

that it is within our discretion to award necessary and proper attorney's fees. "This is the sort of opinion . . . which makes the trial judge a candidate for crucifixion on the cross of discretion." *Gimarc v. Neal*, 417 F.Supp. 129, 132 (D.C.S.C. 1976). However, after applying all four of the *Croft* factors, including the novelty and difficulty of the questions presented and the damages awarded, this court finds that one thousand, five hundred (\$1,500) dollars in attorney's fees is reasonable and proper. Accordingly, defendant will pay plaintiff's counsel fees in that amount. Plaintiff will pay the seven hundred forty-eight dollars and fifty-nine cents (\$748.59) in costs of the prosecution.

#### ORDER OF COURT

October 8, 1990, the court finds for James A. Lucas, Sr., plaintiff, and against Chambersburg Toyota, Inc., defendant, in the amount of one thousand, one hundred nineteen dollars and eight cents (\$1,1190.08); and

The court orders the defendant to pay plaintiff's counsel the sum of one thousand, five hundred (\$1,500) dollars as proper and reasonable attorney's fees.

COMMONWEALTH OF PENNSYLVANIA V. ONE 1982 FORD TRUCK, ETC., ET AL., PENNSYLVANIA STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT, C.P. Franklin County Branch, Misc. Doc. Vol. AA, Page 77

#### *Seizure of Vehicles - Forfeiture - Violation of Liquor Code*

1. Once the Commonwealth introduces evidence that a vehicle was used in violation of the Liquor Code, the burden shifts to the defendant to show it was not so used.
2. The Court has discretion as to whether a confiscated vehicle shall be forfeited.
3. A trial court must consider a claimant's lack of knowledge when deciding whether or not to return seized property.
4. A distinction must be made between a distributor who has no reason to know alcohol is being purchased for resale and where employees of the distributor were active witnesses and participants.

*Michael S. Sherman; Esquire, Counsel for Plaintiff*  
*Robert M. Strickler; Esquire, Counsel for Defendant*

#### OPINION AND ORDER

WALKER, J., October 18, 1990:

Both actions having been consolidated, a hearing was held on the instant motion for return of property and petition for forfeiture on September 20, 1990. The facts, which are not in dispute, follow.

In early 1990, Steven and Kelly Ambrose (hereinafter, "Ambrose") contacted Chambersburg Beverage, Inc. ("Chambersburg Beverage") and ordered 60 half barrels of beer, ice and cups. Ambrose also arranged for the rental of Chambersburg Beverage's truck, which was equipped with tapping devices to dispense the beer. The beer, supplies and truck were delivered to the "Ambrose's 4th Annual Hog Roast" in Greencastle, Franklin County, on September 1, 1990. The event was widely advertised and tickets were sold in advance in and around the Greencastle area.

Two Chambersburg Beverage employees took the beer and truck to the hog roast. While at the picnic, the employees were responsible for remaining with the truck, transferring the barrels of beer from the storage area of the vehicle to the tap area, tapping the barrels, replacing empty barrels of beer and keeping the beer cold.

Officers from the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") purchased tickets to the hog roast for \$20 at the front gate. Before they were permitted to purchase a ticket, however, they were required to show proof of age and to sign a "waiver" stating that they were of legal drinking age. Ambrose did not have either a liquor license or a special occasion permit which permitted him to sell alcohol.

At approximately 2:00 p.m., a raid was conducted and the Bureau officers confiscated the beer and truck. Chambersburg Beverage filed a motion for return of the truck on September 7, 1990, and the Bureau filed its petition for forfeiture of the vehicle on September 19, 1990.

Chambersburg Beverage first argues that the truck was improperly and unlawfully seized. This court disagrees. Sections 2-211 (a)

(3) and 2-211(b) of the Liquor Code clearly provide that the Bureau has the power and the duty to seize and confiscate any vehicles used and possessed in the unlawful sale of alcohol.<sup>1</sup>

Chambersburg Beverage concedes that once the Bureau has introduced evidence from which it can be plainly inferred that the truck was possessed or used in violation of the Liquor Code, the burden of proof shifts to the claimant to show that it was not so used or possessed.<sup>2</sup> There can be no doubt that the truck was used to unlawfully sell beer and that, pursuant to section 211 (a)(3) of the Code, it could be confiscated. Ambrose not only used the truck to transport beer to what the Bureau described as a speakeasy, but actively used it to distribute beer to patrons. The court's determination does not end there, however. The court must now determine whether the truck should be forfeited or returned to the distributor.

The Liquor Code states that, with regard to lawfully confiscated vehicles, "... the Court may, in its discretion, adjudge same forfeited . . ." 47 P.S. section 6-602(e). Chambersburg Beverage hinges its case on the fact that its manager, Donald Klovensky, did not know that Ambrose lacked a liquor license or that beer was actually being sold

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<sup>1</sup> The Liquor Code, 47 P.S. section 2-211(a)(3), provides that officers of the Bureau have the power and duty:

(3) Upon reasonable and probable cause, to search for and to seize, without warrant or process, except in private homes, any liquor, alcohol or malt or brewed beverages unlawfully possessed, manufactured, sold, imported or transported and any stills, equipment, materials, utensils, vehicles, boats, vessels, animals, aircraft, or any of them, which are or have been used in the unlawful manufacture, sale, importation or transportation of the same. Such liquor, alcohol, malt or brewed beverages, stills, equipment, materials, utensils, vehicles, boats, vessels, animals or aircraft so seized shall be disposed of as hereinafter provided.

47 P.S. section 211(b) further provides that:

(b) Any equipment or appurtenance actually used in the commission of the unlawful acts can be confiscated . . .

<sup>2</sup> The Liquor Code, 47 P.S. section 6-602(e), dealing with forfeiture proceedings, provides:

(e) At the time of said hearing, if the Commonwealth shall produce evidence that the property in question was unlawfully possessed or used, the burden shall be upon the claimant to show (1) that he is the owner of said property, (2) that he lawfully acquired the same, and (3) that it was not unlawfully used or possessed.

The Supreme Court held in *Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 465 A.2d 973 (1983), that a trial court must consider a claimant's lack of knowledge when deciding whether or not to return seized property. But "in exercising its discretion the trial court should not allow the owner to close his eyes to facts which should put him on notice of illegal use." *Id.*, 502 Pa. at 200, 465 A.2d at 980.

Here, the facts are undisputed. This was the second time that Chambersburg Beverage has supplied beer to the Ambrose Hog Roast. Ambrose contacted the distributor more than seven months before the picnic to place an order for 60 half barrels of beer, which was so large a delivery that two trucks had to be used. The picnic was widely advertised and two employees of Chambersburg Beverage were actually present at the hog roast to keep the beer flowing to patrons. Persons entering the gate were charged an admission and were being "carded."

Mr. Klovensky appeared to this court to be a very intelligent gentleman, but we are unpersuaded by his testimony that, despite what was going on all around him and the other Chambersburg Beverage employees, they had no idea whatsoever that the beer was, in turn, being sold by Ambrose. The court does not believe Klovensky's testimony that it was not all unusual for an individual to purchase 60 half barrels of beer. The court finds not only that Chambersburg Beverage's truck was used in selling the beer, but also that Chambersburg Beverage should have known that Ambrose was in fact unlawfully distributing alcohol. It is the use of the truck which supports the Bureau's seizure; it is Chambersburg Beverage's knowledge of the unlawful use that supports the forfeiture.

The court does not disagree with counsel for Chambersburg Beverage who so strongly advocates in his brief that the Pennsylvania Liquor Control Board should perhaps bear the cross of further regulating local distributors and of requiring distributors to take steps necessary to prevent unlicensed purchasers of alcohol from later selling it. But, this is not a situation where the distributor had no idea of what was actually happening. A clear distinction must be made between a distributor who has no reason to know what is transpiring and where, as here, employees of the distributor were active witnesses and participants. Chambersburg Beverage

cannot now claim that it had no knowledge of what was occurring.

This court has carefully considered all of the arguments made and has taken special note of the events surrounding the raid and must find that the truck seized was used for the unlawful sale of alcohol and that Chambersburg Beverage knew or should have known of such use. Chambersburg Beverage's motion for return of the truck is denied and the Bureau's petition for forfeiture is granted.

#### ORDER OF COURT

October 18, 1990, the motion of Chambersburg Beverage, Inc. for return of the above captioned 1982 Ford truck is denied, and the Bureau of Liquor Control Enforcement for forfeiture of the 1982 Ford truck is granted.

CARR V. AUTO CLUB OF SOUTHERN PENNSYLVANIA, ET AL., C.P. Franklin County Branch, No. A.D. 1990-272

*Life Insurance - Retired Employee - Conversion Option - Demurrer*

1. Where an insured does not receive notice of a conversion option upon retirement from employment, 40 Pa. CSA, Sec. 532.7 grants insured an additional sixty days beyond the time limit in the policy.
2. A demurrer to the plaintiff's complaint will be granted where insured failed to convert his life insurance policy within the statutory time frame and coverage lapsed prior to insured death.

*Jay H. Gingrich, Esq., Attorney for Plaintiff*  
*Douglas B. Marcello, Esq., Attorney for Defendant, Commercial Union Life Insurance Company of America*  
*Robert H. Griffith, Esq., Attorney for Auto Club of Southern Pennsylvania.*

#### OPINION AND ORDER

KELLER, P.J., October 25, 1990:

Gloria B. Carr, plaintiff, commenced this action on June 6, 1990, by filing a complaint against the defendants, Auto Club of Southern Pennsylvania (defendant Auto Club) and Commercial Union Life

Insurance Company of America (defendant Commercial). The plaintiff is seeking to recover damages under a life insurance policy which was issued by the defendant Commercial and covered employees of the defendant Auto Club; one of whom was the late husband of the plaintiff.

The defendant Commercial filed preliminary objections on July 30, 1990 in the nature of a demurrer and a motion to strike the plaintiff's complaint. Briefs were received from the plaintiff and the defendant Commercial. Oral arguments were held on October 4, 1990. The defendant Auto Club neither filed a brief nor took part in oral arguments since it did not take a position concerning the preliminary objections filed by its co-defendant. This matter is now ripe for disposition.

The defendant Commercial demurs to the complaint on the ground that the plaintiff has failed to state a cause of action against it for the following reasons:

- (a) Plaintiff's decedent did not convert the policy within the time required by the policy;
- (b) Plaintiff's decedent did not convert the policy within the time required by the applicable Pennsylvania statute, including but not limited to 40 P.S. §532.7;
- (c) The facts alleged in plaintiff's complaint do not support a cause of action.

Initially we note the analytical guidelines we must be mindful of when reviewing each party's arguments.

Preliminary objections in the nature of a demurrer admit as true all well pleaded, factual averments and all inferences fairly deducible therefrom. Conclusions of law, however, are not admitted by a demurrer. It is in this light that the complaint must be examined to determine whether it sets forth a cause of action which, if proved by the plaintiff, would entitle him to the relief he seeks. If the plaintiff does set forth a course of action on which he is entitled to relief upon proof, the demurrer cannot be sustained. Conversely, a preliminary objection in the nature of demurrer is properly sustained where the complaint has failed to set forth a cause of action. *Cunningham v. Prudential Property & Casualty Insurance Co.*, 340 Pa. Super. 130, 133, 489 A.2d 875, 877 (1985) (citations omitted).