

Adams County Legal Journal

Vol. 38

June 7, 1996

No. 2, pp. 7-12

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 94-N-321 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 28th day of June, 1996, 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 Menallen Township, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING at a point in the centerline of Pennsylvania Route 34, Biglerville-Carlisle Road, at lands of Gettysburg Industrial Development Authority; THENCE by said lands and through a chisel mark in center of concrete headwall set back 14.80 feet on the line, South 64 Degrees 41 Minutes 10 seconds East, 308.90 feet to an existing iron pin;

HENCE continuing by said lands South 48 Degrees 7 Minutes East, 46.99 feet to a point at Lot Number 2 on the hereinafter recited draft; THENCE by said lot South 22 Degrees 2 Minutes 50 Seconds West, 506.02 feet to a point at lands of Billie W. and Sandra M. Haymaker; THENCE by said lands and through an existing steel stake in tree root set back 137.61 feet from the end of this course and through an existing iron pin set back

27.26 feet from the end of this course, North 62 Degrees 28 Minutes 45 Seconds West, 402.46 feet to a point in the centerline of said Pennsylvania Route 34; THENCE in said Pennsylvania Route 34 North 27 Degrees 31 Minutes 15 Seconds East, 503.47 feet to the place of BEGINNING.

CONTAINING 4.421 acres, more or less.

BEING Lot Number 1 on a draft of survey dated August 5, 1985, prepared by Boyer Surveys, and recorded in Adams County Plat Book 42 at page 78.

BEING the same premises which Harris F. Gustafson and Betty M. Gustafson granted and conveyed unto Thomas B. Birks and Anita L. Birks by Deed dated September 26, 1986 and recorded in the office of the Recorder of Deeds for ADAMS County on September 26, 1986 in Deed Book 437, Page 217.

SEIZED and taken into execution as the property of **Thomas B. Birks and Anita L. Birks**, and to be sold by me
Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
May 7, 1996.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on July 22, 1996,

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.

5/24, 31 & 6/7

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 May 22, 1996.

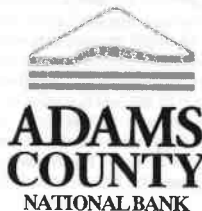
The name of the corporation is LUCK O' THE IRISH, LTD.

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

Robert E. Campbell
Campbell, White & George
122 Baltimore Street
Gettysburg, PA 17325
Attorneys

6/7

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



Member FDIC

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 RAINBOW GUTTER. The address of the principal office or place of business of the business to be carried on under or through the fictitious name is Orrtanna, Adams County, Pennsylvania 17353. The name and address of the person who is party to the registration is Randall and Rebecca Fetter, of 2360 Old Rt. 30, Orrtanna, Adams County, Pennsylvania 17353. 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 16, 1996.

6/7

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-181 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 12th day of July, 1996, 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 on the North side of the New Chester-Hunterstown State Highway in Straban Township, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at a point in the center of the said State Highway at lands now or formerly of Jacob H. Rau and Alda C. Rau; thence by the same and through a stake on the North side of said State Highway, North 33 1/2 degrees West, 200 feet to a stake at lands now or formerly of Jacob H. Rau and Alda C. Rau; thence by the same, North 45 1/2 degrees East, 143 feet to a stake; thence South 33 1/2 degrees East, 200 feet through a stake on the North side of said State Highway to a point in the center of said State Highway; thence by the same, South 45 1/2 degrees West, 143 feet to a point, the place of BEGINNING.

CONTAINING 103 perches, more or less.

HAVING thereon erected a single family dwelling known as 2150 Hunterstown-Hampton Road, New Oxford.

BEING the same premises which Thomas D. Weaver by his deed dated June

18, 1990, recorded in the Recorder of Deeds of Adams County, Pennsylvania, in Record Book 559, Page 351, granted and conveyed unto Joseph M. Jenkins, the Defendant Mortgagor herein.

SEIZED and taken into execution as the property of **Joseph M. Jenkins** and to be sold by me

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
May 16, 1996.

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 5, 1996, 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.

5/31, 6/7 & 14

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 96-S-190 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 12th day of July, 1996, 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, lying and being in the Borough of New Oxford, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING for a point on the right-of-way line of Oxwood Circle at Lot No. 4 as shown on the hereinafter described Subdivision Plan; thence along said right-of-way line, North sixty-six (66) degrees nineteen (19) minutes twelve (12) seconds East, forty-two and seventy-one hundredths (42.71) feet to a point at Lot No. 6; thence along said Lot No. 6 North twenty-three (23) degrees forty (40) minutes forty-eight (48) seconds West, one hundred thirty-seven and sixty-five hundredths (137.65) feet to a point at lands now or formerly of George S. Kuhn; thence along said lands now or formerly of George S. Kuhn South seventy-six (76) degrees fifty (50) minutes forty-four

(44) seconds West forty-five and seventy-seven hundredths (45.77) feet to a point at Lot No. 4 aforesaid; thence along Lot No. 4, South twenty-three (23) degrees forty (40) minutes forty-eight (48) seconds East, one hundred forty-five and ninety-nine hundredths (145.99) feet to a point on the right-of-way line of Oxwood Circle, the point and place of BEGINNING.

The above description was taken from a plan of lots labeled "Oxford Commons" dated November 1990, and recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania, in Adams County Plat Book 58 at page 41 and identified as Lot No. 5 thereon.

UNDER AND SUBJECT NEVERTHELESS, to the Declaration of Protective Covenants, Reservations and Restrictions for Oxford Commons recorded in Adams County Record Book 646 at page 1039.

IT BEING the same premises which I^r John Spalding, by Phyllis Spalding, h. attorney-in-fact, and Phyllis Spalding, husband and wife, by their Deed dated May 28, 1993 and recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania, in Record Book 777-67, granted and conveyed unto Daniel P. Ridge and Michele C. Ridge.

SEIZED and taken into execution as the property of **Daniel P. Ridge and Michele C. Ridge, a/k/a Michele C. Topper** and to be sold by me

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
May 17, 1996.

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 5, 1996, 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.

5/31, 6/7 & 14

IN RE: APPEAL FROM DECISION OF GETTYSBURG
ZONING HEARING BOARD ON APPLICATION OF
C. E. WILLIAMS SONS, INC.

1. Where the Court takes no additional evidence in Zoning Appeals, its scope of review is limited to determining whether the Zoning Hearing Board committed an error of law or manifestly abused its discretion.
2. Zoning law provides that a use which is illegal does not form the basis for the establishment of a valid non-conforming use when zoning is adopted or changed.
3. The Courts must afford permitted uses the broadest interpretation so that a landowner may have the benefit of the least restrictive use and enjoyment of his land.
4. Construction of a statute by those charged with its execution and application is entitled to great weight and should not be disregarded or overturned except for cogent reasons.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 93-S-276 IN RE: APPEAL OF JAMES D. AND PATRICIA M. FRAZEE AND STANLEY A. DEITZ FROM THE DECISION OF THE GETTYSBURG BOROUGH ZONING HEARING BOARD ON THE APPLICATION OF C. E. WILLIAMS SONS, INC.

Henry O. Heiser, III, Esq., for Appellants
Robert E. Campbell, Esq., for Appellee
Catherine J. Gault, Esq., Solicitor for Zoning Hearing Board

OPINION ON ZONING APPEAL

Kuhn, J., November 3, 1995.

Appellants, James D. and Patricia M. Frazee, and Stanley A. Deitz, appeal from a decision of the Gettysburg Zoning Hearing Board regarding an application filed by C. E. Williams & Sons, Inc. Utilizing the Findings of Fact entered by the Board and the record presented, the following background is relevant.

In 1968, Clyde Williams purchased three tracts of land fronting on Fifth Street in the Borough of Gettysburg from McDermitt Concrete. The property, which consisted of a building used for office, garage and shop purposes and vacant areas used to park trucks and other equipment, was leased to the Applicant. Fifth Street lies on the western side of the property and runs in a north-south direction. To the north of the property lies an alley and then the rear of several homes including those of the Appellants. South of the property lies an unopened street and land owned by the Gettysburg Municipal Authority where trucks, pipe and stone are stored. Applicant's business provides paving, excavating, heating oil delivery and water delivery services to persons and businesses in Gettysburg and the surrounding area.

In 1975, the Borough adopted its Zoning Ordinance. At that time, Applicant's parcels were zoned Neighborhood-Commercial and a vacant parcel referred to herein as the "Sachs Lot" which lies east of and adjacent to Applicant's three tracts was zoned R-2 Residential. In 1982, Applicant expressed interest in purchasing the Sach's Lot and upon inquiry was informed by the then Code Enforcement Officer, John Lawver, that the parking of vehicles and equipment on the Sachs Lot would be no problem but that no buildings could be constructed thereon in connection with the business. Members of the Williams family then bought the Sachs Lot and leased it to Applicant. Thereafter the Sachs Lot was covered with a stone base and used for the parking of vehicles, equipment and supplies associated with the business.

In 1985, Borough, on its own initiative, rezoned the Sachs Lot from R-2 to Neighborhood-Commercial. Several Borough officials involved in the rezoning said it was done to accommodate several properties in that area of the borough including Applicant's use of the Sachs Lot. Within this NC-District there is located an automotive body shop, an automotive supply store and an accounting firm office, among other uses.

Over the years, the volume of Applicant's business has increased which resulted in an increase in employees and vehicles. The corresponding use of the Sachs Lot has adversely affected the residential use of Applicant's properties because of noise, dust, diesel odors and aesthetics.

Apparently, a complaint was received by the present Code Enforcement Officer who on November 17, 1992, issued a cease and desist order regarding Applicant's use of the Sachs Lot. This was the first action ever taken by the Borough regarding Applicant's use of the Sachs Lot. Applicant filed an appeal with the Zoning Hearing Board. A hearing was held on January 25, 1993, and a decision rendered on March 10, 1993, holding that Applicant's use of the lot was a matter of right within the NC-District. This appeal followed.

Where, as here, the court takes no additional evidence in zoning appeals its scope of review is limited to determining whether the zoning hearing board committed an error of law or manifestly abused its discretion. *Borough of Fleetwood v. Zoning Hearing Board*, 538 Pa. 536, 540, 649 A.2d 651, 653 (1994). The sole issue here is whether the Board committed an error of law in deciding that Applicant's use of the Sachs Lot was a use by right in an NC-District. Whether a use falls within a given category specified in a zoning ordinance is a question of

law. *Crary Homes v. DeFrees*, 16 Pa. Comlth. Ct. 181, 184, 329 A.2d 874, 876 (1974).

The Gettysburg Zoning Ordinance states in §801 that the purpose of the NC District is “to provide for the needs of local, retail business establishments serving the nearby community. . .” The Ordinance further describes in §802 the uses permitted by right as including: “1. Retail stores and businesses serving the everyday needs of the community.” Also included are restaurants, professional and business offices, personal service shops, financial institutions, general service and repair shops, municipal or governmental buildings and uses as well as accessory buildings and uses customarily incidental to the above uses when located on the same lot.

Without question the use of the original three tracts constitutes a valid nonconforming use. The same cannot be said of the use of the Sachs Lot. A review of the permitted uses in an R-2 District as set forth in Ordinance §501 et seq. makes clear that Applicants’ business activities and use of the Sachs Lot would not be permitted. Whenever the Borough rezoned the lot to include it in the NC-District, Applicant’s use did not become a valid nonconforming use which would entitle Applicant to a continued use on that basis. Zoning law provides that a use which is illegal does not form the basis for the establishment of a valid nonconforming use when zoning is adopted or changed. *Lincoln v. Zoning Board of Adjustment*, 108 Pa. Comlth. Ct. 586, 590, 529 A.2d 1228, 1230 (1987); *Hauser v. Borough of Catasauqua Zoning Hearing Board*, 20 Pa. Comlth. Ct. 313, 317, 341 A.2d 566, 569 (1975). That is not to say, however, that once a use is illegal it is always illegal. It is possible for a subsequent ordinance to make an illegal use legal and to protect it from being illegal under later zoning amendments if the use conforms to the subsequent ordinance. *DiSalvo v. Hempfield Township Zoning Hearing Board*, 118 Pa. Comlth. Ct. 441, 446-7, 545 A.2d 459, 462 (1988). The question, therefore, returns to whether Applicant’s use is a permitted use in an NC-District.

As a further aside we note that Applicant also requested a variance, special exception, and/or a variance by estoppel¹ by the Board. Those issues were not addressed by the Board, based upon the disposition made, and therefore, are also not before the Court.

¹Elements necessary to establish a variance by estoppel have been set forth in numerous cases. See *Greene Townes Financial Corp. v. Zoning Hearing Board of Lower Merion Township*, 157 Pa. Comlth. Ct. 454, 630 A.2d 492 (1993); *Cappoli v. Ward*, 89 Pa. Comlth. Ct. 621, 493 A.2d 791 (1985).

The issue now before the Court is one of statutory construction and our function is to determine the intent of the Borough in enacting §801 and §802 and whether Applicant's use fits the parameters of those sections. *Crary Home v. Defrees*, supra, 16 Pa. Comlth. Ct. at 184, 329 A.2d at 876. *Crary Home* noted that the structure of an ordinance itself provides the best guide to its interpretation and in that regard if a given use is not listed as a permitted use in one zoning classification but is expressly permitted in a lower classification, it is a fair inference that the use was considered and intentionally excluded from the higher classification. 529 A.2d at 877. This, however, is not the only principle applicable in the interpretation of a zoning ordinance. It has also been said that,

Although the Statutory Construction Act, 1 Pa. C.S. §1501-1991, does not apply expressly to zoning . . . ordinances, the principles contained in that act are followed in construing a local ordinance . . . Words and phrases of local ordinances shall be construed according to the rules of grammar and according to their common and approved usage. 1 Pa. C.S. §1903(a) . . . Zoning ordinances should be construed in a sensible manner . . . In interpreting provisions of a zoning ordinance, undefined terms must be given their plain, ordinary meaning, 1 Pa. C.S. §1903(a), and any doubt must be resolved in favor of the landowner and the least restrictive use of the land . . .

Of primary concern in interpreting a zoning ordinance is the legislative intent of the governing body which enacted the ordinance. See 1 Pa. C.S. §1921 (a) . . . The letter of the ordinance is not to be disregarded in the pretext of pursuing its spirit . . . A particular section of a zoning . . . code must 'be read as an integral part of the whole and not as a separate portion with an independent meaning.' 1 Pa. C.S. §1921 (a) . . . Finally, in ascertaining the intent of the governing body in enacting an ordinance, it is presumed that the governing body did not intend a result that is absurd or unreasonable. See 1 Pa. C.S. §1922(1) . . .

Tobin v. Radnor Township Board of Commissioners, 142 Pa. Comlth. Ct. 567, 578-9, 597 A.2d 1258, 1264 (1991) (citations omitted).

With these principles in mind we note that there are several considerations which weigh in favor of including and excluding Applicant's use as a NC-District permitted use. However, the Court is inclined to lean in favor of inclusion. First, the Zoning Ordinance in question, as it existed in 1985, designated eight zoning districts which from least restrictive to most restrictive include 1) Manufacturing, 2) General Commercial, 3) Tourist Commercial, 4) Neighborhood Commercial, 5) Institutional, 6) Old Town, 7) R-2 Residential, and 8) R-1 Residential. Appellants contend that Applicant's use is specifically permitted only in the Manufacturing District where construction or contractor's establishment" and "trucking establishment" are permitted uses. None of these terms are defined in the Ordinance. While some aspects of Applicant's business may involve elements traditionally associated with construction (i.e., excavating) and whereas the business certainly owns and uses trucks, the type of business involved here does not fit neatly into either one of these categories. In other words, Applicant's use is not "expressly" listed in the Manufacturing District. Nevertheless, if there is no permitted use in a more restrictive district which includes Applicant's use, Appellants' argument regarding the Manufacturing District might be persuasive. The Court concludes, however, that such a use is authorized in a more restrictive district.

Second, Applicant and the Board both took the position that Applicant's use involves a retail business serving the everyday needs of the community. Again, terms are not defined. One can utilize a dictionary for guidance in giving a word its ordinary meaning although such definitions are not controlling. *Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board*, 139 Pa. Comlth. Ct. 206, 212, 590 A.2d 65, 68 (1991). Webster's New Collegiate Dictionary (1979) defines "retail" as the sale of commodities or goods in small quantities directly to the ultimate consumer but differs from "wholesale." "Everyday" is defined by the same source as "encountered or used or typically; ordinary." "Community" is likewise not defined but could refer to the borough or the surrounding area but, certainly is not limited to any particular portion of the community, such as residential use. A "community" consists of all its parts. Thus, it would appear that the wording of §802.1 covers a retail business which provides relatively small quantities of goods or services which are typically or ordinarily needed by the community at large. We believe that "retail" describes the type of business and not the size of that business. Heating

oil, excavating and paving services can be said to constitute some of the ordinary needs of the community.

As argued by Appellants, the interpretation given by Applicant and the Board to this type of "retail business" is rather expansive and perhaps not sensible. However, the courts must afford permitted uses the broadest interpretation so that a landowner may have the benefit of the least restrictive use and enjoyment of his land. Appeal of Heller, 101 Pa. Comlth. Ct. 564, 567, 516 A.2d 859, 861 (1986).

Third, the fact that the original parcels were placed in the NC-District, that the Borough rezoned the Sachs Lot to accommodate its actual use, that the Borough raised no issue with Applicant's use for 10 years and that Borough officials, the Planning Commission and the Board all believed the use comported with the NC-District is significant. It is said that Reconstruction of a statute by those charged with its execution and application is entitled to great weight and should not be disregarded or overturned except for cogent reasons." Willits Woods Associates v. Zoning Board of Adjustment, 138 Pa. Comlth. Ct. 62, 67, 587 A.2d 827, 829 (1990). The legislative intent of the Borough in rezoning the Sachs Lot to accommodate Applicant's use has not been contradicted. Legislative intent is, of course, the primary concern. To disregard and overturn that conscious effort would create an absurd and unreasonable result.

It is not the Court's role to substitute its judgment for the legislative body nor is the Court unsympathetic to the Appellants' interests. However, there are competing interests which are just as valuable. We cannot say with certainty that the Board made an error of law.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 3rd day of November, 1995, the zoning appeal taken in this matter is denied.

ESTATE NOTICES

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

FIRST PUBLICATION

ESTATE OF DOROTHEA B. HOFFMAN, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Administrator, C.T.A.: David J. Hoffman, 60 Twin Lakes Drive, Gettysburg, PA 17325
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF PAULINE E. KNOX, a/k/a PAULINE LOUGH KNOX, DEC'D

Late of New Oxford, Adams County, Pennsylvania
 Executor: Suzanne E. Eckert, College Avenue Extended, New Oxford, PA 17350
 Attorney: Larry W. Wolf, Esquire, 215 Broadway, Hanover, PA 17331

ESTATE OF GERTRUDE M. STEELE, DEC'D

Late of Mt. Joy Township, Adams County, Pennsylvania
 Executrix: Mildred Fisher, 203 Longstreet Dr., Gettysburg, PA 17325

SECOND PUBLICATION

ESTATE OF CLYDE G. BOWERS, a/k/a C. G. BOWERS, DEC'D

Late of Butler Township, Adams County, Pennsylvania
 Executrices: Doris Jean Guise, 495 Plainview Road, Gettysburg, PA 17325; Betty-Lou N. Dove, 92 Blackberry School Road, York Springs, PA 17372
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF MERCEDES T. DEATRICK, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Executor: Egberto F. Morales, Calle 6, S6 #13, Urb. El Escorial, Rio Piedras, PR 00926
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF EUGENE W. ROUZER, DEC'D

Late of the Borough of Biglerville, Adams County, Pennsylvania
 Executrices: Sharon E. Messimer, 27 W. Siddonsburg Rd., Dillsburg, PA 17019; Beverly D. Slonaker, 153 N. Main St., Biglerville, PA 17307
 Attorney: Bigham & Raffensperger, Attorneys at Law, 16 Lincoln Sq., Gettysburg, PA 17325

ESTATE OF ERMA C. STRALEY, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Executrices: Alma M. Straley, P. O. Box 2, 6216 Baltimore Pike, Littlestown, PA 17340; Amy Kaye Straley, P. O. Box 2, 6216 Baltimore Pike, Littlestown, PA 17340
 Attorney: Buleit, Schultz & Thrasher, 16 Lincoln Sq., Gettysburg, PA 17325

ESTATE OF C. FRANCES WEISHAAR, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania
 Co-Executrices: Barbara A. Kane, 2180 Old Route 30, Orrtanna, PA 17353; Judith L. Masemer, 1596 Hanover Road, Gettysburg, PA 17325
 Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

ESTATE OF ELMER J. YODER, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Executrix: Barbara Y. Spicer, 685 Blackhorse Tavern Road, Gettysburg, PA 17325
 Attorney: Bruce R. Spicer, Esq., McNees, Wallace and Nurick, P. O. Box 1166, 100 Pine St., Harrisburg, PA 17108-1166

THIRD PUBLICATION

ESTATE OF ANNA MARY BOYER, DEC'D

Late of the Borough of East Berlin, Adams County, Pennsylvania
 Co-Executors: Stanley R. Boyer, R. D. #1, Box 239, Thomasville, PA 17364; James W. Boyer, R.D. #1, Box 1105, East Berlin, PA 17316
 Attorney: Sharon E. Myers, Esq., Countess Gilbert Andrews, 29 North Duke Street, York, PA 17401

ESTATE OF ELLA B. BRANDT, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania
 Executor: Joseph Edward Walter III, 324 South Street, McSherrystown, PA 17344
 Attorney: James T. Yingst, Esq., Rudisill, Guthrie, Nonemaker, Guthrie & Yingst, 40 York Street, Hanover, PA 17331-3192

ESTATE OF ADA F. NOEL, DEC'D

Late of Straban Township, Adams County, Pennsylvania
 Executor: Richard L. Noel, c/o Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF ROBERTA K. PETTYJOHN, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania
 Executrix: Dawn F. Fields, Box 264, McVeytown, PA 17051
 Attorney: Robert E. Campbell, Esq., Campbell, White & George, 122 Baltimore Street, Gettysburg, PA 17325

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the "Fictitious Name Act," 54 Pa. C.S.A. § 301 et seq., that an Application to conduct business in Adams County, Pennsylvania, under the assumed or fictitious name, style or designation of RACEDAY NASCAR STORE was filed in the Office of the Secretary of the Commonwealth of Pennsylvania, in Harrisburg, Pennsylvania, on May 10, 1996. The business is located at 4110 Oxford Road, York Springs, PA. The names and addresses of the persons who are parties to the registration are Dorothy E. Plosay and Anthony J. Rodilosso, 4410 Oxford Road, York Springs, PA.

Robert E. Campbell
 Campbell, White & George
 122 Baltimore Street
 Gettysburg, PA 17325
 Attorneys for Applicant

6/7

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 17, 1996.

The name of the corporation is KASPER DEVELOPMENT CORPORATION.

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

Robert E. Campbell
 Campbell, White & George
 122 Baltimore Street
 Gettysburg, PA 17325
 Attorneys

6/7

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-936 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 28th day of June, 1996, 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 Carroll Valley (formerly Liberty Township), Adams County, Pennsylvania, being Lot No. 153 in Section P, bounded and described as follows:

BEGINNING at a point in the center of Ringneck Trail at Lot No. 152; thence by said lot South 33 degrees 57 minutes 21 seconds West, 225 feet to Lot No. 149; thence by said lot North 56 degrees 2 minutes 30 seconds West, 100 feet to Lot No. 154; thence by said lot North 33 degrees 57 minutes 21 seconds East, 225 feet to a point in the center of said Ringneck Trail; thence in said Ringneck Trail South 56 degrees 2 minutes 39 seconds East 100 feet to the place of BEGINNING.

The above description was taken from a plan of lots labeled "Section P, Charnita" dated August 11, 1969, prepared by Evans, Hagan & Holdefer, and recorded in Adams County Plat Book 1 at Page 52.

HET a dwelling known as 20 Ringneck Trail, Fairfield, PA 17320.

Parcel No.: 34-164.

SEIZED and taken into execution as the property of **Paul Douglas Cantrell**, and to be sold by me

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
May 8, 1996.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on July 22, 1996, 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.

5/24, 31 & 6/7

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-692 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 28th day of June, 1996, 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 on the Western side of Park Avenue in the Borough of Littlestown, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING at the outside Western curb line of Park Avenue at other lands now or formerly of Israel H. Crouse; THENCE along such lands in a Westerly direction 50-1/2 feet to land now or formerly of Mrs. Wilson H. Bish (formerly of Charles Keefer); THENCE along said last mentioned land in a Northerly direction 50-1/2 feet to a 16 foot alley; THENCE along such 16 foot alley in an Easterly direction 50-1/2 feet to a point along the outside Western curb line of Park Avenue; THENCE along same in a Southerly direction 50-1/2 feet to the place of BEGINNING.

BEING the same premises which Khan C. Dang and Cuc Thi Nguyen, husband and wife granted and conveyed unto Jason D. Keller and Lisa A. Keller by Deed dated December 7th, 1990 and recorded in the Office of the Recorder of Deeds for ADAMS County on December 10th, 1990 in Deed Book 575, Page 400.

SEIZED and taken into execution as the property of **Jason D. Keller and Lisa A. Keller**, and to be sold by me

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
May 8, 1996.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on July 22, 1996, 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.

5/24, 31 & 6/7

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 17, 1996, at 9:00 a.m.

SHETRON—Orphans' Court Action Number OC-50-96. The First and Final Account of Robert G. Tate, Executor of the Estate of Ruth Tate Shetron, deceased, late of Huntingdon Township, Adams County, Pennsylvania.

SHEALER—Orphans' Court Action Number OC-48-96. The First and Final Account of Elizabeth Talpas Shealer, Administratrix of the Estate of Thomas E. Shealer, deceased, late of Straban Township, Adams County, Pennsylvania.

CROUSE—Orphans' Court Action Number OC-60-96. The First and Final Account of Elizabeth C. Ross, Executrix of the Last Will and Testament of Alma Weikert Crouse, deceased, late of the Borough of Littlestown, Adams County, Pennsylvania.

DEARDORFF—Orphans' Court Action Number OC-61-96. The First and Final Account of Orville B. Orner and Joanne D. Daykin, Executors of the Will of Nettie O. Deardorff, deceased, late of the Borough of Gettysburg, Adams County, Pennsylvania.

MYERS—Orphans' Court Action Number OC-62-96. The First and Final Account of Angela Hoffnagle, Paula Myers and Louise M. Orndorff, Executrices of the Last Will and Testament of Bertha M. Myers, deceased, late of the Borough of Bonneauville, Adams County, Pennsylvania.

WHITE—Orphans' Court Action Number OC-63-96. The First and Final Account of Robin L. Romero, Administrator of the Estate of Richard W. White, deceased, late of Butler Township, Adams County, Pennsylvania.

OVERBAUGH—Orphans' Court Action Number OC-65-96. The First and Final Account of Steven A. Bankert, Executor of the Estate of Mary K. Overbaugh, deceased, late of Straba Township, Adams County, Pennsylvania.

Peggy J. Breighner
Clerk of Courts

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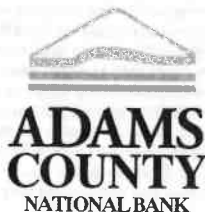
TRUTH FREEWILL BAPTIST CHURCH

VS.

BERWICK TOWNSHIP, ET AL.

Commitment:

The philosophy upon which
Adams County National Bank is
founded and upon which we are planning
for your future financial needs today.



Member FDIC

ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

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LEGAL NOTICE

NOTICE IS HEREBY GIVEN that Thomas R. Campbell intends to apply in open Court for admission to the Bar of the Court of Common Pleas of Adams County, Pennsylvania, on the 22nd day of July, 1996, and that he has established a full time legal practice in Adams County within the guidelines established by the Supreme Court of Pennsylvania.

Campbell, White & George
122 Baltimore Street
Gettysburg, PA 17325

6/14 & 21 & 28

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-181 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 12th day of July, 1996, 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 on the North side of the New Chester-Hunterstown State Highway in Straban Township, Adams County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at a point in the center of the said State Highway at lands now or formerly of Jacob H. Rau and Alda C. Rau; thence by the same and through a stake on the North side of said State Highway, North 33 1/2 degrees West, 200 feet to a stake at lands now or formerly of Jacob H. Rau and Alda C. Rau; thence by the same, North 45 1/2 degrees East, 143 feet to a stake; thence South 33 1/2 degrees East, 200 feet through a stake on the North side of said State Highway to a point in the center of said State Highway; thence by the same, South 45 1/2 degrees West, 143 feet to a point, the place of BEGINNING.

CONTAINING 103 perches, more or less.

HAVING thereon erected a single family dwelling known as 2150 Hunterstown-Hampton Road, New Oxford.

BEING the same premises which Thomas D. Weaver by his deed dated June

18, 1990, recorded in the Recorder of Deeds of Adams County, Pennsylvania, in Record Book 559, Page 351, granted and conveyed unto Joseph M. Jenkins, the Defendant Mortgagee herein.

SEIZED and taken into execution as the property of **Joseph M. Jenkins** and to be sold by me

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
May 16, 1996.

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 5, 1996, 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.

5/31, 6/7 & 14

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 96-S-190 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 12th day of July, 1996, 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, lying and being in the Borough of New Oxford, Adams County, Pennsylvania, bounded and described as follows:

BEGINNING for a point on the right-of-way line of Oxwood Circle at Lot No. 4 as shown on the hereinafter described Sub-division Plan; thence along said right-of-way line, North sixty-six (66) degrees nineteen (19) minutes twelve (12) seconds East, forty-two and seventy-one hundredths (42.71) feet to a point at Lot No. 6; thence along said Lot No. 6 North twenty-three (23) degrees forty (40) minutes forty-eight (48) seconds West, one hundred thirty-seven and sixty-five hundredths (137.65) feet to a point at lands now or formerly of George S. Kuhn; thence along said lands now or formerly of George S. Kuhn South seventy-six (76) degrees fifty (50) minutes forty-four

(44) seconds West forty-five and seventy-seven hundredths (45.77) feet to a point at Lot No. 4 aforesaid; thence along Lot No. 4, South twenty-three (23) degrees forty (40) minutes forty-eight (48) seconds East, one hundred forty-five and ninety-nine hundredths (145.99) feet to a point on the right-of-way line of Oxwood Circle, the point and place of BEGINNING.

The above description was taken from a plan of lots labeled "Oxford Commons" dated November 1990, and recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania, in Adams County Plat Book 58 at page 41 and identified as Lot No. 5 thereon.

UNDER AND SUBJECT NEVERTHELESS, to the Declaration of Protective Covenants, Reservations and Restrictions for Oxford Commons recorded in Adams County Record Book 646 at page 1039.

IT BEING the same premises which John Spalding, by Phyllis Spalding, his attorney-in-fact, and Phyllis Spalding, husband and wife, by their Deed dated May 28, 1993 and recorded in the Office of the Recorder of Deeds in and for Adams County, Pennsylvania, in Record Book 777-67, granted and conveyed unto Daniel P. Ridge and Michele C. Ridge.

SEIZED and taken into execution as the property of **Daniel P. Ridge and Michele C. Ridge, a/k/a Michele C. Topper** and to be sold by me

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
May 17, 1996.

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 5, 1996, 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.

5/31, 6/7 & 14

TRUTH FREEWILL BAPTIST CHURCH VS.
BERWICK TOWNSHIP, ET AL.

1. In Pennsylvania, the Statute of Limitations defense is procedural rather than substantive.
2. In Pennsylvania, the law of the forum determines the time in which a cause of action shall be commenced.
3. The general rule is that the statute of limitations begins to run as soon as the right to institute and maintain the suit arises.
4. Mandamus may compel a municipality to enforce its ordinances but it will not lie to compel that same municipality to perform an act which is discretionary.
5. Whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interest, the fiction of the separate corporate identity may be disregarded.
6. Although there is no definitive test for piercing the corporate veil, the Court will look at whether corporate formalities have been observed, whether corporate records have been kept, whether there are officers and directors who function other than the dominant shareholders and whether the dominant shareholder has used assets of the corporation as if they were his own.
7. The burden placed upon one who contends that a street is a public street is to show acceptance of dedication by clear and convincing evidence but where lots are sold with reference to a plan showing streets, the implication is that the streets have been dedicated for public use.
8. A defense of laches requires (1) a delay arising from the other party's delay or lack of due diligence, and (2) resulting prejudice or harm.
9. The existence of laches is a factual issue which must be decided on a case by case basis.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 89-S-455, TRUTH FREEWILL BAPTIST CHURCH VS. BERWICK TOWNSHIP, MACE, INC., CECIL F. ARTRIP AND MARY ANN ARTRIP, HIS WIFE, INDIVIDUALLY.

Larry Wolfe, Esq., for Plaintiff

Thomas E. Miller, Esq., for Defendants Mace and Artrips

Joanne Steinke Faul, Esq., for Berwick Township

OPINION ON MOTION FOR SUMMARY JUDGMENT
FILED BY DEFENDANTS, MACE, INC. AND ARTRIPS;
ON PLAINTIFF'S MOTION TO AMEND COMPLAINT;
AND MOTION FOR SUMMARY JUDGMENT FILED BY
DEFENDANT, BERWICK TOWNSHIP

Kuhn, J., November 17, 1995.

This matter commenced when Plaintiff, Truth Freewill Baptist Church, filed a Complaint in equity against the various defendants. Plaintiff seeks to impose upon the defendants an obligation to bring

Little Avenue into compliance with the street specifications of the Berwick Township Subdivision Ordinance and then to have that street dedicated as a public street. Extensive pleadings and discovery followed. Each defendant then filed a motion for summary judgment and Plaintiff filed a motion to amend its Complaint. These motions are before the Court for disposition.

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).

From the record before the Court the following background is revealed. Defendant, Mace, Inc. was a Virginia corporation formed by Defendants, Cecil and Mary Artrip, who were the sole shareholders and officers of the corporation. On December 11, 1974, Mace, Inc. registered as a foreign business corporation in Pennsylvania to do business in furniture and appliance sales.

The subject real estate¹ lies south of U.S. Route 30 and east of S.R. 94 in Berwick Township. It is part of a larger parcel owned by a Mr. Shultz who sold to Sabre Heights, Inc. The shareholders of the latter corporation were Cecil Artrip and his former wife. Mace, Inc. bought the subject land from Sabre Heights, Inc. and began steps to subdivide the land into five parcels. A gravel road known as Little Avenue extended from Rt. 94 eastward to and through the land purchased by

¹Deed records show that Mace, Inc. purchased real estate in Berwick Township from Sabre Heights, Inc. by deed dated May 17, 1974.

Mace, Inc. The stretch of the roadway up to Mace's parcel which will be referred to as the original portion, was not maintained by Berwick Township.

In the Spring of 1975, Mace, Inc. submitted its subdivision plan to the township. The plan called for three lots on the southern side of Little Avenue with Lot #1 being on the eastern end of the parcel and Lot #3 being on the western end. Two parcels, Nos. 4 and 5, were situated on the northern side of Little Avenue. At that time the township had in place a subdivision ordinance enacted on January 22, 1966, which required a stone base, macadam surface, curbs and gutters. Section 13 of the Ordinance required that the street construction be completed in accordance with township specifications before a subdivision plan be approved or a bond or deposit of funds be submitted to insure compliance.

By letter dated April 28, 1975, the township's engineer recommended that the lot lines be taken to the street right-of-way line to allow for later dedication to the township and that the street be constructed to the eastern edge of Lot #1. If dedication was not intended at that time, he recommended that Little Avenue be labeled a "private street" on the plan. Mr. Artrip testified that he complained that the cost of extending a paved street across the original portion of Little Avenue to Rt. 94 would be prohibitive. There is some reason to accept this testimony because by letter dated June 23, 1975, the township engineer recommended in response to Mr. Artrip's questions that Mace, Inc. construct the roadway from the eastern edge of Lot #1 to the western edge of Lot #2. Mr. Artrip testified that the township further agreed to modify its construction specifications and that he hired Henson Paving Company to construct the street. The record contains a bill from Henson Paving indicating that on July 8, 1975, it constructed a "chip and oil road." Mr. Artrip further testified that the township engineer was on the site to inspect construction.

Berwick Township approved the subdivision plan on July 12, 1975, without requiring the posting of a bond. The township did require and had in hand a statement dated July 10, 1975, from Mr. Artrip, in his capacity as president, that "Mace, Inc. presently and in the future will maintain Little Ave. from the east end at lot #1 to the west end at lot #3." The plan had been approved by the township planning commission on July 10, 1975, "subject to the fact that the streets are satisfactory to the Township Supervisors." (Letter dated July 10, 1975, from Berwick Township Planning Board to the township board of supervisors.) The Adams County Planning Commission "reviewed" the plan on July 14, 1975, and it was recorded the same date with the notation "a private street" beside Little Avenue.

On September 11, 1975, Mace, Inc. sold Lots #4 and 5 to Plaintiff. The deed granted the right of travel over "Little Avenue, a fifty (50) feet wide private street..." The deed did not mention any obligation regarding street maintenance. Lot #1 became the parsonage for the church and was occupied by the pastor, Buck Riffe, up to 1981. Lot #3 was purchased by Mr. and Mrs. Artrip and has been used by them as their residence.

Over the ensuing years, Plaintiff's buses and congregation used Little Avenue for church and school purposes. The street gradually deteriorated but at no time was it regularly maintained by the Township. Mace, Inc. may have done some maintenance. Plaintiff may contend that the Township plowed snow on Little Avenue two times prior to 1981 so Mrs. Riffe, a township employee, could get to work. Trash collection is by a private hauler. Mail is not delivered to Little Avenue beyond its intersection with Rt. 94.

Mace, Inc. was formally dissolved in Virginia on October 13, 1977. Its Withdrawal Affidavit dated May 8, 1981, and signed by Mr. Artrip was filed with the Pennsylvania Department of Revenue on March 16, 1981. The affidavit indicates that Mace withdrew from doing business in Pennsylvania on May 1, 1980. There is no record of notice of the dissolution being given by newspaper publication or by notice to any other person or entity. According to Mr. Artrip, all corporate records have been destroyed since at least the early 1980's.

Apparently, the Township received some complaint regarding the maintenance of Little Avenue because in late 1982 or early 1983 the Township wrote to Mr. Artrip asking that the July 10, 1975, promise regarding street maintenance be honored. Mr. Artrip responded by letter dated January 24, 1983, and advised the Township that Mace, Inc. had been dissolved for several years and offered to meet with concerned persons to seek an agreement on road repairs. Mr. Artrip contends that he got no response to his correspondence.

By early 1988, Plaintiff had retained counsel to pursue action regarding improvement and maintenance of Little Avenue. Litigation followed in 1989. In a deposition, Mr. Artrip stated that Mace, Inc. had its own checking accounts and filed its own income tax returns. He stated that the corporate accountant was deceased. Mr. Artrip added that the last corporate activity was to pay a tax obligation to the Pennsylvania Department of Revenue in 1983 after Sheriff's sale of some corporate real estate.

Defendants, Cecil and Mary Artrip, as well as Mace, Inc. raise three basic issues in their Motion For Summary. The first issue relates to the statute of limitations. The second issue relates to the extent that Virginia or Pennsylvania law is applicable to an action against the

corporation. The final issue concerns whether the Artrips are individually responsible for the road repairs and maintenance.

One source has written that,

The general stated purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable period of time after the cause of action accrues, as established by the legislature, and to suppress stale or fraudulent claims, thus giving effect to policies and procedures that expedite litigation and discourage delay in the presentation of stale claims, which delay may greatly prejudice the defense of such claims, and serving to give prompt notice to defendants that claims are being made against them.

Standard Pennsylvania Practice 2nd 13:2.

Mace, Inc. contends that Plaintiff's cause of action is barred by the provisions of 15 Pa. C.S.A. §1979(a)(2) or its predecessor, 15 P.S. §2111A, both of which provide a two year statute of limitations against a business corporation after its dissolution. Unfortunately, for Mace, Inc. those provisions are found in subchapters dealing with domestic business corporations rather than foreign business corporations.²

Our research has revealed that 15 P.S. 2015 (now 15 Pa. C.S.A. §4129) provides that a certificate of withdrawal from doing business in Pennsylvania by a foreign corporation does not affect any action pending at the time thereof, or affect any right of action upon any contract made by the corporation in Pennsylvania before its certificate of withdrawal is issued by the Department of State.

We have also been provided with a copy of §13.1-755 of the Code of Virginia which provides,

§13.1-755. Survival of remedy after termination of corporate existence. The termination of corporate existence shall not take away or impair any remedy available to or against the corporation . . . for any right or claim existing or any liability incurred, prior to such termination . . .

Plaintiff contends that Virginia law allows an indefinite period for bringing actions against a dissolved corporation citing *United States v. Village Corp.*, 298 F.2d 816 (4th Cir. 1962).

The Court is mindful that in Pennsylvania the statute of limitations defense is procedural rather than substantive. Standard Pennsylvania Practice 2nd §13:10. As such, statutes of limitations only affect remedies and, by precluding recovery, they do not impair substantive

²We reject the Township's argument that 15 Pa. C.S.A. §4145 is applicable because it refers to actions filed by a shareholder or representative of a foreign corporation against the corporation or the shareholders or representatives thereof.

or fundamental rights. Id. §13:10. Consistent with that principle is the concept that in Pennsylvania the law of the forum determines the time within which a cause of action shall be commenced. *Unisys Finance v. U.S. Vision, Inc.*, 428 Pa. Super. 107, 112, 630 A.2d 55, 58 (1993); *Bulkin v. Western Kraft East, Inc.*, 422 F. Supp. 437, 441 (E.D. Pa. 1976). It thus becomes incumbent to review the applicable Pennsylvania statute of limitations.

We decline to accept the argument that Pennsylvania's "borrowing statute" applies. 42 Pa. C.S.A. §5521 provides that the period of limitation for a claim accruing outside Pennsylvania is the period provided in the foreign jurisdiction where the claim occurred or the period provided under Pennsylvania law, whichever is shorter. Clearly the claim raised in the instant action did not accrue outside of Pennsylvania.

The statute of limitations defense is applicable to an equity action. 42 Pa. C.S.A. §5501(c). *United National Insurance Co. v. J. H. France Refractories Co.*, 417 Pa. Super. 614, 612 A.2d 1371 (1992), *Alloc granted* 622 A.2d 1377 (1993). It would appear that the instant action is governed either by the statute of limitations set forth in 42 Pa. C.S.A. §5525 (an implied contract - 4 years) or §5527 (6 years). The general rule is that the statute of limitations begins to run as soon as the right to institute and maintain the suit arises. *Standard Pennsylvania Prac. 2nd* §13:44.

Therefore, it must be determined when the cause of action accrued. Here, Plaintiff essentially contends that Mace, Inc. failed to perform a duty. Generally, the cause of action arises from the breach of the duty and not from the time the damage is revealed. *Standard Pennsylvania Practice 2nd* §13:41.

In this case, we are unable to determine from the record when the street first deteriorated to the point that maintenance was required. Certainly no breach of duty would have occurred prior to that time. Furthermore, duty of maintenance is alleged to be a continuing duty, each breach of which would constitute a new cause of action. Therefore, it cannot be said that Mace, Inc. is entitled to summary judgment on this issue.

Mace, Inc. also contends that Plaintiff has no standing to maintain this action. Mace argues that any promise to maintain Little Avenue was between the Township and Mace and that Plaintiff has no right in equity to compel Mace to perform that agreement. Plaintiff may be a third party beneficiary of the agreement between Mace and the Township and for that reason would have standing. *Schall v. Sandy Township*, 163 Pa. Comlth. Ct. 336, 641 A.2d 618 (1994). Furthermore, it is not entirely clear that Plaintiff could pursue a mandamus

action which would compel the Township to pursue legal action against Mace. Mandamus may compel a municipality to enforce its ordinances but it will not lie to compel that same municipality to perform an act (i.e. bring legal action against a dissolved corporation or its individual shareholders) which is discretionary.

Next, Defendants, Artrips, contend that the record only shows that they acted in their corporate capacity and that they cannot be held individually liable for the corporate obligation. Plaintiff attempts to pierce the corporate veil.

In deciding whether the individual liability of shareholders is present under a theory of piercing the corporate veil, the court must start with the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception. *Brindley v. Woodland Village Restaurant, Inc.*, 438 Pa. Super. 385, 394, 652 A.2d 865, 870 (1995). Generally, therefore, where a party enters into a contract with a corporation, an action for breach thereof will only lie against the corporation and not the individual shareholders. *First Realvest, Inc. v. Avery Builders, Inc.*, 410 Pa. Super. 572, 576, 600 A.2d 601, 603 (1991). The Supreme Court in *Wicks v. Milzoco Builders, Inc.*, 503 Pa. 614, 470 A.2d 86 (1983) said that when a court pierces the corporate veil the owner is liable because the corporation is not a bona fide independent entity and the acts of the corporation are truly the acts of the owner. In other words, the corporation is a sham and a mere alter ego of the owner. 470 A.2d at 89-90. Thus, whenever one in control of a corporation uses that control, or uses the corporate assets to further his or her own personal interests, the fiction of the separate corporate identity may be disregarded. *Ashley v. Ashley*, 482 Pa. 228, 237, 393 A.2d 637, 641 (1978). Although there is no definitive test for piercing the corporate veil, *First Realvest, Inc. v. Avery Builders, Inc.*, supra., 410 Pa. Super. at 578, 600 A.2d at 604, the court will look at whether corporate formalities have been observed, whether corporate records have been kept, whether there are officers and directors who function other than the dominant shareholders, and whether the dominant shareholder has used assets of the corporation as if they were his own. *Hanrahan v. Audubon Builders, Inc.*, 418 Pa. Super. 497, 507, 614 A.2d 748, 753 (1992).

Instantly, the complaint itself suggests nothing which would call for piercing the Mace, Inc. corporate veil to impose liability upon the Artrips. Discovery revealed that Mace, Inc. was the owner and seller of the parcels in the subdivision. Mace, Inc. alone agreed to maintain the street. All correspondence and documentation in the record and dated prior to May, 1980, references the corporation and not the Artrips individually.

Plaintiff argues, however, that discovery also revealed several matters which suggests that the corporation was the Artrips' alter ego. First, Plaintiff notes that by deed dated November 19, 1979, Mace, Inc. sold the balance of the land it obtained from Sabre Heights, Inc. to Arnold Forbes for \$100,000.00 but no money was exchanged. Instead, by deed dated March 19, 1980, the Artrips acquired real estate valued at \$125,00.00 and improved with apartments in East Berlin, Pennsylvania, from Oxford Building and Development Co. which was owned by Arnold Forbes. Mr. Artrip stated that the transaction was fashioned in this manner because Mace, Inc. owed the Artrips in excess of \$100,000.00 for contributions they previously made to the corporation. Plaintiff argues that this transaction evidences self-dealing. Second, Plaintiff alleges that the Artrips acted fraudulently by dissolving the corporation and failing to notify the Township and the lot owners along Little Avenue. Third, Plaintiff alleges that Mace, Inc. engaged in activities (i.e. real estate development and sales) not authorized in its certificate of authority.

Because there are so many corporate records missing and real estate transactions mentioned for which deeds have not been produced, the credibility of witnesses will become critical to a determination of whether the corporate veil can be pierced. There are questions of fact which makes the granting of this motion inappropriate.

It should be noted that Plaintiff also filed a motion to amend its complaint to add information in support of its allegation that the corporate veil should be pierced. The proposed amendment restates information Plaintiff learned in discovery. The amendment will be permitted as an amplification and elaboration of Paragraph 3 of the original complaint. No prejudice is evident.

Finally, we address the motion for summary judgment filed by the Township. The motion raises two issues: 1) the Township has no duty or authority to maintain a private road and 2) the action claim should be barred by the doctrine of laches.

The Township argues that the plan for Little Street as approved by the then Board of Supervisors clearly denoted that the street was private and that it has no control over private roads. See 53 P.S. §65103. The Township further points out that it never accepted a dedication of Little Street in accordance with provisions of the Second Class Township Code, 53 P.S. §66140.

The burden placed upon one who contends that a street is a public street is to show acceptance of dedication by clear and convincing evidence. *Elliott v. H.B. Alexander & Son, Inc.*, 41 Pa. Comlth. Ct. 184, 189, 399 A.2d 1130, 1133 (1979). However, where lots are sold with reference to a plan showing streets, the implication is that the

streets have been dedicated for public use. Furthermore, acceptance of dedication can be formal and express, which was not the case here, or implied. Where the implied acceptance is alleged, there must be unequivocal authoritative acts of the township evidencing its intention to accept the dedication. *Id.* Plaintiff contends that the Township has made some repairs to Little Avenue and provided some snow removal service. These isolated acts may not be sufficient to amount to unequivocal acts evidencing an intention to accept the street for public use, but the record is not fully developed at this time.

Before proceeding further, we should take note of several relevant statutory provisions in effect in 1975. First, the Second Class Township Code provided in 53 P.S. §66256(c) that the township board of supervisors is not to approve a subdivision plan for recording unless the proposed streets are “installed in strict accordance with the standards and specifications of the township, or that the township be assured by means of a proper completion guarantee in the form of a bond or the deposit of funds or securities in escrow sufficient to cover the cost of the required improvements . . .” and that purchasers of lots in the subdivision shall not have liability for completion of the improvements. Second, the Municipalities Planning Code in 53 P.S. §10509 provided that no subdivision plat was to be approved unless streets shown on the plat have been improved as required by the subdivision ordinance or a bond or other sufficient security be deposited to cover the cost of the improvements. In addition, 53 P.S. §10511 gave the municipality authority to take necessary action to obtain or recover the funds necessary to complete the improvements. Interestingly, under the M.P.C., “street” includes, *inter alia*, streets “used or intended to be used by vehicular traffic or pedestrians whether public or private.” 53 P.S. §10107.

We deal here with several apparently conflicting legal concepts. Reference to the aforementioned statutory provisions would seem to impose upon the Township a duty to require compliance with its ordinance regarding street construction. Certainly, Mace, Inc. installed improvements to Little Avenue and the record suggests that the supervisors deemed those improvements sufficient. Whether the construction met the specifications for street construction at that time is unknown. In *Safford v. Board of Commissioners*, 35 Pa. Comlth. Ct. 631, 387 A.2d 177 (1978) a township was held liable to construct and maintain streets shown on an approved subdivision plan where the township failed to require completion of construction before plan approval or require deposit of sufficient funds to guarantee completion of the streets. There is, however, no indication in *Safford* that the subdivision plan expressly stated that the street was “private.”

In Appeal of Estate of Achey, 86 Pa. Comlth. Ct. 385, 484 A.2d 874 (1984) aff'd 501 A.2d 249 (1985) a township ordinance which regulated the construction of streets was held not to be applicable to private roads within a mobile home park. Because the plans submitted in that case noted a disclaimer that "no streets . . . are proposed for public dedication" the streets were found to be private and to only become public after dedication and acceptance.

With these conflicting authorities in mind and because we deal with a motion for summary judgment, the court declines to relieve the Township of liability just because the street may be "private." The record must be further developed. The result is not clear of doubt as a matter of law.

Finally, the Township argues that Plaintiff is guilty of laches in bringing this action. The laches defense requires 1) a delay arising from the other party's delay or lack of due diligence, and 2) resulting prejudice or harm. *United National Insurance Co. v. J. H. France Refractories Co.*, supra. 417 Pa. Super. 621, 612 A.2d at 1374 (1992). Thus, delay alone is not sufficient. *Williamstown Borough Authority v. Cooper*, 404 Pa. Super. 516, 521-2, 591 A.2d 711, 714 (1991), Alloc. gr. 602 A.2d 861 (1992). The existence of laches is a factual issue which must be decided on a case by case basis. *Patten v. Vose*, 404 Pa. Super. 426, 429, 590 A.2d 1307, 1309 (1991).

Township contends that Plaintiff delayed 14 years from the time it bought its property to institute this action. The delay, if any, however, is a significantly short period. The issue is road maintenance. When the street fell into disrepair is a factual question not yet resolved. The first indication that complaints were made to the Township was in late 1982 or early 1983. The prejudice asserted is the death of two of the three supervisors. The dates of their deaths is unknown, however, there is no indication that the third supervisor, the township secretary, the township engineer or township records are unavailable. Prejudice has, therefore, not been clearly established.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 17th day of November, 1995, the motions for summary judgment filed by the various defendants are denied. Plaintiff's motion to amend is granted.

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 ETHEL ROSELLA BLEVINS, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Administrator: Velma Ruth Blevins
 Attorney: John James Mooney, III, Esquire, Attorney for Estate, 250 York Street, Hanover, PA 17331

ESTATE OF MARGARET ISOBEL CROWE, DEC'D

Late of Straban Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, ATTN: Nancy L. Reichart, Lincoln Square, Gettysburg, PA 17325
 Attorney: Teeter, Teeter, & Teeter, 108 West Middle Street, Gettysburg, PA

ESTATE OF TONY L. HOFFMAN, DEC'D

Late of Bendersville, Adams County, Pennsylvania
 Executor: John Hoffman, 114 South Main Street, Box 191, Bendersville, PA 17306
 Attorney: John A. Wolfe, Esq., Wolfe & Rice, 47 West High Street, Gettysburg, PA 17325

ESTATE OF RUTH T. SEIDERS, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Executrix: Nancy D. Coniff, 27 Liberty Street, Gardiner, ME 04345
 Attorney: Catherine J. Gault, 31 South Washington Street, Gettysburg, PA 17325

ESTATE OF HELEN H. WILDE, DEC'D

Late of the Borough of Biglerville, Adams County, Pennsylvania
 Executrix: Kathleen Reed, 248 Thomas Drive, Gettysburg, PA 17325

SECOND PUBLICATION

ESTATE OF DOROTHEA B. HOFFMAN, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Administrator, C.T.A.: David J. Hoffman, 60 Twin Lakes Drive, Gettysburg, PA 17325
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF PAULINE E. KNOX, a/k/a PAULINE LOUGH KNOX, DEC'D

Late of New Oxford, Adams County, Pennsylvania
 Executor: Suzanne E. Eckert, College Avenue Extended, New Oxford, PA 17350
 Attorney: Larry W. Wolf, Esquire, 215 Broadway, Hanover, PA 17331

ESTATE OF GERTRUDE M. STEELE, DEC'D

Late of Mt. Joy Township, Adams County, Pennsylvania
 Executrix: Mildred Fisher, 203 Longstreet Dr., Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF CLYDE G. BOWERS, a/k/a C. G. BOWERS, DEC'D

Late of Butler Township, Adams County, Pennsylvania
 Executrices: Doris Jean Guise, 495 Plainview Road, Gettysburg, PA 17325; Betty-Lou N. Dove, 92 Blackberry School Road, York Springs, PA 17372
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF MERCEDES T. DEATRICK, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Executor: Egberto F. Morales, Calle 6, S6 #13, Urb. El Escorial, Rio Piedras, PR 00926
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF EUGENE W. ROUZER, DEC'D

Late of the Borough of Biglerville, Adams County, Pennsylvania
 Executrices: Sharon E. Messimer, 27 W. Siddonsburg Rd., Dillsburg, PA 17019; Beverly D. Slonaker, 153 N. Main St., Biglerville, PA 17307
 Attorney: Bigham & Raffensperger, Attorneys at Law, 16 Lincoln Sq., Gettysburg, PA 17325

ESTATE OF ERMA C. STRALEY, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Executrices: Alma M. Straley, P. O. Box 2, 6216 Baltimore Pike, Littlestown, PA 17340; Amy Kaye Straley, P. O. Box 2, 6216 Baltimore Pike, Littlestown, PA 17340
 Attorney: Bulleit, Schultz & Thrasher, 16 Lincoln Sq., Gettysburg, PA 17325

ESTATE OF C. FRANCES WEISHAAR, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania
 Co-Executrices: Barbara A. Kane, 2180 Old Route 30, Orrtanna, PA 17353; Judith L. Masemer, 1596 Hanover Road, Gettysburg, PA 17325
 Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

ESTATE OF ELMER J. YODER, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Executrix: Barbara Y. Spicer, 685 Blackhorse Tavern Road, Gettysburg, PA 17325
 Attorney: Bruce R. Spicer, Esq., McNeese, Wallace and Nurick, P. O. Box 1166, 100 Pine St., Harrisburg, PA 17108-1166

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that on May 21, 1996 an application for registration of the fictitious name CROSS KEYS HOME CARE was filed under the Fictitious Names Act, 54 Pa.C.S.A. § 301, et seq., in the Department of State of the Commonwealth of Pennsylvania, in Harrisburg, Pennsylvania, an application for the conduct of business at its principal office or place of business situated at P.O. Box 128, 2990 Carlisle Pike, New Oxford, Adams County, Pennsylvania, 17350. The name and address of the entity which is a party to this registration is: The Brethren Home, P.O. Box 128, 2990 Carlisle Pike, New Oxford, Adams County, Pennsylvania, 17350.

Latsha & Capozzi
 Staff Office Box 825
 Harrisburg, PA 17108-0825

6/14

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN a certificate was or will be filed under the Fictitious Name Act approved May 24, 1945, in the Office of the Secretary of the Commonwealth of Pennsylvania, setting forth that Robin A. Taylor, 544 Carlisle Street, Hanover, PA 17331, is the only person(s) owning or interested in a business, the character of which is custom automotive repair, and that the name, style and designation under which said business is and will be conducted is C.J'S CUSTOM AUTOMOTIVE and the location where said business is and will be located is 1200 High Street, Hanover, PA 17331.

Robin A. Taylor

6/14

IN THE COURT OF
COMMON PLEAS OF
ADAMS COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW
NO. 96-S-121
Divorce

DARLENE M. WILSON, Plaintiff,

vs.

WILLIAM C. WILSON, JR., Defendant.

TO: William C. Wilson, Jr.

NOTICE OF PENDENCY OF A
DEGREE OF DIVORCE

Based upon Section 3301(d) (1) of the Pennsylvania Divorce Code NOTICE is hereby given of the service of the required Counter-Affidavit. NOTICE is also given of Plaintiff's Intent to File for a Final Decree in divorce twenty (20) days from the publication of this notice. Notice is hereby given of the service of the Counter-Affidavit by publication, and if the Counter-Affidavit is not answered or otherwise pleaded to, the action for Divorce will proceed without any further notice to the Defendant, and a final decree in Divorce will be entered. All inquiries regarding this action should be directed to Gregory L. Lensbower, Esquire, 209 Broadway, Hanover, Pennsylvania 17331, Phone Number (717) 632-0163 or YOU SHOULD TAKE THIS NOTICE TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

County Referral Officer
Adams County Courthouse
Gettysburg, PA 17325
Telephone: (717) 334-6781

Stonesifer and Kelley
Attorneys At Law
209 Broadway
Hanover, PA 17331

6/14

IN THE COURT OF
COMMON PLEAS OF
ADAMS COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW
NO. 96-S-121
Divorce

DARLENE M. WILSON, Plaintiff,

vs.

WILLIAM C. WILSON, JR., Defendant.

NOTICE TO THE DEFENDENT

If you wish to deny any of the statement set forth in this affidavit, you must file a counter-affidavit within twenty (20) days after this affidavit has been served on you or the statements will be admitted.

PLANTIFF'S AFFIDAVIT UNDER

SECTION 3301(d)

OF THE DIVORCE CODE

1. The parties to this action separated on or about May, 1984, and have continued to live separate and apart for a period of at least the time period specified in Section 3301(d) of the Divorce Code.
2. The marriage is irretrievably broken.
3. I understand that I may lose rights concerning alimony, division of property, lawyer's fees or expenses if I do not claim them before a divorce is granted.

I verify that the statements made in this affidavit are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. Section 4904 relating to unsworn falsification to authorities.

Darlene M. Wilson

Stonesifer and Kelley
Attorneys At Law
209 Broadway
Hanover, PA 17331

Dated: June 3, 1996
6/14

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 17, 1996, at 9:00 a.m.

SHETRON—Orphans' Court Action Number OC-50-96. The First and Final Account of Robert G. Tate, Executor of the Estate of Ruth Tate Shetron, deceased, late of Huntington Township, Adams County, Pennsylvania.

SHEALER—Orphans' Court Action Number OC-48-95. The First and Final Account of Elizabeth Talpas Shealer, Administratrix of the Estate of Thomas E. Shealer, deceased, late of Straban Township, Adams County, Pennsylvania.

CROUSE—Orphans' Court Action Number OC-60-96. The First and Final Account of Elizabeth C. Ross, Executrix of the Last Will and Testament of Alma Weikert Crouse, deceased, late of the Borough of Littlestown, Adams County, Pennsylvania.

DEARDORFF—Orphans' Court Action Number OC-61-96. The First and Final Account of Orville B. Orner and Joanne D. Daykin, Executors of the Will of Nettie O. Deardorff, deceased, late of the Borough of Gettysburg, Adams County, Pennsylvania.

MYERS—Orphans' Court Action Number OC-62-96. The First and Final Account of Angela Hoffnagle, Paula Myers and Louise M. Orndorff, Executrices of the Last Will and Testament of Bertha M. Myers, deceased, late of the Borough of Bonneauville, Adams County, Pennsylvania.

WHITE—Orphans' Court Action Number OC-63-96. The First and Final Account of Robin L. Romero, Administrator of the Estate of Richard W. White, deceased, late of Butler Township, Adams County, Pennsylvania.

OVERBAUGH—Orphans' Court Action Number OC-65-96. The First and Final Account of Steven A. Bankert, Executor of the Estate of Mary K. Overbaugh, deceased, late of Straban Township, Adams County, Pennsylvania.

Peggy J. Breighner
Clerk of Courts

Adams County Legal Journal

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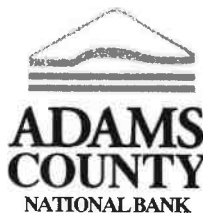
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Strong.
Rooted Upon Traditional Values.
Dedicated to Quality.
Customer Service.
Dependable.
Branching Into The Future.
Our Commitment Is You.



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ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

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LEGAL NOTICE

NOTICE IS HEREBY GIVEN that Thomas R. Campbell intends to apply in open Court for admission to the Bar of the Court of Common Pleas of Adams County, Pennsylvania, on the 22nd day of July, 1996, and that he has established a full time legal practice in Adams County within the guidelines established by the Supreme Court of Pennsylvania.

Campbell, White & George
122 Baltimore Street
Gettysburg, PA 17325

6/14 & 21 & 28

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that an application for fictitious name registration has been filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, under the Fictitious Name Act approved March 16, 1982, setting forth that Bar-Ray Products, Inc., is the only corporation owning a business the character of which is the manufacture of ear plugs for retail sales, and that the name under which said business will be conducted is HEARING TECHNOLOGIES and the location of said business is 95 Monarch Street, Littlestown, PA 17340.

Jeffrey Stein

6/21

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Pennsylvania Department of State, Commonwealth of Pennsylvania, Harrisburg, Pennsylvania, on May 29, 1996, for the purpose of obtaining a Certificate of Incorporation of a proposed business corporation under the Pennsylvania Business Corporation Law of 1988. The name of the corporation is JERRY JUSTICE EXCAVATING, INC.

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

6/21

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 purpose of obtaining a Certificate of Incorporation of a proposed business corporation to be organized under the provisions of the Pennsylvania Business Corporation Law of 1988, approved December 21, 1988, P.L. 1444, No. 177, as amended. The name of the corporation is COUNTRY CUISINE, INC.

Swope, Heiser & McQuaide
104 Baltimore Street
Gettysburg, PA 17325

6/21

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Commonwealth of Pennsylvania, Department of State, at Harrisburg, Pennsylvania, for the purpose of obtaining a Certificate of Incorporation. The name of the proposed corporation which has been organized under the Business Corporation Law of 1988 adopted December 21, 1988, P.L. 1444, No. 177, Section 103, as amended, is VALLEY VIEW GREENS, INC.

Matthew R. Battersby, Solicitor
20 West Main Street
Fairfield, PA 17320

6/21

HOLTSCHNEIDER VS. BOROUGH OF LITTLESTOWN, ET AL.

1. Where Plaintiff was hired after the enactment of Act 600 (which set minimum eligibility requirements for police pension benefits at 25 years of continuous service with retirement after age 55 years) by a municipality which had an ordinance in effect which allowed retirement after 20 years of service, Plaintiff, who retired with less than 25 years service cannot recover the benefits from the pension plan itself.

2. A provision in a labor contract agreed to by a municipality but which violated Act 600 (which set minimum eligibility requirements for police pension benefits) cannot be objected to by the municipality on the basis of its illegality.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 91-S-711, EARL HOLTSCHNEIDER AND ALICE J. HOLTSCHNEIDER VS. BOROUGH OF LITTLESTOWN, BOROUGH COUNCIL OF THE BOROUGH OF LITTLESTOWN, ROBERT J. KUSS & ASSOCIATES, INC. VS. THE PENNSYLVANIA STATE ASSOCIATION OF BOROUGH MUNICIPAL RETIREMENT PLAN AND TRUST.

Roy A. Keefer, Esq., for Plaintiff

John R. White, Esq., for Defendant Borough of Littlestown

Jeffery M. Cook, Esq., for Defendant Robert J. Kuss & Associates

David Fitzsimons, Esq., for Additional Defendant

**OPINION ON MOTIONS FOR SUMMARY JUDGMENT
FILED BY DEFENDANT; BOROUGH OF LITTLESTOWN
AND ADDITIONAL DEFENDANT; THE PENNSYLVANIA
STATE ASSOCIATION OF BOROUGH MUNICIPAL
RETIREMENT PLAN AND TRUST**

Kuhn J., December 1, 1995.

Prior motions for summary judgment were filed by these defendants and denied¹ by Opinion and Order dated March 10, 1994. Thereafter, the parties engaged in more discovery including the deposition of Plaintiff, Earl Holtschneider. Motions for summary judgment were then filed by the Borough of Littlestown, hereinafter "the Borough," and the Pennsylvania State Association of Boroughs Municipal Retirement Plan and Trust, hereinafter the "Trust." For purposes of these motions the record now reveals the following history.

On July 24, 1951, the Borough enacted Ordinance No. 135 which established a Police Pension Fund. That Ordinance provided, inter alia, for payment of a pension to officers at age 65 who at retirement

¹Except to the extent that Plaintiffs were precluded from recovering modified pension benefits from the Borough's police pension fund proper.

had served a minimum period of continuous service of 20 years “or such other period as shall be fixed by ordinance pursuant to statutory authority.” This will be referred to hereinafter as the 20 year option. This ordinance did not have a normal retirement age but, as noted, would not pay out benefits until the participant reached age 65. Under this plan the employee contributed 3% of his salary to the fund. The plan was authorized to purchase insurance policies to fund the pension benefits. On May 29, 1956, the Legislature enacted what is commonly referred to as Act 600,² which set minimum eligibility requirements for police pension benefits at 25 years of continuous service with retirement after age 55 years. This will be referred to hereinafter as the 55/25 option. That Act was subject to a “grandfather’s clause,” adopted October 21, 1965, 53 P.S. §769, which allowed retirement age at 55 or 60 years if so fixed by an ordinance, after 20 years of service for those whose pension fund had been established at that time.

On September 1, 1970, Plaintiff³ retired from the United States Air Force after 20 years service with the military police. In December, 1990, he applied for an opening with the Littlestown Police Department and was interviewed by then Police Chief Roger Gouker and several members of Borough Council. The parties did not discuss the police pension plan at that time. Plaintiff was hired by Borough Council on December 22, 1970, with an effective starting date of January 1, 1971. Prior to beginning his employment Plaintiff was allegedly advised by Chief Gouker that because of his age he would be grandfathered under the Borough’s 60/20 option. This was important to Plaintiff who would reach his 42nd birthday in February, 1971 and who felt he could not work another 25 years. When Plaintiff began employment he met with Borough Secretary Don Michaels to complete insurance documents to fund his retirement after 20 years of service.

Sometime in 1983 the Borough considered changing their pension plan administrators to the Trust. For that purpose Robert J. Kuss met with Plaintiff and several other persons to discuss the proposed pension plan. Mr. Kuss advised that the plan would have a 55/25 option. Plaintiff claims this was the first mention ever made to him that he would have anything other than the 20 year option. Plaintiff told Mr. Kuss that he had been promised the 20 year option to which Mr. Kuss responded that if Plaintiff could prove that he had been hired under the 20 year option it would be honored by the Trust. Plaintiff then showed

²Act of May 29, 1956, P.L. (1955) 1804, No. 600, as amended, 53 P.S. §767-778.

³“Plaintiff” refers to Earl Holtschneider only.

Mr. Kuss copies of the various insurance policies which had been purchased to fund his pension on the basis of the 20 year option. Mr. Kuss replied that because Plaintiff had been hired under the 20 year option "we'll have to pay you." Sometime shortly thereafter, Mr. Kuss sent Plaintiff an analysis of the benefits he would receive under the proposed plan at age 55 with 25 years of service as well as at age 60 with 20 years of service. Where the reference to retirement at age 60 came from is unclear from the record.

On August 23, 1983, the Borough enacted Ordinance No. 346 which established a police pension plan "Under the provisions of the Act 600 of the General Assembly of Pennsylvania, and any other statutes now or hereafter pertaining or applicable thereto." The employee's contribution was set at 5% of salary. The plan included the 55/25 option. Borough reserved the right to amend or discontinue the plan. Borough also elected to join the Trust. Finally, the ordinance expressly repealed Ordinance No. 135.

On January 24, 1984, Plaintiff addressed a letter to Borough Council wherein he stated,

As a participant in the Borough of Littlestown Police Pension Plan, restated on January 1, 1983, I, Earl E. Holtschneider, knowingly and with complete understanding of my prior projected plan benefits, waive participation in the prior plan benefits. I choose to participate in the current pension plan at the benefit levels that have been explained to me.

The only evidence of the benefit levels that had been explained to Plaintiff was the analysis sent to him by Mr. Kuss.

On March 27, 1984, Borough enacted Ordinance No. 349 which amended Section 7.1 of Ordinance No. 346 effective January 1, 1984, to define the normal retirement date of a plan participant to include the 55th birthday with 25 years of service or the 60th birthday after 20 years of service.

On January 26, 1988, the Borough and the Littlestown Borough Police Officers' Association entered into a collective bargaining contract for the years 1988-1990 inclusive. Plaintiff was a member of the union. Article 41 of the contract provided that the Borough would maintain the pension system and benefits in effect as of the date of execution of the contract. It is important to note that this contract expired on December 31, 1990, but would continue from year to year thereafter unless modified by the parties. Within 30 days the Borough's actuary was to meet with the Association and advise its members of the status of the pension fund. The record does not indicate whether that

meeting occurred. The Borough was to provide each officer with an annual comprehensive written statement setting forth the officer's pension benefits status. The record does not indicate whether Plaintiff received his reports.

In 1989, the Borough took steps to transfer the police pension plan from the Trust to Principal Mutual Life Insurance Company (PMLIC). Before that change occurred PMLIC's agent met with members of the police department. Plaintiff inquired whether he could retire after 20 years of service under the PMLIC plan and was advised that he needed 25 years of service. Plaintiff responded to the effect that "Well, I don't want to join your company then." Plaintiff did not notify the Borough that he did not want to join the PMLIC plan. The retirement plan with PMLIC was executed by the Borough on December 26, 1989, but was intended to be effective as of January 1, 1989. This plan set the normal retirement date at age 55 with 25 years of service. Plaintiff did not execute any formal document in order to participate in this plan.

Meanwhile by mid-1989 Borough officials were aware of Plaintiff's plans to retire in 1991 after 20 years of service. In August and September of that year the Borough Manager wrote to the Pennsylvania Public Employee Retirement Study Commission and to Robert J. Kuss & Associates indicating that the Borough believed Plaintiff was eligible for full retirement after 20 years of service and questioned why 25 years of service was necessary. It is unknown whether Plaintiff was aware of the correspondence.

On September 10, 1990, with Plaintiff in attendance Borough Council voted to deny Plaintiff's request for payment of pension benefits after 20 years of service due to the requirements of Act 600. On September 24, 1990, Borough Council received Plaintiff's letter of resignation to be effective after January 4, 1991.

On December 16, 1990, Borough enacted Ordinance 405 which, inter alia, again set the police pension retirement date at age 55 with 25 years of service.

Plaintiff retired effective January 5, 1991, at age 61 with 20 years of service. PMLIC refused to pay pension benefits.

According to Mr. Kuss' 1983 projection, Plaintiff would have received \$727.37 per month if he retired in January, 1991. Apparently PMLIC will begin paying Plaintiff \$721.90 beginning January 1, 1996. This figure represents 80.26% of a full pension benefit he would have received with 25 years of service. Plaintiff seeks five years (1991-5) of benefits at \$721.90 per month.

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).

In the Opinion of March 10, 1994, this Court held that pursuant to the provisions of Act 600 and the case of Perruso v. Township of Palmer, 141 Pa. Comlth. Ct. 520, 596 A.2d 292 (1991) Plaintiff was not entitled to receive benefits directly from the pension plan. In Perruso, the plaintiff was hired as a police officer January 3, 1966. The township had an ordinance in effect at that time (adopted in 1961) which set forth eligibility for retirement benefits at age 60 with 20 years of service. At that time Act 600 required 25 years of service. Over the years Perruso received reports from the pension plan actuary indicating that he could retire at age 60 with 20 years of service. Perruso retired in 1989 at age 62 with 23 years of service. When denied pension benefits because he had not served 25 years, Perruso filed an equity action seeking the benefits.

The Commonwealth Court held that Act 600 was self-executing so as to preempt any inconsistent provisions of the township ordinance. "Because the state statute was effective, prior to Appellant's (Perruso's) date of hire, the terms of the state statute must control." 141 Pa. Comlth. Ct. at 524, 596 A.2d at 294. The Court further explained that because Act 600 was self-executing the township was not required to change its ordinance in order to enforce the 25 year service requirement.

To a significant extent, Perruso is on point with the instant matter. Plaintiff, like Perruso, was hired after the enactment of Act 600 by a municipality which had an ordinance in effect which allowed retirement after 20 years of service. Perruso makes it clear the Plaintiff cannot recover the benefits from the pension plan itself.

In the Opinion dated March 10, 1994, we noted that in Count I (breach of contract) of Plaintiffs' Complaint they alleged that the denial of the full pension benefits violated "the express and implied employment contracts made" by Plaintiff, Borough and Kuss (¶19). The terms of those contracts were not clear at the time that Opinion was written. The Court was reluctant to dismiss Count I solely on the basis of Perruso because other authority existed which held that a provision in a labor contract agreed to by a municipality but which violated Act 600 could not be objected to by the municipality on the basis of its illegality. *Upper Chichester Township v. Pennsylvania Labor Relations Board*, 153 Pa. Comlth. Ct. 446, 621 A.2d 1134 (1993). The case suggested that provisions contrary to Act 600 could be binding upon the municipality for the period of the contract even though not binding upon the pension plan itself.

From the record presently before the Court it appears that Plaintiff contends that the employment contract under which he was hired offered him a full pension after 20 years of service. This contract was based upon oral representations from Chief Gouker, council members, and the Borough Secretary as well as the text of Ordinance No. 135 and the insurance policies used to fund the pension. In 1970 such a contract would have been contrary to Act 600 but nevertheless binding upon the Borough for the period of the employment contract. That ordinance, however, did not provide for payout until age 65.

There were no written employment contracts until the labor agreement was entered into in 1988. Presumably up to that time Plaintiff was an at-will employee. Although it could be argued that Borough changed the terms of employment in 1983 with the enactment of Ordinance No. 346 it can also be argued that Borough recognized its commitment to Plaintiff a year later when, with the adoption of Ordinance No. 349, it authorized a pension at age 60 if the employee had 20 years of service. There is no suggestion that this provision was designed to benefit anyone other than Plaintiff.

Whatever may have been the contract of employment up to 1988 and whether it contained illegal provisions or not there can be no question

⁴ Although this contract expired on December 31, 1990, and Plaintiff did not retire until January 5, 1991, we must assume that the contract automatically renewed itself for 1991 because the record contains no indication to the contrary.

that Plaintiff, through the police union, negotiated a new labor contract with the Borough in 1988.⁴ That contract provided that the Borough would maintain the pension system and benefits in effect as of January 26, 1988. At that time Ordinance No. 349 was in effect with both its 55/25 and 60/20 options. Borough argues that because the 60/20 option was illegal it was not technically part of the pension plan and, therefore, could not be part of the labor contract. On the surface that argument has some appeal. Ordinance No. 349, like the ordinance in Perruso, was adopted after the enactment of Act 600 which forbade 20 years of minimum service. However, as a matter of law, the Court is reluctant to simply make that seemingly logical step because, again, Perruso dealt only with the employee's rights as against the pension plan.

Here we address the terms of a contract between Plaintiff and the Borough. There appears to be some ambiguity which should not be resolved by the Court at this juncture. For example, when the union and the Borough negotiated the employment contract in 1988 did they believe the pension plan had a 55/25 option only or either a 55/25 or 60/20 option? Was there a unilateral mistake as to the normal retirement date or a mutual mistake? Did both the union and the Borough clearly intend at the time the contract was executed that as to Plaintiff there would be the 60/20 option? We noted earlier that in late 1989 the Borough Manager was questioning why Plaintiff was not entitled to retire after 20 years of service. If the union knew the plan was limited to the 55/25 option would it have committed to a contract that may have adversely affected a member with 17 years of service at that time? These are factual questions which unfortunately cannot be resolved without a jury.

The Court has serious reservations whether the Trust should remain a part of this litigation. The Trust has been joined by the Borough with respect to Count I (breach of contract) only. Its activity is limited to the period 1983-89. Its liability exists only if the Borough is liable and then only to the extent that it is responsible because of Mr. Kuss' representations.⁵ There is no evidence that the Trust or Mr. Kuss was involved in any manner with the 1988 labor contract or that the Trust produced any misleading documents upon which Plaintiff relied after the pension plan was transferred to the Trust. At most Mr. Kuss told Plaintiff in 1983 that because he was hired under a 20 year service requirement the Trust would honor that option and provided him with a projected benefit analysis. Neither the Trust nor Mr. Kuss had anything to do

⁵The Trust denies that Mr. Kuss was its agent in connection with those representations, however, that issue is not addressed in the instant motions.

with Plaintiff's hiring or the terms of his employment contract in 1971.

Even if Mr. Kuss made representations upon which Plaintiff relied, the Borough would not be responsible for those representations. In *Perruso* the plaintiff argued that the township was estopped from denying him pension benefits on the basis of 20 years of service because the pension plan's actuary sent him annual reports from 1966 to 1983 (or early 1984) indicating he could retire after 20 years of service. The Commonwealth Court held that mistaken interpretations by an independent actuary cannot be charged to the township and cited *Kirkpatrick v. Butler County Commissioners*, 7 Pa. Comlth. Ct. 106, 298 A.2d 607 (1972).

Nevertheless, we will not dismiss the Trust at this time because it is argued that Mr. Kuss prepared the 1984 ordinance which provided for the 60/20 option. That provision is arguably what created the ambiguity in the 1988 labor contract. If Mr. Kuss was an agent of the Trust and if he had special knowledge or expertise about Act 600 upon which the Borough could rely and if he included an illegal provision which the Borough incorporated into the labor contract the requisite nexus is established and dismissal would be inappropriate.

We address one final issue raised by the Borough. It is argued that Plaintiff was warned in September, 1990, several months prior to retirement, that he would be denied pension benefits if he retired in January, 1991. In this contract action that warning has no bearing on the issue of liability for breach of the contract. Either Plaintiff had a contract which entitled him to retire after 20 years of service or he did not have that right. Ignoring a warning is not a basis for dismissing the action.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 1st day of December, 1995, Motions for Summary Judgment filed by the Borough of Littlestown on September 1, 1995, and by The Pennsylvania State Association of Boroughs Municipal Retirement Plan and Trust filed on September 6, 1995, are denied.

ESTATE NOTICES

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

FIRST PUBLICATION

ESTATE OF ELIZABETH M. BACHELIER, DEC'D
Late of 678 Grant Drive, Gettysburg, PA 17325

Testatrices: Anne Kovall, 678 Grant Drive, Gettysburg, PA 17325; Rose Marie Allison, 2070 Enfield Street, Camp Hill, PA 17011

Attorney: Matthew R. Battersby, P.O. Box 215, 20 West Main Street, Fairfield, PA 17320

ESTATE OF ROSSWELL F. DUSMAN, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: William H. Dusman, 229 Kennedy Court, Severna Park, MD 21146

Attorney: Stonesifer and Kelley, 209 Broadway, Hanover, PA 17331

ESTATE OF MAE I. PHILLIPS, DEC'D
Late of Cumberland Township, Adams County, Pennsylvania

Co-Executors: Brian G. Phillips, 1166 N. Brown's Dam Drive, New Oxford, PA 17350; Michelle M. Flickinger, 255 Brown's Dam Road, New Oxford, PA 17350; Christopher M. Phillips, 710 Stoney Point Road, East Berlin, PA 17316; Tina M. Gladhill Smith, 460 Cedar Ridge Road, New Oxford, PA 17350

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

ESTATE OF DALE STANLEY SITES, SR., DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Administratrix: Penelope S. Sites, P.O. Box 4834, Gettysburg, PA 17325

Attorney: Swope, Heiser & McQuaide, 104 Baltimore Street, Gettysburg, PA 17325

ESTATE OF RALPH H. WHISLER, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executors: A. Jean Martin, 822 Broadway, Hanover, PA 17331; Frederick L. Whisler, 276 Georgetown Road, Littlestown, PA 17340

Attorney: Stonesifer and Kelley, 209 Broadway, Hanover, PA 17331

SECOND PUBLICATION

ESTATE OF ETHEL ROSELLA BLEVINS, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Administrator: Velma Ruth Blevins

Attorney: John James Mooney, III, Esquire, Attorney for Estate, 250 York Street, Hanover, PA 17331

ESTATE OF MARGARET ISOBEL CROWE, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executor: Adams County National Bank, ATTN: Nancy L. Reichart, Lincoln Square, Gettysburg, PA 17325

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

ESTATE OF TONY L. HOFFMAN, DEC'D

Late of Bendersville, Adams County, Pennsylvania

Executor: John Hoffman, 114 South Main Street, Box 191, Bendersville, PA 17306

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

ESTATE OF RUTH T. SEIDERS, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executrix: Nancy D. Coniff, 27 Liberty Street, Gardiner, ME 04345

Attorney: Catherine J. Gault, 31 South Washington Street, Gettysburg, PA 17325

ESTATE OF HELEN H. WILDE, DEC'D

Late of the Borough of Biglerville, Adams County, Pennsylvania

Executrix: Kathleen Reed, 248 Thomas Drive, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF DOROTHEA B. HOFFMAN, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Administrator, C.T.A.: David J. Hoffman, 60 Twin Lakes Drive, Gettysburg, PA 17325

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

ESTATE OF PAULINE E. KNOX, a/k/a PAULINE LOUGH KNOX, DEC'D

Late of New Oxford, Adams County, Pennsylvania

Executor: Suzanne E. Eckert, College Avenue Extended, New Oxford, PA 17350

Attorney: Larry W. Wolf, Esquire, 215 Broadway, Hanover, PA 17331

ESTATE OF GERTRUDE M. STEELE, DEC'D

Late of Mt. Joy Township, Adams County, Pennsylvania

Executrix: Mildred Fisher, 203 Longstreet Dr., Gettysburg, PA 17325

[The following text is extremely faint and largely illegible. It appears to be a multi-column document, possibly a legal opinion or a set of minutes, with several circular marks on the right side.]

Adams County Legal Journal

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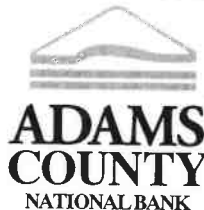
June 28, 1996

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IN THIS ISSUE

HIMMELREICH VS.
BAUGHER INSURANCE AGENCY, ET AL.

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



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ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

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SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 96-S-214 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 26th day of July, 1996, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

BEGINNING at an iron pipe at land now formerly of Donald L. Fetters; thence by said Fetters land, North 76 degrees 16 minutes East, 101.39 feet to an iron pipe; thence by the same, South 13 degrees 21 minutes East, 130.05 feet to an iron pipe at land now or formerly of Duffy-Mott, Inc., thence by said land of Duffy-Mott, Inc., South 79 degrees 30 minutes West 99.95 feet to an iron pipe at other land now or formerly of John S. Baumgardner, thence by said other land of John S. Baumgardner, North 14 degrees 02 minutes West, 124.38 feet to an iron pipe, the place of **BEGINNING**. CONTAINING 0.2934 Acres.

TRACT NO. 2:

BEGINNING at a point along the east side of Prospect Avenue at the southwest corner of Lot No. 6, now or formerly of Orin T. Galusha; thence along the southern line of Lot No. 6, in an eastwardly direction, 175 feet, more or less, to a 12 foot alley, in a southerly direction, 60 feet, more or less, to the northeast corner of Lot No. 5; thence along the northeast line of Lot No. 5, in a westwardly direction, 175 feet, more or less, to the east side of Prospect Avenue; thence along the east side of Prospect Avenue, in a northerly direction 60 feet, more or less, to a point, the place of **BEGINNING**.

TRACT NO. 3:

BEGINNING at a point on the east side of Prospect Avenue at the northwest corner of tract now or formerly of Kenneth Warrenfeltz; thence by said land Warrenfeltz, North 81 degrees 60 minutes East, 175 feet to a point at other land now or formerly of John S. Baumgardner; thence by said land of John S. Baumgardner, North 08 degrees, 50 minutes West, 58 feet to a point at the southeast corner of other land of John S. Baumgardner; thence by said other land of John S. Baumgardner, South 81 degrees 10 minutes West, 175 feet to a point on the east side of Prospect Avenue; thence along said Prospect Avenue South 8 degrees 50 min-

utes East, 58 feet to the northwest corner of land Warrenfeltz, the place of **BEGINNING**.

BEING the same premises which John S. Baumgardner and Patricia A. Baumgardner by their deed dated September 28, 1977 and recorded on September 28, 1977 in Deed Book Volume 333, p. 770, et seq., Adams County Records, granted and conveyed unto Bruce M. Robison and Nancy A. Robison, as tenants by the entireties, in fee.

SEIZED and taken into execution as the property of **Bruce M. Robison and Nancy A. Robison**, and to be sold by me
Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
June 13, 1996.

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 19, 1996, 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.

6/28, 7/5 & 12

ARTICLES OF INCORPORATION
NON-PROFIT CORPORATION

NOTICE IS HEREBY GIVEN that Articles of Incorporation-Domestic Nonprofit Corporation were filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania on June 12, 1996, for the purpose of obtaining a Certificate of Incorporation for a proposed domestic nonprofit business corporation to be organized under the Pennsylvania Business Corporation Law of 1988, P.C. 1444, No. 177. The name of the corporation is **NEW OXFORD GIRLS SOFTBALL ASSOCIATION** and the purpose for which the corporation will be organized is as an organization and facility for athletic competition and to engage in and to do any lawful act concerning any or all business for which corporations may be incorporated under the said Pennsylvania Business Corporation Law of 1988, P.L. 1444, No. 177.

The initial registered office of the corporation is 841 Forest Drive, Abbottstown, Pennsylvania 17301.

Stonesifer and Kelley
Attorneys At Law
209 Broadway
Hanover, PA 17331

6/28

LEGAL NOTICE

NOTICE IS HEREBY GIVEN that Thomas R. Campbell intends to apply in open Court for admission to the Bar of the Court of Common Pleas of Adams County, Pennsylvania, on the 22nd day of July, 1996, and that he has established a full time legal practice in Adams County within the guidelines established by the Supreme Court of Pennsylvania.

Campbell, White & George
122 Baltimore Street
Gettysburg, PA 17325

6/14 & 21 & 28

HIMMELREICH VS. BAUGHER INSURANCE
AGENCY, ET AL.

1. Although it is impossible to establish precise standards as to the degree of particularity required for the pleading of fraud, two conditions must be met to fulfill the requirement: (1) the pleadings must adequately explain the nature of the claim to the opposing party so as to permit the preparation of a defense, and (2) they must be sufficient to convince the court that the averments are not merely subterfuge.

2. The Unfair Trade Practices and Consumer Protection Law is to be liberally construed so as to effectuate, as fully as possible, the Legislature's purpose of preventing unfair and deceptive practices.

3. Although fraud under the Unfair Trade Practices and Consumer Protection Law has not been defined, it has been interpreted to be the equivalent of common law fraud.

4. A cause of action for libel is based upon a writing and as such that writing is to be attached to the complaint.

5. In determining whether punitive damages should be awarded, the state of mind of the actor is vital since the act, or the failure to act, must be intentional, reckless or malicious.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 94-S-753, MARK A. HIMMELREICH AND LISA HIMMELREICH VS. BAUGHER INSURANCE AGENCY, YORKTOWNE MUTUAL INSURANCE CO., AND PENNSYLVANIA NATIONAL INSURANCE COMPANIES.

Charles I. Himmelreich, Esq., for Plaintiffs

Frank J. Lavery, Jr., Esq., for Defendant Baugher

David Mills, Esq., for Defendant Yorktowne Mutual

Jefferson J. Shipman, Esq., for Defendant Pennsylvania National

OPINION ON PRELIMINARY OBJECTIONS
FILED BY ALL DEFENDANTS

Kuhn, J., November 22, 1995.

The procedural history of this matter is relevant. On October 11, 1994, Plaintiffs filed a 12 count complaint against defendants, Baugher Insurance Agency (Count Nos. I, II, III, XII), Yorktowne Mutual Insurance Co., (Count Nos. IV, V, VI, VII, VIII), and Pennsylvania National Insurance Companies (Count Nos. IX, X, XI). The Complaint concerns insurance coverage, or lack thereof, for a property which Plaintiffs bought at a tax sale on September 13, 1991, but were not able to possess until August 24, 1993, due to challenges to the propriety of the tax sale. On November 1, 1991, Baugher allegedly issued to Plaintiffs a policy underwritten by Penn National who subsequently refused to renew the policy after its initial one year term. Baugher then issued two Yorktowne policies to replace the Penn National policy.

Plaintiffs claim that the premises was damaged by the former owners before Plaintiffs could take possession but that Yorktowne refused to honor the claim. In simplistic terms the complaint against Baugher is for failing to obtain proper coverage, against Yorktowne for not covering the claim and against Penn National for refusing to renew its policy.

Preliminary objections were filed by Baugher (November 2, 1994) and Penn National (November 3, 1994) whereas Yorktowne filed an answer with new matter (November 8, 1994). On November 23, 1994, Plaintiffs filed an amended complaint and several days later responded to Yorktowne's new matter. Preliminary objections were filed to the amended complaint by Yorktowne (December 7, 1994), Baugher (December 12, 1994) and Penn National (December 14, 1994). These preliminary objections are before the Court for disposition.

Preliminary Objections By Yorktowne

Yorktowne contends that Plaintiffs filed the amended complaint in violation of Pa. R.C.P. 1028 and 1033 and seeks to strike certain paragraphs of the amended complaint. Rule 1028(c)(1) allows a party to file an amended pleading within 20 days after service of preliminary objections. Yorktowne argues that because it did not file any preliminary objections Plaintiffs had no authority under this rule to file an amended complaint against Yorktowne. After the passage of 20 days, Rule 1033 allows a party to file an amended pleading with the consent of the adverse party or by leave of court. Yorktowne contends that Plaintiffs had neither consent nor leave to file the amended complaint.¹

There is general recognition that the filing of preliminary objections has the effect of staying the proceeding until there has been disposition of the objections. Where there is a timely amendment of the complaint before disposition of the objections those objections become moot. Neither party has cited any case which addresses the instant situation where some but not all defendants file preliminary objections and a plaintiff files an amended complaint as to all defendants after answer has been filed by the non-objecting defendant.

Without setting a definitive rule the court believes these matters should be considered on a case-by-case basis. If Yorktowne's request is granted there would be inconsistency in the allegations regarding the various defendants which could be quite confusing. We believe it is

¹Yorktowne's brief also contends that the amended complaint raises claims which would be barred by the one year statute of limitations, 40 P.S. §636, however, that issue was not raised in Yorktowne's preliminary objection and will, therefore, be disregarded.

better practice to allow the amendment but allow Yorktowne to replead, including, inter alia, the filing of preliminary objections raising the statute of limitations. If the amendment raises a new cause of action beyond the statute of limitations, it would be easier to jettison that cause of action at that juncture than to deal with confusing and inconsistent averments.

Preliminary Objections By Baugher

1. Baugher claims that Plaintiffs did not file the amended complaint within 20 days after service of its preliminary objections as required by Pa. R.C.P. 1028(c). Baugher asserts that its objections were served upon Plaintiffs by letter dated October 31, 1994 or 23 days prior to the filing of the amended complaint and that Pa. R.C.P. 440(b) provides that service is complete upon mailing. However, under Rule 440 it is improper to serve a pleading by mail which was filed subsequent to the date of mailing. See *Equibank v. Duboy*, 367 Pa. Super. 261, 532 A.2d 889 (1987) n.1. Thus, Plaintiffs were not technically served on October 31, 1994, and their amended complaint is timely.

2. Baugher filed a demurrer claiming that Plaintiffs failed to state a cause of action in fraud (Count II) because Plaintiffs failed to set forth the averments of fraud with particularity. Pa. R.C.P. 1019(b). It is well known that a demurrer admits all well pleaded and material facts set forth in a complaint as well as all inferences reasonably deducible therefrom. It does not admit conclusions of law but does test the legal sufficiency of the pleadings. Therefore, the demurrer will only be sustained where the law says with certainty that the plaintiff has failed to state a cause of action for which relief can be granted. *Seils v. Gettysburg Area Industrial Development Authority*, 37 Ad. Co. L.J. 67, 69 (1995).

The elements necessary to prove fraud are (1) a false representation of an existing fact, (2) if the misrepresentation is innocently made, then it is actionable only if it relates to a matter material to the transaction involved; while if the misrepresentation is knowingly made or involves a non-privileged failure to disclose, materiality is not a requisite to the action, (3) scienter, which may be either actual knowledge of the truth or falsity of representation, reckless ignorance of the falsity of the matter or mere false information where a duty to know is imposed upon a person by reason of special circumstances, (4) reliance, which must be justifiable so that common prudence or diligence could not have ascertained the truth, and (5) damage to the person relying thereon. *Wilson v. Smith*, 36 Ad. Co. L.J. 183, 186 (1994). Of course, one alleging fraud has the burden of proving it by clear, precise and

indubitable evidence. *Mancini v. Morrow*, 312 Pa. Super. 192, 201, 458 A.2d 580, 584 (1983). As noted Rule 1019(b) requires that fraud must be averred with particularity. In *Martin v. Lancaster Battery Co., Inc.*, 530 Pa. 11, 606 A.2d 444 (1992) that court stated

although it is impossible to establish precise standards as to the degree of particularity required under this rule, two conditions must be met to fulfill the requirement: (1) the pleadings must adequately explain the nature of the claim to the opposing party so as to permit the preparation of a defense, and (2) they must be sufficient to convince the court that the averments are not merely subterfuge. 530 Pa. at 18, 606 A.2d at 448.

Certainly, an averment of fraud standing alone would not satisfy the rule.

The main thrust of Baugher's objection is its contention that Plaintiffs failed to aver any misrepresentations or fraudulent utterances. However, viewing the amended complaint as a whole the averments pled are sufficient to defeat a demurrer.

3. Baugher filed a demurrer claiming that Plaintiffs failed to state a cause of action under the Unfair Trade Practices and Consumer Protection Law (UTCPL), 73 P.S. §201-1, et. seq. (Count III). It is not entirely clear to the court what is allegedly deficient with the amended complaint and for that reason alone we might decline further comment. Nevertheless, we add the following discussion.

Pennsylvania courts have held that the Act is to be liberally construed, *Commonwealth v. Bell Telephone Company of Pennsylvania*, 121 Pa. Comlth. Ct. 642, 647, 551 A.2d 602, 604 (1988), so as to effectuate, as fully as possible, the Legislature's purpose of preventing unfair and deceptive practices. *Culbreth v. Laurence J. Miller, Inc.*, 328 Pa. Super. 374, 391, 477 A.2d 491, 495 (1984).

The UTCPL provides that

Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers ascertainable loss . . . as the result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action . . .

73 P.S. §201-9.2.

Section, 73 P.S. §201-3, of the Act provides that unlawful acts or practices are those "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" as

defined in 73 P.S. §201-2(4)(i)-(xvii) and regulations promulgated under 73 P.S. §201.3.1.

The amended complaint does not specifically set forth the applicable subsections of 73 P.S. §201-2(4) upon which Plaintiffs rely, however, the court feels safe in concluding that they are proceeding under the “catch all” provision in subsection (xvii) which prohibits “engaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding.” Although fraud has not been defined in the Act, it has been interpreted to be the equivalent of common law fraud. *Prime Meats, Inc. v. Yochim*, 422 Pa. Super. 460, 469, 619 A.2d 769, 773 (1993), Alloc. den. 646 A.2d 1180 (1994). Having earlier concluded that Plaintiffs have adequately pled a cause of action in common law fraud, it follows that they have also pled a cause of action under the U.T. P.C.P.L. The averments of the amended complaint in this action are much more particularly detailed than the averments in *Nelson v. Old Guard Mutual Insurance Co.*, 13 D & C4th 173 (Fulton Co. 1990) relied upon by Baugher.

4. Baugher filed a demurrer to Count XII claiming that Plaintiffs failed to state a cause of action for libel. First, Baugher argues that the statute of limitations for defamation is one year, 42 Pa. C.S.A. §5523(1) and suggests that the amended complaint alleges no libelous conduct within one year of the commencement of this action by writ of summons on August 19, 1994. The alleged libel concerns Baugher’s listing of Plaintiffs as a bad credit risk in a credit report. The amended complaint avers that Plaintiffs obtained possession of the premises on August 24, 1993, assessed damages and had Baugher’s owner inspect the premises the following day (¶30, 31). Thereafter, Penn National and Yorktowne refused to pay Plaintiffs’ claims (¶33, 34). It was “after all the events set forth above . . . had transpired” that Baugher allegedly placed Plaintiffs’ names in the credit report (¶123). Obviously, the action was commenced within one year after the alleged libelous publication.

Second, Baugher contends that it is entitled to a conditional privilege and that there are no averments that the privilege was abused. For this purpose we draw extensively from the opinion of the Honorable Judge Vincent A. Cirello in *Elia v. Erie Insurance Exchange*, 430 Pa. Super. 384, 634 A.2d 657 (1993), Alloc. den. 644 A.2d 1200 (1994).

In an action for defamation, the plaintiff must prove:

- (1) the defamatory character of the communication;
- (2) its publication by the defendant;

- (3) its application to the plaintiff;
- (4) the understanding by the recipient of its defamatory meaning;
- (5) the understanding by the recipient of it as intended to be applied to the plaintiff;
- (6) special harm resulting to the plaintiff from its publication; and
- (7) abuse of a conditionally privileged occasion.

42 Pa. C.S.A. §8343(a) (emphasis added) . . . The defendant has the burden of proving, when relevant to the defense:

- (1) the truth of the defamatory communication;
- (2) the privileged character of the occasion on which it is published; and
- (3) the character of the subject matter of defamatory comment as of public concern.

42 Pa. C.S.A. §8343(b) (emphasis added).

Defamation is a communication which tends to harm an individual's reputation so as to lower him or her in the estimation of the community or deter third persons from associating or dealing with him or her. Under Pennsylvania defamation law, only statements of fact can support an action for libel or slander, not merely expressions of opinion. 42 Pa. C.S.A. §8343(a) . . . Further, whether a particular statement or writing constitutes fact or opinion is a question of law for the court to determine in the first instance . . . Additionally, it is within the trial court's province to determine whether the challenged statements are capable of having defamatory meaning . . .

Next, in order for defamation to occur in the form of either libel or slander, the defamatory statement must be published or communicated to a third person . . .

Notwithstanding the above, a publisher of a defamatory matter is not liable if the publication was made subject to a privilege, and the privilege was not abused . . . "Communications made on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause are

privileged” . . . Examples of such occasions giving rise to conditional privileges are:

- (1) when some interest of the publisher of the defamatory matter is involved;
- (2) when some interest of the recipient of the matter, or a third party is involved; or
- (3) when a recognized interest of the public is involved.

. . . Depending upon the importance of the publisher's actions to society, the privilege may be absolute or conditional/qualified . . .

430 Pa. Super. at 390-91, 634 A.2d at 659-60 (citations omitted).

In *Baird v. Dun & Bradstreet*, 446 Pa. 266, 285 A.2d 166 (1971) the court stated “a cause of action in libel is not adequately pleaded by merely alleging, without any supporting facts or exhibits, that a publication is scandalous, malicious, defamatory and libelous. 446 Pa. at 272, 285 A.2d at 170. The court also held once it is shown that a credit reporting agency is in the business of reporting financial information to subscribers who request such information, those reports are prima facie conditionally privileged and a plaintiff must prove abuse of that privilege.

Reading Count XII the averments regarding an alleged defamatory publication consist of no more than that Baugher listed Plaintiffs' names in a credit report as a bad credit risk, that the credit report was distributed to others and that the statements were false. We conclude that these averments standing alone are inadequate to withstand a demurrer. A cause of action for libel is based upon a writing and as such that writing is to be attached to the complaint. Pa. R.C.P. 1019(h). The court is, therefore, unable to examine the communication to determine its defamatory character. It is also unclear to whom Baugher distributed the report and the context in which the publication was made.

It is premature to determine whether a conditional privilege is present because that burden initially falls upon Baugher not Plaintiffs. It is, therefore, also premature to decide whether Plaintiffs have properly pled abuse of that privilege.

5. Baugher argues that Plaintiffs have not pled the requisite conduct that would entitle them to punitive damages in Counts III and XII.² A request for punitive damages is incidental to a cause of action and does

² Although a demurrer to Count XII has been sustained, it is included in this discussion in anticipation that Plaintiffs will attempt to re-plead that cause of action.

not itself constitute a cause of action. *Nix v. Temple University*, 408 Pa. Super. 369, 380, 596 A.2d 1132, 1138 (1991).

The Superior Court in *Smith v. Celotex Corp.*, 387 Pa. Super. 340, 564, A.2d 209 (1989), recently discussed the guidelines for determining whether punitive damages are appropriate in a given set of circumstances.

It has long been the law of Pennsylvania that punitive damages are appropriate only in the most circumscribed situations. Section 908 of the Restatement (Second) of Torts, which has been adopted in Pennsylvania, sets forth the governing principles for awards of punitive damages:

Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Restatement (Second) of Torts, Section 908(2) (1965). See also *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 69 (1989); *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800 (1989); *Martin v. Johns Manville Corp.*, 508 Pa. 154, 168, 494 A.2d 1088, 1096 (1985) (plurality); *Chambers v. Montgomery*, 411 Pa. 339, 344, 192 A.2d 355, 358 (1963).

The reckless disregard of the rights of others that is required under Section 908 is further explained by Section 500 of the Restatement, which defines "reckless disregard" as follows:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (second) of Torts, Section 500 (1965).

Thus, as the Supreme Court opined in *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984), in determining whether punitive damages should be awarded. “(t)he state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious.” *Id.* at 396, 485 A.2d at 748. See also *Rizzo v. Haines*, supra; *Thomas v. American Cytoscope Makers, Inc.*, 414 F.Supp. 255 (E.D.Pa. 1976); *Neal v. Carey Canadian Mines, Ltd.*, 548 F.Supp. 357, 374 (E.D.Pa. 1982). This focus is unquestionably proper, since the purpose of punitive damages is to punish the defendant’s conduct and deter similar behavior in future. See *Kirkbride*, supra; Restatement (Second Torts, Section 908(1). Where the defendant has acted in a merely negligent manner, or even a grossly negligent manner, there is insufficient culpability and awareness by the defendant of the nature of his acts and of their potential results either to warrant punishment or effectively to deter similar future behavior. 387 Pa. Super. at 343-5; 564 A.2d at 210-11.

Whether Plaintiffs are able to prove conduct outrageous enough to justify punitive damages will be decided at another time. The pleadings are sufficient at this point, and it would be premature to rule on the averments now. *McClellan v. Health Maintenance Organization of PA*, 413 Pa. Super. 128, 145, 604 A.2d 1053, 1061 (1992), *Alloc. den.* 616 A.2d 985 (1992); *Lang v. Emig*, 34 Ad. Co. L.J. 254, 256 (1992). However, Baugher will have an ample opportunity before trial to develop a record and have this issue reviewed.

6. Baugher finally attacks the specificity of the averments in Counts II, III and XII. A motion for a more specific pleading will be denied if the averments of the pleading are sufficient to enable the responding party to file his answer. *Tanon v. Knouse*, 34 Ad. Co. L.J. 207, 209 (1992). With the exception of Count XII, the averments are sufficient for that purpose.

Preliminary Objections of Penn National

1. Penn National demurs to Count IX by arguing that its failure to renew the insurance policy does not constitute fraud. We agree. Whether or not Penn National misrepresented an existing fact (ownership status of the subject premises) it would have been something Plaintiff would have known to be untrue, if in fact it was, and would not be something upon which they could justifiably rely.

2. Penn National demurs to Count X, an alleged violation of the UTPCPL. Plaintiffs have not identified how Penn National's conduct has violated any of the first sixteen unfair or deceptive acts or practices set forth in 73 P.S. §201-2(4)(i)-(xvi). Having ruled that Plaintiffs have not stated a cause of action for common law fraud, their claim would likewise fail under 73 P.S. §201-2(4)(xvii).

3. Penn National requests dismissal of any claims for punitive damages in Counts IX and X. This issue becomes moot in light of the demurrers granted to those counts.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 22nd day of November, 1995, it is hereby ordered that:

- 1) The preliminary objections filed by Baugher Insurance Agency are denied except the demurrer to Count XII is granted.
- 2) The preliminary objections filed by Pennsylvania National Insurance Companies are granted.
- 3) The preliminary objections filed by Yorktowne Mutual Insurance Co. are denied.

Plaintiffs are granted twenty (20) days from the date of mailing of this Order to file any amendments to the Amended Complaint. Responsive pleadings shall be filed twenty (20) days thereafter.

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 DALE R. FIDLER, DEC'D
Late of Straban Township, Adams County, Pennsylvania
Administrator: Fred D. Fidler, 620 Locust Street, Wrightsville, PA 17368
Attorney: Walton V. Davis, Esquire, 31 S. Washington St., Gettysburg, PA 17325

ESTATE OF ANNA Z. SANDERS, a/k/a ANNA M. SANDERS, DEC'D
Late of the Borough of Gettysburg, Adams County, Pennsylvania
Administratrix, c.t.a.: Theresa A. Tudor, 4906 Golfview Drive, Chattanooga, TN 37411
Attorney: Swope, Heiser & McQuaide, 104 Baltimore Street, Gettysburg, PA 17325

ESTATE OF WALTER L. SHEELY, DEC'D
Late of the Borough of Littlestown, Adams County, Pennsylvania
Executors: Walter L. Sheely, Jr., 373 East Catherine Street, Chambersburg, PA 17201; Thomas E. Sheely, 481 Berlin Road, New Oxford, PA 17350
Attorney: Pyle and Entwistle, 33 West Middle Street, Gettysburg, PA 17325

ESTATE OF PAUL I. WAGNER, DEC'D
Late of Oxford Township, Adams County, Pennsylvania
Executors: William J. Groft, 237 Hanover Street, New Oxford, PA 17350; Scott R. Bell, 101 Lincolnway West, New Oxford, PA 17350
Attorney: William W. Hafer, Esquire, 215 Baltimore Street, Hanover, PA 17331

ESTATE OF CORNELIA G. ZEGER, DEC'D
Late of Oxford Township, Adams County, Pennsylvania
Representatives: Galen C. Zeger; Elnora Danzberger; Jacqueline Izer; Thomas A. Zeger, c/o Patterson, Kiersz & Ganley, P.C., 239-B East Main Street, Waynesboro, PA 17268-1681
Attorney: Patterson, Kiersz & Ganley, P.C., 239-B East Main Street, Waynesboro, PA 17268-1681

SECOND PUBLICATION

ESTATE OF ELIZABETH M. BACHELIER, DEC'D
Late of 678 Grant Drive, Gettysburg, PA 17325
Testatrices: Anne Kovall, 678 Grant Drive, Gettysburg, PA 17325; Rose Marie Allison, 2070 Enfield Street, Camp Hill, PA 17011
Attorney: Matthew R. Battersby, P.O. Box 215, 20 West Main Street, Fairfield, PA 17320

ESTATE OF ROSSWELL F. DUSMAN, DEC'D
Late of Oxford Township, Adams County, Pennsylvania
Executor: William H. Dusman, 229 Kennedy Court, Severna Park, MD 21146
Attorney: Stonesifer and Kelley, 209 Broadway, Hanover, PA 17331

ESTATE OF MAE I. PHILLIPS, DEC'D
Late of Cumberland Township, Adams County, Pennsylvania
Co-Executors: Brian G. Phillips, 1166 N. Brown's Dam Drive, New Oxford, PA 17350; Michelle M. Flickinger, 255 Brown's Dam Road, New Oxford, PA 17350; Christopher M. Phillips, 710 Stoney Point Road, East Berlin, PA 17316; Tina M. Gladhill Smith, 460 Cedar Ridge Road, New Oxford, PA 17350
Attorney: Clayton R. Wilcox, Esquire, 234 Baltimore St., Gettysburg, PA 17325

ESTATE OF DALE STANLEY SITES, SR., DEC'D
Late of Franklin Township, Adams County, Pennsylvania
Administratrix: Penelope S. Sites, P.O. Box 4834, Gettysburg, PA 17325
Attorney: Swope, Heiser & McQuaide, 104 Baltimore Street, Gettysburg, PA 17325

ESTATE OF RALPH H. WHISLER, DEC'D
Late of Oxford Township, Adams County, Pennsylvania
Executors: A. Jean Martin, 822 Broadway, Hanover, PA 17331; Frederick L. Whisler, 276 Georgetown Road, Littlestown, PA 17340
Attorney: Stonesifer and Kelley, 209 Broadway, Hanover, PA 17331

THIRD PUBLICATION

ESTATE OF ETHEL ROSELLA BLEVINS, DEC'D
Late of Cumberland Township, Adams County, Pennsylvania
Administrator: Velma Ruth Blevins
Attorney: John James Mooney, III, Esquire, Attorney for Estate, 250 York Street, Hanover, PA 17331

ESTATE OF MARGARET ISOBEL CROWE, DEC'D
Late of Straban Township, Adams County, Pennsylvania
Executor: Adams County National Bank, ATTN: Nancy L. Reichart, Lincoln Square, Gettysburg, PA 17325
Attorney: Teeter, Teeter, & Teeter, 108 West Middle Street, Gettysburg, PA

ESTATE OF TONY L. HOFFMAN, DEC'D
Late of Bendersville, Adams County, Pennsylvania
Executor: John Hoffman, 114 South Main Street, Box 191, Bendersville, PA 17306
Attorney: John A. Wolfe, Esq., Wolfe & Rice, 47 West High Street, Gettysburg, PA 17325

ESTATE OF RUTH T. SEIDERS, DEC'D
Late of Cumberland Township, Adams County, Pennsylvania
Executrix: Nancy D. Coniff, 27 Liberty Street, Gardiner, ME 04345
Attorney: Catherine J. Gault, 31 South Washington Street, Gettysburg, PA 17325

ESTATE OF HELEN H. WILDE, DEC'D
Late of the Borough of Biglerville, Adams County, Pennsylvania
Executrix: Kathleen Reed, 248 Thomas Drive, Gettysburg, PA 17325

NOTICE OF APPLICATION FOR CERTIFICATE OF AUTHORITY

NOTICE IS HEREBY GIVEN that an Application for Certificate of Authority has been filed with the Department of State of the Commonwealth of Pennsylvania, Harrisburg, Pennsylvania for the purposes of obtaining a Certificate of Authority for the EVAN JEFFREY CORPORATION, organized and incorporated under the laws of the State of Maryland with a principal office at 5722-A Buckeystown Pike, Frederick, Maryland 21701, and a proposed registered office at 1275 York Road, Gettysburg, Pennsylvania 17325. Said Application for Certificate of Authority is made under the provisions of the Pennsylvania Business Corporation Law of 1988, approved December 21, 1988, P.L. 1444, No. 177, as amended.

Swope, Heiser & McQuaide
104 Baltimore Street
Gettysburg, PA 17325

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