seems not to have complied with the Municipalities Planning Code.

In *Printzas v. Borough of Norristown*, 10 Pa. Cmwlth. Ct. 482, 313 A.2d 781 (1973), the court, despite the Planning Code's provisions that the board shall keep a stenographic record of the proceedings, approved a record made from the secretary's extensive notes and a sound recorder, emphasizing that the transcript appeared to be a verbatim transcript, especially on matters in contention.

In the Administrative Agency Law, Act of June 4, 1945, P.L. 1388, Sec.31, 71 P.S. Sec.1710.31, there is a provision that all testimony taken at a hearing before such agency shall be stenographically recorded and a full and complete record shall be kept of the proceedings. In *Sharp's Convalescent Home v. Dept. of Public Welfare*, 7 Pa. Cmwlth. Ct. 623, 300 A.2d 909 (1973), the testimony was taken by a tape recorder rather than by a stenographer. Even though the tape was inaudible at points, causing ommissions, the court approved the record, saying:

> The crucial aspect on appeal is whether there is a complete and accurate record of the testimony taken so that the appellant is given a base upon which he may appeal, and also that the appellate court is given a sufficient record upon which to rule on the questions presented. Due process is afforded to any party, regardless of whether the testimony is taken by a stenographer or first taken by a tape recorder and then duly transcribed by a stenographer.

7 Pa. Cmwlth, at 628, 300 A.2d at 911.

The court made it clear it would not approve an incomplete or inaccurate transcript and that there is risk in using sound recording devices. The court said, however, "In this case, the Agency (Dept. of Public Welfare) was fortunate; the transcript is not so vague or remiss so as to require rehearing." *Id.*

The Geesamans, appellants here, do not contend that the record in inadequate, incomplete or inaccurate. They simply argue that the zoning hearing board did not comply with the act and that therefore there should be a new hearing. Unless the record that was maintained, despite the way it was done, was somehow deficient, it is futile to require a new hearing. We conclude from the Commonwealth Court cases that have been cited that at least where there are no exceptions to the record itself and it appears to be a sufficient one for appellate review,

the record must stand and there is no occasion to remand for a stenographic record or a de novo hearing before the court.

We will make an order overruling that portion of appellants' appeal which we have discussed. There are other matters to be argued before the court, however, so we will order that the matter be listed for further argument.

ORDER OF COURT

June 17, 1980, the portion of the appeal of David Geesaman and Irene B. Geesaman in this matter as stated in paragraph 8 (b) of the Notice of Appeal is overruled. It is ordered that the remaining portions of the appeal shall be argued either at a regular session of argument court or at a time fixed by the Court Administrator to be agreed upon by counsel.

COLLEGE v. GOTHIE, C.P. Fulton County Branch, No. 141 of 1978—C

Assumpsit - Preliminary Objections - Pleading General and Special Damages

1. Where plaintiff pleads a breach of contract and a loss of profits "estimated to be in the area of $50,000.00", the fact that the defendant can secure the entire factual basis of the plaintiff's claim for damages through discovery does not relieve the plaintiff of pleading damages with more specificity.

2. General damages are the usual and ordinary consequences of the wrong done.

3. Loss of profits is the usual and ordinary consequences of an assumpsit action for breach of contract.

4. A distinction is made between whether a pleading is sufficient to permit the offer of proof at trial for damages and whether the pleading is sufficiently specific so that if objected to at the pleading stage the defendant is not entitled to a more specific pleading.

5. The plaintiff should specify the items of damage claimed, whenever possible whether the damages be general or specific.

Robert J. Pfaff, Esq., Counsel for Plaintiff

Jerome T. Foerster, Esq., Counsel for Defendant

OPINION AND ORDER
PRELIMINARY OBJECTIONS

KELLER, J., July 29, 1980:

This action in assumpsit was commenced by the filing of a praecipe for a writ of summons on July 7, 1978, and the issuance of the same on the same date. Service of the writ was made by the Sheriff of Franklin County on the defendant on July 27, 1978. Counsel for the defendant filed a praecipe for a rule on the plaintiff to file a complaint within twenty (20) days or suffer judgment of non pros. The rule was issued the same date and served upon counsel for the plaintiff by counsel for the defendant mailing the same on August 17, 1978. The complaint in assumpsit was filed on August 28, 1978 in the office of the Prothonotary of Fulton County.

The complaint alleges inter alia:

(a) An inquiry prior to April 2, 1973 by the defendant to the plaintiff concerning the cutting of timber on the defendant's property.

(b) An inspection of the defendant's property by the plaintiff and the written agreement of the parties dated April 2, 1973. The agreement was attached to the complaint as Exhibit "A".

(c) The plaintiff, pursuant to the contract, cut out a logyard and advised the defendant he would return at a later date to commence cutting.

(d) The defendant in violation of his agreement with the plaintiff caused the timber to be cut and removed by Leo O'Brian.

(e) "As a result of the defendant's breach of the contract, Plaintiff lost profits estimated to be in the area of $50,000.00." (Paragraph 7 of the Complaint)

The agreement signed by the parties, attached to and incorporated in the complaint as Exhibit "A" provides:

"Timber agreement between Foster College and Jack Gothie. Foster College is to cut pulpwood and logs at McConnellsburg and Valley Hi Lodge. Timber at Valley Hi Lodge is to be select cut. All dead and large timber, but large timber is not to be cut under 16 inches. Foster College is to pay 1/2 one half of all veneer logs and $20.00 per thousand

for all other timber and $2.00 a cord per pulpwood. This agreement is for four years. Made up and signed April 2, 1973. Area limited to pre marked trees OK'd by Gothie."

The defendant filed preliminary objections to the complaint on September 13, 1979:

1. In the nature of a motion for more specific pleading:

(a) As to paragraph seven of the complaint on the grounds that the loss of profits are not sufficiently specifically stated in violation of Pa. R.C.P. 1019(f).

(b) As to paragraph four on the grounds that the paragraph fails to specifically aver which of the two properties covered by the contract the plaintiff inspected.

2. A motion to strike paragraph seven and the claim for relief clause on the grounds that each claims unliquidated damages for items of special damage which must be specifically pleaded.

The defendant's motion for a more specific pleading of paragraph four is predicated on the contention that the agreement requires the cutting of timber "at McConnellsburg and Valley Hi Lodge," and defendant is unable to ascertain whether paragraph four intends to allege an inspection of both of these properties. We find no merit in this contention for paragraph four alleges:

"Foster R. College inspected *Jack Gothie's property* . . . pursuant to the inspection and agreement reached between Foster R. College and Jack Gothie, a contract was entered into dated April 2, 1973, and attached hereto as Exhibit "A" . . . " (underlining ours).

The only reasonable interpretation of the language used by the plaintiff is that the plaintiff did inspect both properties referred to in the agreement.

Paragraph seven is the object of the defendant's motions for a more specific pleading and to strike on the grounds that the plaintiff has violated Pa. R.C.P. 1019 (f) by failing to allege with specificity the loss of profits, they being special damages. To the contrary, the plaintiff contends that the loss of profits arising out of the defendant's breach of the contract is a matter of general damage and the pleading is sufficiently specific. Both preliminary objections will be considered as one.

Avenue, the southwest corner of the tract herein conveyed; thence with said Monterey Avenue, north 2 degrees 56 minutes east 100 feet to a pin; thence with Lot No. 7, south 87 degrees 04 minutes west 200 to a 20-foot public alley; thence with said alley, south 2 degrees 26 minutes west 100 feet to a point; thence with Lot No. 5, north 87 degrees 04 minutes west 200 feet to a pin, the place of beginning. Being Lot No. 6 of the subdivision of the property of Charles C. Tracey and Etta K. Tracey, as laid out by Bernard F. Smith and dated October 1940.

BEING the same real estate conveyed to George A. Schaeffer and Nancy L. Schaeffer, his wife, by deed of Andrew Slak and Jane R. Slak, his wife, dated May 4, 1973, and recorded in Franklin County Deed Book Volume 687, Page 333.

BEING sold as the property of George A. Schaeffer and Nancy L. Schaeffer, his wife, Writ No. DSB 1980-735.

SALE NO. 11
Writ No. A.D. 1980-85 Civil 1980
Judg. No. A.D. 1980-85 Civil 1980
Valley Bank and Trust Company
—vs—
James E. Brooks
Atty: Robert C. Schollaert

SCHEDULE OF REAL PROPERTY

ALL THE FOLLOWING described three (3) adjoining parcels of real estate lying and being situate in Greene Township, Franklin County, Pennsylvania, bounded and limited as follows:

PARCEL NO. 1: BEGINNING at a set iron pin on the southerly side of Sunset Lane, a fifty (50) foot wide public street, at corner of Lot No. 2, Section "D", on a plan of lots hereinafter referred to; thence by said Lot No. 2, South 34 degrees 4 minutes East, 130 feet to a set iron pin on line of other lands of James E. Brooks; thence by said land of Brooks, South 55 degrees 56 minutes West, 114.58 feet to an iron pin on the Easterly side of Greene Meadow Drive, a fifty (50) foot wide public street; thence by the easterly side of Greene Meadow Drive on a curve to the left having a radius of 114.60 feet, an arc length of 37.94 feet to an iron pin; thence continuing by the easterly side of Greene Meadow Drive, North 50 degrees 36 minutes West, 42.90 feet to a point at Sunset Lane; thence by said Sunset Lane on a curve to the right having a radius of 40 feet, an arc length of 74.37 feet to a point on the southerly side of Sunset Lane; thence by the southerly side of Sunset Lane, North 55 degrees 56 minutes East, 73.07 feet to a set iron pin, the place of beginning. Containing 15,984.187 square feet and being Lot No. 3, Section "D", on a plan of lots entitled "Addition to Plan of Lots in Greene Meadows, a development in Greene Township, Franklin County, Pa. at Greenvillage", prepared by William A. Brindle Associates, dated April 6, 1972, received and returned without comment by Franklin County Planning Commission on July 12, 1972, received and returned without comment by Greene Township Planning Commission on August 14, 1972, approved by Greene Township Board of Supervisors on August 15, 1972, and recorded among the deed records of Franklin County, Pennsylvania in Deed Book Volume 677, Page 908, marked "revised 11 July, 1972, W.A.B."

PARCEL NO. 2: BEGINNING at an existing iron pin on the easterly side of Greene Meadow Drive, a fifty (50) foot wide street, at corner of Lot No. 3, Section "D", on the aforementioned plan of lots recorded among the deed records of Franklin County, Pennsylvania in Deed Book Volume 677, Page 908; thence by said Lot No. 3 and by Lots Nos. 2 and 1, Section "D", on said plan of lots, North 55 degrees 56 minutes East, 354.58 feet to an existing nail and washer in the public road known as Township Route 605, said existing nail and washer being South 55 degrees 56 minutes West, 5.3 feet from a set nail and washer in the centerline of said Township Route 605; thence through said Township Route 605, South 34 degrees 4 minutes East, 61.59 feet to a point; thence crossing said Township Route 605, South 56 degrees 24 minutes 20 seconds West, 15.21 feet to a point on the westerly side of said Township Route 605; thence along the westerly side of said Township Route 605, South 33 degrees 35 minutes 40 seconds East, 119.20 feet to a point; thence by the same on a curve to the right having a radius of 38 feet, an arc length of 46.90 feet to a point on the northerly side of the public road known as U.S. Route 11; thence along the northerly side of said U.S. Route 11, on a curve to the left having a radius of 3,265.74 feet, an arc length of 164.99 feet to a point at Township Route No. 605; thence along the northerly side of Township Route 605, on a curve to the right having a radius of 110 feet, an arc length of 81.36 feet to a point; thence continuing along the northerly side of said Township Route 605, South 76 degrees 36 minutes 20 seconds West, 6.23 feet to a point; thence by the same on a curve to the left having a radius of 235.36 feet, an arc length of 126.51 feet to a point; thence continuing by the northerly side of said Township Route 605, South 45 degrees 48 minutes 33 seconds West, 186.22 feet to a set iron pin at Lot No. 1, Section "A", on a plan of lots entitled "Greene Meadows" recorded in Franklin County Deed Book Volume 288, Page 72; thence by said lands, North 8 degrees 12 minutes East, 36.71 feet to a set iron pin at a cul-de-sac at the southerly end of Greene Meadow Drive; thence by said cul-de-sac, on a curve to the left having a radius of 40 feet, arc length of 118.31 feet to a point; thence by the same on a curve to the right having a radius of 15 feet, an arc length of 20.68 feet to a point on the easterly side of said Greene Meadow Drive; thence by the easterly side of Greene Meadow Drive, North 7 degrees 44 minutes East, 172.28 feet to a point; thence by the same on a curve to the left, having a radius of 114.60 feet, an arc length of 78.73 feet to an existing iron pin, the place of beginning. Containing 2.532 acres as shown by draft of survey of William A. Brindle Associates dated January 18, 1973, received and returned without comment by Franklin County Planning Commission on February 6, 1974, received and returned without comment by Greene Township Planning Commission on February 11, 1974, and approved by Greene Township Board of Supervisors on February 19, 1974.

BEING part of the same real estate which Greene Meadows, a partnership, by deed dated March 25, 1974 and recorded in Franklin County Deed Book Volume 698, Page 329, conveyed to James E. Brooks and Ruth B. Brooks, his wife, and the said Ruth B. Brooks thereafter died thereby vesting full title to said real estate in James E. Brooks.

BEING sold as the property of James E. Brooks, Writ No. A.D. 1980-85.

TERMS

As soon as the property is knocked down to a 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, September 22, 1980 at 4:00 P.M., E.S.T. otherwise all money previously paid will be forfeited and the property will be resold at the hour at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Preliminarily, we noted that the plaintiff augues the factual basis for his allegation of loss of profits "in the area of $50,000.00" can be acquired by the defendant by availing himself of the applicable Rules of Civil Procedure governing discovery. There is no doubt but that the defendant has the right under the discovery rules to secure by way of interrogatories or deposition the entire factual basis of the plaintiff's claim for damages. However, in our judgment, the fact that that right exists in the defendant improperly ignores the basic issue whether the plaintiff is required to plead his alleged damages with more specificity for:

> 1. The purpose of fact pleading as it is mandated in Pennsylvania not only is intended to inform the contesting parties of the issues which they will be required to meet at the ultimate trial of the matter, but it is also intended to provide the Court with a trial format establishing the parameters of the issues. The discovery procedures do not serve this second purpose.
>
> 2. "The Rules of Civil Procedure are based on the fact-pleading system. It is therefore necessary that the pleadings set forth the facts specifically even though the facts could also be determined by discovery. Thus the fact that discovery procedures are available does not excuse the plaintiff from specifically pleading the material facts on which its cause of action is based.
>
> "Procedure should not be made unnecessarily complicated by requiring the defendant to resort to discovery proceeding to obtain information which the plaintiff could properly plead in his complaint when such information constitutes the basis on which his cause of action is based." 2 Anderson Pa. Civil Practice Rule 1017.111, page 490.

Therefore, the argument on the availability of discovery will be disregarded in the resolution of these preliminary objections

Pa. R.C.P. 1019 provides inter alia:

> "(a) The material facts on which a cause of action for defense is based shall be stated in a concise or summary form.
>
> "(f) Averments of time, place and items of special damage shall be specifically stated."

The issue here is whether the averment: "As a result of defendant's breach of the contract, plaintiff lost profits estimated to be in the area of $50,000.00" is sufficiently specific to constitute compliance with Pa. R.C.P. 1019 (a) (f).

"General damages are those which in the ordinary course of events result in the injury or harm sustained by the plaintiff, that is, they are the usual and ordinary consequences of the wrong committed. Since they bear such relationship to the plaintiff's injury, the mere pleading of the injury conveys to the adverse party the existence and the nature of the loss which the plaintiff has sustained. . ." 2A Anderson Pa. Civil Practice Sec.1019.64, page 258, 259.

"Special and consequential damages are those which in fact are proximately caused by the injury or harm sustained by the plaintiff but which do not always follow such harm, and are not foreseeable, with the consequence that the mere pleading of the plaintiff's harm or injury does not apprise the defendant that the plaintiff has sustained such special consequential damages. It is therefore necessary that the special and consequential damages be pleaded specifically and with particularity in order that the defendant will know that they have been sustained. . .The purpose of requiring the plaintiff to specifically aver items of special damages is to enable the defendant to investigate and determine the accuracy of the averments." 2A Anderson Pa. Civil Practice Sec.1019.66, pages 266, 267, 268.

"Damages are either general, those which are the usual and ordinary consequences of the wrong done, or special, those which are not the usual and ordinary consequence, but which depend upon special circumstances. General damages may be proved without being specially pleaded (citations omitted), the averment of the fact showing the wrong done being sufficient to entitle plaintiff to establish them. Special damages, on the other hand, may not be proved unless the special facts giving rise to them are averred (citations omitted)." *Parson's Trading Co. v. Dohan*, 312 Pa. 464, 468, 167 A. 310, 312 (1933).

In our judgment in an assumpsit action the loss of profits is the usual and ordinary consequences of the breach of a contract. *Romana v. Lord*, 59 Schuy. 162 (1954); *Marine Equipment and Supply Company v. Trojan Boat Company*, 55 Lanc. L.R. 269 (1956). Therefore, we have no difficulty in concluding that the plaintiff has alleged a claim for general damages. This does not, however, resolve the issue in favor of the plaintiff in the case at bar.

"Apart from the question of specifically pleading the damages because they are special or consequential, or of generally pleading or omitting to plead general damages, and although Rule 1019 (f) requires only items of special damages to be specifically stated, the great majority of the courts require

general damages to be particularized insofar as reasonably practical when such is requested in the form of a preliminary objection.

"That is, a distinction is to be made between whether a pleading is sufficient to permit the offer of proof at the trial of the damages sustained by the plaintiff and whether the pleading is sufficiently specific so that if objected to at the pleading stage the defendant is not entitled to a more specific pleading. And it is held that when the damages sustained consist of a number of distinct items which can be itemized, or which represent distinct types at law, it is improper to lump them together and merely plead a total or aggregate sum as the damages sustained. That is, the plaintiff should specify the items of damage claimed, whenever possible, and should plead the nature and extent of his loss with sufficient particularity to inform the defendant of the nature and extent of the loss sustained." 2A Anderson Pa. Civil Practice Sec.1019.68, pages 274,275.

In addition to the foregoing, the mandate of Pa. R.C.P. 1019 (a), and the interpretation thereto require that not only must the material facts be stated in a concise and summary form, but that the pleading must be precise so that the opposing party is reasonably informed and can make such investigation as may be required, prepare a responsive answer, and be prepared to defend.

"The motion generally cannot be employed to question the plaintiff's computation or claim of damages. The motion for a more specific pleading, may, however, be used to compel the adverse party to itemize his damages." 2 Anderson Pa. Civil Practice Sec.1017.118, page 496. "When the plaintiff claims for loss of profits he can be required to set forth in his complaint a cost itemization from which his profits may be computed." Sec.1017.120 page 498. "A complaint should state a cause of action with sufficient factual clarity that if not denied it would support a default judgment. And a complaint is insufficient when the defendant 'is left in the dark' as 'to precisely what injury the plaintiff is claiming.'" Sec.1017.124, page 502. "A complaint is insufficient which claims damages on a flat sum which is neither called for by the contract between the parties nor the computation thereof explained in the complaint." Sec.1017.126, page 514.

Applying the foregoing general rules of pleading and Pa. R.C.P. 1019 (a) to paragraph seven and particularly to the concluding words "in the area of $50,000.00", it is in our judg-

ment evident that the plaintiff has failed to plead the damages claimed with the requisite specificity and has, indeed, left the defendant "in the dark" as to the procedure followed in arriving at the "area" of damages claimed.

Since we have concluded that the defendant's motion for a more specific pleading of paragraph seven of plaintiff's complaint will be granted, it is unnecessary to consider his motion to strike. We do note that the defendant has included within his motion to strike paragraph seven the plaintiff's ad damnum clause on the grounds that that clause as well as paragraph seven claim unliquidated damages for items of special damages which must be specifically pleaded. The defendant failed to address the motion to strike the ad damnum clause in his brief, and we will consider that aspect of the motion abandoned.

Parenthetically, we note that the plaintiff's ad damnum clause demands judgment in excess of $10,000.00 plus interest and costs. A review of Pa. R.C.P. 1021 and 1044 (b) would be advisable.

ORDER OF COURT

NOW, this 29th day of July, 1980, the defendant's preliminary objection in the nature of a motion for a more specific pleading as to paragraph seven of the plaintiff's complaint is sustained. All other preliminary objections are overruled.

Exceptions are granted the parties.

NAUGLE AND WIFE v. TOWNSHIP OF WASHINGTON, C.P. Franklin County Branch, A.D. 1977 - 222

Preliminary Objections - Pa. R.C.P. 1030 - Municipal Law - Governmental Immunity

1. Pa. R.C.P. 1030 mandates that governmental immunity as an affirmative defense be raised in a responsive pleading.

2. Where one party objects to the other party's violation of Pa. R.C.P. 1030 and the substantive merit of the defense of immunity is not apparent on the face of the complaint the Court will sustain the party's motion to strike.

3. The date of accrual of a cause of action against a municipal body for approving conditions of a land development plan is when the party suffers actionable damages, not when the plan is approved.

4. The doors of the court room are open to negligent acts allegedly committed by municipal bodies prior to the abolition of governmental immunity by the Pennsylvania Supreme Court in *Ayala.*

John A. Ayres, Jr., Esq., Counsel for Plaintiffs.

Stephen E. Patterson, Esq., Counsel for Defendant.

OPINION AND ORDER

KELLER, J., February 19, 1980:

This action in trespass was commenced by the filing of a complaint on November 22, 1978, which inter alia alleged construction of an inground swimming pool by the plaintiffs on their real estate; the approval by the defendant of a developer's (Mar-Penn, Inc.) plot plan with conditions and stipulations as to drainage and the posting of a performance bond; the defendant's final approval of the subdivision plan of developer; the development and sale of lots by the developer; the increased flow of surface water on the lands of the plaintiffs, and the giving of notice of the same by the plaintiffs to the defendant; the bulging and ultimate collapse of plaintiffs' swimming pool as a result of flooding; and that the defendant negligently waived maximum grade drainage requirements and failed to compel the developer to comply with ordinances of the defendant. On December 12, 1978, and December 18, 1978, the defendant filed preliminary objections in the nature of demurrers, motions to strike complaint, and motions for a more specific complaint. The demurrer in the December 12, 1978 preliminary objections alleged the defendant to be governmentally immune from liability as a political subdivision of the Commonwealth. On January 2, 1979, the plaintiffs filed preliminary objections in the nature of a motion to strike to the defendant's demurrer alleging governmental immunity. The matter has been argued and counsel have submitted briefs, supplemental briefs and other authorities in support of their respective positions. The matter is now ripe for disposition.

Preliminarily, we note that the plaintiffs have agreed to amend paragraphs 25 and 26 of their complaint to meet defendant's preliminary objection 2(1). The plaintiffs have also agreed to amend paragraphs 5(A) and 26(A) to meet defendant's preliminary objection 2(2). Similar compliance has been agreed to by the parties to meet defendant's preliminary objections 2(5), 3, 5 and 6. The plaintiffs have withdrawn their preliminary objection No. 2 to the defendant's preliminary objections.