

## LEGAL NOTICES, cont.

porated under the Commonwealth of Pennsylvania Business Corporation Law.

Patrick J. Redding  
Patrick J. Redding Law Offices  
19 North Main Street  
Chambersburg, PA 17201

9/29/89

Sheriff's Sale  
Friday, October 20, 1989

By virtue of certain Writs of Execution, issued out of the Court of Common Pleas of Franklin County, Pennsylvania, and to me directed, I will expose at public sale by public venue or outcry in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Pennsylvania at 1:00 o'clock P.M. on the above date, the hereinafter mentioned real estate.

All parties in interest and claimants are hereby notified that a schedule of Distribution will be filed by the Sheriff on November 17, 1989 and that distribution will be made in accordance with said schedule unless exceptions are filed thereto, within ten (10) days thereafter.

SALE NO. 5  
Writ No. AD 1989-176  
Judg. No. AD 1989-176  
Lomas Mortgage USA, Inc., formerly  
The Lomas & Nettleton Company

—vs—  
Steven C. Johnson and Sherry E. Johnson  
Atty: Leon P. Haller

ALL THAT CERTAIN following described two adjoining tracts of real estate, lying and being situate in Lurgan Township, Franklin County, Pennsylvania, bounded and limited as follows:

**TRACT NO. 1:** BEGINNING at a point in the State Road, Route #333, known as the Pleasant Hill Roxbury Road at lands of C. Earl Reed and Ruth R. Reed, thence by said lands of Reed and by lands of William and Dorothy Bowersox, South 69 degrees 45 minutes West, 173.8 feet to a fence post at the north east corner of Tract No. 2, hereinafter described, thence by said Tract No. 2, south 33 degrees 15 minutes East (shown as South 28-3/4 degrees East on survey for Tract No. 2 hereinafter described), 91 feet to a fence post at the southeast corner of said Tract No. 2, on the line of lands formerly of Jacob Beltz, now William and Dorothy Bowersox, thence by said lands of Bowersox South 78 degrees 15 minutes East, 108.3 feet to a point in the aforementioned Pleasant Hill Roxbury Road, thence by said road North 5 degrees 45 minutes East, 164 feet to a point, the place of beginning. Containing 4/10 of an acre as shown by survey and draft of T.L. Essick Reg. Prof. Eng. dated May 24, 1949.

**TRACT NO. 2:** BEGINNING at a fence post at the north-west corner of Tract No. 1 hereinbefore described; thence by lands formerly of C. Earl Reed 2nd Ruth R. Reed his wife, now William and Dorothy Bowersox South 76-1/2 degrees west 157 feet to an iron pin; thence by the same South 10 degrees east, 76.75 feet to a fence post; thence by the same North 72 degrees East, 183.5 feet to a fence post at the southwest corner of Tract No. 1, hereinbefore described; thence by said Tract No. 1, North 28-3/4 degrees West 91 feet to a fence post the place of Beginning.

Having thereon erected a dwelling house known as 11109 Cumberland Way.

BEING the same premises which Walter L. Dague and Donna L. Dague by deed dated November 9, 1984 and

## LEGAL NOTICES, cont.

recorded November 14, 1984 in Franklin County Record Book 917, Page 390, granted and conveyed unto Steven C. Johnson and Sherry E. Johnson.

BEING sold as the property of Steven C. Johnson and Sherry E. Johnson under Franklin County Judgment No. AD 1989-176.

### TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, October 30, 1989 at 4:00 P.M., prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on November 3, 1989 at 1:00 P.M., prevailing time in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack  
Sheriff

Franklin County, Chambersburg, PA  
9/29, 10/6, 10/13/89

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COMMONWEALTH VS. HORN, C.P. Franklin County Branch,  
Misc. Vol. 1, Page 85

*Private Criminal Complaint - Withdrawal of Approval by District Attorney - Request for Court Approval*

1. A court will not interfere with the exercise of prosecutorial discretion under Rule 133 unless there has been a gross abuse of discretion.
2. The District Attorney may consider the probability of a jury being sympathetic when both parties are drinking and one is charged with the unintentional death of a close friend.

John F. Nelson, District Attorney  
David C. Wertime, Esquire, Counsel for Petitioners  
David S. Keller, Esquire, Counsel for Defendant

WALKER, J., May 10, 1989:

Petitioners, Max A. Johnson and Shelby J. Johnson, parents of Douglas A. Johnson, decedent, filed this appeal pursuant to Pennsylvania Rule of Criminal Procedure 133(B)(2) seeking to reinstate their private criminal complaint against Timothy Edward Horn.

On August 4, 1988, petitioners executed a private criminal complaint charging Timothy Edward Horn with the offenses of homicide by vehicle while driving under the influence of intoxicants, homicide by vehicle, and driving under the influence of alcohol or controlled substance. This private complaint was approved on August 5, 1988 by District Attorney John F. Nelson. On the same date the private complaint was filed in the office of District Magistrate J. William Stover.

On December 28, 1988, District Attorney Nelson sent counsel for the petitioners a letter stating that after much consideration he was withdrawing the private criminal complaint.

On January 16, 1989, the petitioners filed a petition with the court requesting that the Court of Common Pleas review the complaint and approve the prosecution.

The court held a hearing on February 13, 1989 at which time the petitioners introduced the following depositions:

hearing is not the functional equivalent of a preliminary hearing and the judge does not act as a district justice, but rather, the judge should give his independent review of the complaint.

However, in *Commonwealth v. Eisemann*, 276 Pa. Super. 543, 545, 419 A.2d 591 (1980), the court in discussing the standard to be applied in reviewing the district attorney's discretion states as follows:

"Whether to charge a person with a criminal offense depends upon the exercise of prosecutorial discretion. The discretionary power of the district attorney in determining whether prosecution shall be commenced or maintained may well depend on matters of policy, wholly separate and apart from the existence or nonexistence of probable cause. For this reason, the courts have been wary of interfering with or attempting to supervise the district attorney in the exercise of his discretion in controlling criminal prosecutions. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) Cert. denied, 381 U.S. 935, 855 Ct. 1767, 14 L.Ed.2d 700. See also A.B.A. Standards Relating to the Prosecution Function and the Defense Function §3.4.

"... therefore, ... a court should not interfere with the exercise of prosecutorial discretion under Rule 133 unless there has been a gross abuse of discretion."

*Id.*, 276 Pa. Superior Ct. at 545 - 547, 419 A.2d at 592 - 593.

The court after having reviewed all the reports and depositions finds that the evidence as to who was operating the vehicle at the point where the vehicle left the roadway and skidded into the white wooden barn to be conflicting and probably inadmissible.

The Pennsylvania State Police report conducted by Trooper Melvin Northern was terminated when the officer found "insufficient and inadmissible evidence."

Jeff Conner, an ambulance chief, responded to the accident scene, and after observing both individuals, radioed that he had two class 1 patients. (Deposition, page 21) He also testified that both patients had "raccoon eyes" which according to his training indicate bleeding from a head injury.

Jeff Conner's deposition, page 34 to page 37, contains his testimony regarding a statement made by Timothy Horn while being

treated at the Chambersburg Hospital:

"Q. Did you ever hear any conversation, any statements that Horn made?

A. Yes, I did.

Q. Would you tell me the circumstances.

A. Horn had went to the X-ray room, had regurgitated, and a couple of the crew members come over to get some portable suction.

I went on back, was there. The State Police were in the ER and had asked if Horn was conscious and able to be talked to.

When I made my passes through this trip, I told them that he was.

They in turn went along back to the X-ray room. At that point one of the troopers -- and I don't know his name -- entered the room.

Horn was on the X-ray table.

Asked him -- he said: Who was driving. And the remark from Horn was: I was.

I was standing in the hall -- off the record, dumb enough to say -- I heard that, and the other state trooper standing in the hall looked at me and said: and your name is?

He recorded it at that point. He then informed the other officer that from that point on he would have to read him his rights before he asked him any other questions.

Q. Do you know what the word lucid means?

A. No.

Q. Was Horn aware of the fact that he was in Chambersburg Hospital?

A. To the best of my knowledge, yes.

Q. Was Horn sufficiently conscious and alert to in your opinion at least to understand the question and his answer?

A. He was moaning, groaning and talking through a lot of his stay in the ER and the Emergency Room.

He resonded to the X-ray tech. I have no knowledge of what head injuries he might have had except that he was talking and answering verbally to questions.

Q. Did he appear to be answering -- sir, let's talk of the role of the X-ray tech.

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The X-ray tech has to position the patient on the table to take certain films, is that correct?

A. That's correct.

Q. Did you overhear the X-ray tech talking to Horn and making requests of him to cooperate in positioning himself in certain ways?

A. I would have heard one or two statements, but I could not recall what they were.

Q. I am not asking that. Did Horn appear to you to be able to comprehend what was going on and cooperate to the extent necessary?

A. Yes.

Q. Did you hear Horn actually talk to the X-ray tech?

A. I'm not sure on that one.

Q. Did you see Horn in the X-ray room?

A. Yes.

Q. Do you recall what portion of his body was under the cone, or what they were really X-raying? Do you know what I mean by cone?

A. Yes. Okay, I don't believe at that time he was on the X-ray table itself. They can use a portable in there too.

Q. Yes, indeed.

A. If I can draw a diagram --

Q. Wait, is that a copy of something?

A. I'm sorry, that is yours.

Q. Don't draw on any originals. Originals are precious.

I will give you a piece of paper.

A. This would be the door into the X-ray room. I was standing here, the Trooper was here, the table was here and the little booth that they go into was here.

If I recall correctly the litter that he was on was approximately there, and his head would have been back here.

Q. Is that the position where he was when the trooper went in and asked him who was driving?

A. To the best of knowledge, yes.

Q. Based upon your observations, Mr. Conner, and I recognize you

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don't have medical training, but you are called upon accident scenes frequently and you do have a chance to assess people and probably their conditions differently than I do.

Do you believe that Horn was competent when he answered the state trooper that he was driving?

A. The only thing I can say is he didn't hesitate with his answer. I didn't talk to him personally the whole conversation, so . . .

Q. Was there more of a conversation than just that question and answer between Horn and the trooper?

A. No sir. Not at that time."

The court has severe reservations whether Jeff Conner had sufficient medical training and had observed the patient for an adequate length of time to render an opinion regarding competency at the time Horn responded that he was driving. In fact, when asked whether Horn was competent, Conner replied, "The only thing I can say is he didn't hesitate with his answer. I didn't talk to him personally the whole conversation, so . . ."

Dr. J. W. Laing, a neurosurgeon with Cumberland Valley Neurosurgical Consultants, expressed his opinion as to Horn's competency to make a statement in the emergency room the night of the accident in a letter dated August 29, 1988:

"I am the neurosurgeon who treated Timothy E. Horn immediately following his arrival at the Chambersburg Hospital on the night of August 9, 1986. I continued to treat him during his hospitalization and saw him several times in my office following his discharge from the hospital in September of 1986.

"As you know, Mr. Horn suffered severe head injury in the accident, including non-depressed frontal skull fracture and a left frontal intra-cerebral hematoma. I was present when he was brought into the Emergency Room and treated him there as well as subsequently following his admission to the hospital. During his time in the Emergency Room, he was not oriented as to time or place, he exhibited inappropriate behavior, he did not know what had happened to him and could provide me with no details as to the accident. He was somnolent, and would tend to go to sleep, although he could be aroused, after which he was agitated and intermittently combative. In addition to his injuries, he had a .20 blood alcohol level, according to lab testing.

"In view of the above, it is my professional opinion, to a reasonable

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## LEGAL NOTICES, cont.

CONFIRMATION: November 2, 1989.

BAKER: First and final account, statement of proposed distribution and notice to the creditors of Douglas E. Baker, Administrator of the Estate of Eugene R. Baker, late of Guilford Township, Franklin County, Pennsylvania, deceased.

FORDYCE: First and final account, statement of proposed distribution and notice to the creditors of Chambersburg Trust Company, Executor of the Estate of Helen V. Fordyce, late of Chambersburg, Franklin County, Pennsylvania, deceased.

KUHL: First and final account, statement of proposed distribution and notice to the creditors of Citizens National Bank of Southern Pennsylvania, Waynesboro, Pennsylvania, Executor of the Estate of J. Elizabeth Kuhl, late of Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

SCHAFF: First and final account, statement of proposed distribution and notice to the creditors of Chloris V. Barnes, Executrix of the Estate of Georgie P. Schaff, late of Greene Township, Franklin County, Pennsylvania, deceased.

STULL: First and final account, statement of proposed distribution and notice to the creditors of Cecil E. Seekford, Catherine V. Myers, Blanche E. Cauffman, Executors of the Last Will and Testament of Susan C. Stull, late of Quincy Township, Franklin County, Pennsylvania, deceased.

VARDEN: First and final account, statement of proposed distribution and notice to the creditors of James C. Varden, Jr. and Thomas M. Varden, Executors of the Estate of James C. Varden, late of the Borough of

## LEGAL NOTICES, cont.

Mercersburg, Franklin County, Pennsylvania, deceased.

Robert J. Woods, Clerk  
Rhonda R. King, Deputy  
Clerk of Orphan's Court  
Franklin County, Pennsylvania  
10/6, 10/13, 10/20, 10/27/89

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degree of medical certainty, that Timothy Horn was not competent to answer questions regarding the collision, including as to who was driving."

Michael Martin, a volunteer with the Chambersburg Area Advanced Life Support Unit testified in his deposition at page 13-15 as follows:

"Q. Do you recall what Dr. Laing was doing in his initial evaluation?

Was he asking Horn questions and getting responses from Horn?

A. Yes, he was pretty much conscious and alert when he, you know, he did his assessment.

He was trying to figure out where all he might be injured.

Q. Would he ask questions, for example, does this hurt, does that hurt?

A. Right

Q. Horn would respond?

A. Right

Q. Did Dr. Laing seem to rely on Horn's responses?

A. Pretty much so.

Q. So Dr. Laing's treatment as far as your observations go depended a lot on what Horn verbally told him?

A. Exactly, and, you know, what we call palpating. He would palpate his arm or something.

Q. Do you recall, were there any conversations at all, Mike, during treatment about the accident itself?

A. Not that I'm — normally in a time like that the doctors usually don't like to talk about things like that.

They just try to calm them down, you know, just make small talk really.

Q. Do you recall small talk taking place in the treatment room?

A. Just mostly asking him how he felt, you know, things like that.

Q. Would there be any questions concerning his family life? Are you married, do you have any kids, that kind of thing?

A. Not that I remember.

Q. Do you remember any specific small talk that may have taken place?

A. He asked him if he had any family or any family would be showing up, and I believe he said yes.

The when we were done, had him all cleaned up and sutured up and stuff, the doctor sent me to get his family.

Q. Did he identify any members of his family who might be there?

When I say him, I mean Tim Horn.

A. No, because he wouldn't have been able to see them.

Q. When you are saying Dr. Laing would have asked him whether he had family members --

A. He just asked him if maybe a wife or brother or sister or mom or dad would be coming into the Emergency Room, and Mr. Horn said that there would be somebody coming, family.

Q. Do you recall did Mr. Horn say that, there would be someone coming like family, or would he have said a sentence is what I am getting at?

A. I'm sure he just said family. I don't think he made a real blown out statement."

Steven R. Walls, an ambulance attendant, at page 23-24 of his deposition, testified that at the accident scene he observed Tim Horn stand up and say that he "wanted to get away."

The court has grave reservations in light of Dr. Laing's testimony, whether any of the statements made by Horn in the emergency room would have been admissible. Assuming the admissibility of the statement, the court does not believe that much weight would be given to this statement considering the physical condition of Tim Horn at the time the statement was given.

The two expert reports arrive at diametrically opposed conclusions regarding who was driving at the time of the accident. Although, each side believes their expert to be superior, the court has found that juries often disregard conflicting experts' opinions.

There was testimony by Carla Stevens Horn that both Doug Johnson and Tim Horn were at the party and drinking beer served from a keg; that Doug and Tim left to go to the Horn residence to bring back his fireworks and that Doug was driving Tim's car when they left the Clopper residence.

Several intangible factors were cited by the district attorney as influencing his decision to withdraw the charges. First, the evidence would reveal that Doug and Tim were very close friends who had been drinking beer together at a party for several hours before the accident. The blood alcohol levels taken after the accident would reveal that both individuals were legally intoxicated, Mr. Johnson's blood alcohol being .15 and Mr. Horn's blood alcohol being .20. Certainly, the district attorney may consider the sympathy factor when two parties are both drinking and one is charged with the unintentional death of his close friend.

In all criminal cases the law presumes the defendant is innocent until the district attorney introduces evidence that proves the defendant's guilt beyond a reasonable doubt. Also, the jury always retains the inherent pardoning power and can refuse to return a guilty verdict.

After reviewing all the evidence and considering the standard to be applied in reviewing the district attorney's reasons for withdrawing his previous approval of the charge, this court does not find an abuse of discretion by the district attorney in his withdrawal of the criminal charges.

#### ORDER OF COURT

May 10, 1989, the court dismisses the petition for review of the private criminal complaint.

NORLAND FAMILY PRACTICE, P.C. VS. YUREK, C.P. Franklin County Branch, No. AD 1989 - 209

*Equity - Covenant Not to Compete - Lack of Consideration - Preliminary Injunction*

1. Where an employment relationship previously exists, a covenant not to compete must be supported by new consideration or it will not be enforceable.