nancy E. Six, 4810 Baltimore Pike, Littlestown, PA 17340  
Attorney: Larry W. Wolf, Esquire, 215 Broadway, Hanover, PA 17331

## ESTATE OF OSCAR S. STAMBAUGH, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Homer S. Stambaugh, R.D. #1, Box 1464, Brodbeck's, PA 17329  
Attorney: James T. Yingst, Esquire, 515 Carlisle Street, Hanover, PA 17331

## SECOND PUBLICATION

## ESTATE OF THELMA K. BROWN, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania

Executor: Lee Krout, 425 Glenwyn Drive, Littlestown, PA 17340  
Attorney: David K. James, III, Esquire, 234 Baltimore Street, Gettysburg, PA 17325

## ESTATE OF TAKAKO FAIR, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Administrator: James M. Fair, 355 Table Rock Road, Gettysburg, PA 17325

Attorney: Roy A. Keefer, Esquire, Swope, Heiser & McQuaide, 104 Baltimore Street, Gettysburg, PA 17325

## ESTATE OF HELEN V. KRICHTEN, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania

Executrices: Geraldine M. Staub, 5544 Hanover Road, Hanover, PA 17331; Rose A. Bevenour, 1 Walnut Lane, New Oxford, PA 17350

Attorney: Donald W. Dorr, Esquire Buchen, Wise & Dorr, 126 Carlisle Street, Hanover, PA 17331

## ESTATE OF RUSSELL A. PEIFER, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executrix: Mary E. Houck, 314 Fourth Street, Hanover, PA 17331

Attorney: James T. Yingst, Esquire, 515 Carlisle Street, Hanover, PA 17331

## ESTATE OF ELEANOR J. SCHOLL, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrices: Eleanor Jane Elsner, 29 Lee Street, Hanover, PA 17331; Rose Ann Ziegler, 93 Ege Drive, Carlisle, PA 17013

Attorney: Donald W. Dorr, Esquire, Buchen, Wise & Dorr, 126 Carlisle Street, Hanover, PA 17331

## THIRD PUBLICATION

## ESTATE OF JOHN C. BUCHER, DEC'D

Late of 810 Old Route 30, Cashtown, Franklin Township, Adams County, Pennsylvania

Co-Executors: J. Gregg Bucher, 890 Georgetown Road, Littlestown, PA 17340; Sue Ann Wentz, P.O. Box 395, Cashtown, PA 17310

Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, Attorneys at Law, 126 Baltimore Street, Gettysburg, PA 17325

## ESTATE OF MARLENE K. CONGLETON A/K/A MARLENE K. THOMPSON, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania

Executor: William C. Congleton, 2494 Old Harrisburg Road, Gettysburg, PA 17325

Attorney: Roy A. Keefer, Esq., Swope, Heiser & McQuaide, 104 Baltimore Street, Gettysburg, PA 17325

## ESTATE OF ARLENE I. REEM, DEC'D

Late of Adams County, Pennsylvania

Executrices: Cynthia T. Reem; Marianne Sipe, c/o 4620 Custer Drive, Harrisburg, PA 17110

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