

# Adams County Legal Journal

Vol. 39

June 6, 1997

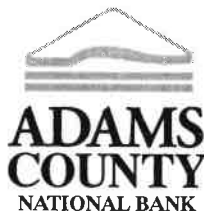
No. 2, pp. 7-14

## ANNOUNCEMENT OF CONTINUING LEGAL EDUCATION PROGRAMS

1. *General Practitioners' Update*. Wednesday, June 11, 1997—  
9:00 a.m.—5:00 p.m. Adams County Cooperative Extension Office.  
Substantive Law—5 credits. Ethics—1 credit. Registration through  
P.B.I. 800-932-4637
2. *Advanced Custody Issues*. Wednesday, August 6, 1997—  
9:00 a.m.—1:30 p.m. Room 307, Adams County Courthouse.  
Substantive Law—4 credits. Ethics—0 credit. Registration through  
P.B.I. 800-932-4637

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ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

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FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that an Application for Registration of a Fictitious Name will be filed with the Department of State, Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on or about the 12th day of May, 1997, pursuant to the Fictitious Name Act of 1982, as amended, setting forth that Jeffrey L. Wagaman, 66 Sherrill Drive, New Oxford, Pennsylvania and David M. Crowl, 114 E. High Street, Apt. 4, New Oxford, Pennsylvania, are adult individuals engaged in a business, the character of which is the sales and installation of audio and rider equipment computers, and computer software and that such business will be conducted under the name of A \ V & VARIETY INSTALLATIONS and have a principal office or location at 66 Sherrill Drive, New Oxford, Pennsylvania.

Wilcox, James and Cook  
234 Baltimore St.  
Gettysburg, PA 17325

6/6

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN pursuant to the Fictitious Names Act, Act 1982-295, as amended, of the filing in the Office of the Secretary of the Commonwealth of Pennsylvania, on May 19, 1997 of an application to conduct a business in Adams County, Pennsylvania under the registered fictitious name of KINETIC ELECTRIC. The address of the principal office or place of such business to be carried on under or through such fictitious name is 1150 Fox Run Terrace, Hanover, PA 17331. The name of the person interested in such business who is party to such registration is Michael A. Abendschoen of the same address.

Teeter, Teeter & Teeter  
Solicitors

6/6

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

1. The Plaintiff in a products liability case based on Section 402A of Restatement (2nd) of Torts 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.

2. A product may be defective because of design or because of inadequate warnings to notify the ultimate user of the non-obvious dangers inherent in the use of the product.

3. 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.

4. If the dangers are known, then the product is not defective and the manufacturer is under no duty to warn.

5. 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.

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

7. Where plaintiff denied an understanding of the risk that denial alone is sufficient to prevent a finding, as a matter of law, that he assumed the risk.

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 Pell, Esq., for Plaintiff

Paul Grego, Esq., for Defendant W. W. Babcock

### OPINION ON MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT W. W. BABCOCK COMPANY, INC.

Kuhn, J., September 12, 1996.

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, the fruit harvesting bag he was using shifted causing him to lose his balance and fall off the orchard ladder manufactured by Defendant, W. W. Babcock Company, Inc. Babcock's liability under both counts is premised upon its failure to

affix adequate English and Spanish warnings to the ladder which would alert the user that the ladder should only be used for ascending and descending, that it should not be used as a work platform to harvest fruit, and that quadriplegia or death could result from falls off the ladder.

After extensive discovery Babcock filed a motion for summary judgment which is before the Court for disposition. Babcock's position is that Plaintiff has either assumed the risk or not identified a defect with the ladder which caused his fall.

It has often been stated that,

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories and admissions on file show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law...Summary judgment may be entered only in cases that are clear and free from doubt...The moving party...has the burden of proving that no material issue of fact exists...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).

In addition, the record must be examined in a light most favorable to the non-moving party, accepting as true all well-pleaded facts in the pleadings and giving that party the benefit of all reasonable inferences drawn therefrom. *Godlewski v. Pars Manufacturing Company*, 408 Pa. Super. 425, 430, 597 A.2d 106, 109 (1991). Finally, pursuant to the Nanty-Glo rule, summary judgment is not available where the moving party relies exclusively upon oral affidavits or 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 packer 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 and manufactured by Babcock. The ladder is known as a 20 foot long "spread bottom fruit single" and according to Babcock's catalog "It is designed for the orchard where maximum stability and safety are required." The ladder was constructed of wood with wooden rungs having a 1 5/32" diameter. Certain

warning labels may have been placed on the ladder by the manufacturer but none were present at the time of the accident.

Late in the afternoon of 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. As Plaintiff reached for an apple with his right hand his left foot slipped off the rung, a picking bag containing approximately 40 pounds of apples swung away from the left side of his body causing Plaintiff to fall to his left and off the ladder. The ladder stayed in the tree.

Plaintiff testified in his deposition that he had only seen one other person fall off an orchard ladder before and that he had never experienced a fall before this incident. He further stated that if the ladder displayed a warning that it was unsafe as a work station for picking apples he would not have used it.

Two issues are presented in this motion for summary judgment. The first is whether, as a matter of law, the subject ladder was defective and unreasonably dangerous because it lacked the warnings suggested. The second issue is whether Plaintiff assumed the risk.

Strict liability based upon §402 of 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. Smithline Beecham Corp.*, \_\_\_ Pa. Super. \_\_\_, \_\_\_, 671 A.2d 1151, 1153 (1996).

The focus of this discussion will be upon whether the ladder in question was “defective.” A product may be defective because of design or, as argued by Plaintiff, because of inadequate warnings. 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. 124, 131, 665 A.2d 1167, 1171 (1995). The danger for which warnings are required refer to non obvious dangers inherent in the use of the product. *Davis v. Berwind Corp.*, supra., 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 considerations of social policy. *Jordon By Jordon 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 produce 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. *Jordon By Jordon v. K-Mart Corp.*, supra., 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 be likely to 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.<sup>1</sup>

In the instant case the "danger" which needs to be recognized and appreciated is that a worker may fall off a ladder and be seriously injured if his foot slips off a rung and he loses his balance. Ladders have been in existence for thousands of years. Ladders are used for numerous purposes which are so well known they need not be repeated. Generally, when climbing or standing on a ladder people hold on out of fear and recognition that a loss of balance could result in a fall and injury. The undersigned feels quite comfortable in characterizing that danger as obvious. The community of orchard workers is as cognizant of that risk as children are cognizant of the risk that a sled may hit a tree, *Jordon By Jordon*, supra., or that the sharp edge of a knife can cause a cut, *Miron v. Fisher*, 37 Ad. Co. L.J. 211 (1995). It should be noted that the ladder did not cause the fall. In fact, the ladder remained in the tree.

We assume for the instant purposes that Babcock's ladder contained no warnings although Babcock claims that its spread bottom ladders contained certain warnings when distributed. However, finding that the danger was obvious we need not consider what warnings should have been in place. Nevertheless, we note in passing that even if warnings were required this Court would reject as appropriate the warnings suggested by Plaintiff. For example, to suggest that a ladder should not be used as a work platform fails to recognize the realities of life for house painters, firefighters, orchard workers and other similar occupations not to mention the do-it-yourself homeowner.

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

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<sup>1</sup> The undersigned spent most of his formative years working on a fruit farm and is quite familiar with the characteristics of orchard ladders when used for picking fruit.

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 knowledge 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<sup>2</sup> and cited with approval language in

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<sup>2</sup>In that case the obvious risks inherent in drinking alcohol and driving a vehicle.



*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 Babcock’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 and 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 picking apples from a ladder and voluntarily chose to encounter it. However, he denied an understanding of that risk. A jury may well find his testimony incredible 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 12th day of September, 1996, the motion for summary judgment filed by Defendant, W. W. Babcock Company, Inc., is granted for the reasons set forth in the attached Opinion.

## 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 HAROLD D. BROWN, DEC'D

Late of the Borough of Fairfield, Adams County, Pennsylvania  
 Executors: Thomas A. Brown, 105 Longview Boulevard, Gettysburg, PA 17325; Ronald L. Brown, 10926 Middlegate Drive, Fairfax, VA 22032  
 Attorney: Bulleit, Schultz & Thrasher, 16 Lincoln Square, Gettysburg, PA 17325

## ESTATE OF GLADYS E. CLEVELAND, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania  
 Executors: Doris F. Trussell, 26 Naomi Avenue, P. O. Box 126, Landisville, PA 17538; Clyde K. Cleveland, 2066 Dalton Avenue, Deltona, FL 32725  
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

## ESTATE OF GEORGE P. SLICK, DEC'D

Late of Germany Township, Adams County, Pennsylvania  
 Executrix: M. Joann Welk, 325 Lumber Street, Littlestown, PA 17340  
 Attorney: William W. Hafer, Esquire, 215 Baltimore Street, Hanover, PA 17331

## ESTATE OF MINNIE I. STOOPS, DEC'D

Late of Straban Township, Adams County, Pennsylvania  
 Executor: Adams County National Bank, P. O. Box 4566, Gettysburg, PA 17325  
 Attorney: Bulleit, Schultz & Thrasher, 16 Lincoln Square, Gettysburg, PA 17325

## SECOND PUBLICATION

## ESTATE OF EVA M. GINTER, DEC'D

Late of Freedom Township, Adams County, Pennsylvania  
 Executor: Delmar B. Richardson, 1741 Carroll's Tract Road, Ortanna, PA 17353

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

## ESTATE OF DONALD O. HEFFLEY, DEC'D

Late of Fayetteville, Adams County, Pennsylvania

Administrator: Peter M. Heffley, c/o Stephen D. Kulla, 9 E. Main Street, Waynesboro, PA 17268

## ESTATE OF ELSIE C. O'NEALE, DEC'D

Late of Mt. Joy Township, Adams County, Pennsylvania

Executor: William O'Neale, 59 Mud College Road, Littlestown, PA 17340  
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

## THIRD PUBLICATION

## ESTATE OF RUTH E. CONAWAY, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Maurice G. Neiman, 257 Abbottstown Pike, Abbottstown, PA 17301; Bank of Hanover and Trust Company, Trust Dept., 25 Carlisle Street, Hanover, PA 17331

Attorney: Daniel M. Frey, Daniel M. Frey & Associates, P.C., 14 Center Square, Hanover, PA 17331

## ESTATE OF ROSE P. TOPPER, DEC'D

Late of Hanover, Pennsylvania  
 Executor: John A. Donnelly, P.C., 526 Main Street, McSherrystown, PA 17344



# *Adams County* Legal Journal

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June 13, 1997

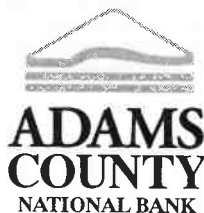
No. 3, pp.15-18

## IN THIS ISSUE

J.F. WAYBRANT & SONS, INC. VS. MOUNT JOY  
TOWNSHIP ZONING HEARING BOARD

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Adams County National Bank's commitment to its communities is more than a fleeting promise. It is a tradition founded upon our more than 130 years of service to the individuals, businesses and organizations in these communities.



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

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## FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of Pennsylvania's "Fictitious Names Act," 54 Pa. C.S.A. §§ 301 et seq., of the filing of an Application for Registration of Fictitious Name under the said Act. The fictitious name is TIME LINE DESIGNS. The address of the principal office or place of business to be carried on under or through the fictitious name is 777 Baltimore Street, Old Gettysburg Village, Shop #12, Gettysburg, Adams County, Pennsylvania 17325. The names and addresses of the persons who are parties to the registration are Thomas J. Winter, Jr., of 35 Buford Avenue, #17, Gettysburg, Adams County, Pennsylvania 17325 and Thomas J. Winter, Sr., 529 McGlaughlin Road, Gettysburg, Adams County, Pennsylvania 17325. An application for registration under the Fictitious Names Act of the said fictitious name was filed in the Office of the Secretary of the Commonwealth of Pennsylvania on May 21, 1997.

Campbell & White  
122 Baltimore Street  
Gettysburg, PA 17325  
Attorneys for Applicant

6/13

## INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on April 25, 1997.

The name of the corporation is FAIR AND HOYLMAN INSURANCE AGENCY INC.

The corporation has been incorporated under the Pennsylvania Business Corporation of 1988.

Bigham & Puhl  
Attorneys at Law  
16 Lincoln Square  
Gettysburg, PA 17325

Attorneys for the Corporation

6/13

## NOTICE BY THE ADAMS COUNTY CLERK OF COURTS

NOTICE IS HEREBY GIVEN to all heirs, legatees and other persons concerned that the following accounts with statement of proposed distribution filed therewith have been filed in the Office of the Adams County Clerk of Courts and will be presented to the Court of Common Pleas of Adams County - Orphans' Court, Gettysburg, Pennsylvania, for confirmation of accounts and entering decrees of distribution on Monday, June 23, 1997, at 9:00 o'clock a.m.

**LONGANECKER**—Orphans' Court Action Number OC-158-96. The First and Final Account of Mary S. Longanecker, Executrix of the Estate of Reida Longanecker, deceased, late of Straban Township, Adams County, Pennsylvania.

**DAVIS**—Orphans' Court Action Number OC-128-95. The First and Final Account of Nita M. Cullison and Betty S. Stultz Mitchell, Executrices of the Estate of Annie M. Davis a/k/a Annie Mae Davis, deceased, late of Cumberland Township, Adams County, Pennsylvania.

**HOFF**—Orphans' Court Action Number OC-43-97. The First and Final Account of Adams County National Bank, Executor of the Last Will and Testament of Mildred Kathryn Hoff, deceased, late of the Borough of Littlestown, Adams County, Pennsylvania.

**STRONG**—Orphans' Court Action Number OC-47-97. The First and Final Account of Edwin G. Strong, Jr., Executor of the Estate of Catherine Baker Strong, deceased, late of Cumberland Township, Adams County, Pennsylvania.

**HAMM**—Orphans' Court Action Number OC-50-97. The First and Final Account of Larry R. Hamm, Administrator C.T.A. under the will of Lillian I. Hamm a/k/a Lillian N. Hamm, deceased, late of Oxford Township, Adams County, Pennsylvania.

**NEWMAN**—Orphans' Court Action Number OC-51-97. The First and Final Account of Linn E. Newman, Douglas J. Newman and Craig Howard Newman, Executors of the Last Will and Testament of Dorothy J. Newman, deceased, late of Fairfield Borough, Adams County, Pennsylvania.

**KOONTZ**—Orphans' Court Action Number OC-60-97. The First and Final Account of Charles E. Koontz, Jr. and Ester Amanda Hess a/k/a Esther Amanda Hess, Co-Executors under the Will of Treva Amelia Koontz a/k/a Treva A. Koontz, deceased, late of Straban Township, Adams County, Pennsylvania.

**KUHN**—Orphans' Court Action Number OC-61-97. The First and Final Account of Dennis E. Kuhn, Executor of the Will of Robert G. Kuhn, deceased, late of the Borough of Gettysburg, Adams County, Pennsylvania.

**BYARD**—Orphans' Court Action Number OC-165-96. The First and Final Account of Kimberly Nolan now Kimberly Tabor, Executrix of the Will of Albert M. Byard, deceased, late of Hamiltonban Township, Adams County, Pennsylvania.

Peggy J. Breighner  
Clerk of Court

6/13 & 20

J. F. WAYBRANT & SONS, INC. VS. MOUNT JOY  
TOWNSHIP ZONING HEARING BOARD

1. One who is a "party" before the Zoning Hearing Board should be entitled to have status as an appellant.
2. A "party" before the Zoning Hearing Board includes any person affected by the application who has made timely appearance of record before the Board.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 96-S-228, J. F. WAYBRANT & SONS, INC. VS. MOUNT JOY TOWNSHIP ZONING HEARING BOARD.

Paula J. Leicht, Esq., for Appellant  
Catherine J. Gault, Esq., for Appellee  
Gary E. Hartman, Esq., for Petitioner  
Scott L. Kelley, Esq., for Gettysburg Concrete

OPINION ON MOTIONS TO QUASH  
AND/OR DISMISS LAND USE APPEAL

Kuhn, J., September 19, 1996.

*Procedural History*

On November 21, 1995, Valley Quarries, Inc. filed an application for special exception with Mt. Joy Township Zoning Hearing Board in order to construct a ready mix concrete plant on real estate identified as Adams County Tax Map G-14, Parcel 62A. A hearing was held by the Board on January 4, 1996, after which the Board granted the application. The written decision of the Board was not dated until February 16, 1996.

On March 15, 1996, J. F. Waybrant & Sons, Inc., appealed the Board's decision. Waybrant, Inc. alleged that it owned a tract of land fronting on Pa. Route 97 and adjoining the parcel subject to the zoning application. Waybrant, Inc. claims that it was not properly notified of the zoning hearing before the Board and that the Board abused its discretion in granting the special exception.

Motions to quash and/or dismiss the corporation's appeal were filed by Gettysburg Concrete Company, Inc. and Hanover Concrete Company on April 16, 1996, and by Valley Quarries, Inc. on April 24, 1996. Essentially they contend that Waybrant, Inc. has no standing to appeal. Hearing on Valley Quarries' Motion was scheduled for May 20, 1996.

*Factual Background*

At the May 20, 1996 hearing on the Motion To Quash the following background was elicited. J. F. Waybrant & Sons, Inc. has leased approximately 5 acres along Pa. Route 97 next to real estate owned by Valley Quarries, Inc. and known as 1685 Baltimore Pike. Since at least

October, 1993, the fee simple owners of the premises have been Jack and Betty Waybrant. Occupying No. 1685 is a building which is leased from Jack and Betty Waybrant by the corporation and three other tenants, some of whom receive mail at that address. The corporation currently uses the structure as a maintenance facility. According to corporate president, Steve Waybrant, the corporate office is located at 1845 York Road, Gettysburg, although it had been at No. 1685 for approximately six years prior to September, 1995. Interestingly, the corporate mailing address is P.O. Box 4447, Gettysburg, but Mr. Waybrant candidly admitted that mail addressed to either No. 1685 or No. 1845 will be delivered to the P.O. Box by postal authorities. The September, 1995, local telephone white and yellow pages and Mr. Waybrant's business cards list No. 1685 as the corporate address. Mr. Waybrant further stated that before September, 1994, Mt. Joy Township sent real estate tax bills for the premises to No. 1685 but that after that date they have been sent to Jack and Betty Waybrant in Florida where they reside.

Bonnie Koontz is the Secretary-Treasurer to the Mt. Joy Township Board of Supervisors and has been secretary to the township Zoning Hearing Board for the past three years. She was the person responsible for sending notices of the January 4, 1996, hearing. With regard to the Waybrant property Ms. Koontz utilized a tax map she received in late 1995 from the tax assessor to identify persons who should receive notice of the zoning hearing. Based upon that document and her familiarity with the premises (mailbox identifies parcel as No. 1685) Ms. Koontz sent notice of the hearing to J. F. Waybrant & Sons at 1685 Baltimore Pike by ordinary mail on December 26, 1995. That mailing was not returned as undeliverable. Mr. Waybrant contends that the corporation never received the notice. Ms. Koontz said she had no knowledge that the corporation had received tax notices at the P.O. Box nor that tax notices were sent to Jack and Betty Waybrant in Florida.

In addition, the Valley Quarry premises was posted with a copy of the notice which was visible from Route 97.

#### *Discussion*

The Pennsylvania Municipalities Planning Code defines when an appeal must be filed.

§11002-A. Jurisdiction and venue on appeal; time for appeal

All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the court of common pleas . . . and shall be filed within 30 days after entry of the



decision as provided in 42 Pa. C.S. §5572 (relating to time of entry of order) or, in the case of a deemed decision, within 30 days after the date upon which notice of said deemed decision is given as set forth in section 908(9) of this act.

42 Pa. C.S.A. §5572 provides that the date of service of an order of a governmental unit, which shall be the date of mailing, is deemed to be the date of entry of the order for appeal purposes. The record gives no indication when the decision was mailed to Waybrant, Inc. so the Court will assume that the appeal was timely filed.

On the merits, Waybrant, Inc. contends that it did not receive notice of the zoning hearing as required by 53 P.S. §10908(1). That section provides,

§10908. Hearings

The board shall conduct hearings and make decisions in accordance with the following requirements:

(1) Public notice shall be given and written notice shall be given to the applicant, the zoning officer, such other persons as the governing body shall designate by ordinance and to any person who has made timely request for the same. Written notices shall be given at such time and in such manner as shall be prescribed by ordinance. . . In addition to the written notice provided herein, written notice of said hearing shall be conspicuously posted on the affected tract of land at least one week prior to the hearing.

Section 110-10 of the zoning provisions of Mount Joy Township Code provides that notice of a hearing shall include notice to owners of record of property abutting or within 100 feet of the subject property. The Court need not engage in discussion of the adequacy of the notice to Waybrant, Inc. because the corporation was not the owner of record. No party has produced any record that the corporation was a record owner of the subject property.<sup>1</sup> Thus, there exists no legal basis or authority for the corporation to have received notice.<sup>2</sup>

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<sup>1</sup> A superficial review of the public records in the Adams County Mapping Department and Office of Recorder of Deeds suggests that the corporation never had recorded title to this real estate.

<sup>2</sup> Even if the corporation was entitled to notice it was mailed to an address which was acknowledged to be the corporate address listed in the local telephone records. The corporation by its own action held out to the public an inaccurate address and cannot now complain that notice was sent to the wrong address. In our opinion the notice was legally adequate.

Even if Waybrant, Inc. was not entitled to notice does the corporation have standing to appeal? We believe the answer is no. Prior to December, 1988, "persons aggrieved" were entitled to appeal. That language was eliminated when §11002-A was enacted. A thorough reading of the MPC, however, suggests that one who is a "party" before the zoning hearing board should be entitled to have status as an appellant. A "party" to the hearing includes "any person affected by the application who has made timely appearance of record before the board . . ." 53 P.S. §10908(3). Here, the corporation did not appear before the board so it cannot be considered a party, even if one concedes it is "affected by the application."

The corporation argued that as a tenant it has a right to bring and enforce the rights of a landowner in a zoning appeal. We agree, to a limited extent with that proposition. The term "landowner" is defined at 53 P.S. §10107 to include the owner of the land and "a lessee if he is authorized under the lease to exercise the right of the landowner." Here, not only did the corporation erroneously hold itself out as the owner of the adjoining real estate in its appeal but the record fails to include any evidence that such authorization has been given.

Thus, the Court concludes that Waybrant, Inc. has no standing as an appellant and its appeal must be stricken.

Accordingly, the attached Order is entered.

#### ORDER OF COURT

AND NOW, this 19th day of September, 1996, after hearing on Motion To Quash filed by Intervenor, Valley Quarries, Inc., the Court grants the Motion and dismisses J. F. Waybrant & Sons, Inc. as an appellant in the above captioned matter.

## 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 G. MICKLEY BENCHOFF, DEC'D

Late of Fairfield, Adams County, Pennsylvania

Executor: Emmert J. Rowland, c/o Keller, Keller and Frey, 100 Walnut Street, Waynesboro, PA 17268

Attorney: John W. Frey, Esquire, Keller, Keller and Frey, 100 Walnut Street, Waynesboro, PA 17268

## ESTATE OF J. GLENN GUISE, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Executor: D. Richard Guise, P. O. Box 3666, Gettysburg, PA 17325

Attorney: Neal S. West, Esquire, McNeese, Wallace & Nurick, 100 Pine Street, P. O. Box 1166, Harrisburg, PA 17108

## ESTATE OF HERBERT L. MYERS, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrices: Rochelle N. Livingston, 280 Rt. 194 North, Abbottstown, PA 17301; Amie N. Bridge, R. 1, Box 220, Lyndhurst, VA 22952

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

## ESTATE OF WARREN A. SPONSELLER, DEC'D

Late of Liberty Township, Adams County, Pennsylvania

Administratrix: Mildred M. Sponseller, 314 E. Walnut St., Apt 2, Hanover, PA 17331

## ESTATE OF HUBERT R. WEAVER, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executors: Vera E. Slagle; Donna Weaver Vanderbosch; Robert Weaver

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

## ESTATE OF REBECCA M. WEAVER, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: William E. Meyers, 4668 Cottonwood Drive, Ann Arbor, MI 48108

Attorney: Steven M. Hovis, Stock and Leader, A Professional Corporation, 35 South Duke Street, P. O. Box 5167, York, PA 17405-5167

## SECOND PUBLICATION

## ESTATE OF HAROLD D. BROWN, DEC'D

Late of the Borough of Fairfield, Adams County, Pennsylvania

Executors: Thomas A. Brown, 105 Longview Boulevard, Gettysburg, PA 17325; Ronald L. Brown, 10926 Middlegate Drive, Fairfax, VA 22032

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

## ESTATE OF GLADYS E. CLEVELAND, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Executors: Doris F. Trussell, 26 Naomi Avenue, P. O. Box 126, Landisville, PA 17538; Clyde K. Cleveland, 2066 Dalton Avenue, Deltona, FL 32725

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

## ESTATE OF GEORGE P. SLICK, DEC'D

Late of Germany Township, Adams County, Pennsylvania

Executrix: M. Joann Welk, 325 Lumber Street, Littlestown, PA 17340

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

## ESTATE OF MINNIE I. STOOBS, DEC'D

Late of Straban Township, Adams County, Pennsylvania

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

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

## THIRD PUBLICATION

## ESTATE OF EVA M. GINTER, DEC'D

Late of Freedom Township, Adams County, Pennsylvania

Executor: Delmar B. Richardson, 1741 Carroll's Tract Road, Orrtanna, PA 17353

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

## ESTATE OF DONALD O. HEFFLEY, DEC'D

Late of Fayetteville, Adams County, Pennsylvania

Administrator: Peter M. Heffley, c/o Stephen D. Kulla, 9 E. Main Street, Waynesboro, PA 17268

## ESTATE OF ELSIE C. O'NEALE, DEC'D

Late of Mt. Joy Township, Adams County, Pennsylvania

Executor: William O'Neale, 59 Mud College Road, Littlestown, PA 17340

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

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-N-350 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 11th day of July, 1997, 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 Mt. Joy Township, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at a spike driven in the center of Township Road T-420 (which connects State Highways Nos. 140 and 116), at corner of lot of Harold K. Golden; thence in the center of said Township Road, North 28 degrees East, 150 feet to a spike in center of same; thence through the original tract of the Grantors herein, and through a pipe 16.5 feet from the beginning of this course, South 62 degrees East, 200 feet to a pipe; thence continuing through said original tract, South 28 degrees West 150 feet to a pipe; thence along the lot of Harold K. Golden aforesaid, North 62 degrees West, 200 feet, through a pipe 16.5 feet from the end of this course, to the above described place of BEGINNING.

CONTAINING 30,000 square feet.

The above description was taken from a draft of survey of Wilbur V. Redding, Registered Surveyor, dated October 15, 1969, for the use of Robert B. and Betty L. Brown.

BEING THE SAME PREMISES which Donald M. Steinour and Joyce L. Steinour, husband and wife, by their deed dated November 15, 1969, recorded November 15, 1969 in the Office of the Recorder of Deeds of Adams County, Pennsylvania, in Deed Book 279, page 634, granted and conveyed unto Robert B. Brown and Betty L. Brown, husband and wife, as tenants of an estate by the entireties, said Betty L. Brown having died January 13, 1996, whereas vesting sole title interest into Robert B. Brown, who is Grantor and Grantee herein making this tax exempt transfer.

Under and subject to any and all restrictions, objections, etc., as they appear of record.

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

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
May 19, 1997.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 4, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/13, 20 & 27

# Adams County Legal Journal

Vol. 19

June 20, 1997

No. 4, pp.19-24

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-259 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 25th day of July, 1997, 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 in the Borough of McSherrystown, Adams County, Pennsylvania, bounded and described as follows, to-wit:

BEGINNING for a point on the cul-de-sac of Cricket Lane at Lot No. 20-A; thence along and with said Lot No. 20-A, North seventy-eight (78) degrees, forty-nine (49) minutes, fifty-three (53) seconds West one hundred nineteen and seventeen hundredths (119.17) feet to a point at lands now or formerly of L.O.O.M.; thence along said last mentioned lands, North twenty-two (22) degrees, fifty-nine (59) minutes, zero (0) seconds West, forty and eleven hundredths (20.11) feet, more or less to a point, at lands now or formerly of Urban F. Staub; thence along said last mentioned lands North fifty-seven (57) degrees, forty-six (46) minutes, zero (0) seconds East sixty (60) feet to a point at Lot No. 21-A; thence along and with said Lot No. 21-A south fifty-five (55) degrees, fifty-four (54) minutes, forty (40) seconds East ninety-eight and six tenths (98.6) feet to a point at the above mentioned cul-de-sac by a curve to the left, the long chord of which is nineteen and eighty-seven hundredths (19.87) feet, South twenty-two (22) degrees, thirty-seven (37) minutes, forty-two (42) seconds West an arc distance of twenty (20) feet to the point and place of beginning.

CONTAINING 4,990 square feet and being known as Lot No. 20-B, as per survey of Donald E. Worley, Professional Land Surveyor, bearing date of May 8, 1985 and recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania in Plan Book 41 page 103 and being known as Delone development.

UNDER AND SUBJECT nevertheless, to the covenants, restrictions and conditions as set forth in the Declaration of Protective Covenants and Restrictions dated March 18, 1985 and recorded in the Adams County Recorder of Deeds Office in Record Book 399 page 779 and the Amendment to Declaration of Covenants and Restrictions dated May 14,

1985 and recorded in the Adams County Recorder of Deeds Office in Record Book 400 page 428.

TAX PARCEL NUMBER: #6-117

PREMISES: 603 CRICKET LANE, MCSHERRYSTOWN, PA 17344

TITLE TO SAID PREMISES IS VESTED IN Michael E. Reindollar and Violet L. Reindollar, husband and wife, by Deed from Douglas S. Duvail and Lisa M. Duvail, husband and wife dated 9/8/89 recorded 9/12/89 in Deed Book 533 page 258.

SEIZED and taken into execution as the property of **Michael E. Reindollar and Violet L. Reindollar** and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
May 21, 1997.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 18, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/20, 27 & 7/4

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-265 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 25th day of July, 1997, 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 piece, parcel or tract of land situate, lying and being in Oxford Township, Adams County, Pennsylvania, more particularly bounded, limited and described as follows, to-wit:

BEGINNING for a point in the right-of-way line of Lingg Road, (TR-480) a fifty (50) foot wide street, at corner of Lot No. 544, on the hereinafter referred to plan of lots, thence along said lot North thirty-eight (38) degrees forty-nine (49) minutes fifty-eight (58) seconds East, one hundred nine and ninety-three hun-

dreths (109.93) feet to a point at Lot No. 551, thence along said Lot Nos. 551 and 550 South fifty-one (51) degrees ten (10) minutes two (02) seconds East, seventy-five (75.00) feet to a point at Lot No. 546, thence by said lot South thirty-eight (38) degrees forty-nine (49) minutes fifty-eight (58) seconds West, one hundred nine and eighty-six hundredths (109.86) feet to a point at the right-of-way line of Lingg Road, aforesaid, thence in and along said road North fifty-one (51) degrees thirteen (13) minutes nine (09) seconds West, seventy-five (75.00) feet to a point at Lot No. 544, the point and place of BEGINNING.

IT BEING the same tract of land which Oxford Estates, a General Partnership, by deed bearing even date herewith and about to be recorded in the Office of the Recorder of Deeds for Adams County, Pennsylvania, granted and conveyed unto Arthur R. Cockrell and Tabitha D. Cockrell, MORTGAGORS HEREIN.

BEING KNOWN AS 472 LINGG ROAD, NEW OXFORD, PA 17350.

TAX PARCEL NUMBER: #10-58

TITLE TO SAID PREMISES IS VESTED IN Arthur R. Cockrell and Tabitha D. Cockrell, his wife by Deed from Oxford Estates, a General Partnership by Mark Lee Kuhn, its attorney-in-fact specially made and constituted by Power of Attorney dated 10/9/85 and recorded in the Office of the Recorder of Deeds of Adams County, Pennsylvania in Record Book 410 page 761, dated 10/15/92 recorded 10/19/92 in Record Book 645 page 745.

SEIZED and taken into execution as the property of **Arthur R. Cockrell and Tabitha D. Cockrell** and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
May 21, 1997.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 18, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/20, 27 & 7/4

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

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#### NOTICE BY THE ADAMS COUNTY CLERK OF COURTS

NOTICE IS HEREBY GIVEN to all heirs, legatees and other persons concerned that the following accounts with statement of proposed distribution filed therewith have been filed in the Office of the Adams County Clerk of Courts and will be presented to the Court of Common Pleas of Adams County - Orphans' Court, Gettysburg, Pennsylvania, for confirmation of accounts and entering decrees of distribution on Monday, June 23, 1997, at 9:00 o'clock a.m.

**LONGANECKER**—Orphans' Court Action Number OC-158-96. The First and Final Account of Mary S. Longanecker, Executrix of the Estate of Reida Longanecker, deceased, late of Straban Township, Adams County, Pennsylvania.

**DAVIS**—Orphans' Court Action Number OC-128-95. The First and Final Account of Nita M. Cullison and Betty S. Stultz Mitchell, Executrices of the Estate of Annie M. Davis a/k/a Annie Mae Davis, deceased, late of Cumberland Township, Adams County, Pennsylvania.

**HOFF**—Orphans' Court Action Number OC-43-97. The First and Final Account of Adams County National Bank, Executor of the Last Will and Testament of Mildred Kathryn Hoff, deceased, late of the Borough of Littlestown, Adams County, Pennsylvania.

**STRONG**—Orphans' Court Action Number OC-47-97. The First and Final Account of Edwin G. Strong, Jr., Executor of the Estate of Catherine Baker Strong, deceased, late of Cumberland Township, Adams County, Pennsylvania.

**HAMM**—Orphans' Court Action Number OC-50-97. The First and Final Account of Larry R. Hamm, Administrator C.T.A. under the will of Lillian I. Hamm a/k/a Lillian N. Hamm, deceased, late of Oxford Township, Adams County, Pennsylvania.

**NEWMAN**—Orphans' Court Action Number OC-51-97. The First and Final Account of Linn E. Newman, Douglas J. Newman and Craig Howard Newman, Executors of the Last Will and Testament of Dorothy J. Newman, deceased, late of Fairfield Borough, Adams County, Pennsylvania.

**KOONTZ**—Orphans' Court Action Number OC-60-97. The First and Final Account of Charles E. Koontz, Jr. and Ester Amanda Hess a/k/a Esther Amanda Hess, Co-Executors under the Will of

Treva Amelia Koontz a/k/a Treva A. Koontz, deceased, late of Straban Township, Adams County, Pennsylvania.

**KUHN**—Orphans' Court Action Number OC-61-97. The First and Final Account of Dennis E. Kuhn, Executor of the Will of Robert G. Kuhn, deceased, late of the Borough of Gettysburg, Adams County, Pennsylvania.

**BYARD**—Orphans' Court Action Number OC-165-96. The First and Final Account of Kimberly Nolan now Kimberly Tabor, Executrix of the Will of Albert M. Byard, deceased, late of Hamiltonban Township, Adams County, Pennsylvania.

Peggy J. Breighner  
Clerk of Courts

6/13 & 20

#### SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-N-350 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 11th day of July, 1997, 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 Mt. Joy Township, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at a spike driven in the center of Township Road T-420 (which connects State Highways Nos. 140 and 116), at corner of lot of Harold K. Golden; thence in the center of said Township Road, North 28 degrees East, 150 feet to a spike in center of same; thence through the original tract of the Grantors herein, and through a pipe 16.5 feet from the beginning of this course, South 62 degrees East, 200 feet to a pipe; thence continuing through said original tract, South 28 degrees West 150 feet to a pipe; thence along the lot of Harold K. Golden aforesaid, North 62 degrees West, 200 feet, through a pipe 16.5 feet from the end of this course, to the above described place of BEGINNING.

CONTAINING 30,000 square feet.

The above description was taken from a draft of survey of Wilbur V. Redding, Registered Surveyor, dated October 15, 1969, for the use of Robert B. and Betty L. Brown.

BEING THE SAME PREMISES which Donald M. Steinour and Joyce L. Steinour, husband and wife, by their deed dated November 15, 1969, recorded Novem-

ber 15, 1969 in the Office of the Recorder of Deeds of Adams County, Pennsylvania, in Deed Book 279, page 634, granted and conveyed unto Robert B. Brown and Betty L. Brown, husband and wife, as tenants of an estate by the entireties, said Betty L. Brown having died January 13, 1996, whereas vesting sole title interest into Robert B. Brown, who is Grantor and Grantee herein making this tax exempt transfer.

Under and subject to any and all restrictions, objections, etc., as they appear of record.

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

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
May 19, 1997.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 4, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/13, 20 & 27

#### FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that an Application for Registration of Fictitious Name has been filed with the Department of State of the Commonwealth of Pennsylvania in Harrisburg, Pennsylvania, on May 20, 1997, pursuant to the Fictitious Name Act, Act No. 1982-295, setting forth that Talex, Inc. of 400 Main Street, York Springs, Adams County, Pennsylvania is the only entity engaged or interested in a business, the character of which is for the purpose of providing assisted residential living services and that the name, style and designation under which said business is and will be conducted is WHISPERING PINES ASSISTED LIVING, and the principal office or place of business is 400 Main Street, York Springs, Adams County, Pennsylvania 17372.

Miller & Shultis  
Solicitor

## BOROUGH OF BIGLERVILLE VS. STONER

1. Tapping fees can be charged when someone desires to connect to the water or sewer system and cannot be imposed for other purposes.

2. Tapping fees can be imposed when a property is being physically connected or fastened to the water or sewer system and there is no authority for imposing a tapping fee upon a property already connected to the system.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 81 of 1995, 95-N-424, BOROUGH OF BIGLERVILLE VS. DAVID STONER AND WENDY STONER.

Bernard A. Yannetti, Jr., Esq., for Plaintiff

Jeffery M. Cook, Esq., for Defendants

### MEMORANDUM OPINION

Kuhn, J., September 19, 1996.

On February 24, 1995, the Borough of Biglerville filed a municipal lien against real estate owned by Defendants, David and Wendy Stoner, in the amount of \$5,535.23 of which \$3,274.59 is designated as a sewer tapping fee and the balance of \$2,260.64 is a water tapping fee. Defendants filed an Affidavit of Defense and the matter was set for hearing on August 21, 1995. From that hearing, the following facts appeared.

The premises involved is located at 146 York Street in the Borough of Biglerville. Prior to December, 1956, the premises was separated into two units and occupied by two families. In December, 1956, the Denisar family purchased and moved into the home and used it as a single family unit up to November, 1992. In 1961, the Borough built a sewer system to which the premises was connected in 1962. There was only one connection and the Denisars were charged one connection fee of \$175.00. The premises was also serviced by a water system which the Borough acquired in 1981. There is only one connection to the water system for the premises.

On July 7, 1992, the Borough adopted Ordinance #2-92 which established fees for connection of an improved property to the Borough's water system. On August 4, 1992, the Borough adopted Ordinance #4-92 which established fees for connection to the Borough's sewer system.

Defendants purchased the premises in November, 1992, and after obtaining a conditional use permit from the Borough converted the premises to a two unit rental building. There is a single meter for measuring and billing water usage. Sewer usage is based upon double the water usage.

Defendants raise several defenses: 1) no work has been performed to impose a fee, 2) the ordinances are unconstitutional, and 3) there has

been no new connections since 1962. Defendants have not indicated in what manner the ordinances are unconstitutional. This defense is waived. *Curson v. West Conshohocken Municipal Authority*, 148 Pa. Comlth. Ct. 386, 611 A.2d 775 (1992) footnote no. 2. On the other issues, a heavy burden is placed on Defendants to show that Borough abused its discretion, or that the rate system established is arbitrary or unreasonable. *Id.* 611 A.2d at 777.

Both ordinances are expressly enacted pursuant to authority set forth in Act 203 of 1990, which, in pertinent part, is an amendment of the Municipality Authorities Act of 1945, 53 P.S. 301, et seq. Act 203 became effective February 17, 1991. Each ordinance imposes a "tapping fee" defined in the ordinance as

"the Fee authorized by Act 203 of 1990 and which is required to be paid upon the connection of any Improved Property to the [sewer/water] system owned by the Authority and operated by the Borough." (emphasis added).

Neither ordinance defines the term "connection" but it is clear from other language that it is intended to have a broader meaning than its common usage. A tapping fee is imposed upon properties after they physically connect with the system and also if the property

"is already connected to the [water/sewer] system, and where there is an expansion of, addition to or a change in the use of such Improved Property which results in an increase in the volume of water usage, an Additional Tapping Fee shall be paid for each additional EDU generated by such expansion, addition or change in use . . ." Section IV(c).

Both ordinances declare that each rental unit within an apartment building constitutes one EDU. Section V. The tapping fees imposed in this matter occurred because of the conversion of Stoners' premises to a two unit dwelling.

The general authority for setting fees under the Municipality Authorities Act is found in 53 P.S. §306 wherein the Legislature provided that,

B. Every Authority is hereby granted, and shall have and may exercise all powers necessary or convenient for the carrying out of the aforesaid purposes, including but without limiting the generality of the foregoing, the following rights and powers:

...

(h) To fix, alter, charge and collect rates and other charges in the area served by the facilities at reasonable and uniform rates to be determined exclu-



sively by it, for the purpose of providing for the payment of the expenses of the Authority, the construction, improvement, repair, maintenance and operation of its facilities . . .

However, with respect to the matter sub judice, there is specific language which must prevail over the aforementioned general language. See 1 Pa. C.S.A. §1933. One of the additional powers enumerated under §306(B) provides,

(t) To charge certain enumerated fees to property owners who desire to or are required to connect to the Authority's sewer or water system. Such fees shall be based upon the duly adopted fee schedule at the time of payment and shall be payable at the time of application for connection or at such other time as the property owner and the authority agree . . .

(1) The fees may include some or all of the following fee components, which shall be separately set forth in the appropriate resolution of the Authority establishing such fees:

(i) Connection fee. A fee which shall not exceed an amount based upon the actual cost of the connection of the property from the Authority's main to the property line or curb of the property so connected . . .

(ii) Customer facilities fee . . .

(iii) Tapping fee. A fee which shall not exceed an amount based upon some or all of the following fee components, which shall be separately set forth in the appropriate resolution of the Authority establishing the fee . . .

(A) Capacity part . . .

(B) Distribution or collection part . . .

(C) Special purpose part . . .

(D) Reimbursement component . . .

(E) Calculation of tapping fee component . . .

(3) No authority shall have the power to impose any connection fee, customer facilities fee, tapping fee or any similar fee except as provided specifically in this section.

(emphasis added).

It is quite clear that the Borough of Biglerville enacted its ordinances under the authority set forth in §306(B)(t). Not only did the ordinances refer to Act 203 of 1990, which for the first time added subsection (t) to the Municipality Authorities Act, but they also described the component parts which constituted the tapping fee. These component parts were described as the capacity part, collection part, and reimbursement part which mirrored the language of §306(B)(t).

It is clear from the above referenced subsections that tapping fees can be charged when someone desires to connect to the water or sewer system and that tapping fees cannot be imposed for other purposes. The words “connect” or “connection” are not defined in the statute, therefore, in accordance with the rules of statutory construction they must be accorded their common and approved usage. 1 Pa. C.S.A. §1903. “Connect” is defined as “to join or fasten together” and “connection” means “the act of connecting.” Webster’s New Collegiate Dictionary (1979). Thus, it appears that tapping fees can be imposed when a property is being physically connected or fastened to the water or sewer system. There appears to be no authority for imposing a tapping fee upon a property already connected to the system.

The Borough argues that it has the right under an ordinance to adopt its own definition for a term such as “tapping fee,” citing *City of Harrisburg v. Home Builders Association of Metropolitan Harrisburg*, 96 Pa. Comlth Ct. 549, 507 A.2d 1307 (1986). This Court has no argument with that basic concept, however, it is not applicable here. In *City of Harrisburg* the municipality had a right to impose an amusement tax and to define the term “amusement.” Here, unlike there, the enabling legislation has placed strict parameters on what constitutes a tapping fee and the Borough has no powers to impose or define a tapping fee except as set forth therein. Borough has attempted, without legal authority, to expand the statutory allowance for a tapping fee. Absent any statutory or caselaw authority to the contrary, this Court is compelled to conclude that the tapping fees imposed here are not proper under law.

We find Borough’s reliance upon *Curson v. West Conshohocken Municipal Authority*, supra., *Life Services, Inc. v. Chalfont-New Britain Township Joint Sewage Authority*, 107 Pa. Comlth. Ct. 484, 528 A.2d 1038 (1989) and *Milford-Trumbauersville Area Sewer Authority v. Lopez*, 56 Bucks 159 (1989), to be misplaced in that these cases involve ordinances and fees imposed prior to enactment of Act 203 of 1990.

By way of dicta, we note that when the Denisar family occupied the premises up to nine persons resided there. At the time of hearing there were a total of five persons occupying the two units. There has been no evidence presented that conversion of the residence into two

apartments had or will have any impact on the volume of water used or sewage discharged. If there is an increase in usage the Borough will certainly enjoy increased user fees.

Finally, the Court is not unsympathetic to the financial burdens placed upon a governmental unit or authority to operate a water and sewer system at a reasonable cost. We are not suggesting that what the Borough has done in this case is conceptually misguided. One can imagine a number of larger homes already connected to the water and sewer system being expanded into apartment buildings with higher occupancy than exists in this case and placing an unfair burden on the system. However, the Court cannot permit imposition of a lien where there appears to be no underlying authority to do so. The remedy seems to be with the Legislature.

Accordingly, the attached Order is entered.

#### ORDER OF COURT

AND NOW, this 19th day of September, 1996, in consideration of the reasons set forth in the attached Memorandum Opinion the municipal liens imposed in the above captioned matter are hereby vacated and discharged.

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#### FARMERS BANK AND TRUST COMPANY OF HANOVER VS. SHOWERS, ET. AL.

While on a motion for summary judgment under Pa.R.C.P. 1035.2 the moving party initially bears the burden of showing the absence of material issues of fact, a non-moving party may also bear some responsibility to demonstrate that such issues exist.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 96-S-430, FARMERS BANK AND TRUST COMPANY OF HANOVER, A DIVISION OF DAUPHIN DEPOSIT BANK AND TRUST COMPANY VS. DAVID L. SHOWERS AND BONNIE L. SHOWERS.

Scott A. Dietterick, Esq., for Plaintiff

Eugene R. Campbell, Esq. for Defendants

#### OPINION ON MOTION FOR SUMMARY JUDGMENT

Spicer, P.J., September 20, 1996.

Plaintiff began this action in mortgage foreclosure by filing a complaint on May 15, 1996. By their answer, filed June 10, 1996, defendants admitted all allegations except 6, 7 and 10. The answer to paragraph 7 was a qualified admission and the responses to paragraph 6 and 10 were:

After reasonable investigation, Defendant is without knowledge of the truth of this allegation. Proof thereof is demanded [sic] at trial. It is alleged by way of Answer that Defendants do not owe all the amount alleged in this paragraph.

Paragraph 6 in the complaint alleged default for reasons including failure to pay monthly installments of principal and interest. Seven averred a demand for payment and failure or refusal to comply. Paragraph 10 itemized the amounts due, which totaled \$57,783.83.

Plaintiff did not move for judgment on the pleadings under Pa.R.C.P. 1034 despite the legal insufficiency of the three answers. First Wisconsin Trust Co. v. Strausser, 439 Pa.Super. 192, 653 A.2d 688 (1995). Reliance on Rule 1029(c), which normally gives such allegations the effect of a denial is unjustified when "it is clear the pleader must know whether a particular allegation is true or false," 653 A.2d at 692. Instead, plaintiff moved for summary judgment under Rule 1035.2. The present version of rules relating to summary judgment makes it clear that the process is not passive, as it relates to the non moving party. Defendants are required to file a response, Rule 1035.3, which they did. The non-moving party may not rest upon the mere allegations or denials of the pleadings.

Although the moving party initially bears the burden of showing the absence of material issues of fact, a non-moving party may also bear some responsibility to demonstrate that such issues exist. Ertel v. Patriot-News Co., \_\_\_ Pa. \_\_\_, 674 A.2d 1038 (1996).

Plaintiff attached an affidavit to its motion for summary judgment. Susan Lisle, the bank's vice president, swore that business records and loan history documents indicated \$59,392.70 to be due as of June 30, 1996. Documents were attached to the affidavit.

While it is true, as defendants suggest, that many of the copies are illegible, enough is set forth to establish the sums due and owing. Defendants alleged that they had requested legible copies, which have not been provided. They have said nothing else, nor done anything to suggest a particular figure. Defendants have admitted owing some money, which places them in default. Alleging that business record copies are not legible will not save them from summary judgment.

#### ORDER

AND NOW, this 20th day of September, 1996, Summary Judgment is granted as requested in favor of Plaintiff and against Defendant.

## 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 EDGAR L. GROFT, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania

Executors: Ellen R. Brown, 401 Main St., Apt. 2, McSherrystown, PA 17344; Daniel G. Groft, 76 Thomas Drive, McSherrystown, PA 17344

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

## ESTATE OF JANET LOUISE MYERS, DEC'D

Late of 500 South Street, McSherrystown, Adams County, Pennsylvania

Executors: Ronald L. Myers; Christine L. Wilhelm, c/o R. L. Myers, 1340 Valley View Road, York, PA 17403-4265

## STATE OF COLUMBUS G. SCHNEIDER, DEC'D

Late of 254 South Jefferson Street, Hanover, Adams County, Pennsylvania

Executor: C. Michael Gladhill, 901 Fish & Game Road, Littlestown, PA 17340  
Attorney: Alison H. Peterson, Esquire, Peterson & Peterson, 515 Carlisle Street, Hanover, PA 17331

## ESTATE OF DOROTHY M. WHISLER, DEC'D

Late of Latimore Township, Adams County, Pennsylvania

Executor: Richard E. Whisler, 112 Baltimore Road, York Springs, PA 17372  
Attorney: John C. Zepp, III, Esquire, P. O. Box 204, 8438 Carlisle Pike, York Springs, PA 17372

## SECOND PUBLICATION

## ESTATE OF G. MICKLEY BENCHOFF, DEC'D

Late of Fairfield, Adams County, Pennsylvania

Executor: Emmert J. Rowland, c/o Keller, Keller and Frey, 100 Walnut Street, Waynesboro, PA 17268

Attorney: John W. Frey, Esquire, Keller, Keller and Frey, 100 Walnut Street, Waynesboro, PA 17268

## ESTATE OF J. GLENN GUISE, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Executor: D. Richard Guise, P. O. Box 3666, Gettysburg, PA 17325

Attorney: Neal S. West, Esquire, McNees, Wallace & Nurick, 100 Pine Street, P. O. Box 1166, Harrisburg, PA 17108

## ESTATE OF HERBERT L. MYERS, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrices: Rochelle N. Livingston, 280 Rt. 194 North, Abbottstown, PA 17301; Amie N. Bridge, R. 1, Box 220, Lyndhurst, VA 22952

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

## ESTATE OF WARREN A. SPONSELLER, DEC'D

Late of Liberty Township, Adams County, Pennsylvania

Administratrix: Mildred M. Sponseller, 314 E. Walnut St., Apt 2, Hanover, PA 17331

## ESTATE OF HUBERT R. WEAVER, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executors: Vera E. Slagle; Donna Weaver Vanderbosch; Robert Weaver

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

## ESTATE OF REBECCA M. WEAVER, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: William E. Meyers, 4668 Cottonwood Drive, Ann Arbor, MI 48108

Attorney: Steven M. Hovis, Stock and Leader, A Professional Corporation, 35 South Duke Street, P. O. Box 5167, York, PA 17405-5167

## THIRD PUBLICATION

## ESTATE OF HAROLD D. BROWN, DEC'D

Late of the Borough of Fairfield, Adams County, Pennsylvania

Executors: Thomas A. Brown, 105 Longview Boulevard, Gettysburg, PA 17325; Ronald L. Brown, 10926 Middlegate Drive, Fairfax, VA 22032

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

## ESTATE OF GLADYS E. CLEVELAND, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Executors: Doris F. Trussell, 26 Naomi Avenue, P. O. Box 126, Landisville, PA 17538; Clyde K. Cleveland, 2065 Dalton Avenue, Deltona, FL 32725

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

## ESTATE OF GEORGE P. SLICK, DEC'D

Late of Germany Township, Adams County, Pennsylvania

Executrix: M. Joann Welk, 325 Lumber Street, Littlestown, PA 17340

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

## ESTATE OF MINNIE I. STOOPS, DEC'D

Late of Straban Township, Adams County, Pennsylvania

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

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

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-1 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 8th day of August, 1997, 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 lot of ground along the public road leading from the Hanover-Carlisle State Highway to the Hanover-Abbottstown State Highway, in Berwick Township, Adams County, Pennsylvania, which is bounded and described as follows:

BEGINNING at an iron stake on the North side of the public road aforesaid at land now or formerly of George Wolf; thence by the same North 29 degrees West 49.5 feet to an iron pin at lands now or formerly of Emory Laughman; thence by the same North 50 degrees 27 minutes East 244 feet to an iron pin near a walnut tree at the other land now or formerly of Charles H. Bittinger; thence by the same South 37 degrees East 67 feet to an iron pin at the public road aforesaid; thence by the same South 54 degrees 48 minutes West 260 feet to an iron pin, the place of BEGINNING.

EXCEPTING AND RESERVING, however unto C. H. Bittinger, his heirs and assigns, the perpetual right of way and privilege irrevocably, in, over and under the lot hereby conveyed for the purpose of maintaining, operating and replacing the water pipe line which now exists and extends upon the lot of ground hereby conveyed.

This conveyance does not include or intend to include any water right or privilege to obtain water from the pipe line of C. H. Bittinger, as now existing over the lot of ground hereby conveyed.

IT BEING the same tract of land which Earl D. Anthony and Joyce M. Anthony, husband and wife, by their deed dated August 6, 1982, recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania in Book 364, at page 38, granted and conveyed unto Frank W. Beadle, Jr. and Kathi L. Beadle, husband and wife.

Tax Map L-12, Parcel 57

SEIZED and taken into execution as the property of **Frank W. Beadle, Jr. and Kathi L. Beadle** and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
April 10, 1997.

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 September 1, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/20, 27 & 7/4

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-247 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 8th day of August, 1997, 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 Butler Township, Adams County, Pennsylvania more particularly bounded and described as follows:

BEGINNING at a point in the center of State Highway Route No. 34 leading from Gettysburg to Carlisle; thence running in the center of same, North one-half (1/2) degree East, one hundred and eight (108) feet to another point in the center of said highway; thence running by land now or formerly of Ray Edwin Unger, North eighty-eight and one-fourth (88-1/4) degrees East, three hundred and eighty-two (382) feet to a stake and stones; thence running by land now or formerly of Sara Rife, South three-fourths (3/4) degree West, one hundred and twenty (120) feet to a stake and stones; thence running by land now or formerly of Frank Thomas, South eighty-nine and one-half (89-1/2) degrees West, three hundred and seventy-eight (378) feet to a point in said highway, the place of beginning. CONTAINING 1 Acre and 20 square feet.

PARCEL 70 MAP F10

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

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
June 3, 1997.

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 September 1, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/20, 27 & 7/4

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-101 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 8th day of August, 1997, 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 in Hamilton Township, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING at an iron pin on the north side of the State Highway leading from Fairfield to Greenstone at line of land now or formerly of Susan J. Bupp and land now or formerly of Edward Richardson and extending thence along said Richardson land, North 82 degrees 30 minutes East 256 feet to a point in center of said highway at land now or formerly of Clarence Wright; thence along said Wright land, South 20 degrees East 120 feet through a pine tree and across Tom's Creek to a stone at said land now or formerly of Susan J. Bupp; thence along said Bupp land, South 73 degrees West 278 feet to stones; thence North 8 degrees 30 minutes West 160 feet re-crossing Tom's Creek and through another pine tree to the place of BEGINNING.

CONTAINING 136 square rods, more or less.

BEING THE SAME PREMISE WHICH became vested in John E. Myers, Sr. and Wanda J. Myers by virtue of deed dated July 2, 1993 and recorded July 6, 1993 in Adams County Records Book 748, page 109.

TO BE SOLD AS THE PROPERTY OF JOHN E. MYERS, SR. AND WANDA J. MYERS UNDER ADAMS COUNTY JUDGMENT NO. 97-S-101.

TAX PARCEL: 18-B16-79

SEIZED and taken into execution as the property of **John E. Myers, Sr. and Wanda J. Myers** and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
June 6, 1997.

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 September 1, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/20, 27 & 7/4

# Adams County Legal Journal

Vol. 39

June 27, 1997

No. 5, pp.25-30

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-259 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 25th day of July, 1997, 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 in the Borough of McSherrystown, Adams County, Pennsylvania, bounded and described as follows, to wit:

BEGINNING for a point on the cul-de-sac of Cricket Lane at Lot No. 20-A; thence along and with said Lot No. 20-A, North seventy-eight (78) degrees, forty-nine (49) minutes, fifty-three (53) seconds West one hundred nineteen and seventeen hundredths (119.17) feet to a point at lands now or formerly of L.O.O.M.; thence along said last mentioned lands, ~~North twenty-two (22) degrees, fifty-nine (59) minutes, zero (0) seconds West, .wenty and eleven hundredths (20.11) feet, more or less to a point, at lands now or formerly of Urban F. Staub; thence along said last mentioned lands North fifty-seven (57) degrees, forty-six (46) minutes, zero (0) seconds East sixty (60) feet to a point at Lot No. 21-A; thence along and with said Lot No. 21-A south fifty-five (55) degrees, fifty-four (54) minutes, forty (40) seconds East ninety-eight and six tenths (98.6) feet to a point at the above mentioned cul-de-sac by a curve to the left, the long chord of which is nineteen and eighty-seven hundredths (19.87) feet, South twenty-two (22) degrees, thirty-seven (37) minutes, forty-two (42) seconds West an arc distance of twenty (20) feet to the point and place of beginning.~~

CONTAINING 4,990 square feet and being known as Lot No. 20-B, as per survey of Donald E. Worley, Professional Land Surveyor, bearing date of May 8, 1985 and recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania in Plan Book 41 page 103 and being known as Delone Development.

UNDER AND SUBJECT nevertheless, to the covenants, restrictions and conditions as set forth in the Declaration of Protective Covenants and Restrictions dated March 18, 1985 and recorded in the Adams County Recorder of Deeds Office in Record Book 399 page 779 and the Amendment to Declaration of Covenants and Restrictions dated May 14,

1985 and recorded in the Adams County Recorder of Deeds Office in Record Book 400 page 428.

TAX PARCEL NUMBER: #6-117

PREMISES: 603 CRICKET LANE, MCSHERRYSTOWN, PA 17344

TITLE TO SAID PREMISES IS VESTED IN Michael E. Reindollar and Violet L. Reindollar, husband and wife, by Deed from Douglas S. Duvail and Lisa M. Duvail, husband and wife dated 9/8/89 recorded 9/12/89 in Deed Book 533 page 258.

SEIZED and taken into execution as the property of **Michael E. Reindollar and Violet L. Reindollar** and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
May 21, 1997.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 18, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/20, 27 & 7/4

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-265 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 25th day of July, 1997, 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 piece, parcel or tract of land situate, lying and being in Oxford Township, Adams County, Pennsylvania, more particularly bounded, limited and described as follows, to-wit:

BEGINNING for a point in the right-of-way line of Lingg Road, (TR-480) a fifty (50) foot wide street, at corner of Lot No. 544, on the hereinafter referred to plan of lots, thence along said lot North thirty-eight (38) degrees forty-nine (49) minutes fifty-eight (58) seconds East, one hundred nine and ninety-three hun-

dredths (109.93) feet to a point at Lot No. 551, thence along said Lot Nos. 551 and 550 South fifty-one (51) degrees ten (10) minutes two (02) seconds East, seventy-five (75.00) feet to a point at Lot No. 546, thence by said lot South thirty-eight (38) degrees forty-nine (49) minutes fifty-eight (58) seconds West, one hundred nine and eighty-six hundredths (109.86) feet to a point at the right-of-way line of Lingg Road, aforesaid, thence in and along said road North fifty-one (51) degrees thirteen (13) minutes nine (09) seconds West, seventy-five (75.00) feet to a point at Lot No. 544, the point and place of BEGINNING.

IT BEING the same tract of land which Oxford Estates, a General Partnership, by deed bearing even date herewith and about to be recorded in the Office of the Recorder of Deeds for Adams County, Pennsylvania, granted and conveyed unto Arthur R. Cockrell and Tabitha D. Cockrell, MORTGAGORS HEREIN.

BEING KNOWN AS 472 LINGG ROAD, NEW OXFORD, PA 17350.

TAX PARCEL NUMBER: #10-/58

TITLE TO SAID PREMISES IS VESTED IN Arthur R. Cockrell and Tabitha D. Cockrell, his wife by Deed from Oxford Estates, a General Partnership by Mark Lee Kuhn, its attorney-in-fact specially made and constituted by Power of Attorney dated 10/9/85 and recorded in the Office of the Recorder of Deeds of Adams County, Pennsylvania in Record Book 410 page 761, dated 10/15/92 recorded 10/19/92 in Record Book 645 page 745.

SEIZED and taken into execution as the property of **Arthur R. Cockrell and Tabitha D. Cockrell** and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
May 21, 1997.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 18, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/20, 27 & 7/4

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

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## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-133 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 15th day of August, 1997, 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, together with the improvements thereon, situate in the Borough of Littlestown, Adams County, Pennsylvania, as shown on the subdivision plan for "Lakeview Village-Phase Two," prepared by Donald E. Worley, Registered Surveyor, of Worley Surveying, dated April 21, 1989, revised September 11, 1989, recorded in the Office of the Recorder of Deeds of Adams County, Pennsylvania, in Plat Book 54, page 65 (2 pages), more particularly bounded and described as follows:

LOT NO. 20: BEGINNING at a steel pin on the southern right-of-way line of Starlite Drive at corner of Lot No. 21 on the plan of lots hereinabove identified; thence by said Lot No. 21, South forty-four (44) degrees twenty-two (22) minutes thirty-two (32) seconds East, one hundred and zero hundredths (100.00) feet to a steel pin at corner of Lot No. 11 of Lakeview Village-Phase One; thence by said Lot No. 11, South forty-five (45) degrees thirty-seven (37) minutes twenty-eight (28) seconds West, thirty-six and zero hundredths (36.00) feet to a steel pin at corner of Lot No. 19; thence by said Lot No. 19, North Forty-four (44) degrees twenty-two (22) minutes thirty-two (32) seconds West, one hundred and zero hundredths (100.00) feet to a steel pin on the southern right-of-way line of Starlite Drive; thence by said southern right-of-way line of Starlite Drive, North forty-five (45) degrees thirty-seven (37) minutes twenty-eight (28) seconds East, thirty-six and zero hundredths (36.00) feet to the above described place of BEGINNING. CONTAINING 3,600 square feet.

SUBJECT TO CONDITIONS AND RESTRICTIONS, easements and rights of way and/or set back lines filed with Plan in Book 54, Page 65 and Declaration of Restrictions recorded in Book 559, Page 653.

BEING THE SAME PREMISES WHICH Willow Oak Builders, Inc. by deed dated 9/28/94 and recorded 9/30/94 in Adams County Record Book 945 Page 83 granted and conveyed unto Ronnie R. Spencer.

TO BE SOLD AS THE PROPERTY OF RONNIE R. SPENCER UNDER ADAMS COUNTY JUDGMENT NO. 97-S-133.

PARCEL: 27-12-73

SEIZED and taken into execution as the property of **Ronnie R. Spencer** and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
June 11, 1997.

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 September 8, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/27, 7/4 & 11

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 96-N-335 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 15th day of August, 1997, 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 lot of ground situate on West Middle Street in the Borough of Gettysburg, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING for a corner on said West Middle Street at property formerly of Elizabeth Johns; thence along property formerly of Elizabeth Johns, North one hundred eighty (180) feet, more or less, to a public alley; thence along said alley, East thirty (30) feet, more or less, to property now or formerly of John Irwin; thence along said property now or formerly of John Irwin, South one hundred eighty (180) feet, more or less, to West Middle Street aforesaid; thence along said West Middle Street, West thirty (30) feet to the place of BEGINNING.

BEING THE SAME LOT of land whi. Lida E. Carbaugh, widow, of the Borough of Gettysburg, Adams County, Pennsylvania, by his Deed dated June 7, 1974, recorded June 10, 1974, in the Office of the Recorder of Deeds of Adams County, Pennsylvania, in Deed Book 313, Page 934, granted and conveyed unto Joseph G. Patti, single man, of the Borough of Gettysburg, Adams County, Pennsylvania.

Under and subject to any and all restrictions, objections, etc., as they appear of record.

SEIZED and taken into execution as the property of **Joseph J. Patti, a/k/a/ Joseph G. Patti** and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
June 12, 1997.

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 September 8, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/27, 7/4 & 11



SEILS VS. KNOUSE FOODS COOPERATIVE, INC. ET AL.

1. The Solid Waste Management Act is designed to give DER authority to obtain relief from violations of its provisions and private citizens are not afforded the right to use specific provisions to institute a cause of action to obtain injunctive relief or monetary damages in their own right.
2. The Solid Waste Management Act specifically permits private citizens to pursue common law actions when they believe they have been harmed by the handling of hazardous wastes in their environment.
3. Mere silence in the absence of a duty to speak, does not constitute fraud.
4. Lack of direct privity does not eliminate a cause of action for fraud.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 94-S-35, CARL A. SEILS AND DEBORAH R. SEILS VS. GETTYSBURG AREA INDUSTRIAL DEVELOPMENT AUTHORITY, KNOUSE FOODS COOPERATIVE, INC., M.F.P. ENTERPRISES, INC. AND PET, INCORPORATED.

Gregory Barton Abein, Esq., for Plaintiffs  
Kenneth L. Joel, Esq., for Defendants

AMENDED OPINION ON PRELIMINARY OBJECTIONS  
FILED BY DEFENDANT, PET, INC., TO PLAINTIFFS'  
THIRD AMENDED COMPLAINT

Kuhn, J., September 24, 1996.

The Court has been asked to reconsider its Order and Opinion entered on May 16, 1996. It is clear that the undersigned did not fully comprehend one aspect of the legal theory being advanced in Plaintiffs' Count V<sup>1</sup> labeled "Action in Assumpsit." To the extent this Opinion differs from the discussion entered on May 16, 1996, this Amended Opinion shall prevail, otherwise that Opinion is incorporated herein.

In preliminary objections to Plaintiffs' Third Amended Complaint Pet argued that Paragraphs 19, 20, 22, 27, 32, 45, 47, 48, 49, 50, 51 and 52 should be stricken as impertinent. These paragraphs essentially aver that Pet failed to disclose the presence of the disposal site in its sale to subsequent owners including on a deed of disclosure. Furthermore, Plaintiffs alleged that by such a failure Pet impliedly warranted that no waste products were present or at least it had no knowledge of them and that such implied representation

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<sup>1</sup> In the third amended complaint there are two counts labeled Count IV. To avoid confusion we have referred to the second Count IV as Count V.

was material and relied upon by Plaintiffs. In the earlier Opinion this Court ruled that §512(b) of the HSCA, 35 P.S. §6020.512(b) imposed no duty of disclosure upon Pet because that provision was enacted after Pet transferred the real estate.

We failed, however, to address whether Pet was burdened by a duty of disclosure by the Solid Waste Management Act (SWMA), 35 P.S. §6018.101, et seq., which, in turn, would support a claim of implied warranty. Section 405 of SWMA provides, §6018.405. Conveyance of disposal site property.

After the effective date of this act, the grantor in every deed for the conveyance of property on which hazardous waste is presently being disposed, or has ever been disposed by the grantor or to the grantor's actual knowledge shall include in his property description section of such deed an acknowledgment of such hazardous waste disposal . . .

The effective date of this provision was September 5, 1980. Pet is alleged to have deposited hazardous waste on the real estate throughout the 1970s and early 1980s until they sold the property on July 24, 1981, subsequent to enactment of §405 of SWMA.

We are aware of no case which discusses the impact of §405 and whether violation of that section can be used to create a duty which is enforceable in an action at common law. We do know, however, that the SWMA is designed to give the DER authority to obtain relief from violations of its provisions and that private citizens are not afforded the right to use specific provisions to institute a cause of action to obtain injunctive relief or monetary damages in their own right. *Fleck v. Timmons*, 374 Pa. Super. 417, 424-5, 543 A.2d 148, 152 (1988). In that case the Court ruled that the legal presumption found in §611 of the SWMA could not be used in legal actions instituted by private citizens. The Court did note, however, that private citizens may pursue common law actions when they believe they have been harmed by the handling of hazardous wastes in their environment. *Id.*

One year after *Fleck* was decided Judge Nealon ruled in *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413 (M.D. Pa. 1989) that violations of the SWMA could not be the basis for a private cause of action for negligence per se. He stated that,

With regard to the . . . SWMA, Pennsylvania's General Assembly obviously intended to limit a private

citizen's right to enforce the terms of the Act by vesting enforcement authority in the DER. At the same time, however, the General Assembly expressly provided that nothing contained in the Acts "shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under common law or statutory law, criminal or civil . . ." See 35 P.S. §6018.607 . . . *Fleck v. Timmons*, 374 Pa. Super. at 424-425, 543 A.2d at 152. Thus, the legislature obviously had the rights of private citizens in mind when it drafted the Acts but elected to protect those rights by way of existing common law remedies, such as actions for negligence and nuisance. Far from acting out of deference and respect to the legislature, . . . the court would be going against the expressed intentions of the legislature by permitting plaintiffs' negligence per se claim to proceed.

718 F. Supp. at 428.

These cases leave this Court with the very uncomfortable feeling that even a violation of §405 of the SWMA cannot be used to circumvent the legislative intent that the SWMA was designed to protect the public at large and that DER has the role of enforcing its provisions. Private citizens may intervene in actions instituted by DER if they have been adversely affected, 35 P.S. §6018.615, but it does not appear that violations of duties created under the SWMA can form the basis of private causes of action. Thus, if DER had pursued violations of the SWMA on Plaintiffs' property perhaps Plaintiffs' could have intervened for, among other reasons, violations of §405. The frustration for Plaintiffs lies in the remedies available under the SWMA as opposed to possible remedies available, such as diminution in property value, in private causes of action.

Absent the availability of §405 to bootstrap Plaintiffs' claim for breach of implied warranty that cause of action must be dismissed. It might have suffered a fatal ending regardless of the decision just made as to §405. Pennsylvania law has limited breach of implied warranty in real estate matters to the implied warranty of habitability. In turn, the implied warranty of habitability has been restricted to builder-vendors, *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972); and residential leases, *Pugh v. Holmes*, 486 Pa. 272, 405

A.2d 897 (1979). If the law in this area is to be extended it should be done by the Legislature or our appellate courts.

Pet also raises a statute of limitations issue which we need not address because of the disposition just entered.

Plaintiffs also argue that Count V is intended to be an action for fraudulent concealment (despite being labeled an *assumpsit* action.) In paragraph 52 Plaintiffs allege that Pet's failure to disclose the presence of the waste constituted a fraudulent misrepresentation upon which Plaintiffs relied in purchasing the premises.

Fraud is proven by establishing the following elements: 1) a false representation of an existing fact, 2) a fraudulent utterance thereof, 3) the maker's intent that the recipient be induced thereby to act, 4) the recipient's justifiable reliance on the misrepresentation and 5) damage to the recipient proximately caused thereby. *Sevin v. Kelshaw*, 417 Pa. Super. 1, 9, 611 A.2d 1232, 1236 (1992). Intentional concealment calculated to deceive would likewise constitute fraud if it is material. *Smith v. Renaut*, 387 Pa. Super. 299, 564 A.2d 188 (1989). Mere silence, in the absence of a duty to speak, does not constitute fraud. *Id.*

Concealment cases seem to fall into two categories. The first involves cases where sellers or their agents are liable to a purchaser for failing to disclose a serious and latent condition which involves an unreasonable risk to people on the land such as *Quashnock v. Frost*, 299 Pa. Super. 9, 445 A.2d 121 (1982) (termite damage) and *Harper v. Anderson*, 424 Pa. Super. 161, 622 A.2d 319 (1993), *Alloc. den.* 634 A.2d 222 (1993) (malfunctioning sewer system.) The second category imposes liability upon a seller or agent for failure to disclose material information. See *Roberts v. Estate of Barbagallo*, 366 Pa. Super. 559, 531 A.2d 1125 (1987). The latter theory relies on §550, Restatement (Second) of Torts which provides,

§550. Liability For Fraudulent Concealment

One party to a transaction who by concealment or other action intentionally prevents the other party from acquiring material information is subject to the same liability to the other for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discerning.

We do not hesitate in concluding that the unknown deposit of hazardous waste imposes a serious and latent condition which

involves an unreasonable risk to people on the land. For example, the General Assembly has determined,

. . . that exposure to hazardous materials has the potential for causing undesirable health and environmental effects and poses a threat to the health, safety and welfare of the citizens of this Commonwealth . . .

35 P.S. §6022.102(a).

In addition, and again without hesitation, we conclude that intentional concealment of a hazardous waste deposit could constitute a material aspect of a real estate transaction not only because of the potential for harm but also because of the potential responsibility for clean up costs.

Pet attempts to distinguish the above cited cases because they did not involve the sale of unimproved land as was the sale between Pet and its successor in title. We respectfully reject that argument. The focus of fraudulent concealment cases dealing with a serious and latent condition should not be upon whether the land was improved or unimproved but rather whether an unreasonable risk of harm to people exists.

Here, of course, Pet did not sell to Plaintiffs. However, lack of direct privity does not eliminate the cause of action. As stated in *Woodward v. Dietrich*, 378 Pa. Super. 111, 548 A.2d 301 (1988),

When fraud creates or conceals a latent defect, transfer of the defective chattel or realty to an innocent third party should not absolve the wrongdoer from liability for damages caused by that undiscovered fraud.

378 Pa. Super. at 141, 548 A.2d at 316.

The theory seems to suggest that the wrongdoer should be held liable to innocent third parties dealing with the same real estate who the wrongdoer should reasonably expect to be harmed by the concealment. Plaintiffs' complaint would satisfy that theory.

Finally, Pet contends that Plaintiffs' action for fraud is barred by the applicable statute of limitations. We agree. The statute of limitations for fraud is 2 years. 42 Pa. C.S.A. §5524(7). Plaintiffs filed the Third Amended Complaint raising the issue of fraud on June 20, 1995. Without discussing the applicability of the discovery rule Plaintiffs admittedly knew of the deposits at least by Summer, 1992. Clearly the period of limitations had run by the time the claim was filed.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 24th day of September, 1996, in consideration of Preliminary Objections filed by Defendant, Pet, Inc. to Plaintiffs' Third Amended Complaint, for the reasons set forth in the attached Opinion as well as the Opinion dated May 16, 1996, it is ordered that:

1. Count I alleging a common law cause of action for nuisance per se is dismissed.
2. Paragraphs 19, 20, 22, 27, 32, 45, 47, 48, 49, 50, 51 and 52 are not stricken as impertinent, however, Count V, labeled as Count IV, Action is Assumpsit, is dismissed.
3. Paragraphs 22C and 22D as well as Plaintiffs' claim for diminution in property value and for compensatory damage are stricken.

## FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that on March 19, 1997, a certificate will be filed under the Fictitious Name Act approved December 21, 1988, P.L. 1444, in the Office of the Secretary of the Commonwealth of Pennsylvania, setting forth that LBL, a partnership, 30 Ram Drive, Hanover, PA 17331, is/are the only person(s) owning or interested in a business, the character of which is making of lawns and lawn maintenance and that the name, style and designation under which said business is and will be conducted is JAY'S LAWN & LANDSCAPING and the location where said business is and will be located is 30 Ram Drive, Hanover, PA 17331.

6/27

## FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that pursuant to the provisions of Section 311 of the Act of December 16, 1982, P.L. 1309, No. 295, the Fictitious Names Act (54 Pa. C.S.A. §311) there was filed in the office of the Secretary of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania on June 11, 1997, an Application for the registration of the fictitious name OSTEOPOROSIS DIAGNOSTIC CENTER OF GETTYSBURG, the address of the principal office or place of business of the business to be carried on, under or through said name being 360 York Street, Gettysburg, PA 17325. The names and addresses of the persons who are parties to the registration are: Joseph E. Tripi, M.D., 555 Pumping Station Road, Gettysburg, PA 17325; Lon D. Woods, M.D., 350 Ridgewood Drive, Gettysburg, PA 17325; and Ivan L. Miller, M.D., 11 Round Top Lane, Gettysburg, PA 17325.

Bigham & Puhl  
Attorneys

6/27

## INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Non-profit Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on or about the 22nd day of May, 1997, for the purpose of obtaining a Certificate of Incorporation of a proposed nonprofit corporation to be organized under the provisions of the Nonprofit Corporation Law of 1988. The name of the proposed nonprofit corporation is GETTYSBURG COLLEGE TITLE HOLDING COMPANY.

The purpose for which it will be organized is: To hold title to property, to collect income therefrom, and to turn over the entire amount of net rents, less expenses, to Gettysburg College.

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

6/27

## INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Pennsylvania Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, for the purposes of obtaining a Certificate of Incorporation of a proposed corporation to be organized under the provisions of the Pennsylvania Nonprofit Corporation Law of 1988, approved December 21, 1988, P.L. 144, No. 177, as amended. The name of the corporation is FREEDOM JOURNEY SERVICE DOGS, INC. 6/27

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-N-350 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 11th day of July, 1997, 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 Mt. Joy Township, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at a spike driven in the center of Township Road T-420 (which connects State Highways Nos. 140 and 116), at corner of lot of Harold K. Golden; thence in the center of said Township Road, North 28 degrees East, 150 feet to a spike in center of same; thence through the original tract of the Grantors herein, and through a pipe 16.5 feet from the beginning of this course, South 62 degrees East, 200 feet to a pipe; thence continuing through said original tract, South 28 degrees West 150 feet to a pipe; thence along the lot of Harold K. Golden aforesaid, North 62 degrees West, 200 feet, through a pipe 16.5 feet from the end of this course, to the above described place of BEGINNING.

CONTAINING 30,000 square feet.

The above description was taken from a draft of survey of Wilbur V. Redding, Registered Surveyor, dated October 15, 1969, for the use of Robert B. and Betty L. Brown.

BEING THE SAME PREMISES which Donald M. Steinour and Joyce L. Steinour, husband and wife, by their deed dated November 15, 1969, recorded November 15, 1969 in the Office of the Recorder of Deeds of Adams County, Pennsylvania, in Deed Book 279, page 634, granted and conveyed unto Robert B. Brown and Betty L. Brown, husband and wife, as tenants of an estate by the entireties, said Betty L. Brown having died January 13, 1996, whereas vesting sole title interest into Robert B. Brown, who is Grantor and Grantee herein making this tax exempt transfer.

Under and subject to any and all restrictions, objections, etc., as they appear of record.

SEIZED and taken into execution as the property of Robert B. Brown and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
May 19, 1997.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on August 4, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/13, 20 &amp; 27





## 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, 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 MARY ELIZABETH SMITH, DEC'D

Late of 235 Pegram St., Cumberland Township, Gettysburg, Adams County, Pennsylvania

Executor: Frederic C. Smith, 339 Buchanan Valley Road, Ortanna, PA 17353

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

## ESTATE OF EUGENE V. SNYDER, DEC'D

Late of Germany Township, Adams County, Pennsylvania

Executor: Stephen D. Snyder, 902 Long Lane, Gettysburg, PA 17325

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

## SECOND PUBLICATION

ESTATE OF EDGAR L. GROFT, DEC'D  
Late of the Borough of McSherrystown, Adams County, Pennsylvania

Executors: Ellen R. Brown, 401 Main St., Apt. 2, McSherrystown, PA 17344; Daniel G. Groft, 76 Thomas Drive, McSherrystown, PA 17344

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

## ESTATE OF JANET LOUISE MYERS, DEC'D

Late of 500 South Street, McSherrystown, Adams County, Pennsylvania

Executors: Ronald L. Myers; Christine L. Willheim, c/o R. L. Myers, 1340 Valley View Road, York, PA 17403-4265

## ESTATE OF COLUMBUS G. SCHNEIDER, DEC'D

Late of 254 South Jefferson Street, Hanover, Adams County, Pennsylvania

Executor: C. Michael Gladhill, 901 Fish & Game Road, Littlestown, PA 17340

Attorney: Alison H. Peterson, Esquire, Peterson & Peterson, 515 Carlisle Street, Hanover, PA 17331

## ESTATE OF DOROTHY M. WHISLER, DEC'D

Late of Latimore Township, Adams County, Pennsylvania

Executor: Richard E. Whisler, 112 Baltimore Road, York Springs, PA 17372

Attorney: John C. Zepp, III, Esquire, P. O. Box 204, 8438 Carlisle Pike, York Springs, PA 17372

## THIRD PUBLICATION

## ESTATE OF G. MICKLEY BENCHOFF, DEC'D

Late of Fairfield, Adams County, Pennsylvania

Executor: Emmert J. Rowland, c/o Keller, Keller and Frey, 100 Walnut Street, Waynesboro, PA 17268

Attorney: John W. Frey, Esquire, Keller, Keller and Frey, 100 Walnut Street, Waynesboro, PA 17268

ESTATE OF J. GLENN GUISE, DEC'D  
Late of the Borough of Gettysburg, Adams County, Pennsylvania

Executor: D. Richard Guise, P. O. Box 3666, Gettysburg, PA 17325

Attorney: Neal S. West, Esquire, McNeese, Wallace & Nurick, 100 Pine Street, P. O. Box 1166, Harrisburg, PA 17108

## ESTATE OF HERBERT L. MYERS, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrices: Rochelle N. Livingston, 280 Rt. 194 North, Abbottstown, PA 17301; Amie N. Bridge, R. 1, Box 220, Lyndhurst, VA 22952

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

## ESTATE OF WARREN A. SPONSELLER, DEC'D

Late of Liberty Township, Adams County, Pennsylvania

Administratrix: Mildred M. Sponseller, 314 E. Walnut St., Apt 2, Hanover, PA 17331

## ESTATE OF HUBERT R. WEAVER, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executors: Vera E. Slagle; Donna Weaver Vanderbosch; Robert Weaver

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

## ESTATE OF REBECCA M. WEAVER, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: William E. Meyers, 4668 Cottonwood Drive, Ann Arbor, MI 48108

Attorney: Steven M. Hovis, Stock and Leader, A Professional Corporation, 35 South Duke Street, P. O. Box 5167, York, PA 17405-5167

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-1 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 8th day of August, 1997, 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 lot of ground along the public road leading from the Hanover-Carlisle State Highway to the Hanover-Abbottstown State Highway, in Berwick Township, Adams County, Pennsylvania, which is bounded and described as follows:

BEGINNING at an iron stake on the North side of the public road aforesaid at land now or formerly of George Wolf; thence by the same North 29 degrees West 49.5 feet to an iron pin at lands now or formerly of Emory Laughman; thence by the same North 50 degrees 27 minutes East 244 feet to an iron pin near a walnut tree at the other land now or formerly of Charles H. Bittinger; thence by the same South 37 degrees East 67 feet to an iron pin at the public road aforesaid; thence by the same South 54 degrees 48 minutes West 260 feet to an iron pin, the place of BEGINNING.

EXCEPTING AND RESERVING, however unto C. H. Bittinger, his heirs and assigns, the perpetual right of way and privilege irrevocably, in, over and under the lot hereby conveyed for the purpose of maintaining, operating and replacing the water pipe line which now exists and extends upon the lot of ground hereby conveyed.

This conveyance does not include or intend to include any water right or privilege to obtain water from the pipe line of C. H. Bittinger, as now existing over the lot of ground hereby conveyed.

IT BEING the same tract of land which Earl D. Anthony and Joyce M. Anthony, husband and wife, by their deed dated August 6, 1982, recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania in Book 364, at page 38, granted and conveyed unto Frank W. Beadle, Jr. and Kathi L. Beadle, husband and wife.

Tax Map L-12, Parcel 57

SEIZED and taken into execution as the property of **Frank W. Beadle, Jr. and Kathi L. Beadle** and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
April 10, 1997.

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 September 1, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/20, 27 & 7/4

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-247 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 8th day of August, 1997, 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 Butler Township, Adams County, Pennsylvania more particularly bounded and described as follows:

BEGINNING at a point in the center of State Highway Route No. 34 leading from Gettysburg to Carlisle; thence running in the center of same, North one-half (1/2) degree East, one hundred and eight (108) feet to another point in the center of said highway; thence running by land now or formerly of Ray Edwin Unger, North eighty-eight and one-fourth (88-1/4) degrees East, three hundred and eighty-two (382) feet to a stake and stones; thence running by land now or formerly of Sara Rife, South three-fourths (3/4) degree West, one hundred and twenty (120) feet to a stake and stones; thence running by land now or formerly of Frank Thomas, South eighty-nine and one-half (89-1/2) degrees West, three hundred and seventy-eight (378) feet to a point in said highway, the place of beginning. CONTAINING 1 Acre and 20 square feet.

PARCEL 70 MAP F10

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

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
June 3, 1997.

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 September 1, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/20, 27 & 7/4

## SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 97-S-101 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 8th day of August, 1997, 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 ate in Hamiltonban Township, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING at an iron pin on the north side of the State Highway leading from Fairfield to Greenstone at line of land now or formerly of Susan J. Bupp and land now or formerly of Edward Richardson and extending thence along said Richardson land, North 82 degrees 30 minutes East 256 feet to a point in center of said highway at land now or formerly of Clarence Wright; thence along said Wright land, South 20 degrees East 120 feet through a pine tree and across Tom's Creek to a stone at said land now or formerly of Susan J. Bupp; thence along said Bupp land, South 73 degrees West 278 feet to stones; thence North 8 degrees 30 minutes West 160 feet recrossing Tom's Creek and through another pine tree to the place of BEGINNING.

CONTAINING 136 square rods, more or less.

BEING THE SAME PREMIS WHICH became vested in John E. Myers, Sr. and Wanda J. Myers by virtue of deed dated July 2, 1993 and recorded July 6, 1993 in Adams County Records Book 748, page 109.

TO BE SOLD AS THE PROPERTY OF JOHN E. MYERS, SR. AND WANDA J. MYERS UNDER ADAMS COUNTY JUDGMENT NO. 97-S-101.

TAX PARCEL: 18-B16-79

SEIZED and taken into execution as the property of **John E. Myers, Sr. and Wanda J. Myers** and to be sold by me

Bernard V. Miller  
Sheriff

Sheriff's Office, Gettysburg, PA  
June 6, 1997.

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 September 1, 1997, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

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

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

6/20, 27 & 7/4