It is the Commission's position that public policy requires that investigatory information must be privileged information to insure that candid replies will be received concerning job applicants' qualifications. Hovis presents three arguments supporting disclosure of the letter. He argues that Federal law would support a desclosure of this information if this had been a federal rather than a local agency under Sect. 552a (d) (1) of the Federal Privacy Act, 5 U.S.C. Sect 552a (d)(1), as amended. But subsection (k), within that same section, permits agency heads to promulgate rules to exempt from disclosure requirements investigatory material compiled solely for the purpose of determining eligibility for Federal employment. 5 U.S.C. Sect. 552a (k). Thus, the Federal law recognizes the need for confidential investigatory employment information. Furthermore, a suggestion that we follow federal legislation by analogy to make available such records indicates that there is no other existing authority in Pennsylvania for obtaining the information.

Hovis also asserts that the "Right to Know Law" governs this situation as the letter falls within the definition of a public record which is to be open for examination and inspection. Act of June 21, 1957, P.L. 390, as amended, 65 P.S. Sect 66.1-66.4. Hovis fails to note, however, that within that very definition of "public record", there is a proviso stating:

> . . . That the term "public records" shall not mean any report, communication, or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, . . . 65 P.S. Sect 66.1(2).

As the letter was a result of a background investigation of Hovis by the Commission as part of its official duty of determining eligibility and suitability for employment, disclosure is not mandated under this statute.

Hovis also cites the Borough Code, Article XI, section J, Sect. 1177 which provides in part:

> . . . All recommendations of applicants for appointment received by the Commission shall be kept and preserved for a period of 5 years, and all such records . . . shall be open to public inspection and subject to reasonable regulation. Act of Feb. 1, 1966, P.L. 581, as amended, 53 P.S. Sect 46177.

This section refers to public inspection of recommendations of applicants as distinguished from

investigation reports. This distinction is important as reccommendations are usually solicited by the applicant while the Commission initiated the background investigation. The difference in the nature of these documents leads us to find sect.46177 inapplicable to this factual situation.

There does not appear to be any authority permitting the discovery or requiring the disclosure of investigatory information. Given the public policy arguments for according confidentiality for such reports and the specific exemptions of investigation materials, found in both State and Federal statutes, we find that Pryor's letter providing background investigation of Hovis is privileged so as to preclude discovery under Pa. R.C.P. 4011(c).

There remains a question as to whether this privilege was waived when a secretary of the Commission showed Hovis his file which contained Pryor's letter. A communication ceases to be privileged if the privilege is waived by the person benefited by the existence of the privilege. 5A Anderson Pa. Civil Practice sect. 4011.222. Here, the privilege runs between Pryor and the Commission. There are no allegations nor a showing that a secretary in the office of the Commission has any authority to waive the Commission's privilege. Without such authority, the privilege has not been waived by one who has been benefited by the privilege. Determining the privilege to be waived in this manner would run counter to the aforementioned public policy of according confidentiality to the information. Accordingly, absent a showing of authority, the secretary's action will not act to waive the Commission's privilege.

ORDER OF COURT

Now, April 17, 1978, the rule to show cause is discharged.

DEVILBISS v. ROYER, C.P., Franklin County Branch, A.D. 1977-466

Replevin - Pleading - Preliminary Objections - Demurrer - Measure of damages - Averment of ownership - Motion to Strike - Double Recovery - Motion for a more specific complaint - Pa. R.C.P. 1073.1 - Itemized value.

1. Preliminary objections in the form of a demurrer will not be sustained in a replevin action on the basis that the averment of ownership is by an alleged breach of an agreement, nor will they be sustained on the basis that an improper measure of damages is sought.

2. Preliminary objections in the form of a motion to strike in a replevin action will be granted where inconsistent prayers are made which if granted would constitute an impermissible double recovery.

3. Preliminary objections in the form of a motion for a more specific complaint in a replevin action will be granted where the value of the property sought is stated in the aggregate rather than itemized and separately valued as required by Pa. R.C.P. 1073.1.

John A. Ayres, Jr., Esq., Attorney for Plaintiff

E. Franklin Martin, Esq., Attorney for Defendant

OPINION AND ORDER

KELLER, J., March 22, 1978:

The plaintiff and the defendant were divorced on March 18, 1975. The plaintiff filed this action in replevin without bond on September 6, 1977, and the complaint was served on the defendant on that same day. The preliminary objections now before this Court were filed on behalf of the defendant on October 17, 1977, and a copy thereof was served on the plaintiff's counsel on that same day. Several stipulations were filed by counsel on November 22, 1977.

Attached to the complaint is a copy of a deed, dated July 30, 1975, by which the plaintiff conveyed her interest in real estate owned by herself and the defendant to the defendant. The plaintiff emphasizes, in paragraph 6 of her complaint, that this deed recited as consideration "other good and valuable considerations" in addition to the sum of $16,000.00 for her conveyance of her interest in said real estate to the defendant.

The plaintiff then alleges that, prior to the signing of this deed, the defendant promised to convey to her his interest in, and surrender possession of, the personal property listed in paragraph 4 of the complaint, the ownership and right to possession of which is the subject of this action. The plaintiff asserts that this promise is what constitutes the "other good and valuable considerations" mentioned above.

The plaintiff alleges that the aggregate value of the property sought by this action is $1,899.00. She further alleges that, due to the defendant's failure to surrender possession of such property to her, she has incurred expenses in the amount of $860.00 in replacing three of the items.

In her prayer for relief the plaintiff seeks $860.00 in special damages for detention of the property and either possession of the property or $1,899.00 as damages for the value of the property plus interest at the rate of 6% from July 30, 1975.

The defendant has filed preliminary objections in the form of a demurrer, a motion to strike, and a motion for more specific complaint. At argument the defendant abandoned motions for a more specific pleading Nos. 1, 2 and 4. We will deal with the remaining preliminary objections seriatim.

The demurrer asserts that the plaintiff's complaint fails to state cause of action for the following reasons: (1) that the complaint fails to show that the property, the right to possession of which is in dispute, is the personal property of the plaintiff; and, (2) that the prayer requests a recovery of value not allowed in a replevin action.

The first part of the defendant's demurrer is dismissed. The complaint avers the plaintiff's right to possession of the property in question, the means by which that right arose, and of the refusal of the defendant to surrender possession thereof upon demand. For the purpose of the demurrer, we must treat the averments as admitted. They are legally sufficient.

The plaintiff's claim of ownership is based upon an alleged breach of agreement. We do not read the case of *Mellon National Bank and Trust Co. v. Wagner*, 198 Pa. Super. 290, 182 A. 2d 284 (1962) to be authority for the proposition that a replevin action may not have its basis in a breached agreement. Nor do we believe the rule, as expressed in *Time Sales Finance Corp. v. Parks*, 198 Pa. Super. 579, 182 A. 2d 239 (1962), prohibiting the joinder of a claim in assumpsit in a replevin action has application here.

In *Devers v. Nicolodi and Sachs*, 49 Schuyl. Rec. 165 (1951), the court held that a complaint which averred that the plaintiff "on and for a considerable period of time. . . was the absolute and unqualified owner of certain goods and chattels. . . " constituted a sufficient averment of the plaintiff's ownership of the property in question and of his right to possession.

While it is clear that the *Devers* case is not "authority for the proposition that a bald averment of ownership is a sufficient pleading in an action of replevin," as pointed out by the court

in *Levick v. Levick*, 21 D&C 2d 69, 71 (1960), the plaintiff in the instant case does not rely on a bald averment of ownership in her complaint.

The defendant attaches great significance to the statement in the *Levick* case, at p. 71, that:

> "It is not necessary for plaintiff to set forth in great detail the source of her title with respect to each of the items included in. . . the complaint. Plaintiff must, however, list the various items under particular categories sufficient to identify the source of ownership, such as those items which she owned prior to marriage, or perhaps those items which were gifts to her alone, made after the marriage. This will serve the purpose of making it easier for defendant to file a proper answer, and will also serve to narrow the issues to be decided at the trial of the case."

While we are in agreement with the rule enunciated in *Levick*, supra, it is not applicable in the instant case, for this plaintiff asserts an alleged breach of agreement as the bases of her right to possession of the property.

We also dismiss the second part of the demurrer in which the defendant asserts that paragraph 1 of the plaintiff's prayer requests a recovery not allowed in a replevin action. While the Pennsylvania Supreme Court, in *Hudock v. Donegal Insurance Co.*, 438 Pa. 272, 277; fn. 2, 264 A. 2d 668 (1970), has noted that the "lower courts of the Commonwealth have reached inconsistent answers to the problem" of whether preliminary objections in the form of a demurrer are an appropriate means by which to challenge the legality of the damages sought in a complaint, the weight of authority and, we believe, the better reasoned view is that an improper measure of damages sought in a prayer is not sufficient ground to warrant sustaining a demurrer. See Goodrich-Amram 2d Sect. 1017(b): 11 (n. 35), and cases cited therein.

The next preliminary objection is in the form of a motion to strike on the grounds that paragraph 1 of the ad damnus clause is impertinent and also inconsistent with paragraph 2. In paragraph 1 the plaintiff seeks "a judgment against the defendant for $860.00 as (special) damages for detention of said property." The plaintiff apparently arrives at the sum of $860.00 by totalling the amount spent to replace 3 pieces of furniture which are among the items of property sought by this action.

In paragraph 2 of the prayer for relief the plaintiff seeks "a

judgment that the plaintiff is entitled to the possession of the property or $1,899.00 as damages for the value of the property plus interest at the rate of 6% from July 30, 1975."

The defendant argues that granting both of these prayers would give the plaintiff a double recovery, for she would then be receiving damages for replacing 3 ascertained pieces of property and either the property sought in the action, including those 3 pieces, or the value of all the property, again including those 3 pieces. We agree that this would constitute an impermissible double recovery.

While it is well established that a plaintiff in a replevin action can recover special damages, such damages are generally measured by interest on the value of the goods, together with any depreciation, during the period of wrongful detention. *Main Investment Co. v. Gisolfi*, 203 Pa. Super. 244, 248, 199 A. 2d 535 (1964); *Kovatch v. Hyde*, 47 Luz. L.R. 13, 16 (1956). In none of the cases brought to our attention has a measure of damages such as that sought in the instant case been allowed.

The defendant's motion to strike will be granted.

The final preliminary objection raised by the defendant is his motion for more specific complaint, in which he asserts that paragraph 4 of the complaint violates Pa. R.C.P. 1019(a) because the plaintiff states an aggregate value of the property rather than itemizing the value.

Pa. R.C.P. 1073.1 is the applicable rule in the case at bar. That rule provides inter alia:

> "(a) the plaintiff shall include in the complaint:
>
> (1) a description of the property to be replevied.
> (2) its value,
> (3) its location if known, and
> (4) the material facts on which plaintiff's claim is based."

We note that the plaintiff did not contest the lack of specificity of her complaint and stated in her brief, "To the extent possible, the plaintiff agrees to further itemize the value of certain of the items recited in paragraph 4 of the complaint and, therefore, the plaintiff will not argue the fourth point listed in the defendant's brief."

In *Burnett v. Mueller*, 48 D&C 2d 165, 168 (1969), the court held:

> "A motion for a more specific complaint is provided by the procedural rules so that a defendant's right and ability to answer and defend will not be unduly impaired by plaintiff's vagueness in stating the grounds of his suit. . . .The ultimate test and controlling consideration is whether the complaint adequately informs the adverse party of the issues which he must be prepared to meet so that he may properly prepare his defense for trial. . . .The whole complaint must be considered in making this determination." (citations omitted.)

We quote with approval from *General Electric Credit Corp. v. Grudowski*, 33 Westmoreland L.J. 305, 309-310 (1950):

> "Where there are several articles to be replevied, each must have a separate value so that in a case. . .where title to only one of the articles is found to be in the defendant, there will be a valuation in the affidavit of value for such article."

Plaintiff is required to itemize and separately value the items listed in paragraph 4 of her complaint. The motion for a more specific pleading will be granted.

ORDER

NOW, this 22nd day of March, 1978, the defendant's preliminary objections in the nature of a motion to strike and for a more specific pleading are sustained; the demurrers are overruled.

The plaintiff is granted leave to amend her complaint pursuant to this Opinion and pursuant to counsel's oral stipulation to claim such special damages as may be appropriate.

Exceptions are granted plaintiff and defendant.

BARNHART v. HENSON, et al, C. P. Franklin County Branch, No. 96 November Term, 1976

Pa. R.C.P. 1035 - Motion for Summary Judgment - Borough Police Officers - Conditional Immunity

1. A borough is neither the council nor the mayor but the total governing authority, consisting of the mayor as executive, and the council as legislative, with joint administrative functions.

2. Where no authority is given a motion for summary judgment will not be granted where it is alleged that police officers knew the plaintiff was

being held down by one of the defendants, that they failed to respond even though they knew that there was a gun involved and that they had in fact received orders that they should not enter taverns to settle such disputes.

3. Municipal police officers in Pennsylvnaia are employees and not public officials.

4. Municipal police officers are not entitled to conditional immunity where their overcaution has been called into question.

Denis M. DiLoreto, Esq., Attorney for Plaintiff, Donald E. Barnhart

Gerald E. Ruth, Esq., Attorney for Defendant, Joseph E. Henson, Jr.

Robert P. Shoemaker, Esq., Attorney for Defendant, Joseph E. Henson, Sr.

Rudolf M. Wertime, Esq., and *Robert J. Stewart, Esq.*, Attorneys for Additional Defendant, Borough of Greencastle

OPINION AND ORDER

EPPINGER, P.J., May 30, 1978:

Donald E. Barnhart was in the Hotel Greencastle. An encounter lasting for a period of time culminated in the proprietor, Joseph H. Henson, Jr. shooting Barnhart with a pistol. While Barnhart was being held down by Henson and his father and Henson was pointing the pistol at Barnhart, the Greencastle Police were notified of the disturbance but did not respond.

Barnhart has filed this action against Henson who has in turn joined the Borough of Greencastle (borough) and four of its policemen as additional defendants. Discovery is completed and the borough has moved for summary judgment and this motion is before the court.

The borough's motion is based on three propositions: (1) that the police department is under the control of the mayor, an independent elected official, (2) that there is no general duty of a borough to provide adequate police protection and (3) that the borough is immune from liability because the policemen are conditionally immune from liability.