over the private road shown on the plan referred to above, such use by the Mortgagee to be in common with Mary Jane Timmons, her heirs and assigns, and the owners of other lots on the plan referred to above. It is agreed that no mobile home may be placed on Lot No. 1.
Parcel # - 17-J-28-92

SALE # 7

Writ # AD 1996-180
Dauphin Deposit Bank & Trust Co.
vs
David T. Freeman & Martha L. Freeman
Atty: Scott Dietterick

ALL the following described real estate lying and being situate in Lurgan Township, Franklin County, Pennsylvania, more particularly described as follows:

BEGINNING at an existing iron pin in the center of Route T-833 at corner of lands now or formerly of William R. Yost and wife; thence by corner of lands now or formerly of Yost and lands now or formerly of Davis, North 26 degrees 26 minutes West 437.6 feet to an iron pin at lands now or formerly of Elsie M. Kyner, thence by lands now or formerly of Kyner, North 52 degrees 38 minutes East 219.67 feet to an iron pin at lands now or formerly of Charles Hill; thence by lands now or formerly of Hill, South 19 degrees 52 minutes East 600.75 feet to a point in the center of Route T-833; thence by the center of said Route T-833, South 70 degrees 7 minutes West 159.5 feet to a point, the place of beginning, containing 2 acres per survey of Nassaux-Hemsley, Inc., dated November 26, 1971.

BEING the same premises which William J. White and Jean H. White, husband and wife, by Deed, dated July 3, 1989, and recorded July 18, 1989, in the Office of Recorder of Deeds in and for Franklin County at Deed Book Volume 1055, Page 68, granted and conveyed unto David T. Freeman and Martha L. Freeman, husband and wife.

TAX PARCEL #46/TAX MAP #G-20

Sale # 8

Writ # AD 1996-179
Norwest Mortgage, Inc.
vs
Daniel G. McCleaf & Linda M. McCleaf
Atty: Charles Casalnova

ALL THE FOLLOWING DESCRIBED REAL ESTATE LYING AND BEING SITUATE IN WASHINGTON TOWNSHIP, FRANKLIN COUNTY, PENNSYLVANIA, BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT AN IRON PIN ON THE EASTERLY SIDE OF TOWNSHIP ROUTE 378 AT THE SOUTHWEST CORNER OF LANDS NOW OR FORMERLY OF RYDER KAUFFMAN; THENCE ALONG SAID LANDS SOUTH 75 DEGREES 57 MINUTES EAST 140.0 FEET TO AN IRON PIN; THENCE SOUTH 47 DEGREES 03 MINUTES WEST 135.0 FEET TO AN IRON PIN; THENCE NORTH 75 DEGREES 58 MINUTES WEST 140.0 FEET TO AN IRON PIN ON THE EASTERLY SIDE OF TOWNSHIP ROUTE 378; THENCE NORTH 14 DEGREES 03 MINUTES EAST 135.0 FEET TO THE PLACE OF BEGINNING. THIS REAL ESTATE IS TRACT NO. 2 ON A SURVEY OF JOHN H. MCCLELLAN, C.S., DATED MAY 21, 1988.

BEING THE SAME REAL ESTATE CONVEYED TO DANIEL G. MCCLEAF AND LINDA M. MCCLEAF, HIS WIFE, BY DEED OF PATRICK TODD HARBAUGH AND DEATRA E. HARBAUGH, HIS WIFE, DATED FEBRUARY 12, 1993 AND RECORDED IN FRANKLIN COUNTY DEED BOOK 1173, PAGE 278.

TAX MAP Q-19, Parcel 190

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price 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 October 21, 1996 at 4:00 PM, prevailing time. Otherwise all money previously paid will be forefeited and the property will be resold on October 25, 1996, 1:00 PM, prevailing time, in the Franklin County Court House, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be the higher, shall be paid in full.

Robert B. Wollyung
Sheriff
Franklin County
Chambersburg, PA.
9/20, 9/27, 10/4/96

GARY L. PERRY, JR. AND ROBIN A. PERRY, his wife, PLAINTIFFS vs. GUY LYNN ORRIS and NANCY ORRIS, his wife, t/d/b/a G & B PAINT BALL, and GARY D. NELSON and ICILDA L. NELSON, his wife, DEFENDANTS, Franklin County Branch, Civil Action-Law No. A.D. 1996 - 107

Preliminary Objections - Affirmative Defenses - Demurrer -Negligence

1. In a negligence action, averments which raise questions about the existence of a legal duty, breach of that alleged duty and causation are properly set forth as preliminary objections and will not be dismissed on the basis that they are affirmative defenses properly plead as New Matter.

2. In a negligence action, averments alleging that plaintiff was aware of the danger and that any harm was the result of a superseding cause are not properly raised as preliminary objections. They must be plead as New Matter.

3. A demurrer will be sustained where the complaint fails to aver that an act of negligence occurred on property owned by or under the control of the defendant; likewise, a demurrer will be sustained where there are no averments that a defendant had an ownership interest in or exercised any control over a business which is allegedly responsible for the plaintiff's injuries.

David R. Breshi, Esq., Attorney for Plaintiffs
Richard L. Bushman, Esq., Attorney for defendants Orris
Paul f. Lantieri, Esq., Attorney for defendants Nelson

OPINION AND ORDER

KAYE, J., September 13, 1996

OPINION

On January 22, 1996, the above action was commenced by the filing of a complaint by Gary L. Perry, Jr. and Robin A. Perry ("plaintiffs"). [For convenient reference hereafter, Gary L. Perry will be referred to as "plaintiff"]. In the complaint, it was alleged that on April, 1995, Gary Lynn Orris and Nancy Orris ("defendants Orris") operated a business known as "G & B Paint Ball" at their residence in Greencastle, Franklin County. At about 3:00 o'clock p.m. on that date, plaintiff arrived at the defendants Orris' residence to deliver candy, after which he placed a fluorescent orange vest on his body, and began to watch the activities at G & B Paint Ball, which we gather involved adults, or adolescents, attempting to shoot each with paint-filled balls, fired from some sort of gun.

One of the game participants' guns malfunctioned, and plaintiff volunteered to replace it. Plaintiff went into a playing area, yelling what he was doing, whereupon an unknown person responded that replacing a gun was against the rules and plaintiff would be shot at unless he left within ten (10) seconds. When plaintiff failed to comply quickly enough to satisfy that individual, plaintiff was shot in the eye with a paint ball, and was rendered unconscious. He allegedly received serious permanent injuries to his eye, and now suffers from frequent headaches, and a variety of problems related to the injuries. As a result of the injuries, plaintiff filed the instant litigation. Defendants Gary D. Nelson and Icilda L. Nelson, his wife, ("defendants Nelson"), filed preliminary objections in the nature of a demurrer to the complaint, and plaintiffs filed preliminary objections to those preliminary objections. Both of the later were argued and briefed, and are before the Court for disposition. We will commence with plaintiffs' preliminary objections to preliminary objections.

I. Plaintiffs' preliminary objections to preliminary objections.

The sole basis for plaintiffs' preliminary objections to preliminary objections is that the matters asserted in defendants Nelsons' pleading are limited to the defenses of assumption of the risk, superseding proximate causation, and duty to warn and, therefore, are affirmative defenses which must be raised in a responsive pleading. To evaluate this assertion, we should first set forth that, under Pa.R.C.P. No. 1017(n), a preliminary objection is among the matters expressly allowed as a pleading, and under Pa.R.C.P. No. 1028 (a)), "Preliminary objections may be filed by any party to *any* pleading..." Under the later Rule, preliminary objections are limited to the following:

> (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
>
> (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
>
> (3) insufficient specificity in a pleading.
>
> (4) legal insufficiency of a pleading (demurrer); and

> (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action; and
>
> (6) pendency of a prior action or agreement for alternative dispute resolution.
>
> [Notes omitted].

In general , plaintiffs are correct that affirmative defenses must be raised in New Matter, not in Preliminary Objections, Pa.R.C.P. No. 1030, though it is not necessary that certain defenses, including assumption of the risk, be pleaded. Pa.R.C.P. 1030(b). However, plaintiffs are incorrect in their assertion that defendants Nelsons' preliminary objections are limited to the three matters set forth above. On the contrary, the preliminary objections raise questions, at least in part, as to whether the Complaint raised a legal duty on the part of defendants Nelson which was breached, and that this breach of a duty was pleaded as a substantial cause of the resultant injury upon which plaintiffs claim asserted herein is founded. Sub-paragraph 7(a) of the Preliminary Objections at the very least raises a question in the nature of a demurer to the complaint as to whether these defendants had a duty to warn plaintiff regarding the hazard to which he exposed himself by his entry onto a paint ball court, and thus the preliminary objection to this preliminary objection will be denied.

We agree that the remaining sub-paragraphs raise issues that are in the nature of affirmative defenses to the complaint. Sub-paragraph (b), for instance, refers to the averments in the complaint that indicate plaintiff was aware of the hazards of the game in that he put on fluorescent gear and yelled for participants to stop firing before he entered the play area; sub-paragraph (c) avers that because the complaint indicates this plaintiff was aware of the hazards of the game his injury was not proximately caused by breach of a duty, but his own knowing action; and sub-paragraph (d) refers to the shooting by an unknown individual as plaintiff left the play area, as constituting a superseding cause. These assertions do in fact raise affirmative defenses, which must be pleaded, except as provided in the Rules of Civil Procedure,

and thus we will sustain the preliminary objections to preliminary objections as to sub-paragraphs 7(b), 7(c), and 7 (d).

In so ruling, we recognized that it is possible that a complaint may contain averments which in and of themselves would assert a defense to a claim, and thus would provide a basis for the granting of a demurrer, but only if the facts pled would permit no recovery under any theory. We are unable to find that the facts pled herein at this juncture could not permit a recovery, although we think it to be questionable as to whether these defendants owed a duty to plaintiff, the breach of which would give rise to the instant cause of action. We think it would be premature to make this ultimate determination at this juncture of the litigation, as opposed to the time, if and when, defendants Nelson assert these matters in New Matter and a Reply is made thereto. At that time, the factual allegations should be fully set forth in a manner that would permit a ruling if this issue is raised with an appropriate motion.

II. Defendants Nelsons' preliminary objections to the Complaint.

As noted above, defendants Nelsons' preliminary objections are in the nature of a demurrer. Owing to the ruling in part I. Hereof, we will limit our discussion of sub-paragraph 7(a) of the Preliminary Objections. This sub-paragraph reads as follows:

> (a) Plaintiffs have failed to allege any factual basis for the existence of a duty owed by the Nelsons to the plaintiffs where plaintiffs have admitted that the game was operated by the co-defendants on property owned by the co-defendants and where plaintiffs have failed to aver any basis on which defendants Gary and Icilda Nelson had any control or right of control over the participants in the game;

A demurrer challenges the pleadings as failing to set forth a cause of action upon which relief can be granted under any theory of law. *Balsbaugh v. Rowland,* 447 Pa. 423, 290 A.2d 85 (1972). A demurrer admits all well-pleaded material facts, and all inferences reasonable arising therefrom. *Firing v. Kephart,* 466 Pa. 560, 353 A.2d 833 (1976). The facts, thus derived, are set forth previously in this opinion. The only allegations which

purport to create a duty upon the defendants Nelson is contained in Counts II and III of the complaint wherein it is asserted that the Nelsons "knew or should have known that G & B Paint Ball was operating its business on property owned by them[.]" [Complaint ¶30], and that the defendants Nelson were permitted to play the paint ball game with G & B equipment without charge or payment for this use.

From the foregoing, it is unclear whether this language asserts that the Nelsons were owners of the realty on which the game was wholly conducted, or whether these defendants merely permitted the game participants to enter onto their real estate while engaged in the game. The pleadings are quite devoid of any suggestion whatever that the Nelsons had any ownership interest in G & B Paint Ball, or that they undertook any duty of supervision of the game, or that the injury occurred on the Nelsons' property. Under the circumstances presented herein, it is apparent that for defendants Nelson to have any legal duty to plaintiff to protect him from harm or to warn him of danger, this could only arise out of their ownership of the real estate on which the injury occurred, as there is no allegation that they were involved in the business in a any way beyond permitting use of their real estate for game play by G & B Paint Ball. An identical allegation is made with respect to the defendant Orris, i.e. it is alleged that they permitted G & B Paint Ball to use their real estate to conduct its business. We think it unnecessary to recite precedent for the notion that a legal duty which derives from one's ownership interest in real property does not arise unless the injured party enters onto the alleged tortfeasor's realty and sustains the injury thereon. This allegation is missing herein. The absence of this allegation, or of any other allegation that the Nelsons had any authority or control over the paint ball business will result in the demurrer being sustained.

ORDER OF COURT

Now, September 13, 1996, upon consideration of the preliminary objections filed by the defendants Nelson and the preliminary objections to preliminary objections filed by plaintiffs, and of the briefs submitted and of oral argument, the Court sustains and denies the preliminary objections and sustains

the defendant Nelsons' remaining preliminary objection, consistent with the attached opinion.

Plaintiffs are granted twenty (20) days from this date to file an Amended Complaint and upon failure to do so will suffer non pros.

THANK YOU

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Anonymous Attorney

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