

Adams County Legal Journal

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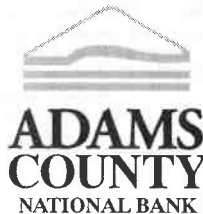
No. 33, pp. 201-208

CONTINUING LEGAL EDUCATION PROGRAMS

1. *Highlights of the New Pennsylvania Rules of Evidence*
Thursday, January 28, 1999 - 9:00 to 11:00
Room 307, Adams County Courthouse
Credits: Substantive Law - 2, Ethics - 0
2. *Fundamentals of Mortgage Foreclosures*
Friday, February 5, 1999 - 9:00 to 1:30
Room 307, Adams County Courthouse
Credits: Substantive Law - 4, Ethics - 0
3. *Second Annual Family Law Update*
30 Thursday, February 11, 1999 - 9:00 to 5:00
Room 307, Adams County Courthouse
Credits: Substantive Law - 5, Ethics - 1

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SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-235 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 29th day of January, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT CERTAIN tract of land, situate, lying and being in the Borough of Bonneauville, Adams County, Pennsylvania, more fully bounded and limited as follows, to wit:

BEGINNING at a corner at a point on the Northeastern edge of White Birch Drive at the southwestern most corner of Lot N, 7-A as shown on the hereinafter referred to Subdivision Plan; thence along said Lot No. 7-A, and lands now or formerly of Rosville V. Topper, 111, North forty-six (46) degrees ten (10) minutes twenty-eight (28) seconds East, ninety-two and twenty-seven hundredths (82.27) feet to a point at lands now or formerly of Michael D. Sentz and Lot No. 9 on the hereinafter referred to Subdivision Plan; thence along said Lot No. 9, South forty-three (43) degrees forty-nine minutes thirty-two (32) seconds East, ninety-seven and forty-nine hundredths (97.49) feet to a point on the Northwestern edge of Holly Court on the hereinafter referred to Subdivision Plan; thence along said Holly Court the following three (3) courses and distances; (1) by a curve to the right having a radius of fifteen (15) feet the long chord of which is South twenty-two (22) seconds West, eight and sixty-seven hundredths (8.67) feet for an arc distance of eight and eighty hundredths (8.80) feet to a point; (28) seconds West, sixty and twenty-six hundredths (60.26) feet to a point; (3) North eighty-nine (89) degrees fifty-one (51) minutes fifty-two (52) seconds West, twenty-four and eighty-one hundredths (24.81) feet to a point on the Northeastern edge of White Birch Drive on the hereinafter referred to Subdivision Plan; thence along said Northeastern edge of White Birch Drive the following two (2) courses and distances; (1) by a curve to the left having a radius of one hundred eighty-five (185) feet the long chord of which is North forty-four (44) degrees fifty-one (51) minutes ten (10) seconds West, fifty-two and thirty-two hundredths (52.32) feet for an arc distance of fifty-two and fifty hundredths (52.50) feet to a point; (2) North fifty-two (52) degrees fifty-eight (58) minutes fifty-nine (59) seconds West, thirty and eighty-five hundredths (30.85) feet to a point at the Southwestern most corner of Lot No., 7-A on the hereinafter referred to

Subdivision Plan, being the point and place of BEGINNING.

BEING THE SAME PREMISES which Jeremy D. Forbes and Peggy L. Forbes, by their Deed dated September 24, 1993 and recorded in Adams County Recorder of Deeds Office on October 1, 1993 in Deed Book 786, page 219, granted and conveyed unto Carrol E. Snyder and Barbara J. Snyder, Barbara J. Snyder is deceased.

SEIZED IN EXECUTION AS THE PROPERTY OF CARROL E. SNYDER UNDER ADAMS COUNTY JUDGMENT NO. 1997-S-235.

SEIZED and taken into execution as the property of **Carrol E. Snyder** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
October 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 February 22, 1999, 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.

12/23, 30 & 1/8

NOTICE

A HEARING SHALL BE HELD before the Court of Common Pleas, Adams County, Pennsylvania, in Courtroom No. 1 or 2 of the Adams County Courthouse, Gettysburg, Pennsylvania, on February 9, 1999, at 9:00 o'clock, a.m. for the purpose of considering the sale of unimproved real estate from the Upper Adams School District to Inland Container Corp., in exchange for an unimproved tract of real estate to be conveyed by Inland Container Corp., to Upper Adams School District. Any persons interested in the sale and exchange of the aforesaid real estate should appear and be heard at that time.

Robert L. McQuaide
Solicitor for Upper Adams
School District

12/30, 1/8, 15

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Commonwealth of Pennsylvania, Department of State, at Harrisburg, Pennsylvania, for the purpose of obtaining a Certificate of Incorporation.

The name of the proposed corporation which has been organized under the Business Corporation Law of 1988 adopted December 21, 1988, P.L. 1444, No. 177, §103, as amended, is DRI MACHINE SHOP, INC.

G. Steven McKonly, Solicitor

1/8

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 Tuesday, January 19, 1999, at 9:00 o'clock a.m.

PETTYJOHN—Orphans' Court Action Number OC-138-98. The First and Final Account of Dawn F. Fields, now Dawn F. Wertz, Executrix of the Estate of J. Harvey Pettyjohn, deceased, late of Oxford Township, Adams County, Pennsylvania.

Peggy J. Breighner
Clerk Of Courts

1/8, 15

NOTICE TO THE BAR

EFFECTIVE JANUARY 1, 1999, the Superior Court will be issuing opinions containing a Universal Citation. This citation will be as follows: *Jones V. Smith*, 1999 PA Super, 1. The second number is the Court-issued number of the opinion. Each opinion will also have numbered paragraphs, to be used for pinpoint citations, e.g., *Jones V. Smith*, 1999 PA Super, 1, 15.

Citation to opinions that have not yet been issued an Atlantic 2d citation are to be the Universal citation number. After the official citation has been issued, citation is to be only to the official citation, and not to the Universal Citation.

Joseph J. Mittleman
Executive Administrator
Superior Court of Pennsylvania

1/8 & 15

CARBAJAL VS. W.W. BABCOCK COMPANY, INC. ET AL.

1. 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.

2. A manufacturer is a guarantor of its product, not an insurer, and it is not the purpose of §402A of the Restatement (Second) of Torts to impose absolute liability.

3. A product may be defective due to: design defect, manufacturing defect, and failure-to-warn defect.

4. The danger for which warnings are required refers to non-obvious dangers inherent in the use of the product.

5. Whether, in a particular case, a product is deemed to be defective because of an inadequate warning is a question of law to be decided by the trial court, and only after this judicial determination is made will the case be submitted to the jury to determine whether the facts support the claim.

6. If the dangers are known to the overall group of consumers who ordinarily use the product, then the product is not defective and the manufacturer is under no duty to warn.

7. In negligence cases, under §388 of the Restatement (Second) of Torts, as in strict liability cases, whether a duty to warn exists must be evaluated in light of the knowledge of ordinary consumers of the risks inherent.

8. The question of whether a plaintiff has assumed the risk of his injuries should not be decided as a matter of law unless it is beyond question that the plaintiff voluntarily and knowingly proceeded in the face of an obvious dangerous condition.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 92-S-876, IGNACIO CARBAJAL VS. W. W. BABCOCK COMPANY, INC., COSNER MFG., CO., COSNER INVESTMENTS CO., O.C. RICE, INC.

Daniel M. Pell, Esq. and Harry M. Philo, Esq., for Plaintiff
Barry A. Kronthal, Esq., for Defendants Cosner

OPINION ON MOTION FOR SUMMARY JUDGMENT FILED BY COSNER MANUFACTURING COMPANY AND COSNER INVESTMENT COMPANY

Kuhn, J., January 29, 1998.

Plaintiff, Ignacio Carbajal, filed an Amended Complaint sounding in negligence and strict liability. Plaintiff contends that on October 1, 1990, he sustained serious injury while working as a farm laborer. He claims that his left foot slipped off the rung of a ladder as he reached for an apple and the fruit harvesting bag he was using shifted causing him to lose his balance and fall. Defendants, Cosner Manufacturing Company and Cosner Investment Company ("Cosner"), designed,

manufactured, and sold the harvesting bag being used by Plaintiff.

Cosner's liability under both counts is premised upon its failure to affix adequate English and Spanish warnings to the harvesting bag and its failure to provide a waist strap as standard equipment with the bag. Plaintiff claims the warnings should have alerted the user that the bag should be worn in front of him, that a waistband should be worn, that the bag should not be used at heights unless a secure work platform is provided, and that the bag should not be used to gather fruit if working from a ladder.

After extensive discovery, Cosner filed a motion for summary judgment¹ which is before this Court for disposition. Cosner's position is that Plaintiff has assumed the risk and that the product was not defective due to inadequate warnings.

LEGAL DISCUSSION

Summary judgment shall be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits², 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). Finally, pursuant to the Nanty-Glo rule, summary judgment is not available where the moving party relies exclusively upon oral affidavits or

¹ Cosner's Motion filed on December 23, 1996 was actually the second Motion for Summary Judgment. The first Motion was filed on July 27, 1994 and was denied by President Judge Oscar Spicer by Court Order dated December 8, 1994.

² Plaintiff has attached an affidavit to its brief in opposition to Defendant's Motion for Summary Judgment. This affidavit was not used because it is not a proper affidavit to be used in a Motion for Summary Judgment. Pa.R.C.P. 1035.4 concerns affidavits as used in a Motion for Summary Judgment and states,

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the signer is competent to testify to the matters stated therein....

The affidavit presented by Plaintiff does not concern facts. It is a compilation of the opinions of David D. Whitaker, an attorney in the firm representing Plaintiff. Mr. Whitaker relies on texts, treatises, and articles in making his conclusions. This Court did not find it necessary to rely on this extraneous information in making its decision on the facts of this case.

depositions to establish the absence of a genuine issue of material fact, except where that oral testimony consists of admissions of the opposing party or his witnesses. *Johnson v. Johnson*, 410 Pa. Super. 631, 637, 600 A.2d 965, 968 (1991).

Evidence favorable to Plaintiff suggests that at the time of the accident he was a 49-year-old Mexican laborer who had been a fruit picker for 17 years. He is unable to read English. On October 1, 1990, and for a period of at least three weeks, Plaintiff had been using a ladder designed by W.W. Babcock, and a fruit-harvesting bag designed, manufactured, and sold by Cosner. Cosner offered an optional waist-band "to hold the bag close to the pickers body." (Def.'s catalog, Rice Deposition #7, App. 5). However, there is no evidence that Plaintiff knew of its existence. Plaintiff claims to have never seen another harvester using a waist band. (Plt.'s Deposition at 32).

Late in the afternoon on the day in question Plaintiff ascended the ladder to a point where his feet were on the fourth rung from the top of the ladder and his left hand was holding on to the top rung. The harvesting bag was around his neck and hung on the left side of his body. As Plaintiff reached for an apple with his right hand his left foot slipped off the rung. The bag, which contained approximately 40 pounds of apples, swung away from his left side causing Plaintiff to fall to the left and off the ladder. According to Plaintiff, the harvesting bag "started pulling me down snapping me to the ground." (Plt.'s Deposition at 42). The ladder stayed in the tree.

Plaintiff testified in his deposition that he had seen two other persons fall off an orchard ladder before but that he had never personally experienced a fall before this incident. (Plt.'s Deposition at 30-31). He further stated that if the bag displayed a warning he would have read it. (Plt.'s Deposition at 60).

Two issues are presented in this Motion for Summary Judgment. The first is whether, as a matter of law, the harvesting bag was defective and unreasonably dangerous because it lacked the warnings suggested. The second issue is whether Plaintiff assumed the risks of using the bag.

Strict liability based upon §402 of the Restatement (Second) of Torts has been part of Pennsylvania law since *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). That section provides,

§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

A manufacturer is a guarantor of its product, not an insurer, and it is not the purpose of §402A to impose absolute liability, *Davis v. Berwind Corp.*, 433 Pa. Super. 342, 353, 640 A.2d 1289,1295 (1994), alloc. gr. 655 A.2d 514 (1995). Thus, the plaintiff in a §402A case has the burden of showing that (1) the product was defective, (2) the defect caused the injury, and (3) the defect existed at the time the product left the manufacturer. *Demmler v. Smithkline Beecham Corp.*, 448 Pa. Super. 425, 430, 671 A.2d 1151,1153.

The focus of this discussion will be upon whether the harvesting bag in question was “defective” due to inadequate warnings. A product may be defective due to: design defect, manufacturing defect, and failure-to-warn defect. *Phillips v. A-Best Products Company*, 542 Pa. 124, 131, 665 A.2d 1167,1170 (1995). Both the design and the failure-to-warn defects are raised in Plaintiff’s Complaint; however, Cosner’s Motion for Summary Judgment addresses only the inadequate warnings defect.

A product is defective due to inadequate warnings when it is distributed without sufficient warnings to notify the ultimate user of the dangers inherent in the product. *Phillips v. A-Best Products Co.*, 542 Pa. at 131, 665 A.2d 1167 at 1171. The danger for which warnings are required refers to non-obvious dangers inherent in the use of the product. *Davis v. Berwind Corp.*, 433 Pa. Super. at 354, 640 A.2d at 1296. Whether, in a particular case, a product is deemed to be defective because of an inadequate warning is a question of law to be decided by the trial court, *Fletcher v. Raymond Corp.*, 424 Pa. Super. 605, 611, 623 A.2d 845, 848 (1993), and resolution of that question generally depends upon consideration of social policy. *Jordan By Jordan v. K-Mart Corp.*, 417 Pa. Super. 186,189, 611 A.2d 1328,1330 (1992). Only after this judicial determination is made will the case be submitted to the jury to determine whether the facts support the claim. *Id.*

In deciding whether the product is defective as a matter of law the court is guided by language set out in Comment (I) of §402A stating “The article sold must be dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to the characteristics.” (emphasis added). This language suggests an objective (i.e. community) evaluation rather than a subjective (i.e. the injured party) consideration. *Ellis v. Chicago Bridge & Iron*, 376 Pa. Super. 220, 545 A.2d 906 (1988). If the dangers are known, then the product is not defective and the manufacturer is under no duty to warn. *Dauphin Deposit Bank and Trust Co. v. Toyota Motor Corp.*, 408 Pa. Super. 256, 262, 596 A.2d 845, 848 (1991). The community being referenced is the overall group of consumers who ordinarily use the product. Thus, if a product is customarily used by children the danger must be one which would be likely to be recognized and appreciated by children otherwise warnings are required. *Jordan By Jordan v. K-Mart Corp.*, 417 Pa. Super. at 191, 611 A.2d at 1331. Likewise, if the product is one customarily used by orchard workers the danger must be one which would likely be recognized and appreciated by orchard workers. Furthermore, as stated in *Mackowick v. Westinghouse Electric Corp.*, 525 Pa. 52, 575 A.2d 100 (1990), “...warnings must be directed to the understanding of the intended user...The duty to adequately warn does not require the manufacturer to educate a neophyte in the principles of the product.” 525 Pa. at 56, 575 A.2d at 102. A trial judge is not isolated from the world outside the courtroom and can therefore call upon knowledge and experience in making this evaluation.³

In the instant case the “danger” which needs to be recognized and appreciated is that a harvesting bag may, in some circumstances, cause a worker to lose his balance, fall, and be seriously injured when working at heights. This recognition would also include an appreciation of the instability of working on a ladder. This Court has already determined that the danger of falling when working on a ladder is an obvious one. *Carbajal v. W.W. Babcock, et al.*, 39 Ad. Co. L.J. 7 (1996). Similarly, it is well known that being on a ladder with off-centered weight from a bag or other object could cause a person to lose his or her balance. When on a ladder with an object which is causing weight displacement, it is generally known that this displacement could cause instability and that it is

³ The undersigned spent most of his formative years working on a fruit farm and is quite familiar with the characteristics of orchard work.

necessary to be more careful to keep one's balance. Plaintiff's deposition testimony reveals that he has seen at least two workers fall while using a fruit bag. (Plt.'s Deposition at 30-31). Thus, it is this Court's determination that the danger of imbalance caused by having a harvest bag around the neck, especially when loaded with apples, is obvious. Having found that the danger was obvious we need not consider what warnings should have been in place.

An issue not specifically discussed by the parties but akin to the above discussion of Plaintiff's claim that Cosner was negligent in providing inadequate warnings. As stated in *Dauphin Deposit Bank & Trust v. Toyota Motor Corp.*, supra.,

We note that in a products liability suit based on negligence, appellant must prove that the manufacturer owed a duty to appellant; the manufacturer breached that duty; and such breach was the proximate cause of appellant's injuries... We also note that Pennsylvania has adopted the Restatement (Second) of Torts section 388 in cases involving a claim of negligent failure to warn... Section 388 provides that:

one who supplies.. .a chattel for another to use is subject to liability.. .for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier:

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Restatement (Second) of Torts § 388 (1965) (emphasis added). Comment k to section 388 interprets the requirement of subsection (b) as follows:

One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him, or of facts which to his knowl-

edge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved.

408 Pa. Super. at 266-7, 596 A.2d at 849-50.

The Superior Court adopted the same approach used in §402A cases in ruling that a manufacturer was under no duty to warn consumers of obvious risks and cited with approval language in *Morris v. Adolp Coors Company*, 735 S.W. 2d 578 (Tex. App. 1987) which held that in negligence cases, as in strict liability cases, “whether a duty to warn exists must be evaluated in light of the knowledge of ordinary consumers of the risks inherent... The dangers inherent... are common knowledge to the ordinary consumer. As such, there is no duty... imposed... to warn or inform consumers of such obvious dangers.” 408 Pa. Super. at 256, 596 A.2d at 850. Therefore, having concluded that the risk involved in this case was obvious to the ordinary consumer both the strict liability and negligence claims must be dismissed.

We reject Cosner’s contention that Plaintiff’s action should be dismissed because the record establishes that Plaintiff assumed the risk. It is well known that if a person assumes the risk of his injuries the defendant is relieved of responsibility. The question of whether a plaintiff has assumed the risk of his injuries should not be decided as a matter of law. The only exception to this rule is where it is beyond question that the plaintiff voluntarily and knowingly proceeded in the face of an obvious dangerous condition. *Long v. Norriton Hydraulics, Inc.*, 443 Pa. Super. 532, 536, 662 A.2d 1089, 1091 (1995), alloc. den. 674 A.2d 1074 (1996). The defense is only available where the defendant shows that the plaintiff had subjective knowledge of the defect which caused his injury and appreciated the danger before using the product. *Kupetz v. Deere & Company, Inc.*, 435 Pa. Super. 16, 31-2, 644 A.2d 1213, 1220 (1994), alloc. den. 653 A.2d 1232 (1994). A plaintiff’s knowledge and understanding of the risk may be shown by circumstantial evidence. *Mucowski v. Clark*, 404 Pa. Super. 197, 201-2, 590 A.2d 348, 350 (1991).

In this case, a jury could find that because of Plaintiff’s background and experience he was cognizant of the danger involved with using a harvesting bag while picking apples from a ladder and voluntarily choose to encounter it. However, Plaintiff made a general allegation in his deposition testimony that he was not expecting any danger of the

type that occurred and thus did not understand the risk. (Plt.'s Deposition at 74). A jury may well find his testimony unconvincing but that denial alone is sufficient to prevent a finding, as a matter of law, that he assumed the risk. *Id.* In *Mucowski* the plaintiff's denial of knowledge of the risk was enough to prevent the granting of defendant's motion for summary judgment.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 29th day of January 1998, Defendants', Cosner Manufacturing Company and Cosner Investment Company, Motion for Summary Judgment is hereby granted in part and the strict liability and negligence claims related to inadequate warnings are dismissed.

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 ROSE M. JACOBS, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Executors: Larke J. Stymiest and Anthony J. Stymiest, 47 Woodstock Road, Fayetteville, PA 17222

Attorney: Richard K. Hoskinson, Esquire, 232 Lincoln Way East, Chambersburg, PA 17201

ESTATE OF LORENA A. KELLER, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executrix: Josephine Barrick, 6 Robin Drive, Carlisle, PA 17013; Dixie Lee Andriou, 6710 Garvey Drive, Baltimore, MD 21237-2111

Attorney: David A. Baric, Esquire, O'Brien, Baric & Scherer, 17 West South Street, Carlisle, PA 17013

ESTATE OF BERTHA T. WILLIAMS, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Roberta J. Anderson, 255 Confederate Drive, Gettysburg, PA 17325

Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF WILLIAM . MADISON JR.,

DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Dean Madison, 121 Park Avenue, Selingsgrove, PA 17870

Attorney: Keith R. Nonemaker, Esquire, Guthrie, Nonemaker, Guthrie, & Yingst, 40 York Street, Hanover, PA 17331

ESTATE OF CHARLES ROBERT WELLER, ALSO KNOWN AS C. ROBERT WELLER, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania

Executrices: Joanne Louise Staub, 230 South Fifth Street, McSherrystown, PA 17344; Patricia Livelsberger, 372 Main Street, McSherrystown, PA 17344

Attorney: John W. Phillips, Esquire, 101 West Middle Street, Gettysburg, PA 17325

ESTATE OF ROBERT S. WOLF, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Michael R. Wolf, 19 Krug Avenue, Hanover, PA 17331

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

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-184 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 February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT improved tract of land, situate on the North side of South Street, in the Borough of McSherrystown, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING for a corner on the North side of South Street aforesaid and line of lot now or formerly of Mary A. Slagle; thence in a Northerly direction, 166 feet, more or less, to South Alley; thence Westerly along said South Alley, 30 feet, more or less, to line of lot now or formerly of John W. Spangler and Gladys J. Spangler; thence Southerly along said lot now or formerly of John W. Spangler and Gladys J. Spangler, 174 feet, more or less, to the North side of South Street aforesaid; thence East along the North side of said South Street, 30 feet, more or less, to line of lot now or formerly of Mary A. Slagle aforesaid, the point and place of beginning.

MAP 5 PARCEL 302.

SEIZED and taken into execution as the property of **Richard C. Hagerman and Shelby R. Hagerman** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
November 7, 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 March 8, 1999, 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.

12/30 1/8 & 15

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-328 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 29th day of January, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT tract of land situate in Franklin Township, Adams County, Pennsylvania, bounded described as follows:

BEGINNING at a point in the center of Belmont Road (Township Road T-348) at corner of land now or formerly of William H. Orner, Jr. and wife; thence in the center of said Belmont Road, South 8 degrees 35 minutes West, 136.82 feet to a point; thence continuing in the center of Belmont Road, South 5 degrees 59 minutes West, 13.18 feet to a point in the center of said road; thence by land now or formerly of Wrenice W. Kauffman and wife, North 79 degrees 6 minutes West, 419.23 feet to a point; thence by land now or formerly of Grace Kenney and by land now or formerly of D. L. Radsma, North 14 degrees 39 minutes East, 150 feet to a point; thence by land now or formerly of William H. Orner, Jr. and wife, South 79 degrees 8 minutes East, 402.75 feet to a point in the center of Belmont Road, the place of BEGINNING. CONTAINING 1.406 Acres.

The foregoing description was obtained from a draft of survey made by Wilbur V. Redding, Registered Surveyor, on May 31, 1974 and recorded in Plat Book 5, Page 7, on which the above lot is identified as Lot No. 3.

HAVING THEREON ERECTED A DWELLING KNOWN AS 716 Belmont Road, Gettysburg, PA 17325.

BEING THE SAME PREMISES which Nolan S. Huffaker and Vicki R. Huffaker, by their Deed dated April 21, 1994 and recorded in Adams County Recorder of Deeds Office on April 26, 1994 in Deed Book 877, page 194, granted and conveyed unto Vicki R. Huffaker.

SEIZED IN EXECUTION AS THE PROPERTY OF VICKI R. HUFFAKER UNDER ADAMS COUNTY JUDGMENT NUMBER 1998-S-328.

PARCEL: 12E-11-00100

SEIZED and taken into execution as the property of **Vicki Huffaker** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
October 31, 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 February 22, 1999, 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.

1/8, 15 & 22

IN THE COURT OF
COMMON PLEAS OF
ADAMS COUNTY, PENNSYLVANIA

CIVIL-LAW
No. 98-S-1202
Action to Quiet Title

GENE GUERNY
JUDITH A. GUERNY, Plaintiffs,

vs.

CLIFFORD SANDERS, SARAH SANDERS, The heirs of Clifford and Sarah Sanders, Defendants.

NOTICE TO: The above-named defendants, their heirs, assigns and all persons claiming any right, title, claim or interest to that property located in Liberty Township, Adams County, Pennsylvania, more particularly described in deed book 164 at page 426 in Office of the Recorder of Deeds of Adams County, Pennsylvania containing 155 square perches of land, more or less.

TAKE NOTICE THAT Gene Guerny and Judith A. Guerny have filed an Action to Quiet Title in the aforesaid Court, averring that they have acquired title to the property by virtue of adverse possession. Plaintiffs have requested an order declaring Plaintiffs to be the legal and equitable owners of the property and ordering the Recorder of deeds to record an Order awarding fee simple title to the Plaintiffs. You are hereby notified to file an Answer within twenty (20) days following the date of this publication. If you fail to do so final judgment may be entered against you.

If you wish to defend, you must enter a written appearance personally or by an attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Adams County Court Administrator
117 Baltimore Street
Gettysburg, PA 17325
Telephone: (717) 337-9846

Wendy Weikal-Beauchat, Esq.
116 Baltimore Street
Gettysburg, Pennsylvania 17325
Attorney for the Plaintiff

Adams County Legal Journal

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No. 34, pp. 209-220

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-730 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 February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.

ALL THAT CERTAIN tract of land situate, lying and being in Cumberland Township, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING at an iron pin set at the edge of Herr's Ridge Road at corner of Lot No. 5 on the hereinafter referred to draft of survey; thence in and along Herr's Ridge Road, South 21 degrees 57 minutes 30 seconds West, 489.84 feet to a p.k.nail at the edge of Herr's Ridge Road at corner of land now or formerly of Robert L. Starner; thence along said land now or formerly of Robert L. Starner, North 67 degrees 02 minutes 10 sec-

onds West, 442.06 feet to an iron pin set along land now or formerly of Kenneth F. Thomas at corner of Lot No. 5 on said draft of survey; thence by same, North 34 degrees 41 minutes 28 seconds East, 490 feet to a set iron pin; thence by same, South 67 degrees 02 minutes 10 seconds East, 418.70 feet to an iron pin set at the edge of Herr's Ridge Road at corner of Lot No. 5, the point and place of BEGINNING.

Containing 4.8390 acres.

HAVING THEREON ERECTED A DWELLING KNOWN AS 935 Herr's Ridge Road, Gettysburg, PA 17325.

BEING THE SAME PREMISES WHICH Elizabeth D. Stober and Commonwealth of Pennsylvania, Office of Attorney General, by their Deed dated September 27, 1993 and recorded in Adams County Recorder of Deeds Office on September 30, 1993 in Deed Book 786, page 57.

MAP & PARCEL # F12-1H

SEIZED and taken into execution as

the property of **Warren B. Aguilar** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
December 12, 1998

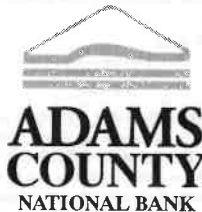
TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on March 8, 1999, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after filing thereof. Purchaser must 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.

1/15, 22 & 29

Our Trust Department
makes a business of caring
for other people's property.



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SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-579 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 5th day of February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.

ALL THOSE TWO (2) tracts of land situate, lying and being in the Borough of Carroll Valley, (formerly Liberty Township), Adams County, Pennsylvania, being Lots No. 431 and 433 in Section WA, bounded and described as follows:

TRACT NO. 1 (LOT WA-431)

BEGINNING at a point in the center of Lynn Trail at Lot No. 433; thence by said lot North 16 degrees 26 minutes 20 seconds West, 251.38 feet to Lot No. 432; thence by said lot South 65 degrees 52 minutes East, 185.26 feet to a point in the center of Louise Trail; thence in said Louise Trail South 12 degrees 36 minutes 20 seconds East, 140 feet to a point in the intersection of Louise Trail and Lynn Trail; thence in said Lynn Trail South 77 degrees 23 minutes 40 seconds West, 131.66 feet to the place of BEGINNING.

The above description was taken from a plan of lots labeled "Section WA, Charnita" dated January 17, 1970, Prepared by Gordon L. Brown, R.S., and recorded in Adams County Plat Book No.1 at Page 65.

TRACT NO. 1 TOGETHER WITH and SUBJECT TO the rights of way, covenants, conditions, reservations and restrictions contained in a deed recorded in the Office of the Recorder of Deeds of Adams County, Pennsylvania, in Deed Book 295 at Page 869.

TRACT NO. 2 (LOT WA-433)

BEGINNING at a point in the cul-de-sac of Lynn Trail at Lot No. 434; thence in the cul-de-sac and by said Lot North 20 degrees 00 minutes 20 second West, 161.75 feet to Lot No. 273; thence by said lot North 28 degrees 4 minutes 40 seconds East, 135 feet to Lot No. 432; thence by said lot South 65 degrees 52 minutes East, 20 feet to Lot No. 431; thence by said lot South 16 degrees 26 minutes 20 seconds East, 251.38 feet to a point in the center of said Lynn Trail; thence in said Lynn Trail and in the cul-de-sac thereof South 77 degrees 23 minutes 40 seconds West, 100 feet to the place of BEGINNING.

The above description was taken from a plan of lots labeled "Section WA,

Charnita" dated January 17, 1970, prepared by Gordon L. Brown, R.S., and recorded in Adams County Plat Book No. 1 at Page 65.

TRACT NO. 2 TOGETHER WITH and SUBJECT TO the rights of way, covenants, conditions, reservations and restrictions contained in a deed recorded in the aforementioned Recorder's Office, in Deed Book 295 at Page 303.

BEING the same premises which Allen W. Beckett, trading and doing business as Allen Beckett Construction, by Deed dated December 20, 1994 and recorded in the Office of the Recorder of Deeds of Adams County on December 22, 1994, in Deed Book Volume 979, Page 87, granted and conveyed unto Charles F. Arp.

SEIZED and taken into execution as the property of Charles F. Arp and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
November 21, 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 March 1, 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.

1/15, 22, & 29

NOTICE

A HEARING SHALL BE HELD before the Court of Common Pleas, Adams County, Pennsylvania, in Courtroom No. 1 or 2 of the Adams County Courthouse, Gettysburg, Pennsylvania, on February 9, 1999, at 9:00 o'clock, a.m. for the purpose of considering the sale of unimproved real estate from the Upper Adams School District to Inland Container Corp., in exchange for an unimproved tract of real estate to be conveyed by Inland Container Corp., to Upper Adams School District. Any persons interested in the sale and exchange of the aforesaid real estate should appear and be heard at that time.

Robert L. McQuade
Solicitor for UpperAdams
School District

12/30, 1/8, & 15

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 Tuesday, January 19, 1999, at 9:00 o'clock a.m.

PETTYJOHN—Orphans' Court Action Number OC-138-98. The First and Final Account of Dawn F. Fields, now Dawn F. Wertz, Executrix of the Estate of J. Harvey Pettyjohn, deceased, late of Oxford Township, Adams County, Pennsylvania.

Peggy J. Breighner
Clerk Of Courts

1/8, & 15

NOTICE TO THE BAR

EFFECTIVE JANUARY 1, 1999, the Superior Court will be issuing opinions containing a Universal Citation. This citation will be as follows: *Jones V. Smith*, 1999 PA Super, 1. The second number is the Court-issued number of the opinion. Each opinion will also have numbered paragraphs, to be used for pinpoint citations, e.g., *Jones V. Smith*, 1999 PA Super, 1, 15.

Citation to opinions that have not yet been issued an Atlantic 2d citation are to be the Universal citation number. After the official citation has been issued, citation is to be only to the official citation, and not to the Universal Citation.

Joseph J. Mittleman
Executive Administrator
Superior Court of Pennsylvania

1/8 & 15

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that an application for registration of the fictitious name PINEY MT. GAME FARM, having its principal place of business located at 760 Wenksville Road, Biglerville, Adams County, Pennsylvania 17037, was filed with the Department of State of the Commonwealth of Pennsylvania under the Fictitious Names Act. The individuals interested in such name are Robert C. Lott, Jr., and Sue Ann Lott, both of the above address.

Miller & May, LLP
600 North 12th Street
Lemoyne, PA 17043

1/15

NAUGLE, ET UX VS. MILLER, ET AL.

1. A Court may exercise its discretion in entering a judgment of non pros by taking the following circumstances into consideration: (1) a party has shown a lack of due diligence by failing to proceed with reasonable promptitude, (2) there is no compelling reason for the delay, and (3) the delay has caused prejudice to the adverse party which, in cases involving a delay for a period of two years or more, will be presumed prejudicial for purposes of any proceeding to dismiss for lack of activity on the docket.

2. On a motion for a Judgment of Non Pros, presumption of prejudice involving a delay for a period of two years or more may be rebutted through evidence that the defendants have intentionally contributed to the delay but may not be rebutted by evidence that the defendants have not experienced actual prejudice.

3. A party seeking non pros may waive the right thereto if his or her conduct indicates a willingness to try the case on its merits.

4. A motion for Judgment on the pleadings is similar to a demurrer and may be entered where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law.

5. Since the question whether a cause of action is barred by the Statute of Limitations is one of law, the application of undisputed facts to the question is properly determined by the trial court upon motion for judgment on the pleadings.

6. When both legal and equitable relief are sought in an equity action, the Court will adjudicate both claims for relief in order to do complete justice and avoid piecemeal litigation.

7. 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.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil Action—Equity No. 91-S-507, GLENN C. NAUGLE AND ESTHER M. NAUGLE VS. DONALD P. MILLER, KIMBERLY E. MILLER, PHILIP J. MILLER, NELLIE R. MILLER AND ROUND HILL FOODS, INC.

John D. Miller, Esq., for Plaintiffs

Barbara Jo Entwistle, Esq., for Defendants Millers

OPINION ON DEFENDANTS' MOTIONS

Kuhn, J., January 26, 1998.

Plaintiffs, Glenn C. Naugle and Esther M. Naugle, filed a Complaint on October 3, 1991. The Miller Defendants, Donald P. Miller and his wife Kimberly E. Miller ("D. Millers") and Philip J. Miller and his wife Nellie Miller ("P. Millers"), filed numerous preliminary objections. On April 7, 1997, the Miller Defendants filed a Petition for Entry of Judgment Non Pros and a Motion for Judgment on the Pleadings. On April 25, 1997, P. Millers filed a Motion for Partial Summary Judgment. All three of these objections are now before this Court for disposition.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case is the result of various alleged annoyances related to the operation of poultry houses. Plaintiffs have alleged that D. Millers own and operate two poultry houses located in Cumberland Township. Plaintiffs further allege that P. Millers own a portion of the land over which the poultry houses are located and where turkey manure is disposed. Round Hill Foods, Inc. ("Round Hill"), now Wampler-Longacre, Inc., is allegedly involved in the operation of the poultry houses.

Plaintiffs have claimed that odors created through the burning of dead turkeys and the removal of poultry manure is so severe as to disturb the enjoyment of their land, located approximately 150 yards from one of the poultry houses.

The docket activity in this case began with the issuing of a Writ of Summons on June 28, 1991. After Round Hill praeciped to have Plaintiffs file the Complaint or suffer non pros, Plaintiffs filed the Complaint on October 3, 1991. The Miller Defendants answered on December 3, 1991 and Round Hill filed preliminary objections on this same day. These objections were denied by Court Order dated May 22, 1992 and on June 15, 1992 Round Hill filed an answer to the Complaint. No further activity was docketed until February 1, 1995, a gap of 33 months, when Plaintiffs' prior attorney withdrew as counsel and new counsel entered an appearance. On March 22, 1995, new counsel for Round Hill entered an appearance.

Additional docket activity occurred from March 1995 through June 1995 regarding what was termed a "second set of interrogatories" served upon Round Hill by Plaintiffs. No evidence has been presented to this court indicating when those interrogatories were served; however, a Motion to Stay the proceedings and for a Protective Order were filed by Round Hill on March 31, 1995, indicating that they must have been served before this time. On June 5, 1995, the Motion for Protective Order was denied and Round Hill was given 60 days to answer the "second set of interrogatories."

No further activity was docketed until August 1996, a gap of 14 months, when correspondence regarding interrogatories between the parties was filed. However, non-docket activity from January 1996 until August 1996 was steady. For example, on January 22, 1996, Plaintiffs served what they termed the "second set of interrogatories" upon both Round Hill and the Miller Defendants. Additionally, the correspondence between the attorneys showed that the Miller Defendants served interrogatories upon Plaintiffs,

which were answered on March 22, 1996. In June 1996, two of the four Miller defendants filed their answers to Plaintiffs interrogatories. In August 1996, Round Hill answered the "second set of interrogatories" served upon them by Plaintiffs.

Docket activity began again in September 1996 when Plaintiffs filed a Motion to Compel for the remaining Miller Defendants to answer the interrogatories. By Court Order dated September 24, 1996, the two remaining Miller Defendants were ordered to answer Plaintiffs' interrogatories in 20 days. Correspondence between the parties shows this happened on October 7, 1996 when the Miller Defendants sent answers to the interrogatories to Plaintiffs claiming they had not answered sooner because Plaintiffs had not properly completed the interrogatories served upon them.

From the time the Miller Defendants were compelled by Court order to answer the interrogatories in September 1996 until the Motion for Non Pros was filed on April 7, 1997, there was no substantive docket activity, a gap in activity lasting 7 months. In total, besides the entry of appearance and withdraw of appearance of attorneys for all parties and some motions and orders relating to interrogatories, no substantive docket activity took place from June 1992 until April of 1997, a period of 58 months.

We note that Plaintiffs have claimed in their brief that the Miller Defendants discussed scheduling the depositions of both Plaintiffs in March of 1997 and that the depositions actually took place on April 8, 1997. Defendant Millers filed the Petition for Entry of Judgment of Non Pros and for Judgment on the Pleadings on April 7, 1997. Subsequent docket activity occurred from this point, including a praecipe by Plaintiff to schedule the case for pre-trial conference filed on July 10, 1997.

LEGAL DISCUSSION

Defendants' first objection asks for a Judgment of Non Pros. In *Penn Piping, Inc. v. Insurance Company of North America*, 529 Pa. 350, 603 A.2d 1006 (1992), the Pennsylvania Supreme Court established the standard to be used when determining whether a non pros should be granted. The Court modified the original test set forth in *James Brothers Lumber Co. v. Union Banking and Trust*, 432 Pa. 129, 247 A.2d 587 (1968). The test established in *James Brothers* was that a court may exercise its discretion in entering a judgment of non pros by taking the following circumstances into consideration: (1) a party has shown a lack of due diligence by failing to proceed with reasonable

promptitude, (2) there is no compelling reason for the delay, and (3) the delay has caused prejudice to the adverse party. *Id.* at 132. The third prong of this test was modified in *Penn Piping* where the Court held that “in cases involving a delay for a period of two years or more, the delay will be presumed prejudicial for purposes of any proceeding to dismiss for lack of activity on the docket.” *Penn Piping, Inc. v. Insurance Company of North America*, 529 Pa. at 356, 603 A.2d at 1009.

The main issue presented in the case at hand is whether the presumption of prejudice established in *Penn Piping* can be rebutted. There is some confusion in the courts with regard to this issue; therefore, we have reviewed the case law in great detail in order to resolve the inconsistencies. In reconciling both the Commonwealth and Superior Court cases we have determined that the presumption of prejudice may be rebutted through evidence that the defendants have intentionally contributed to the delay. However, the presumption may not be rebutted by evidence that the defendants have not experienced actual prejudice.

Both the Commonwealth and Superior Courts have held that the presumption created in *Penn Piping* is irrebutable absent a showing that the period of inactivity was less than two years. *State of the Art Medical Products Inc. v. Aries Medical Inc.*, 456 Pa. Super. 148, 689 A.2d 957 (1997); *Rockwood Insurance Company v. Motor Coils Manufacturing*, 166 Pa. Commw. 495, 646 A.2d 705 (1994). In *State of the Art Medical*, the Court said that “[a] plaintiff may not, however seek to demonstrate a lack of actual prejudice once the presumption attaches.” 456 Pa. Super. at 157, 689 A.2d at 962. However, we do not believe these cases are conclusive on the issue because the Courts were responding specifically to an attempt to show no actual prejudice to the defendant and not to what effect the defendant’s actions would have on the presumption.

In support of this conclusion, we note that there have been numerous opinions from both the Commonwealth and Superior Courts which hold that “a delay caused by a defendant or properly chargeable to a defendant cannot be a ground for the entry of a judgment of non pros against a plaintiff.” *Herb v. Snyder*, 454 Pa. Super. 612, 620, 686 A.2d 412, 413 (1996), *alloc. den.* 698 A.2d 67; see also, *Wasson v. McClintock*, PICS Case No. 97-2633 (Pa. Commw. Dec. 9, 1997); *Doyle v. Tesauro*, ___ Pa. Super. ___, 694 A.2d 627 (1997); *Collura v. L&E Concrete Pumping, Inc.*, 454 Pa. Super. 572, 686 A.2d 392 (1996); *Biondillo v. Commonwealth Department of Transportation* ___ Pa. Commw. ___, 674 A.2d 1175 (1996); *Mudd v. Nosker Lumber, Inc.*, 443 Pa. Super. 483, 662 A.2d 660 (1995).

Specifically, in *Mudd*, the Court stated that the presumption created in *Penn Piping* was meant to “protect defendants from the unfairness, anxiety and prejudice that can result from a plaintiff’s failure to pursue a threatened lawsuit.” 443 Pa. Super. at 490, 662 A.2d at 663. The Court went on to discuss *Penn Piping* as follows:

We are hard pressed to accept the notion that our Supreme Court, in establishing the ‘presumption of prejudice’ in that case envisioned a situation in which defendants, through their own subterfuge, are able to avoid a final determination of liability... Moreover, to accept the proposition that the appellees have been prejudiced by the delay would stand the principle underlying the grant of non pros on its head. The grant of non pros has evolved as a mechanism to ensure that plaintiffs do not take advantage of defendants through dilatory tactics... This principle should apply equally to defendants. If a plaintiff cannot delay a lawsuit to achieve a desired result, then neither should a defendant.

443 Pa. Super. at 490, 662 A.2d at 663 (citations omitted). Therefore, although plaintiffs may not attempt to rebut the *Penn Piping* presumption by showing no actual prejudice to defendant, they may rebut it by showing that a defendant intentionally acted to further delay the case.

Applying this finding to the case at hand, we hold that the *Miller Defendants* have not contributed to the delay in such a manner as to rebut the presumption of prejudice created by an excess of 2 years of inactivity on the docket.

In arguing that the *Miller Defendants’* petition should be denied, Plaintiffs rely primarily on a recent Commonwealth Court case. In *Wasson, supra.*, the court held that the presumption of prejudice was rebutted because the defendant allowed the plaintiff to actively pursue the case for almost two years after the almost three years of docket inactivity. The defendant in that case participated in the scheduling of trial and allowed plaintiff to arrange the depositions of two defendants. Additionally, there was evidence that the defendant knew of his right to file a petition for non pros but was intentionally prolonging the case to wait for Plaintiff to act. After allowing depositions to be scheduled, the defendant requested they be postponed and filed a petition for non pros that same day. The Commonwealth Court refused to reward this behavior and held that defendant’s delay in bringing the non pros petition prejudiced plaintiffs by allowing them to actively pursue the case for approximately 2 years.

Although in the case at hand depositions had been scheduled and taken after the Petition for Non Pros was filed, there was no evidence that the Miller Defendants intentionally prejudiced Plaintiffs by allowing two years to pass before filing. Plaintiff did not schedule the case for a pre-trial conference until after the Petition for Non Pros was filed. Additionally, except for the exchange of interrogatories between all parties, there is no indication that Plaintiffs were attempting to move this case forward to trial in what amounts to a 58-month period of little significant docket activity. We acknowledge that Defendants were responsible for some delay by failing to promptly answer interrogatories; however, we do not believe this substantiates the 58 month period of insignificant activity as it is “plaintiff’s burden to move a case to trial...[and if] plaintiff’s counsel finds herself faced with delays created by others, she must take action to move the case forward...” *Pennridge Electric Inc. v. Souderton Area Joint School Authority*, 419 Pa. Super. 201, 209, 615 A.2d 95, 99 (1992). Plaintiffs have not “actively” pursued the case and we therefore hold that the presumption of prejudice established in *Penn Piping* has not been rebutted.

Because we have determined that the presumption has not been rebutted we will address the remaining elements of the non pros test. First, there must be a showing that there has been a lack of due diligence by Plaintiffs in proceeding with the case. The unexplained gap in activity from June 1992 to February 1995 clearly shows that Plaintiffs did not act with due diligence. Additionally, in the period from June 15, 1992 until the filing of the Petition for Entry of Judgment of Non Pros on April 7, 1997, all docket activity, and apparently all non-docket activity, dealt with interrogatories and with the withdraw or appearance of counsel. We do not believe that this activity has sufficient substantive value to prove due diligence.

In *Collura*, 454 Pa. Super. at 577-78, 686 A.2d at 395, the Court held that the entry of appearance of counsel was not activity that could be deemed “substantive.” Additionally, in *Pine Township Water Company, Inc. v. Felmont Oil Corporation*, 425 Pa. Super. 473, 478, 625 A.2d 703, 706 (1993), alloc. den. 644 A.2d 1202, the Superior Court held that plaintiff’s petition to remove a case from a termination list was “neither substantive in nature nor exemplary of the type of positive docket activity contemplated by this Court in *Penn Piping*.” Likewise, in the case at hand, the praecipes regarding the withdrawal and entry of appearance of counsel are not the type of activity that would show due diligence on the part of Plaintiffs. Further, although there are numerous entries on the docket showing motions by both Plaintiffs and

Defendants, they all relate to interrogatories and are not indicative of any real effort to bring the case closer to trial. As the period of delay with no substantive docket activity lasted approximately five years, we feel Plaintiffs have not made any diligent effort to bring the case to an end.

The last prong in the non pros test is that there must be no compelling reason for the delay. A compelling reason may include "cases where the delaying party establishes that the delay was caused by bankruptcy, liquidation, or other operation of law, or in cases awaiting significant developments in the law." *Penn Piping, Inc. v. Insurance Company of North America*, 529 Pa. at 356, n. 2, 603 A.2d at 1009, n. 2. It is well-settled law that settlement negotiations, discovery and financial considerations do not present compelling reasons for delay. *Erie v. Peerless Heater Company*, ___ Pa. Commw. ___, 660 A.2d 238, 240 (1995) (citations omitted).

The insignificant discovery in the case at hand does not present a compelling reason for the lengthy delay. Therefore, because the presumption of prejudice to Defendants has not been rebutted and because Plaintiffs have failed to show due diligence or a compelling reason for the delay, an entry of non pros would be appropriate. However, our discussion cannot end here, as the issue of waiver has not yet been addressed. "[A] party seeking non pros may waive the right thereto if his or her conduct indicates a willingness to try the case on its merits...." *Neshaminy Constructors, Inc. v. Plymouth Township*, 132 Pa. Commw. 229, 237, 572 A.2d 814, 818 (1990); see also, *Dorich v. DiBacco*, 440 Pa. Super. 581, 656 A.2d 522 (1995), alloc. den. 668 A.2d 1132.

In the case at hand, the Miller Defendants answered the interrogatories only after the Court compelled them to do so. This compelled answer does not show a willingness to dispense with the case on the merits. See, *Dorich v. DiBacco*, 440 Pa. Super. at 591, 656 A.2d at 527 (holding that responding to discovery requests, as required under the Pennsylvania Rules of Civil Procedure, is not inconsistent with a request for non pros). However, there is evidence that the Miller Defendants served interrogatories of their own on Plaintiffs and even deposed both Plaintiffs after having filed their Petition for Non Pros. The Miller Defendants also proceeded to file Motions addressing the merits of the case. On April 7, 1997, Plaintiffs filed a Motion for Judgment on the Pleadings and on April 25, 1997, the P. Millers filed a Motion for Partial Summary Judgment. Defendants' actions show their willingness to proceed with the merits of the case and we therefore find

that they have waived their right to petition for non pros at this time.

The Miller Defendants have also filed a Motion for Judgment on the Pleadings. Our Superior Court has set the standard for ruling on a motion for judgment on the pleadings as follows:

Entry of judgment on the pleadings is permitted under Pa.R.C.P. 1034 which provides for such judgment after the pleadings are closed, but within such time as not to delay trial. A motion for judgment on the pleadings is similar to a demurrer. It may be entered where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. In determining if there is a dispute as to facts, the court must confine its consideration to the pleadings and relevant documents.

Vetter v. Fun Footwear Co., 447 Pa. Super. 84, 87, 668 A.2d 529, 530-31 (1995); alloc. den. 676 A.2d 1199 (citations omitted).

The Miller Defendants argue that Plaintiffs have improperly pleaded several causes of action in one count, have raised the legal claims after the statute of limitations has expired, and have improperly joined legal and equitable claims. Substantively, the Miller Defendants argue that Plaintiffs have not pled facts to defeat the Agricultural Area Security Law (3 P.S. § 901 et seq.).

Initially, we must address Plaintiffs' argument that the procedural issues raised by the Miller Defendants, including improper pleading of several causes of action in one count and improper joinder of legal and equitable actions in one cause of action, are not properly brought in a motion for judgment on the pleadings.

A motion for judgment on the pleadings is in the nature of a demurrer. *Sejpal v. Corson, Mitchell, Tomhave & McKinley*, 445 Pa. Super. 427, 430, 665 A.2d 1198, 1199 (1995). "A preliminary objection in the nature of a demurrer is identical to a motion for judgment on the pleadings pursuant to Rule 1034, Pa.R.C.P., and is governed by identical standards." *Engel v. Parkway Company*, 439 Pa. 559, 266 A.2d 685 (1970). "The motion for judgment on the pleadings can be utilized as an alternative to a preliminary objection, in the nature of a final demurrer before trial, and can include every possible demurrer that could have been filed as part of a preliminary objection, had the party chosen to do so in the pleading stage of the action." 6 Std. Pa. Practice 2d §31.4. Thus, if the issues being raised are of such a nature that they could have been raised by demurrer, they are permitted to be raised in a motion for judgment on the pleadings. Therefore, we will look to what is properly raised by demurrer.

“A preliminary objection in the form of a demurrer challenges the pleadings as failing to set forth a cause of action upon which relief can be granted under any theory of law.” 5 Std. Pa. Practice 2d § 25.63. A preliminary objection in the nature of a demurrer may not “reach defects of form or a failure to comply with rules of proper pleading.” *Einstein Medical Center v. Nathans*, 5 D&C 3d 619 (1978).

Thus, reading these sections together it would appear that the objections challenging the pleadings can not be raised in a motion for judgment on the pleadings because they can not properly be raised by demurrer. Therefore, the Miller Defendants have improperly raised the procedural issues of improper pleading of several causes of action in one count and of improper joinder of legal and equitable actions in a motion for judgment on the pleadings.

The Miller Defendants have also argued that the Plaintiffs raised their legal claims after the statute of limitations expired. This affirmative defense was properly raised in *New Matter* as required by Pa. R.C.P. 1030. Additionally, “[s]ince the question whether a cause of action is barred by the statute of limitations is one of law, the application of undisputed facts to the question is properly determined by the trial court upon motion for judgment on the pleadings....” 6 Std. Pa. Practice 2d § 31.22 (footnotes omitted).

The Miller Defendants argue the statute of limitations as found in 3 P.S. § 954 is applicable. Section 954(a) reads as follows:

No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action, where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations, or if the physical facilities of such agricultural operations are substantially expanded or substantially altered and the expanded or substantially altered facility has been in operation for one year or more prior to the date of bringing such action; Provided, however, That nothing herein shall in any way restrict or impede the authority of this State from protecting the public health, safety and welfare or the authority of a municipality to enforce State law.

3 P.S. § 954(a).

Defendants admit that the equitable claims began with the Writ of Summons issued on June 28, 1991 but that the legal claims were

not raised until the Complaint was filed on October 3, 1991. We find this argument to be without merit. A Court sitting in equity may grant legal relief.

When both legal and equitable relief are sought in an equity action the court will adjudicate both claims for relief in order to “do complete justice and avoid piecemeal litigation.” *Trimble Services Inc. v. Franchise Realty Interstate Corporation*, 445 Pa. 333, 341, 285 A.2d 113, 117 (1971). “Obtaining legal relief in equity does not require separate pleading of equitable and legal causes of action in separate counts; claimant need merely combine in his prayer for relief in the equity cause of action all forms of relief sought.” *Commonwealth v. Kitchen Appliances (No. 1)*, 27 D&C 3d 91, 99 (1981). Therefore, the issuing of the Writ of Summons in Equity began the entire action and tolled the statute of limitations for both the legal and equitable remedies sought.

In the alternative, the Miller Defendants argue that Plaintiffs have failed to plead that no adequate remedy at law exists. This argument is without merit for two reasons. First, the Miller Defendants have raised this issue in their brief but not in their Motion for Judgment on the Pleadings. It is impermissible to raise such an objection for the first time in brief. It must be set forth in the Motion. Second, Pa.R.C.P. 1509(c) states that “[t]he objection of the existence of a full, complete and adequate non-statutory remedy at law shall be raised by preliminary objection...If not so pleaded, the objection is waived.” Therefore, as the Miller Defendants failed to raise this issue in preliminary objections, it is waived.

The Miller Defendants also argue that the Complaint is legally insufficient. Defendants claim that Plaintiffs have not pled facts to defeat the Agricultural Area Security Law. 3 P.S. § 901 et seq. The Agricultural Security Law provides no protection from suits brought against owners by private parties and is therefore of no help to Defendants.

Plaintiffs note in their brief that the Agricultural Area Security Law is not applicable to their case but state that the Miller Defendants must be referring to the “Right to Farm Act.” 3 P.S. § 954.¹ Sections 951 through 957 deal with protecting agricultural operations from nuisance suits and is generally regarded as the “Right to Farm Act.” Specifically, Section 954 limits nuisance suits brought against agricultural opera-

¹ Plaintiffs brief actually cites Section 1954; however, as this Section does not exist it is this Court’s belief that Plaintiffs must be referring to Section 954.

tions when conducting “normal agricultural operations.”² Section 954 states that “[n]o nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action....” 3 P.S. § 954(a).

Plaintiffs’ operation began in July 1990³ and a Writ of Summons was filed in June 1991. Therefore, it is clear that Defendants’ poultry operation was not in “operation” for one year or more before this action was brought. Because we previously determined that the Writ effectively began the entire action, Section 954 is not applicable.

Lastly the P. Millers have filed a Motion for Partial Summary Judgment alleging that the P. Millers conveyed their interest in the subject land to the D. Millers on March 4, 1993 and thus have no involvement in this case. At the time this action was commenced, the P. Millers admittedly owned a portion of the land on which the turkeys were housed and P. Miller assisted in the turkey operations.

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).

It is true that had the only remedy requested been for injunction, the P. Millers would have no interest in the case and could rightfully be

²“Normal agricultural operations” is defined in Section 952 as follows:

The customary and generally accepted activities, practices, equipment and procedures that farmers adopt, use or engage in year after year in the production and preparation for market of poultry, livestock and their products and in the production and harvesting of agricultural, agronomic, horticultural, silvicultural and aquicultural crops and commodities and is:

(1) not less than ten continuous acres in area; or

(2) less than ten continuous acres in area but has an anticipated yearly gross income of at least \$10,000.

....
3 P.S. § 914.1.

³ Plaintiffs allege in their Complaint that operations began in July of 1990 and the Miller Defendants admitted to this in their answer and gave the exact date as July 10, 1990.

excused. However, the Plaintiffs have also made a claim for damages; therefore, the P. Millers may be held responsible for a portion of the monetary damages for the period in which they owned a portion of the property if such liability is determined; therefore, they may not be excused from all liability in this case.

The P. Millers have also argued that “mere ownership of the underlying land does not establish liability for the acts of the tenant without more.” (P. Millers’ Brief on Motion for Partial Summary Judgment). However, there has been no indication that there is a landlord/tenant relationship between the D. Millers and P. Millers. Without any evidence of such relationship, the P. Millers may not rely on landlord/tenant law.

Accordingly, the attached Order is issued.

ORDER OF COURT

AND NOW, this 26th day of January, 1998, this Court holds as follows:

1. Defendants’, Donald P., Kimberly E., Philip J., and Nellie R. Millers, Petition for Entry of Judgment of Non Pros is denied;
2. Defendants’, Donald P., Kimberly E., Philip J., and Nellie R. Millers, Motion for Judgment on the Pleadings is denied;
3. Defendants’, Philip J. and Nellie R. Millers, Motion for Partial Summary Judgment is 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 EDWARD R. FRIEDLINE, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Hugh R. Friedline, 1169 Kohler Mill Rd., New Oxford, PA 17350.

Attorney: David J. Lenox, Esquire, Wiley, Lenox & Colgan, P.C., One South Baltimore St., Dillsburg, PA 17019

ESTATE OF ANNA G. KUHN, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executors: Jane M. Walker, Edward W. Kuhn and John H. Kuhn
Attorney: Alan M. Cashman, Esquire, 141 Broadway, Suite 230, Hanover, PA 17331

ESTATE OF KENNETH E. LOUEY, DEC'D

Late of Germany Township, Adams County, Pennsylvania

Administratrix C.T.A.: Betty Louise Louey a/k/a Betty LeGore Louey, 10 Locust Drive, P.O. Box 154, Littlestown, PA 17340

Attorney: Ronald J. Hagarman, Esquire, 110 Baltimore Street, Gettysburg, PA 17325

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN of the filing in the Office of the Secretary of the Commonwealth of Pennsylvania, at Harrisburg, PA of an application for registration under the Fictitious Name Act. The name of the business is MER PUBLICATIONS with its principal place of business at 40 Confederate Drive, Gettysburg, Pennsylvania. The owner of the business is Michael E. Reyka, of 40 Confederate Drive, Gettysburg, Pennsylvania.

Robert G. Teeter
Teeter, Teeter & Teeter
108 West Middle Street
Gettysburg, PA 17325

1/15

SECOND PUBLICATION

ESTATE OF ROSE M. JACOBS, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Executors: Larke J. Stymiest, 47 Woodstock Road, Fayetteville, PA 17222

Attorney: Richard K. Hoskinson, Esquire, 232 Lincoln Way East, Chambersburg, PA 17201

ESTATE OF LORENA A. KELLER, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executrix: Josephine Barrick, 6 Robin Drive, Carlisle, PA 17013; Dixie Lee Andrion, 6710 Garvey Drive, Baltimore, MD 21237-2111

Attorney: David A. Baric, Esquire, O'Brien, Baric & Scherer, 17 West South Street, Carlisle, PA 17013

ESTATE OF BERTHA T. WILLIAMS, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Roberta J. Anderson, 255 Confederate Drive, Gettysburg, PA 17325

Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

CORPORATE NOTICE

NOTICE IS HEREBY GIVEN that an application has been made to the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, PA, by Gettysburg Scenic Rail Tours, Inc., a foreign corporation formed under the laws of the State of Delaware, where its principal office is located at P.O. Box 151 Georgetown, DE 19947, Sussex County, for a Certificate of Authority to do business within the Commonwealth of Pennsylvania under the fictitious name of Gettysburg Scenic Railway, pursuant to the provisions of the Business Corporation Law of 1988. The registered office of said corporation in the Commonwealth of Pennsylvania will be located at 1150 Rosewood Drive, Blue Bell, PA 19422.

Geoffrey N. Zeh
1150 Rosewood Drive
Blue Bell, PA 19422

1/15

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed with the Corporation Bureau of the Department of State of the Commonwealth of Pennsylvania for the purpose of incorporating a domestic business corporation. The name of the corporation is APPLE COUNTRY HUNTS, INC. The Articles of Incorporation were filed pursuant to the provisions of the Pennsylvania Business Corporation Law of 1988 contained in the Act of December 21, 1988, P.L. 1444, as amended.

Miller & May, LLP
600 North 12th Street
Lemoyne, PA 17043

1/15

NOTICE OF INCORPORATION

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on October 8, 1998, for the purpose of obtaining a Certificate of Incorporation of a business Corporation organized under the Business Corporation Law of the Commonwealth of Pennsylvania, Act of December 21, 1988, P.L. 1444, No. 177.

The name of the corporation is T & K FORBES ENTERPRISES, INC.

The purpose for which the corporation has been organized is: The corporation shall have unlimited power to engage in and do any law act concerning any or all lawful business for which corporations may be organized under the Pennsylvania Business Corporation Law.

T & K Forbes Enterprises, Inc.
335 Rolling Lane
Abbottstown, PA 17301

1/15

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that on November 12, 1998 Articles of Incorporation - Domestic Nonprofit Corporation were filed by PEOPLE WHO CARE with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, for the purpose of incorporating under the Pennsylvania Business Corporation Law of 1988, Act of December 21, 1988, P.L. 1444, No. 177, as amended and supplemented.

Samuel A. Gates, Esq.
Gates & Gates
250 York Street
Hanover, PA 17331

1/15

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-184 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 February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT improved tract of land, situate on the North side of South Street, in the Borough of McSherrystown, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING for a corner on the North side of South Street aforesaid and line of lot now or formerly of Mary A. Slagle; thence in a Northerly direction, 166 feet, more or less, to South Alley; thence Westerly along said South Alley, 30 feet, more or less, to line of lot now or formerly of John W. Spangler and Gladys J. Spangler; thence Southerly along said lot now or formerly of John W. Spangler and Gladys J. Spangler, 174 feet, more or less, to the North side of South Street aforesaid; thence East along the North side of said South Street, 30 feet, more or less, to line of lot now or formerly of Mary A. Slagle aforesaid, the point and place of beginning.

MAP 5 PARCEL 302.

SEIZED and taken into execution as the property of **Richard C. Hagerman and Shelby R. Hagerman** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
November 7, 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 March 8, 1999, 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.

12/30 1/8 & 15

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-328 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 29th day of January, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT tract of land situate in Franklin Township, Adams County, Pennsylvania, bounded as follows:

BEGINNING at a point in the center of Belmont Road (Township Road T-348) at corner of land now or formerly of William H. Orner, Jr. and wife; thence in the center of said Belmont Road, South 8 degrees 35 minutes West, 136.82 feet to a point; thence continuing in the center of Belmont Road, South 5 degrees 59 minutes West, 13.18 feet to a point in the center of said road; thence by land now or formerly of Wrenice W. Kauffman and wife, North 79 degrees 6 minutes West, 419.23 feet to a point; thence by land now or formerly of Grace Kenney and by land now or formerly of D. L. Radsma, North 14 degrees 39 minutes East, 150 feet to a point; thence by land now or formerly of William H. Orner, Jr. and wife, South 79 degrees 8 minutes East, 402.75 feet to a point in the center of Belmont Road, the place of BEGINNING. CONTAINING 1.406 Acres.

The foregoing description was obtained from a draft of survey made by Wilbur V. Redding, Registered Surveyor, on May 31, 1974 and recorded in Plat Book 5, Page 7, on which the above lot is identified as Lot No. 3.

HAVING THEREON ERECTED A DWELLING KNOWN AS 716 Belmont Road, Gettysburg, PA 17325.

BEING THE SAME PREMISES which Nolan S. Huffaker and Vicki R. Huffaker, by their Deed dated April 21, 1994 and recorded in Adams County Recorder of Deeds Office on April 26, 1994 in Deed Book 877, page 194, granted and conveyed unto Vicki R. Huffaker.

SEIZED IN EXECUTION AS THE PROPERTY OF VICKI R. HUFFAKER UNDER ADAMS COUNTY JUDGMENT NUMBER 1998-S-328.

PARCEL: 12E-11-00100

SEIZED and taken into execution as the property of **Vicki Huffaker** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
October 31, 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 February 22, 1999, 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.

1/8, 15 & 22

IN THE COURT OF
COMMON PLEAS FOR
ADAMS COUNTY, PENNSYLVANIA

CIVIL - LAW
NO. 98-S-1250
Quiet Title Action

BRADLEY D. FRENCH Plaintiff,

vs.

HAZEL E. CARSON, MYRTLE E. CARSON, DECEASED, BENJAMIN F. CARSON, DECEASED, CATHERINE CARSON, R. HIRAM CARSON, RAYMOND CARSON, EARL CARSON, MRS. WALTER GANTZ, MRS. ALBERT PRYOR, MRS. CHARLES RECK. All other heirs of Benjamin Carson, Defendants.

NOTICE TO: The above-named defendants, their heirs, assigns and all persons claiming any right, title, claim or interest to that property located in Hamiltonban Township, Adams County, Pennsylvania, more particularly described in deed book 741 at page 009 in Office of the Recorder of Deeds of Adams County, Pennsylvania containing 45 acres of land, more or less.

TAKE NOTICE THAT BRADLEY FRENCH has filed an Action to Quiet Title in the aforesaid Court, averring that they have acquired title to the property by virtue of adverse possession. Plaintiffs have requested an order declaring Plaintiffs to be the legal and equitable owner of the property and ordering the Recorder of deeds to record an Order awarding fee simple title to the Plaintiff. You are hereby notified to file an Answer within twenty (20) days following the date of this publication. If you fail to do so final judgment may be entered against you.

If you wish to defend, you must enter a written appearance personally or by an attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you. YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Adams County Court Administrator
117 Baltimore Street
Gettysburg, PA 17325
Telephone: (717) 337-9846

Wendy Weikal-Beauchat, Esq.
116 Baltimore Street
Gettysburg, Pennsylvania 17325
Attorney for the Plaintiff

Adams County Legal Journal

Vol. 40

January 22, 1999

No. 35, pp. 221-228

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-730 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 February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.

ALL THAT CERTAIN tract of land situate, lying and being in Cumberland Township, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING at an iron pin set at the edge of Herr's Ridge Road at corner of Lot No. 5 on the hereinafter referred to draft of survey; thence in and along Herr's Ridge Road, South 21 degrees 57 minutes 30 seconds West, 489.84 feet to a p.k. nail at the edge of Herr's Ridge Road at corner of land now or formerly of Robert L. Starner; thence along said land now or formerly of Robert L. Starner, North 67 degrees 02 minutes 10 sec-

onds West, 442.06 feet to an iron pin set along land now or formerly of Kenneth F. Thomas at corner of Lot No. 5 on said draft of survey; thence by same, North 34 degrees 41 minutes 28 seconds East, 490 feet to a set iron pin; thence by same, South 67 degrees 02 minutes 10 seconds East, 418.70 feet to an iron pin set at the edge of Herr's Ridge Road at corner of Lot No. 5, the point and place of BEGINNING.

Containing 4.8390 acres.

HAVING THEREON ERECTED A DWELLING KNOWN AS 935 Herr's Ridge Road, Gettysburg, PA 17325.

BEING THE SAME PREMISES WHICH Elizabeth D. Stober and Commonwealth of Pennsylvania, Office of Attorney General, by their Deed dated September 27, 1993 and recorded in Adams County Recorder of Deeds Office on September 30, 1993 in Deed Book 786, page 57.

MAP & PARCEL # F12-1H

SEIZED and taken into execution as

the property of **Warren B. Aguilar** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
December 12, 1998

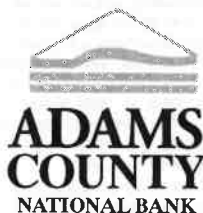
TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on March 8, 1999, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after filing thereof. Purchaser must 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.

1/15, 22 & 29

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



Member FDIC

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SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-579 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 5th day of February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.

ALL THOSE TWO (2) tracts of land situate, lying and being in the Borough of Carroll Valley, (formerly Liberty Township), Adams County, Pennsylvania, being Lots No. 431 and 433 in Section WA, bounded and described as follows:

TRACT NO. 1 (LOT WA-431)

BEGINNING at a point in the center of Lynn Trail at Lot No. 433; thence by said lot North 16 degrees 26 minutes 20 seconds West, 251.38 feet to Lot No. 432; thence by said lot South 65 degrees 52 minutes East, 185.26 feet to a point in the center of Louise Trail; thence in said Louise Trail South 12 degrees 36 minutes 20 seconds East, 140 feet to a point in the intersection of Louise Trail and Lynn Trail; thence in said Lynn Trail South 77 degrees 23 minutes 40 seconds West, 131.66 feet to the place of BEGINNING.

The above description was taken from a plan of lots labeled "Section WA, Charnita" dated January 17, 1970, Prepared by Gordon L. Brown, R.S., and recorded in Adams County Plat Book No.1 at Page 65.

TRACT NO. 1 TOGETHER WITH and SUBJECT TO the rights of way, covenants, conditions, reservations and restrictions contained in a deed recorded in the Office of the Recorder of Deeds of Adams County, Pennsylvania, in Deed Book 295 at Page 869.

TRACT NO. 2 (LOT WA-433)

BEGINNING at a point in the cul-de-sac of Lynn Trail at Lot No. 434; thence in the cul-de-sac and by said Lot North 20 degrees 00 minutes 20 second West, 161.75 feet to Lot No. 273; thence by said lot North 28 degrees 4 minutes 40 seconds East, 135 feet to Lot No. 432; thence by said lot South 65 degrees 52 minutes East, 20 feet to Lot No. 431; thence by said lot South 16 degrees 26 minutes 20 seconds East, 251.38 feet to a point in the center of said Lynn Trail; thence in said Lynn Trail and in the cul-de-sac thereof South 77 degrees 23 minutes 40 seconds West, 100 feet to the place of BEGINNING.

The above description was taken from a plan of lots labeled "Section WA,

Charnita" dated January 17, 1970, prepared by Gordon L. Brown, R.S., and recorded in Adams County Plat Book No. 1 at Page 65.

TRACT NO. 2 TOGETHER WITH and SUBJECT TO the rights of way, covenants, conditions, reservations and restrictions contained in a deed recorded in the aforementioned Recorder's Office, in Deed Book 295 at Page 303.

BEING the same premises which Allen W. Beckett, trading and doing business as Allen Beckett Construction, by Deed dated December 20, 1994 and recorded in the Office of the Recorder of Deeds of Adams County on December 22, 1994, in Deed Book Volume 979, Page 87, granted and conveyed unto Charles F. Arp.

SEIZED and taken into execution as the property of **Charles F. Arp** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
November 21, 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 March 1, 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.

1/15,22, & 29

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-362 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 19th day of February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT tract of land situate, lying and being along the South side of Main Street in the Borough of Fairfield, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING at a point along Main Street at corner of land now or formerly of Howard

Sanders; thence along lands now or formerly of Howard Sanders, South 37-1/2 degrees East, 254 feet to an alley; thence along said alley and adjoining land now or formerly of John E. Brown, South 52-1/2 degrees West, 75 feet to a point; thence along other land now or formerly of Fairfield Mennonite Church, North 37-1/2 degrees West, 254 feet more or less, to a point along said Main Street; thence along said Main Street, North 52-1/2 degrees East, 75 feet to a point, the place of beginning.

HAVING THEREON ERECTED A DWELLING KNOWN AS 138 West Main Street, Fairfield, PA 17320.

BEING THE SAME PREMISES WHICH Ginny L. Reichart Realty, Inc. by their Deed dated December 12, 1996 and recorded in Adams County Recorder of Deeds Office on January 3, 1997 in Deed Book 1312, page 303, granted and conveyed unto Mary R. Keepers.

SEIZED IN EXECUTION AS THE PROPERTY OF MARY R. KEEPERS UNDER ADAMS COUNTY JUDGMENT NO. 1998-S-362.

PARCEL: 5-47

SEIZED and taken into execution as the property of **Mary S. Keepers** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
November 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 March 15, 1999, 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.

1/22,29 & 2/5

ORNER, ET UX. VS. RODGERS, ET AL.

1. A demurrer admits every well-pleaded material fact set forth in the pleadings to which it is addressed as well as all inferences reasonably deducible therefrom, but not conclusions of law.

2. A demurrer is properly sustained where the complaint indicates on its face that the Plaintiff's claim cannot be sustained and the law will not permit recovery.

3. Negligent misrepresentation differs from intentional misrepresentation in that to commit the former, the speaker need not know his or her words are untrue, but must have failed to make reasonable investigation of the truth of those words.

4. Fraud arises where the misrepresentation is knowingly false, where there is an intentional concealment calculated to deceive, or where there is a nonprivileged failure to disclose.

5. In the context of the sale of real estate, the failure to inform a buyer of a latent defect can lead to liability for fraud; however, a seller only has this duty when there is a "serious and dangerous latent defect."

6. The complaint must not only apprise the Defendant of an asserted claim, but it must also synopsize the essential facts to support the claim.

7. While the Rules of Civil Procedure require that an affirmative defense may be raised in New Matter, where a party improperly raises "immunity from suit" in preliminary objections and the opposing party does not object to this defect, then the question of immunity from suit may be decided by the court.

8. The Defendant Township, as a local agency, is immune from suit under PSTCA unless Plaintiff can allege and prove that one of the eight exceptions listed in 42 Pa.C.S.A. §8542(b) is applicable.

9. Employees are liable under PSTCA for acts within the scope of their official duties to the extent that the local agency is liable unless such employee's act constituted a crime, actual fraud, actual malice or willful misconduct.

10. The principal is liable to innocent third parties for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances of his agent committed in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of, such misconduct, or even if he forbade the acts or disapproved of them.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 96-S-1002, JACK C. ORNER, JR. AND PATRICIA ORNER, HUSBAND AND WIFE VS. DANIEL RODGERS, INDIVIDUALLY AND AS BROKER FOR RE/MAX; RE/MAX QUALITY SERVICE, INC.; LARRY E. STOUGH; COMMONWEALTH LAND TITLE INSURANCE COMPANY, INC., A PENNSYLVANIA CORPORATION; BRETHERAN CONSTRUCTION COMPANY, INC., A PENNSYLVANIA CORPORATION; HULSE FAMILY PROPERTIES, INC., A PENNSYLVANIA CORPORATION; CHARLES DOVE, BUILDING PERMIT OFFICER; MORTON HULSE SR. AND NADIA HULSE, HUSBAND AND WIFE; NATIONAL CITY MORTGAGE COMPANY, AN OHIO CORPORATION C/O CT CORPORATION SYSTEM; LAKE MEADE PROPERTY OWNER ASSOCIATION, A PENNSYLVANIA NON-PROFIT CORPORATION; LATIMORE TOWNSHIP; BARBARA BOYER; GATES & MOONEY; PAT SHEAFFER, INDIVIDUALLY AND AS OWNER OF SHEAFFER & ASSOCIATES.

Robert L. Buzzenfore, Esq., for Plaintiffs

Timothy P. Ruth, Esq., for Defendants Rodgers and Stough

John A. Wolfe, Esq., for Defendant Hulse Family Properties, Inc. and
Defendant Hulses

Karen Coates, Esq., for Defendant Lake Meade Property Owner
Association

Charles B. Calkins, Esq., for Defendant Latimore Township and
Defendant Dove

Matthew L. Guthrie, Esq., for Defendant Boyer

Timothy J. Shultis, Esq., for Defendant Sheaffer

OPINION ON PRELIMINARY OBJECTIONS OF
DEFENDANTS DANIEL RODGERS AND LARRY STOUGH.

Kuhn, J., December 8, 1997.

Plaintiffs filed a Complaint against Defendants on December 30, 1996. Defendants Daniel Rodgers ("Rodgers") and Larry Stough ("Stough") filed Preliminary Objections on January 21, 1997. Oral argument was heard by this Court on April 14, 1997. For the following reasons, the objections are sustained.

STATEMENT OF FACTS

In approximately 1985, Hulse Family Properties, Inc. ("Hulse Properties") owned property located at 101 Lake Meade Drive in East Berlin. The property was later conveyed to a private party who began construction on the premises. However, the Township terminated the construction because it was being conducted on a floodplain. The property was then conveyed back to Hulse Properties, which applied for and received a building permit for additional construction outside the floodplain. Plaintiffs have alleged that a Plan was included in the building permit which showed the projected construction outside the floodplain.¹ Plaintiffs allege that the premises was not built as the plans indicated but was instead positioned within the floodplain.

In April of 1987, the property was transferred to Bretheran Construction Company, Inc. ("Bretheran") and then to Stough and Rodgers. Stough and Rodgers were the general partners of R&S Partnership, which eventually conveyed the property to Plaintiffs, Jack and Patricia Orner. Plaintiffs have alleged that numerous misrepresentations regarding the flooding problems on the property were made and that the property flooded approximately five times after the date of purchase to the date the complaint was filed.

LEGAL DISCUSSION

Plaintiffs have alleged negligent misrepresentation against Rodgers and Stough in Count I of their Complaint. Count II is for a violation of the Unfair Trade Practices and Consumer Protection Law ("UTPA") by Defendants Rodgers and Stough and Count III alleges fraudulent misrep-

¹This Plan was not attached to the pleadings and we were therefore unable to review it.

resentation. Defendants Rodgers and Stough have raised Preliminary Objections in the nature of a demurrer as to all counts and argue, in the alternative, for a more specific pleading.

The Pennsylvania Supreme Court has stated that “[a] demurrer admits every well-pleaded material fact set forth in the pleadings to which it is addressed as well as all inferences reasonably deducible therefrom, but not conclusions of law.” *Gekas v. Shap*, 469 Pa. 1, 5, 364 A.2d 691, 693 (1976). A demurrer is properly sustained where the complaint indicates on its face that the plaintiff’s claim cannot be sustained, and the law will not permit recovery. *Lobdell v. Leichtenberger*, 442 Pa. Super. 21, 24, 658 A.2d 399, 401 (1995) (citations omitted). If there is any doubt as to the propriety of a judgment in favor of a demurring party it should not be entered. *Creeger Brick & Building Supply, Inc. v. Mid-State Bank and Trust Co.*, 385 Pa. Super. 30, 32-33, 560 A.2d 151, 152 (1989).

Plaintiffs’ first Count against Defendants Rodgers and Stough is for negligent misrepresentation. Negligent misrepresentation consists of the following elements: (1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation. *Gibbs v. Ernst*, 538 Pa. 193, 210, 647 A.2d 882, 890 (1994) (citations omitted). Our Supreme Court went on to say that “negligent misrepresentation differs from intentional misrepresentation in that to commit the former, the speaker need not know his or her words are untrue, but must have failed to make reasonable investigation of the truth of those words.” *Id.* (citing Restatement (Second) of Torts § 552).

In Count I of Plaintiffs’ Complaint, they make general allegations which refer to “the misrepresentations made by Defendant Rodgers and Defendant Stough...” (Plts.’ Complaint ¶¶ 35, 37). However, Plaintiffs have alleged no specific facts in support of the allegation of misrepresentations. In order to hold Defendants Rodgers and Stough liable for negligent misrepresentation, there must be a misrepresentation. A misrepresentation is defined as “an assertion not in accord with the facts.” See, *Six v. Cole, et al.*, 34 Ad. Co. L. J. 271 (1992). Plaintiffs have failed to plead any facts that Defendants spoke to Plaintiffs about the premises or made any misrepresentations or statements to them. Thus, Plaintiffs have failed to state a claim against Defendants Rodgers or Stough for negligent misrepresentation.

Plaintiffs’ third Count is for intentional misrepresentation or fraud. Intentional misrepresentation requires a showing of: (1) a misrepresentation; (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4)

with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. *Id.* at 889 (citations omitted). Fraud arises where the misrepresentation is knowingly false, where there is an intentional concealment calculated to deceive, or where there is a nonprivileged failure to disclose. *Smith v. Renault*, 387 Pa. Super. 299, 306, 564 A.2d 188, 192 (1989) (citations omitted). When there is a serious and dangerous latent defect known to exist by the seller, then he must disclose such defect to the unknowing buyer or suffer liability for his failure to do so. *Quashnock v. Frost*, 299 Pa. Super. 9, 17-19, 445 A.2d 121, 125 (1982) (citations omitted).

In Count III of Plaintiffs' Complaint they make general averments that Defendants made statements and omissions of fact." (Plts.' Complaint ¶¶ 43, 44). However, Plaintiffs have pleaded no facts regarding the representations allegedly made by Defendants Rodgers or Stough. In order to hold Defendants Rodgers and Stough liable for intentional misrepresentation, there must be a misrepresentation or a failure to disclose. As noted above, the pleading is void of any "assertion not in accord with the facts."

Plaintiff may also state a claim for fraud by alleging Defendants made intentional concealments calculated to deceive or that they failed to disclose nonprivileged information. As noted above, in the context of the sale of real estate, the failure to inform a buyer of a latent defect can lead to liability for fraud; however, a seller only has this duty when there is a "serious and dangerous latent defect." A defect is latent when it is not readily ascertainable upon a reasonable examination. *Quashnock v. Frost*, 445 A.2d at 125, n.5. Additionally, our Supreme Court has stated that:

Ordinarily, the seller is not obliged to disclose facts of which he is aware when the vendee can in the exercise of his ordinary activities, discover the truth for himself, though he is responsible for loss if shown guilty of fraud or intentional concealment of essential matters.

Rothermel v. Phillips, 292 Pa. 371, 141 A. 241 (1928).

In the case at hand, Plaintiffs have made a general allegation that there were "omissions of fact" by the Defendants but have not provided what those omissions were. Plaintiffs are required to show that Defendants intentionally concealed information, or failed to disclose nonprivileged information, relating to a defect that is a "serious and dangerous latent defect." Plaintiffs have made no allegations that the alleged "omissions of fact" related to a latent defect that was serious or dangerous. Thus, they have failed to allege the facts necessary to support a claim for fraud under a theory of failure to disclose.

Additionally, we note that Pennsylvania is a fact pleading state. Rule 1019(b) requires that "averments of fraud... shall be averred with particularity." Pa.R.C.P. 1019(b), 42 Pa.C.S.A. Rule 1019(a) states that "[t]he material facts on which a cause of action or defense is based shall be stated

in a concise and summary form.” Pa.R.C.P. 1019(a), 42 Pa.C.S.A. This has been interpreted to mean that “the complaint must not only apprise the defendant of an asserted claim, but it must also synopsise the essential facts to support the claim.” *Miketic v. Baron*, 450 Pa. Super. 91, 104, 675 A.2d 324, 331 (1996) (citations omitted).

Plaintiffs have failed to allege the facts upon which they rely in claiming Defendants Rodgers and Stough made misrepresentations or failed to disclose. Thus, they have failed to conform to the Pennsylvania Rules of Civil Procedure and have failed state a claim against Defendants for fraudulent misrepresentation.

Plaintiffs Count II alleges a violation of the UTPA by Defendants Rodgers and Stough. Plaintiffs cite the entire statute and then explain that it “provides that a person, in the conduct or trade or commerce, engaging in any fraudulent conduct, which creates a likelihood of confusion or misunderstanding, is guilty of an unlawful, unfair method of competition or deceptive act or practice.” (Plts.’ Complaint ¶ 40). Once again, Plaintiffs have failed to provide any facts supporting this claim. Plaintiffs point to Defendants “promise of performance, as evidenced by their representations and correspondence” but fail to plead what promise, what representations, or what correspondence they are relying upon. We reiterate “the complaint must not only apprise the defendant of an asserted claim, but it must also synopsise the essential facts to support the claim.” *Miketic v. Baron*, 450 Pa. Super. at 104, 675 A.2d at 331. As Plaintiffs have failed to provide the facts supporting their claim, they have failed to sufficiently plead their cause of action.

Additionally, it is unclear what portion of the statute has been violated by Defendants’ failure to apprise Plaintiffs that the property is within the flood zone. (Plts.’ Complaint ¶ 41). However, if we were to speculate that Plaintiffs were relying upon the catchall provision of the statute prohibiting fraudulent conduct, Plaintiffs would still be required to prove fraud. “The key to invoking § 201-2(xvii) of the Consumer Protection Law is fraud....” *Rizzo v. Michener*, 401 Pa. Super. 47, 61, 584 A.2d 973, 980 (1990), alloc. den. 596 A.2d 159. The Court goes on to list the elements of common law fraud and state that all elements must be met in order to recover. *Id.* As discussed above, Plaintiffs have failed to sufficiently allege the elements of fraud and the Counts for violations of the UTPA therefore must also fail.

Thus, the attached Order is issued.

ORDER OF COURT

AND NOW, this 8th day of December 1997, the Preliminary Objections of Defendants Larry E. Stough and Daniel Rodgers are sustained and Counts I, II, and III of Plaintiffs’ Complaint are hereby dismissed. Plaintiffs are given 20 days from the date of mailing of this Order to amend their Complaint.

OPINION ON PRELIMINARY OBJECTIONS OF
DEFENDANTS LATIMORE TOWNSHIP
AND CHARLES DOVE

Plaintiffs filed a Complaint against Defendants on December 30, 1996. Defendants, Latimore Township and Charles Dove ("Dove"), filed Preliminary Objections on January 21, 1997. Oral argument was heard by this Court on April 14, 1997. For the following reasons, the objections are sustained.

STATEMENT OF FACTS

In approximately 1985, Hulse Family Properties, Inc. ("Hulse Properties") owned property located at 101 Lake Meade Drive in East Berlin. The property was later conveyed to a private party who began construction on the premises. However, the Township terminated the construction because it was being conducted on a floodplain. The property was then conveyed back to Hulse Properties, which applied for and received a building permit for additional construction outside the floodplain. Plaintiffs have alleged that a Plan was included in the budding permit application that showed the projected construction outside the flood zone.¹ Plaintiffs allege that the premises was not built as the plans had indicated but was positioned within the floodplain.

In April of 1987, the property was transferred to Bretheran Construction Company, Inc. ("Bretheran") and then to Larry E. Stough ("Stough") and Daniel Rodgers ("Rodgers"). Stough and Rodgers were the general partners of R&S Partnership, which eventually conveyed the property to Plaintiffs, Jack and Patricia Omer. Plaintiffs have alleged that numerous misrepresentations regarding the flooding problems with the property were made and that the property flooded approximately 5 times from the date of purchase.

On October 6, 1986, Latimore Township and Dove, as zoning officer for the Township, approved a building permit for the property in question. Plaintiffs claim that Latimore Township and Dove were negligent in failing to inspect the property and the public records. The Township was also charged with negligence in failing to check its records indicating that a previous permit for the same property had been denied due to flood zone concerns.

LEGAL DISCUSSION

Defendants have raised Preliminary Objections in the nature of a demurrer claiming immunity from suit pursuant to the Political

¹This Plan was not attached to the pleadings and we were therefore unable to review it.

Subdivision Tort Claims Act ("PSTCA"). 42 Pa.C.S.A. §§ 8541-8564. The Pennsylvania Supreme Court has stated that "[a] demurrer admits every well-pleaded material fact set forth in the pleadings to which it is addressed as well as all inferences reasonably deducible therefrom, but not conclusions of law." *Gekas v. Shap*, 469 Pa. 1, 5, 364 A.2d 691, 693 (1976). A demurrer is properly sustained where the complaint indicates on its face that the plaintiff's claim cannot be sustained, and the law will not permit recovery. *Lobdell v. Leichtenberger*, 442 Pa. Super. 21, 24, 658 A.2d 399, 401 (1995) (citations omitted). If there is any doubt as to the propriety of a judgment in favor of a demurring party, it should not be entered. *Creeger Brick & Building Supply, Inc. v. Mid-State Bank and Trust Co.*, 385 Pa. Super. 30, 32-33, 560 A.2d 151, 152 (1989).

Initially, we note that the Rules of Civil Procedure require that an affirmative defense, including immunity from suit, be raised in *New Matter*. Pa.R.C.P. 1030, 42 Pa.C.S.A. However, "[w]here a party improperly raises 'immunity from suit' in preliminary objections and the opposing party does not object to this defect, then the question of immunity from suit may be decided by the court." *Fewell v. Besner*, 444 Pa. Super. 559, 570, 664 A.2d 577, 582 (1995).

Plaintiffs have not briefed a response to Defendants' claim of governmental immunity and have filed no objection to the preliminary objections. Therefore, we conclude that Plaintiffs have waived this pleading defect.

The PSTCA provides immunity to local agencies for "any damages on account of any injury to a person or property caused by an act of the local agency or an employee thereof or any other person." 42 Pa.C.S.A. § 8541. A "local agency" is defined as a "government unit other than the Commonwealth." 42 Pa.C.S.A. § 8501. A "government unit" is defined as any political subdivision, or any other officer or agency of any such political subdivision. 42 Pa.C.S.A. § 102.

Our Courts have held that a city, (*Weinerman v. City of Philadelphia*, 785 F.Supp. 1174 (E.D. Pa. 1992)); a community college (*Community College of Allegheny County v. Seibert*, 144 Pa. Commw. 616, 601 A.2d 1348 (1992)); a municipal parking authority (*Rhoads v. Lancaster Parking Authority*, 103 Pa. Commw. 303, 520 A.2d 122 (1987)); a prison board and a County Board of Commissioners (*Damron v. Smith*, 616 F. Supp. 424 (E.D. Pa. 1985)) are all local agencies. See *Louey v. Germany Township, et al.*, 28 Ad.Co.L.J. 97, 100 (1986). Thus, the Township would clearly constitute a local agency.

Count XIII of Plaintiffs' Complaint alleges negligence against Latimore Township. Latimore Township, as a local agency, is immune

from suit unless Plaintiffs can prove that the damages requested are recoverable under common law or statutory theories and that the injury was caused by the negligence of the local agency or its employee. 42 Pa.C.S.A. § 8542(a). Plaintiffs must then allege that one of the eight exceptions listed in subsection (b) is applicable. In the case at hand, Plaintiffs have failed to assert that any exception to governmental immunity is applicable. Therefore, Count XIII against Latimore Township is dismissed.

Plaintiffs have also alleged a count of negligence against Latimore's employee, Dove. Employees are liable under PSTCA for acts within the scope of their official duties to the extent that the local agency is liable. 42 Pa.C.S.A. § 8545. Section 8541 "precludes liability of local agencies unless the allegedly injurious acts falls under one of the exceptions in 42 Pa.C.S. 8542." *Lancie v. Giles*, 132 Pa. Commw. 255, 261, 572 A.2d 827, 830 (1990). Thus, Dove is also immune from suit as Plaintiffs have failed to allege that any exception is applicable to Latimore Township.

The only possible exception to Dove's immunity is Section 8550. This Section states that an employee's act is not protected by the local agency's immunity if "...such act constituted a crime, actual fraud, actual malice or willful misconduct." 42 Pa.C.S.A. § 8550. However, Plaintiffs' negligence claim against Dove makes no allegations of such criminal or willful actions. Thus, Plaintiffs' Count XIV against Dove is dismissed.

Accordingly, the attached Order is issued.

ORDER OF COURT

AND NOW, this 8th day of December, 1997, the Preliminary Objections of Defendants Latimore Township and Charles Dove are sustained and Counts XIII and XIV are dismissed.

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 L. HAMM, DEC'D
Late of Hamiltonban Township, Adams County, Pennsylvania
Executor: Allen Haar, 6805 Laurel Summit Drive, R.D. #5, Hanover, PA 17331
Attorney: James T. Yingst, Esquire, 515 Carlisle Street, Hanover, PA 17331

ESTATE OF MARGARET K. MILLER, a/k/a MARGARET VADELLA MILLER, DEC'D
Late of Reading Township, Adams County, Pennsylvania
Executor: John L. Miller, 31 Hilltop Road, Yardley, PA 19067
Attorney: Clayton R. Wilcox, Esquire, 234 Baltimore Street, Gettysburg, PA 17325

ESTATE OF DOROTHEA M. PALMER, DEC'D
Late of Oxford Township, Adams County, Pennsylvania
Executor: Charles J. Kint, RD #1, Box 222, Abbottstown, PA 17301
Attorney: Matthew L. Guthrie, Esquire, Guthrie, Nonemaker, Guthrie, & Yingst, 40 York Street, Hanover, PA 17331

ESTATE OF ELIZABETH K. SCHULTZ, DEC'D
Late of the Borough of York Springs, Adams County, Pennsylvania
Executors: Jack G. Schultz, 848 Cricket Road, Secane, PA 19018; Charles W. Smith, 45 Diane Lane, Biglerville, PA 17307
Attorney: Frey and Tiley, Attorneys at Law, 5 South Hanover Street, Carlisle, PA 17013

ESTATE OF BERNARD E. SMITH, DEC'D
Late of Straban Township, Adams County, Pennsylvania
Co-executors: Kathleen A. Brown, RD #5, Box 5413, Spring Grove, PA 17362; Robert B. Smith, 838 West Middle Street, Hanover, PA 17331
Attorney: Keith R. Nonemaker, Esquire, Guthrie, Nonemaker, Guthrie, & Yingst, 40 York Street, Hanover, PA 17331

ESTATE OF PORTIA E. UFFELMAN, DEC'D

Late of Oxford Township, Adams County, Pennsylvania
Administratrix: Gloria J. Kopman, 445 Maple Grove Road, Hanover, PA 17331
Attorney: William W. Hafer, Esquire, 215 Baltimore Street, Hanover, PA 17331

ESTATE OF VERNA K. WOLF, DEC'D
Late of Oxford Township, Adams County, Pennsylvania

Executrix: Sandra J. Haverstick, 100 Pine Run Road, New Oxford, PA 17350
Attorney: Keith R. Nonemaker, Esquire, Guthrie, Nonemaker, Guthrie, & Yingst, 40 York Street, Hanover, PA 17331

SECOND PUBLICATION

ESTATE OF EDWARD R. FRIEDLINE, DEC'D

Late of Oxford Township, Adams County, Pennsylvania
Executor: Hugh R. Friedline, 1169 Kohlr Mill Rd., New Oxford, PA 17350.
Attorney: David J. Lenox, Esquire, Wiley, Lenox & Colgan, P.C., One South Baltimore St., Dillsburg, PA 17019

ESTATE OF ANNA G. KUHN, DEC'D
Late of Oxford Township, Adams County, Pennsylvania

Executors: Jane M. Walker, Edward W. Kuhn and John H. Kuhn
Attorney: Alan M. Cashman, Esquire, 141 Broadway, Suite 230, Hanover, PA 17331

ESTATE OF KENNETH E. LOUEY, DEC'D

Late of Germany Township, Adams County, Pennsylvania
Administratrix C.T.A.: Betty Louise Louey a/k/a Betty LeGore Louey, 10 Locust Drive, P.O. Box 154, Littlestown, PA 17340
Attorney: Ronald J. Hagarman, Esquire, 110 Baltimore Street, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF ROSE M. JACOBS, DEC'D
Late of Franklin Township, Adams County, Pennsylvania

Executors: Larke J. Stymiest and Anthony J. Stymiest, 47 Woodstock Road, Fayetteville, PA 17222
Attorney: Richard K. Hoskinson, Es-

quire, 232 Lincoln Way East, Chambersburg, PA 17201

ESTATE OF LORENA A. KELLER, DEC'D

Late of Straban Township, Adams County, Pennsylvania
Executrix: Josephine Barrick, 6 Robin Drive, Carlisle, PA 17013; Dixie Lee Andrian, 6710 Garvey Drive, Baltimore, MD 21237-2111
Attorney: David A. Baric, Esquire, O'Brien, Baric & Scherer, 17 West South Street, Carlisle, PA 17013

ESTATE OF BERTHA T. WILLIAMS, DEC'D

Late of Oxford Township, Adams County, Pennsylvania
Executrix: Roberta J. Anderson, 255 Confederate Drive, Gettysburg, PA 17325
Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-328 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 29th day of January, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT tract of land situate in Franklin Township, Adams County, Pennsylvania, bounded described as follows:

BEGINNING at a point in the center of Belmont Road (Township Road T-348) at corner of land now or formerly of William H. Orner, Jr. and wife; thence in the center of said Belmont Road, South 8 degrees 35 minutes West, 136.82 feet to a point; thence continuing in the center of Belmont Road, South 5 degrees 59 minutes West, 13.18 feet to a point in the center of said road; thence by land now or formerly of Wrenice W. Kaufman and wife, North 79 degrees 6 minutes West, 419.23 feet to a point; thence by land now or formerly of Grace Kenney and by land now or formerly of D. L. Radsma, North 14 degrees 39 minutes East, 150 feet to a point; thence by land now or formerly of William H. Orner, Jr. and wife, South 79 degrees 8 minutes East, 402.75 feet to a point in the center of Belmont Road, the place of BEGINNING. CONTAINING 1.406 Acres.

The foregoing description was obtained from a draft of survey made by Wilbur V. Redding, Registered Surveyor, on May 31, 1974 and recorded in Plat Book 5, Page 7, on which the above lot is identified as Lot No. 3.

HAVING THEREON ERECTED A DWELLING KNOWN AS 716 Belmont Road, Gettysburg, PA 17325.

BEING THE SAME PREMISES which Nolan S. Huffaker and Vicki R. Huffaker, by their Deed dated April 21, 1994 and recorded in Adams County Recorder of Deeds Office on April 26, 1994 in Deed Book 877, page 194, granted and conveyed unto Vicki R. Huffaker.

SEIZED IN EXECUTION AS THE PROPERTY OF VICKI R. HUFFAKER UNDER ADAMS COUNTY JUDGMENT NUMBER 1998-S-328.

PARCEL: 12E-11-00100

SEIZED and taken into execution as the property of **Vicki Huffaker** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
October 31, 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 February 22, 1999, 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.

1/8, 15 & 22

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-869 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 19th day of February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT CERTAIN tract of land, situate, lying and being in Freedom Township, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at an iron pin in Township Road T-318 at a point where it intersects with Township Road T-324 and at the Southwestern corner of land now or formerly of Carl H. Perkins and the Northeastern corner of land now or formerly of Sydney M. Shapiro; thence running in Township Road T-318 and by land now or formerly of Sydney M. Shapiro, South 65 degrees 22 minutes 05 seconds West 233.76 feet to a railroad spike at the Southeastern corner of Tract #1 above; thence by Tract #1 and through an iron pin set back 25 feet from the start of this course North 05 degrees 52 minutes 55 seconds West 420.86 feet to an iron pin on line of land of Lot #3 in the hereinafter described Plan of Lots, which lot is currently owned by Alan P. Horoschak and wife; thence by Lot #3 and crossing Township Road T-324, North 73 degrees 14 minutes 21 seconds East 396.48 feet to an iron pin, situate 18 feet East of the center line of T-324 and on line of land now or formerly of Henry P. Benoit; thence running along and in Township Road T-324, by land now or formerly of Henry P. Benoit and by land now or formerly of Carl H. Perkins, South 15 degrees 52 minutes 37 seconds West 452.86 feet to an iron pin at the intersection of Township Road T-324 and Township Road T-318, the point and place of BEGINNING.

THE DESCRIPTION of the above tract was taken from a draft of Survey of Wilbur L. Plank Registered Engineer, date May 18, 1979 and recorded in Adams County Plat Book 28 at page 4.

THE TRACT is referred to as Lot #2 in said Plan.

BEING Tax Map #D-15 Parcel #22.

BEING THE SAME PREMISES which Alan P. Horoschak and Patricia A. Horoschak, husband and wife, by their Deed dated June 12, 1992 and recorded in the Office of the Recorder of Deeds in and for Adams County on March 1, 1993 in Deed Book 696, Page 23, granted and conveyed unto Dennis J. Walter and

Theresa D. Walter, husband and wife, the Defendants herein.

SEIZED and taken into execution as the property of **Dennis J. Walter & Theresa D. Walter** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
December 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 March 15, 1999, 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.

1/22, 29 & 2/5

NOTICE OF INCORPORATION

NOTICE IS HEREBY GIVEN in compliance with the requirements of Section 1306 of the Business Corporation Law of 1988 Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, on December 28, 1998, for the purpose of obtaining a Certificate of Incorporation of a proposed business corporation to be organized under the Business Corporation Law of 1988, as amended and supplemented. The name of the proposed corporation is: EAST BERLIN EYE CARE, P.C. The purpose for which the corporation was organized are: To engage in and do any lawful act concerning any and all lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

David W. Reager, Esq.
Reager & Adler, PC
2331 Market Street
Camp Hill, PA 17011

1/22

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that an Application for Registration of Fictitious Name was filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on September 15, 1998, pursuant to the Fictitious Name Act, setting forth that Shawn A. Starnier is the only individual interested in a business, the character of which is a computer and network service, and that the designation under which the business is and will be conducted is SSCN and that the location where said business is and will be conducted is 820 Coleman Road, Gettysburg, PA 17325.

Shawn A. Starnier

1/22

Adams County Legal Journal

Vol. 40

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No. 36, pp. 229-240

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-730 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 February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.

ALL THAT CERTAIN tract of land situate, lying and being in Cumberland Township, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING at an iron pin set at the edge of Herr's Ridge Road at corner of Lot No. 5 on the hereinafter referred to draft of survey; thence in and along Herr's Ridge Road, South 21 degrees 57 minutes 30 seconds West, 489.84 feet to a p.k.nail at the edge of Herr's Ridge Road at corner of land now or formerly of Robert L. Starnier; thence along said land now or formerly of Robert L. Starnier, North 67 degrees 02 minutes 10 seconds West, 442.06 feet to an iron pin set along land now or formerly of Kenneth F. Thomas at corner of Lot No. 5 on said draft of survey; thence by same, North 34 degrees 41 minutes 28 seconds East, 490 feet to a set iron pin; thence by same, South 67 degrees 02 minutes 10 seconds East, 418.70 feet to an iron pin set at the edge of Herr's Ridge Road at corner of Lot No. 5, the point and place of BEGINNING.

Containing 4.8390 acres.

HAVING THEREON ERECTED A DWELLING KNOWN AS 935 Herr's Ridge Road, Gettysburg, PA 17325.

BEING THE SAME PREMISES WHICH Elizabeth D. Stober and Commonwealth of Pennsylvania, Office of Attorney General, by their Deed dated September 27, 1993 and recorded in Adams County Recorder of Deeds Office on September 30, 1993 in Deed Book 786, page 57.

MAP & PARCEL # F12-1H

SEIZED and taken into execution as the property of **Warren B. Aguilar** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
December 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 March 8, 1999, 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.
1/15, 22 & 29

IN THE COURT OF
COMMON PLEAS OF
ADAMS COUNTY,
PENNSYLVANIA

CIVIL ACTION-LAW
NO. 98-S-913

EMMA L. COLEMAN and EMMERT J. ROWLAND, Plaintiff
vs.

HELEN MORROW BENCHOFF, her spouse, heirs and assigns, Defendant.

TO: **HELEN MORROW BENCHOFF**, her spouse, heirs and assigns.

Date of Notice: January 14, 1999

IMPORTANT NOTICE

YOU ARE IN DEFAULT BECAUSE YOU HAVE FAILED TO TAKE ACTION REQUIRED OF YOU IN THIS CASE. UNLESS YOU ACT WITHIN TEN DAYS FROM THE DATE OF THIS NOTICE, A JUDGMENT MAY BE ENTERED AGAINST YOU WITHOUT A HEARING AND YOU MAY LOSE YOUR PROPERTY OR OTHER IMPORTANT RIGHTS. YOU SHOULD TAKE THIS NOTICE TO A LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE FOLLOWING OFFICE TO FIND OUT WHERE YOU CAN GET LEGAL HELP:

Court Administrator
Adams County Courthouse
111 Baltimore Street
Gettysburg, PA 17325
(717)334-6781 Ext. 213

Patrick W. Quinn, Esq.
Attorneys for Plaintiffs
47 West High Street
Gettysburg, PA 17325

1/29

IN THE COURT OF
COMMON PLEAS OF
ADAMS COUNTY,
PENNSYLVANIA

CIVIL ACTION-LAW
NO. 98-S-914

EMMA L. COLEMAN, Plaintiff
vs.

HELEN MORROW BENCHOFF, her spouse, heirs and assigns, Defendant.

TO: **HELEN MORROW BENCHOFF**, her spouse, heirs and assigns.

Date of Notice: January 14, 1999

IMPORTANT NOTICE

YOU ARE IN DEFAULT BECAUSE YOU HAVE FAILED TO TAKE ACTION REQUIRED OF YOU IN THIS CASE. UNLESS YOU ACT WITHIN TEN DAYS FROM THE DATE OF THIS NOTICE, A JUDGMENT MAY BE ENTERED AGAINST YOU WITHOUT A HEARING AND YOU MAY LOSE YOUR PROPERTY OR OTHER IMPORTANT RIGHTS. YOU SHOULD TAKE THIS NOTICE TO A LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE FOLLOWING OFFICE TO FIND OUT WHERE YOU CAN GET LEGAL HELP:

Court Administrator
Adams County Courthouse
111 Baltimore Street
Gettysburg, PA 17325
(717)334-6781 Ext. 213

Patrick W. Quinn, Esq.
Attorneys for Plaintiffs
47 West High Street
Gettysburg, PA 17325

1/29

NOTICE OF INCORPORATION

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania on December 18, 1998 for the purpose of obtaining a Certificate of Incorporation of the proposed corporation to be organized under the Business Corporation Law of the Commonwealth of Pennsylvania, approved December 21, 1988, as amended.

The name of the proposed corporation is: PENNSYLVANIA GUN PARTS, INC.

The purpose or purposes for which it was engaged are: The corporation shall have unlimited powers to engage in and do any lawful acts concerning any and all lawful businesses for which corporations may be incorporated under the Business Corporation Law, Act of December 21, 1988, P.L. 1444, as amended.

Francis A. Zulli, Esquire
Wion, Zulli & Seibert
109 Locust Street
P.O. Box 1121
Harrisburg, PA 17108

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SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-579 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 5th day of February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.

ALL THOSE TWO (2) tracts of land situate, lying and being in the Borough of Carroll Valley, (formerly Liberty Township), Adams County, Pennsylvania, being Lots No. 431 and 433 in Section WA, bounded and described as follows:

TRACT NO. 1 (LOT WA-431)

BEGINNING at a point in the center of Lynn Trail at Lot No. 433; thence by said lot North 16 degrees 26 minutes 20 seconds West, 251.38 feet to Lot No. 432; thence by said lot South 65 degrees 52 minutes East, 185.26 feet to a point in the center of Louise Trail; thence in said Louise Trail South 12 degrees 36 minutes 20 seconds East, 140 feet to a point in the intersection of Louise Trail and Lynn Trail; thence in said Lynn Trail South 77 degrees 23 minutes 40 seconds West, 131.66 feet to the place of BEGINNING.

The above description was taken from a plan of lots labeled "Section WA, Charnita" dated January 17, 1970, Prepared by Gordon L. Brown, R.S., and recorded in Adams County Plat Book No. 1 at Page 65.

TRACT NO. 1 TOGETHER WITH and SUBJECT TO the rights of way, covenants, conditions, reservations and restrictions contained in a deed recorded in the Office of the Recorder of Deeds of Adams County, Pennsylvania, in Deed Book 295 at Page 869.

TRACT NO. 2 (LOT WA-433)

BEGINNING at a point in the cul-de-sac of Lynn Trail at Lot No. 434; thence in the cul-de-sac and by said Lot North 20 degrees 00 minutes 20 second West, 161.75 feet to Lot No. 273; thence by said lot North 28 degrees 4 minutes 40 seconds East, 135 feet to Lot No. 432; thence by said lot South 65 degrees 52 minutes East, 20 feet to Lot No. 431; thence by said lot South 16 degrees 26 minutes 20 seconds East, 251.38 feet to a point in the center of said Lynn Trail; thence in said Lynn Trail and in the cul-de-sac thereof South 77 degrees 23 minutes 40 seconds West, 100 feet to the place of BEGINNING.

The above description was taken from a plan of lots labeled "Section WA, Charnita" dated January 17, 1970, prepared by Gordon L. Brown, R.S., and recorded in Adams County Plat Book No. 1 at Page 65.

TRACT NO. 2 TOGETHER WITH and SUBJECT TO the rights of way, covenants, conditions, reservations and restrictions contained in a deed recorded in the aforementioned Recorder's Office, in Deed Book 295 at Page 303.

BEING the same premises which Allen W. Beckett, trading and doing business as Allen Beckett Construction, by Deed dated December 20, 1994 and recorded in the Office of the Recorder of Deeds of Adams County on December 22, 1994, in Deed Book Volume 979, Page 87, granted and conveyed unto Charles F. Arp.

SEIZED and taken into execution as the property of **Charles F. Arp** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
November 21, 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 March 1, 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.

1/15, 22, & 29

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-362 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 19th day of February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT tract of land situate, lying and being along the South side of Main Street in the Borough of Fairfield, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING at a point along Main Street at corner of land now or formerly of Howard Sanders; thence along lands now or formerly of Howard Sanders, South 37-1/2 degrees East, 254 feet to an alley; thence along said alley and adjoining land now or formerly of John E. Brown, South 52-1/2 degrees West, 75 feet to a point; thence along other land now or formerly of Fairfield Mennonite Church, North 37-1/2 degrees West, 254 feet more or less, to a point along said Main Street; thence along said Main Street, North 52-1/2 degrees East, 75 feet to a point, the place of beginning.

HAVING THEREON ERECTED A DWELLING KNOWN AS 138 West Main Street, Fairfield, PA 17320.

BEING THE SAME PREMISES WHICH Ginny L. Reichart Realty, Inc. by their Deed dated December 12, 1996 and recorded in Adams County Recorder of Deeds Office on January 3, 1997 in Deed Book 1312, page 303, granted and conveyed unto Mary R. Keepers.

SEIZED IN EXECUTION AS THE PROPERTY OF MARY R. KEEPERS UNDER ADAMS COUNTY JUDGMENT NO. 1998-S-362.

PARCEL: 5-47

SEIZED and taken into execution as the property of **Mary S. Keepers** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
November 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 March 15, 1999, 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 Price, Pennsylvania, more particularly bounded and described as follows:

1/22, 29 & 2/5

JACK C. ORNER, JR. AND PATRICIA ORNER VS.
DANIEL RODGERS, ET AL. 96-S-1002, continued

OPINION ON PRELIMINARY OBJECTIONS OF
DEFENDANT LAKE MEADE PROPERTY
OWNER ASSOCIATION

Plaintiffs filed a Complaint against Defendants on December 30, 1996. Defendant Lake Meade Property Owner Association ("Lake Meade") filed Preliminary Objections on January 21, 1997. Oral argument was heard by this Court on April 14, 1997. For the following reasons, the objections are sustained.

STATEMENT OF FACTS

In approximately 1985, Hulse Family Properties, Inc. ("Hulse Properties") owned property located at 101 Lake Meade Drive in East Berlin. The property was later conveyed to a private party who began construction on the premises. However, the Township terminated the construction because it was being conducted on a floodplain. The property was then conveyed back to Hulse Properties, which applied for and received a building permit for additional construction outside the floodplain. Plaintiffs have alleged that a Plan was included in the building permit which showed the projected construction outside the floodplain.¹ Plaintiffs allege that the premises was not built as the plans indicated but was instead positioned within the floodplain.

In April of 1987, the property was transferred to Bretheran Construction Company, Inc. ("Bretheran") and then to Larry E. Stough ("Stough") and Daniel Rodgers ("Rodgers"). Stough and Rodgers were the general partners of R&S Partnership, which eventually conveyed the property to Plaintiffs, Jack and Patricia Orner. Plaintiffs have alleged that numerous misrepresentations regarding the flooding problems on the property were made and that the property flooded approximately 5 times after the date of purchase to the date the Complaint was filed.

Plaintiffs allege that Lake Meade is a non-profit corporation responsible for the establishment and enforcement of the Association's covenants and that it had a duty to disclose that the building was erected within a flood zone. (Plts.' Complaint ¶ 122).

LEGAL DISCUSSION

Count XIX of Plaintiffs' Complaint alleges negligence by Lake Meade in approving the building of the premises on a floodplain before inspecting the property and public records. Count XX alleges gross

¹This Plan was not attached to the pleadings and we were therefore unable to review it.

negligence by Lake Meade in failing to notify Plaintiffs that the premises was located within a flood zone. Defendant Lake Meade has raised Preliminary Objections in the nature of a demurrer claiming that Plaintiffs have failed to state a cause of action for which relief may be granted and have failed to state a cause of action for which punitive damages are recoverable.²

The Pennsylvania Supreme Court has stated that “[a] demurrer admits every well-pleaded material fact set forth in the pleadings to which it is addressed as well as all inferences reasonably deducible therefrom, but not conclusions of law.” *Gekas v. Shap*, 469 Pa. 1, 5, 364 A.2d 691, 693 (1976). A demurrer is properly sustained where the complaint indicates on its face that the plaintiff’s claim cannot be sustained, and the law will not permit recovery. *Lobdell v. Leichtenberger*, 442 Pa. Super. 21, 24, 658 A.2d 399, 401 (1995) (citations omitted). If there is any doubt as to the propriety of a judgment in favor of a demurring party, it should not be entered. *Creger Brick & Building Supply, Inc. v. Mid-State Bank and Trust Co.*, 385 Pa. Super. 30, 32-33, 560 A.2d 151, 152 (1989).

It is this Court’s determination that Plaintiffs’ Complaint fails to sufficiently plead a cause of action for negligence. Negligence requires Plaintiff prove (1) a duty or obligation recognized by law, (2) a breach of that duty, (3) a causal connection between the conduct and the resulting injury, and (4) actual damages. *Pittsburgh National Bank v. Perr*, 431 Pa. Super. 580, 584, 637 A.2d 334, 336 (1994), alloc. den. 644 A.2d 1202.

Pennsylvania is a fact pleading state. Rule 1019(a) states that “[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form.” Pa.R.C.P. 1019(a), 42 Pa.C.S.A. This Rule has been interpreted to mean that the complaint must not only apprise the defendant of an asserted claim, but it must also synopsise the essential facts to support the claim. *Miketic v. Baron*, 450 Pa. Super. 91, 104, 675 A.2d 324, 331 (1996) (citations omitted).

Plaintiffs allege negligent acts by Lake Meade but plead no facts indicating that Lake Meade owed a duty to Plaintiffs. In Count XIX, Plaintiffs make a general allegation that Lake Meade was negligent in approving the building of the premises in a “flood zone” in 1987 and that it therefore “breached its duty of good, faith, fair dealing and disclosure to Plaintiffs” who purchased the premises in 1992 from

²As it has been determined that Plaintiffs have failed to state a cause of action against Defendant Lake Meade for negligence, it is not necessary to address the issue of damages; however, this case does not appear appropriate for punitive damages.

persons who did not construct the building or own the property in 1987. (Plts.' Complaint ¶ 123) (emphasis added).³ However, Plaintiffs have failed to allege any facts in support of this conclusion. In fact, Plaintiffs have failed to set forth a copy of the covenants or regulations that Plaintiffs claim Lake Meade is obligated to enforce in order to ascertain whether a duty to Plaintiff exists. Simply making a general allegation that a duty exists is insufficient without some factual background as to how the duty arose.

Plaintiffs' argument centers on the fact that privity is not required in order to find a duty between two parties. Plaintiff relies mainly on *Woodward v. Dietrich*, 318 Pa. Super. 111, 548 A.2d 301 (1988), which dealt specifically with liability to third persons for fraudulent misrepresentations. However, the issue here is not whether there was privity between the parties giving rise to a duty but whether or not Plaintiffs sufficiently plead facts to support a general claim of duty. Plaintiffs failed to allege such facts and have thus failed to state a cause of action for negligence.

Count XX claims that Lake Meade was negligent in not notifying the Plaintiffs that the premises was constructed on a floodplain. Again, the factual background to support Plaintiffs' claim that Lake Meade owed them a duty is lacking. In this particular Count, Plaintiffs fail to even make a general allegation that a duty exists.

Thus, the attached Order is issued.

ORDER OF COURT

AND NOW, this 8th day of December 1997, the Preliminary Objections of Defendant Lake Meade Property Owner's Association are sustained and Counts XIX and XX of Plaintiffs' Complaint are hereby dismissed. Plaintiffs are given 20 days from the date of mailing of this Order to amend their Complaint.

OPINION ON PRELIMINARY OBJECTIONS OF DEFENDANTS BARBARA BOYER AND PAT SHEAFFER

Plaintiffs filed a Complaint against Defendants on December 30, 1996. Defendant Barbara Boyer filed Preliminary Objections on January 21, 1997 and Defendant Pat Sheaffer filed Preliminary Objections on January 31, 1997. Oral argument was heard by this Court on April 14, 1997. For the following reasons, the objections are sustained.

STATEMENT OF FACTS

In approximately 1985, Hulse Family Properties, Inc. ("Hulse Properties") owned property located at 101 Lake Meade Drive in East

³This is a question of law that may not be accepted as true for purposes of a demurrer.

Berlin. The property was later conveyed to a private party who began construction on the premises. However, the Township terminated the construction because it was being conducted on a floodplain. The property was then conveyed back to Hulse Properties, which applied for and received a building permit for additional construction outside the floodplain. Plaintiffs allege that a Plan was included in the building permit application that showed the projected construction outside the floodplain.¹ Plaintiffs allege that the premises was not built as the plans indicated but was instead positioned within the floodplain.

In April of 1987, the property was transferred to Bretheran Construction Company, Inc. ("Bretheran") and then to Larry E. Stough ("Stough") and Daniel Rodgers ("Rodgers"). Stough and Rodgers were the general partners of R&S Partnership, which eventually conveyed the property to Plaintiffs, Jack and Patricia Orner. Plaintiffs have alleged that numerous misrepresentations regarding the flooding problems on the property were made and that the property flooded approximately 5 times after the date of purchase to the date the Complaint was filed.

Plaintiffs allege that Defendants Barbara Boyer ("Boyer") and Pat Sheaffer ("Sheaffer") are real estate brokers licensed by the Commonwealth of Pennsylvania. Plaintiffs further allege that Sheaffer was a subagent for the seller of the property, R&S Partnership. Before closing, Plaintiffs inquired about a hole in the basement floor for a sump pump and Boyer, as an employee of Defendant Sheaffer, "informed them that a sump pump was not required because the property never flooded." (Plt.'s Complaint ¶ 25). Boyer also allegedly told Plaintiffs at closing that the property had no flooding problems.

LEGAL DISCUSSION

Defendant Boyer has raised Preliminary Objections in the nature of a demurrer claiming that Plaintiffs have failed to state a cause of action for which relief may be granted by: (1) failing to allege prior instances of flooding on the property, and (2) failing to allege facts of misrepresentation of a material fact. Defendant Sheaffer has raised Preliminary Objections in the nature of a demurrer claiming that Plaintiffs have failed to state a cause of action for which relief may be granted by: (1) failing to allege any representations regarding the property made by Sheaffer, and (2) failing to show that Sheaffer, as subagent of seller, had a duty to

¹This Plan was not attached to the pleadings and we were therefore unable to review it.

Plaintiffs. Defendant Sheaffer has also argued improper service.²

The Pennsylvania Supreme Court has stated that “[a] demurrer admits every well-pleaded material fact set forth in the pleadings to which it is addressed as well as all inferences reasonably deducible therefrom, but not conclusions of law.” *Gekas v. Shap*, 469 Pa. 1, 5, 364 A.2d 691, 693 (1976). A demurrer is properly sustained where the complaint indicates on its face that the plaintiff’s claim cannot be sustained, and the law will not permit recovery. *Lobdell v. Leichtenberger*, 442 Pa. Super. 21, 24, 658 A.2d 399, 401 (1995) (citations omitted). If there is any doubt as to the propriety of a judgment in favor of a demurring party, it should not be entered. *Creeger Brick & Building Supply, Inc. v. Mid-State Bank and Trust Co.*, 385 Pa. Super. 30, 32-33, 560 A.2d 151, 152 (1989).

Plaintiffs allege negligent misrepresentation by Defendant Boyer in Count VIII of their Complaint. Plaintiffs’ allegations against Defendant Sheaffer are for negligent misrepresentation (Count VIII) and for both negligent and fraudulent misrepresentation under a theory of respondeat superior (Count XXI).

Negligent misrepresentation consists of the following elements: (1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation. *Gibbs v. Ernst*, 538 Pa. 193, 210, 647 A.2d 882, 890 (1994) (citations omitted). Our Supreme Court went on to say that “negligent misrepresentation differs from intentional misrepresentation in that to commit the former, the speaker need not know his or her words are untrue, but must have failed to make reasonable investigation of the truth of those words.” *Id.* (citing Restatement (Second) of Torts § 552).

Plaintiffs allege Boyer was negligent in misrepresenting that “the location of the improvements on the property were not subject to flooding.” Plaintiffs have pled that Boyer informed them that “the property never flooded” and that “no flood problems existed.” (Plts.’ Complaint ¶¶ 25, 27). However, we note that there has been

²Plaintiffs argue that Defendant Sheaffer’s Preliminary Objections should be dismissed because he has failed to file a brief. Defendant Sheaffer’s brief was filed on April 9, 1997 before argument was heard by this Court. Thus, Plaintiffs’ argument is without merit. Additionally, as Defendant Sheaffer’s brief did not address the issue of improper service, it is deemed waived.

no allegation that the property experienced flooding before the sale to Plaintiffs.

In order to hold Defendant Boyer liable for negligent misrepresentation, there must be a misrepresentation. A misrepresentation is defined as “an assertion not in accord with the facts.” See, *Six v. Cole, et al.*, 34 Ad. Co. L. J. 271 (1992). Although Boyer need not have *known* that her statements were untrue (because she may be held liable even if she failed to make a reasonable investigation) there is no indication that her statements were untrue. Thus, as the pleadings stand, Plaintiffs’ claim fails to state a cause of action against Boyer for negligent misrepresentation.³

Count VII also claims that Defendant Sheaffer was individually liable for negligent misrepresentation. However, Plaintiffs have failed to plead that Sheaffer has made any direct representations to them. Therefore, Plaintiffs’ Complaint fails to state a claim for negligent misrepresentation against Defendant Sheaffer in an individual capacity.

Count XXI against Sheaffer is for negligent and/or fraudulent misrepresentation under a theory of respondeat superior. This law of vicarious liability has been summarized by our Supreme Court as follows:

Today we reaffirm the longstanding and widely held rule of law that a principal is liable to innocent third parties for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances of his agent committed in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of, such misconduct, or even if he forbade the acts or disapproved of them.

Aiello v. Ed Saxe Real Estate Inc., 508 Pa. 553, 562, 499 A.2d 282, 287 (1985) (footnote omitted).

As principal, Sheaffer would be liable to Plaintiffs for Boyer’s statements if they were deceits, misrepresentations, or the like. However, since it has been determined that the Complaint fails to sufficiently plead that Boyer’s statements were untrue in any way, the claims against Sheaffer, as principal, also fail to state a claim upon which relief may be granted.

Thus, the attached Order is issued.

³Defendant Boyer has also argued that Plaintiff has failed to plead facts constituting misrepresentation of a “material” fact. Since it has been determined that there is no indication in the pleadings that a misrepresentation was made, we need not address the issue of materiality.

ORDER OF COURT

AND NOW, this 8th day of December 1997, the Preliminary Objections of Defendants Barbara Boyer and Pat Sheaffer are sustained and Counts VII and XXI of Plaintiffs Complaint are hereby dismissed. Plaintiffs are granted 20 days from the date of mailing of this Order to amend their Complaint.

OPINION ON PRELIMINARY OBJECTIONS OF DEFENDANTS HULSE FAMILY PROPERTIES, INC., MORTON HULSE, SR. AND NADIA HULSE

Plaintiff filed a Complaint against Defendants on December 30, 1996. Defendants Hulse Family Properties, Inc. ("Hulse Properties") and Morton Hulse, Sr. ("M.Hulse") and Nadia Hulse ("N.Hulse") filed Preliminary Objections on January 29, 1997. Oral argument was heard by this Court on April 14, 1997. For the following reasons, the objections are sustained.

STATEMENT OF FACTS

In approximately 1985, Hulse Family Properties, Inc. ("Hulse Properties") owned property located at 101 Lake Meade Drive in East Berlin. The property was later conveyed to a private party who began construction on the premises. However, the Township terminated the construction because it was being conducted on a floodplain. The property was then conveyed back to Hulse Properties, which applied for and received a building permit for additional construction outside the floodplain. Plaintiffs have alleged that a Plan was included in the building permit which showed the projected construction outside the floodplain.¹ Plaintiffs allege that the premises was not built as the plans indicated but was instead positioned within the floodplain.

Hulse Properties was apparently incorporated by M.Hulse and N.Hulse who have allegedly held office since the date of incorporation. Plaintiffs allege that M.Hulse and N.Hulse have been conducting, managing and controlling the affairs of the corporation as its alter ego.

In April of 1987, the property was transferred to Bretheran Construction Company, Inc. ("Bretheran") and then to Larry E. Stough ("Stough") and Daniel Rodgers ("Rodgers"). Stough and Rodgers were the general partners of R&S Partnership, which eventually conveyed the property to Plaintiffs, Jack and Patricia Orner. Plaintiffs

¹This Plan was not attached to the pleadings and we were therefore unable to review it.

have alleged that numerous misrepresentations regarding the flooding problems on the property were made and that the property flooded approximately 5 times after the date of purchase to the date the Complaint was filed.

LEGAL DISCUSSION

Defendants Hulse Properties and M.Hulse with N.Hulse have raised Preliminary Objections in the nature of a demurrer claiming that Plaintiffs have failed to state a cause of action upon which relief may be granted: (1) by failing to allege that they made any representations to Plaintiffs or had any contact with them whatsoever which would give rise to a duty, and (2) by making false allegations in paragraph 20 of the Complaint.²

The Pennsylvania Supreme Court has stated that “[a] demurrer admits every well-pleaded material fact set forth in the pleadings to which it is addressed as well as all inferences reasonably deducible therefrom, but not conclusions of law.” *Gekas v. Shap*, 469 Pa. 1, 5, 364 A.2d 691, 693 (1976). A demurrer is properly sustained where the complaint indicates on its face that the plaintiff’s claim cannot be sustained, and the law will not permit recovery. *Lobdell v. Leichtenberger*, 442 Pa. Super. 21, 24, 658 A.2d 399, 401 (1995) (citations omitted). If there is any doubt as to the propriety of a judgment in favor of a demurring party, it should not be entered. *Creeger Brick & Building Supply, Inc. v. Mid-State Bank and Trust Co.*, 385 Pa. Super. 30, 32-33, 560 A.2d 151, 152 (1989).

Plaintiffs allege fraudulent misrepresentation (Count IX) and violation of the Unfair Trade Practices and Consumer Protection Law (“UTPA”) (Count X) by Defendant Hulse Properties. Plaintiffs’ allegations against Defendants, M.Hulse and N.Hulse, are for negligent misrepresentation (Count XV), fraudulent misrepresentation (Count XVII), and violations of the UTPA (Count XVI).

Intentional misrepresentation, or fraud, requires a showing of: (1) a misrepresentation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. *Gibbs v. Ernst*, 538 Pa. 193, 210, 647 A.2d 882, 899 (1994) (citations omitted). Fraud arises where the misrepresentation is knowingly false, where

²As all Counts against the Defendants, Hulse Properties, M.Hulse, and N.Hulse, have been dismissed under the first set of objections, we need not address Defendants’ argument that the allegations made in paragraph 20 are false.

there is an intentional concealment calculated to deceive, or where there is a nonprivileged failure to disclose. *Smith v. Renault*, 387 Pa. Super. 299, 306, 564 A.2d 188, 192 (1989) (citations omitted). When there is a serious and dangerous latent defect known to exist by the seller, then he must disclose such defect to the unknowing buyer or suffer liability for his failure to do so. *Quashnock v. Frost*, 299 Pa. Super. 9, 17-19, 445 A.2d 121, 125 (1982) (citations omitted).

In support of the fraudulent misrepresentation claim against Hulse Properties, Plaintiffs make general allegations which refer to “the misrepresentations made by Defendant Hulse Properties....” Plaintiffs further allege that “Defendant Hulse Properties knew or should have known that Plaintiffs...would rely upon the representations that the location of the improvements on the property *were in a flood zone.*” (Plts.’ Complaint ¶¶ 70, 71) (emphasis added). However, Plaintiffs have not alleged to whom these representations were made, when they were made, or in what capacity.

According to the pleadings, Hulse Properties owned the property in 1986 and conveyed it to Bretheran Construction Company in 1987. Bretheran then conveyed it to Stough and Rodgers in their individual capacity, who then conveyed the land to R&S Partnership. R&S Partnership is the entity that sold the premises to Plaintiffs. Therefore, it is not clear to whom Hulse Properties made the representations or when they were made.

Additionally, we note that Pennsylvania is a fact pleading state. Rule 1019(b) requires that “averments of fraud ... shall be averred with particularity.” Pa.R.C.P. 1019(b), 42 Pa.C.S.A. Rule 1019(a) states that “[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form.” Pa.R.C.P. 1019(a), 42 Pa.C.S.A. This has been interpreted to mean that “the complaint must not only apprise the defendant of an asserted claim, but it must also synopsize the essential facts to support the claim.” *Miketic v. Baron*, 450 Pa. Super. 91, 104, 675 A.2d 324, 331(1996) (citations omitted). As Plaintiffs have failed to allege the particular facts upon which they rely in claiming Defendant Hulse made misrepresentations, they have failed to conform to the Pennsylvania Rules of Civil Procedure.

Furthermore, in reading Plaintiffs’ Complaint we note that the representation made by Hulse Properties was alleged to be that the “*improvements... were in a flood zone.*” (Plts.’ Complaint ¶ 71). If this allegation is to be taken as true, there would be no claim for fraudulent misrepresentation against Hulse Properties as Plaintiffs claim that the improvements were in the flood zone is consistent with this statement. In order to hold Hulse Properties liable for fraudulent misrepresenta-

tion, there must be a misrepresentation or a failure to disclose. A misrepresentation is defined as “an assertion not in accord with the facts.” See, *Six v. Cole, et al.*, 34 Ad. Co. L. J. 271 (1992). Taking this allegation as true, there is no claim for misrepresentation.

Plaintiff may also state a claim for fraud by alleging Defendant made intentional concealments calculated to deceive or they failed to disclose nonprivileged information. In the context of the sale of real estate, the failure to inform a buyer of a latent defect can lead to liability for fraud; however, a seller only has this duty when there is a “serious and dangerous latent defect.” A defect is latent when it is not readily ascertainable upon a reasonable examination. *Quashnock v. Frost*, 445 A.2d at 125, n.5. Additionally, our Supreme Court has stated that:

Ordinarily, the seller is not obliged to disclose facts of which he is aware when the vendee can in the exercise of his ordinary activities, discover the truth for himself, though he is responsible for loss if shown guilty of fraud or intentional concealment of essential matters.

Rothermel v. Phillips, 292 Pa. 371, 141 A. 241 (1928).

In the case at hand, Plaintiffs have made no allegations that there was failure to disclose by Defendant Hulse. If Plaintiffs were to rely upon failure to disclose to support their claim for fraud they would have to show that Defendants intentionally concealed information, or failed to disclose nonprivileged information, relating to a latent defect that is a “serious and dangerous latent defect.” Plaintiffs have made no allegations that there was a failure to disclose information of a latent defect that was serious or dangerous. Thus, they have failed to allege the facts necessary to support a claim for fraud under a theory of failure to disclose.

Count XVII alleges fraudulent misrepresentation against Defendant M.Hulse and N.Hulse. Plaintiffs make general allegations that “the statements and omissions of fact made by them [M.Hulse and N.Hulse] regarding the Property’s flooding were false, or that there was no basis for such statements...” (Plts.’ Complaint ¶ 110). Plaintiffs again fail to set forth any specific facts regarding the representations. Thus, Plaintiffs have failed to allege the essential elements of fraudulent misrepresentation and have failed to comply with the Rules of Civil Procedure.

Again, Plaintiffs may state a claim for fraud by alleging Defendants, M.Hulse and N.Hulse, made intentional concealments calculated to deceive or they failed to disclose nonprivileged information relating to a “serious and dangerous latent defect.”

In the case at hand, Plaintiffs' have made a general allegation that there were "omissions of fact" by the Defendants but have not provided what those omissions were. Plaintiffs' have made no allegations that the alleged "omissions of fact" related to a latent defect that was serious or dangerous. Thus, they have failed to allege the facts necessary to support a claim for fraud under a theory of failure to disclose.

In Count XV, Plaintiffs argue that Defendants are guilty of negligent misrepresentation because they are, in effect, the alter ego of Hulse Properties and are therefore responsible for the corporation's actions. Negligent misrepresentation consists of the following elements: (1) a **misrepresentation** of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation. *Gibbs v. Ernst*, 538 Pa. at 210, 647 A.2d at 890 (1994) (citations omitted). Our Supreme Court went on to say that "negligent misrepresentation differs from intentional misrepresentation in that to commit the former, the speaker need not know his or her words are untrue, but must have failed to make reasonable investigation of the truth of those words." *Id.* (citing Restatement (Second) of Torts § 552).

Count XV contains no allegations of misrepresentations by Defendants M.Hulse and N.Hulse but states that they are liable for the actions of Hulse Properties. Thus, both Defendants liability would stem from the count of fraudulent misrepresentation against Hulse Properties. Because we have determined that Plaintiffs have failed to sufficiently allege any misrepresentation by Hulse Properties, it would follow that Defendants, M.Hulse and N.Hulse, could not be liable as its alter ego.

Counts X and XVI allege violations of the UTPA by all three Defendants. Plaintiffs cite the entire statute and then explain that it "provides that a person, in the conduct or trade or commerce, engaging in any fraudulent conduct, which creates a likelihood of confusion or misunderstanding, is guilty of an unlawful, unfair method of competition or deceptive act or practice." (Plts.' Complaint ¶¶ 75, 106). Once again, Plaintiffs have failed to provide any facts supporting this claim. Plaintiffs claim that all three Defendants "engaged in the deceptive policy of failing to apprise Plaintiffs that the actual location of the improvements on the property were in a flood zone." (Plts.' Complaint ¶¶ 76, 107).

It is unclear what portion of the statute has been violated by Defendants' failure to apprise Plaintiffs that the property is within the flood zone. However, if we were to speculate that Plaintiffs were relying upon the catchall provision of the statute prohibiting fraudulent conduct, Plaintiffs would still be required to prove fraud. "The key to invoking § 201-2(xvii) of the Consumer Protection Law is fraud..." *Rizzo v. Michener*, 401 Pa. Super. 47, 61, 584 A.2d 973, 980 (1990), alloc. den. 596 A.2d 159. The Court goes on to list the elements of common law fraud and state that all elements must be met in order to recover. *Id.* As discussed above, Plaintiffs have failed to sufficiently allege the elements of fraud and the Counts for violations of the UTPA must therefore also fail.

Thus, the attached Order is issued.

ORDER OF COURT

AND NOW, this 8th day of December 1997, the Preliminary Objections of Defendants Hulse Family Properties, Inc., Morton Hulse, Sr. and Nadia Hulse are sustained and Counts IX, X, XV, XVI, and XVII of Plaintiffs' Complaint are hereby dismissed. Plaintiffs are granted 20 days from the mailing of this Order to amend their Complaint.

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 MAE A. BAKER, DEC'D
Late of Franklin Township, Adams County, Pennsylvania

Executrix: Alice M. Sponseller, 286 S. Hickory Lane, New Oxford, PA 17350

Attorney: Richard E. Thrasher, Bulleit, Shultz & Thrasher, 16 Lincoln Square, Gettysburg, PA 17325

ESTATE OF ELIZABETH G. GIFFORD, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executor: Adams County National Bank, P.O. Box 4566, Gettysburg, PA 17325

Attorney: Bulleit, Shultz & Thrasher, 16 Lincoln Square, Gettysburg, PA 17325

ESTATE OF RONALD CLAIR IRWIN, DEC'D

Late of Mount Pleasant Township, Adams County, Pennsylvania

Executrix: Peggy M. Woodring, 744 Whitehall Road, Littlestown, PA 17344

Attorney: Keith R. Nonemaker, Esquire, Guthrie, Nonemaker, Guthrie, & Yingst, 40 York Street, Hanover, PA 17331

ESTATE OF ALLEN L. LEIB, DEC'D

Late of Abbottstown Borough, Adams County, Pennsylvania

Personal Representative: Janet A. Leib, 171 West Water Street, Abbottstown, PA 17301

Attorney: William W. Hafer, Esquire, 215 Baltimore Street, Hanover, PA 17331

ESTATE OF ALEXIS JANELLE MASON, DEC'D

Late of Mt. Joy Township, Adams County, Pennsylvania

Administrator: Jeffrey G. Mason, 38 BOWENS ROAD, Littlestown, PA 17340

Attorney: Mark David Frankel, Esquire, Frankel, Bare & Associates, 14 West King Street, P.O. Box 1389, York, PA 17405-1389

ESTATE OF GLORIA MAY MILHIMES, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Howard M. Milhimes, 150 700 Road, New Oxford, PA 17350
Attorney: Larry W. Wolf, Esquire, 215 Broadway, Hanover, PA 17331

ESTATE OF MARGARET E. WEYANT, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Co-Executors: John S. Weyant & Byron H. LeCates, c/o Stock & Leader, P.C., 35 South Duke Street, P.O. Box 5167, York, PA 17405-5167

Attorney: Henry B. Leader, Stock & Leader, P.C., 35 South Duke Street, P.O. Box 5167, York, PA 17405-5167

SECOND PUBLICATION

ESTATE OF JOHN L. HAMM, DEC'D

Late of Hamiltonban Township, Adams County, Pennsylvania

Executor: Allen Haar, 6805 Laurel Summit Drive, R.D. #5, Hanover, PA 17331

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

ESTATE OF MARGARET K. MILLER, a/k/a MARGARET VADELLA MILLER, DEC'D

Late of Reading Township, Adams County, Pennsylvania

Executor: John L. Miller, 31 Hilltop Road, Yardley, PA 19067

Attorney: Clayton R. Wilcox, Esquire, 234 Baltimore Street, Gettysburg, PA 17325

ESTATE OF DOROTHEA M. PALMER, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Charles J. Kint, RD #1, Box 222, Abbottstown, PA 17301

Attorney: Matthew L. Guthrie, Esquire, Guthrie, Nonemaker, Guthrie, & Yingst, 40 York Street, Hanover, PA 17331

ESTATE OF ELIZABETH K. SCHULTZ, DEC'D

Late of the Borough of York Springs, Adams County, Pennsylvania

Executors: Jack G. Schultz, 848 Cricket Road, Secane, PA 19018; Charles W. Smith, 45 Diane Lane, Biglerville, PA 17307

Attorney: Frey and Tiley, Attorneys at Law, 5 South Hanover Street, Carlisle, PA 17013

ESTATE OF BERNARD E. SMITH, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Co-executors: Kathleen A. Brown, RD #5, Box 5413, Spring Grove, PA 17362; Robert B. Smith, 838 West Middle Street, Hanover, PA 17331

Attorney: Keith R. Nonemaker, Esquire, Guthrie, Nonemaker, Guthrie, & Yingst, 40 York Street, Hanover, PA 17331

ESTATE OF PORTIA E. UFFELMAN, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Administratrix: Gloria J. Kopman, 445 Maple Grove Road, Hanover, PA 17331

Attorney: William W. Hafer, Esquire,

215 Baltimore Street, Hanover, PA 17331

ESTATE OF VERNA K. WOLF, DEC'D
Late of Oxford Township, Adams County, Pennsylvania

Executrix: Sandra J. Haverstick, 100 Pine Run Road, New Oxford, PA 17350

Attorney: Keith R. Nonemaker, Esquire, Guthrie, Nonemaker, Guthrie, & Yingst, 40 York Street, Hanover, PA 17331

THIRD PUBLICATION

ESTATE OF EDWARD R. FRIEDLINE, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Hugh R. Friedline, 1169 Kohlr Mill Rd., New Oxford, PA 17350.

Attorney: David J. Lenox, Esquire, Wiley, Lenox & Colgan, P.C., One South Baltimore St., Dillsburg, PA 17019

ESTATE OF ANNA G. KUHN, DEC'D
Late of Oxford Township, Adams County, Pennsylvania

Executors: Jane M. Walker, Edward W. Kuhn and John H. Kuhn

Attorney: Alan M. Cashman, Esquire, 141 Broadway, Suite 230, Hanover, PA 17331

ESTATE OF KENNETH E. LOUEY, DEC'D

Late of Germany Township, Adams County, Pennsylvania

Administratrix C.T.A.: Betty Louise Louey a/k/a Betty LeGore Louey, 10 Locust Drive, P.O. Box 154, Littlestown, PA 17340

Attorney: Ronald J. Hagarman, Esquire, 110 Baltimore Street, Gettysburg, PA 17325

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 Tuesday, February 9, 1999, at 9:00 o'clock a.m.

KITZMILLER—Orphans' Court Action Number OC-146-98. The First and Final Account of Thomas L. Kitzmiller, Richard A. Kitzmiller and Kenneth R. Kitzmiller, Executors of the Last Will and Testament of Ray J. Kitzmiller, deceased, late of Gettysburg Borough, Adams County, Pennsylvania.

Peggy J. Breighner
Clerk Of Courts

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-869 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 19th day of February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT CERTAIN tract of land, situate, lying and being in Freedom Township, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at an iron pin in Township Road T-318 at a point where it intersects with Township Road T-324 and at the Southwest corner of land now or formerly of Carl H. Perkins and the Northeastern corner of land now or formerly of Sydney M. Shapiro; thence running in Township Road T-318 and by land now or formerly of Sydney M. Shapiro, South 65 degrees 22 minutes 05 seconds West 233.76 feet to a railroad spike at the Southeastern corner of Tract #1 above; thence by Tract #1 and through an iron pin set back 25 feet from the start of this course North 05 degrees 52 minutes 55 seconds West 420.86 feet to an iron pin on line of land of Lot #3 in the hereinafter described Plan of Lots, which lot is currently owned by Alan P. Horoschak and wife; thence by Lot #3 and crossing Township Road T-324, North 73 degrees 14 minutes 21 seconds East 396.48 feet to an iron pin, situate 18 feet East of the center line of T-324 and on line of land now or formerly of Henry P. Benoit; thence running along and in Township Road T-324, by land now or formerly of Henry P. Benoit and by land now or formerly of Carl H. Perkins, South 15 degrees 52 minutes 37 seconds West 452.86 feet to an iron pin at the intersection of Township Road T-324 and Township Road T-318, the point and place of BEGINNING.

THE DESCRIPTION of the above tract was taken from a draft of Survey of Wilbur L. Plank Registered Engineer, date May 18, 1979 and recorded in Adams County Plat Book 28 at page 4.

THE TRACT is referred to as Lot #2 in said Plan.

BEING Tax Map #D-15 Parcel #22.

BEING THE SAME PREMISES which Alan P. Horoschak and Patricia A. Horoschak, husband and wife, by their Deed dated June 12, 1992 and recorded in the Office of the Recorder of Deeds in and for Adams County on March 1, 1993 in Deed Book 696, Page 23, granted and conveyed unto Dennis J. Walter and Theresa D. Walter, husband and wife, the Defendants herein.

SEIZED and taken into execution as the property of **Dennis J. Walter & Theresa D. Walter** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
December 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 March 15, 1999, 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.
1/22, 29 & 2/5

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-618 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 19th day of February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT CERTAIN tract of land, situate and being in Cumberland Township, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING at an existing p.k. nail in the center line of the intersection of the Biglerville Road (S.R. 0034) with Boyde School Road (T-341); thence running in the center line of Boyde School Road (T-341) South 85 degrees 00 minutes 10 seconds West, 214.52 feet to an existing railroad spike in said center line at corner of land now or formerly of Rudisill; thence running by said Rudisill land North 16 degrees 57 minutes 55 seconds West, 93.36 feet running through a reference pipe set back 15 feet from the beginning of this course, to an existing square pipe relocated by mutual agreements of land owners; thence by land now or formerly of Claude Rudisill North 73 degrees 13 minutes 40 seconds East, 209.58 feet to a point in the center line of Biglerville Road (S.R. 0034) running through an existing reference pipe set back 25-20 feet from the terminus of this course; thence in said center line of Biglerville Road (S.R. 0034) South 17 degrees 04 minutes 50 seconds East, 137.14 feet to an existing p.k. nail in the center line of the intersection of Biglerville Road (S.R. 0034) and Boyde School Road (T-341), the point and place of BEGINNING. CONTAINING 0.555 Acre (24,165 Square Feet).

HAVING A DWELLING ERECTED THEREON KNOWN as 1310 Biglerville Road, Gettysburg, PA.

BEING THE SAME PREMISES WHICH Michael A. Myers and Pamela S. Myers by deed dated 11/18/94 and recorded 11/28/94 in Adams County Deed Book 969 Page 184 granted and conveyed unto Carole M. Laughman.

TO BE SOLD AS THE PROPERTY OF CAROLE M. LAUGHMAN UNDER ADAMS COUNTY JUDGMENT NO. 98 S 618.

Parcel: F11-118

SEIZED and taken into execution as the property of **Carole M. Laughman & Melanie S. Cook** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
December 19, 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 March 15, 1999, 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.
1/29, 2/5 & 12

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 98-S-893 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 19th day of February, 1999, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL that certain lot of ground, situate, lying and being in Oxford Township, Adams County, Pennsylvania, bounded and described as follows, to-wit:

BEGINNING at an iron pin for a corner at land now or formerly of Robert Johnson and other land now or formerly of Francis A. Carbaugh, widower; thence by said land now or formerly of Francis A. Carbaugh, North twenty-nine (29) degrees twelve (12) minutes East, one hundred forty (140.00) feet to an iron pin; thence by same South sixty-one (61) degrees six (06) minutes East, two hundred twenty-five (225.00) feet to an iron pin; thence by same South twenty-nine (29) degrees twelve (12) minutes West, one hundred forty (140.00) feet to an iron pin at land now or formerly of George Good; thence by said land now or formerly of George Good, North sixty-one (61) degrees six (06) minutes West, fifty-five (55.00) feet to an iron pin at land now or formerly of Reginald Rohrbaug; thence by said land now or formerly of Reginald Rohrbaug, North sixty-one (61) degrees six (06) minutes West, seventy (70.00) feet to an iron pin at land now or formerly of Kenneth W. Klinedinst; thence by said land now or formerly of Kenneth W. Klinedinst, North sixty-one (61) degrees six (06) minutes West, one hundred (100.00) feet to an iron pin, the place of BEGINNING. CONTAINING 31,500 square feet. The within description being taken from a draft of survey made May 13, 1953, by J. H. Rife, R.E., as the Johnson and Carbaugh plots.

Being known as: Lot along Becker Road N/K/A 910 Q HANOVER STREET NEW OXFORD PA

Tax Parcel # K12-41A

Title to said premises is vested in Tony J. Hippensteel by deed from Dale E. Seymour and Elaine D. Seymour, his Wife, dated 8/31/1992 recorded 9/9/1992 in deed book 641 page 61.

SEIZED and taken into execution as the property of **Tony J. Hippensteel** and to be sold by me

Raymond W. Newman
Sheriff

Sheriff's Office, Gettysburg, PA
January 16, 1999.

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 March 15, 1999, 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.
1/29, 2/5 & 12