resultant loss of the leg or death. There is a reasonable chance that tissue destruction can be halted with appropriate treatment and that infection and gangrene can be prevented.

Mrs. Moore is a paranoid schizophrenic and does not have the mental capacity to make decisions concerning her health. This was the credible testimony of Dr. Strite. She denies having the ulcer and evades questions about its existence at this time, though there may have been a time when she was aware of her problem. To assert that she might have been aware of her problem at one time is however, according to Dr. Strite, to give her the benefit of the doubt because it would be hard for anyone to look at the unbandaged ulcer and deny that there was a hole in the leg. Mrs. Moore's judgment is impaired by her delusional and paranoid ideas.

It is Mrs. Moore's view that treating her leg with water is all that is needed. She first denied any conversation with Dr. Closson and others about her leg and then said, "they think there is danger, however, I say there isn't." She stated she had a blood clot that she believed in treating with mustard packs and believed in annointing her leg.

Mrs. Moore said she doesn't believe in hospitals but only in house physicians, an apparent reference to a time when doctors made house calls. When asked to choose between an operation and death she stated she didn't fear death but didn't believe her time had come. She later stated: "I intend to die. Not now, not yet, but I have been told for awhile that I am good for a hundred." On the basis of the medical testimony, the condition of her leg may cause death long before her intended time.

We did not fine a Pennsylvania case precisely on point. We found a somewhat similar situation in *In re Maida Yetter*, 62 D. & C2d 619 (1973). A doctor wanted to perform a surgical biopsy and corrective surgery the pathology on the biopsy indicated was required. Mrs. Yetter was a 60-year-old patient of a State Hospital and refused treatment so a petition was presented to appoint a guardian to give consent to the surgery. The Court found that Mrs. Yetter had refused the treatment at a time when she was informed and conscious of the consequences. Her determination not to have the surgery continued to the time of the petition, which was occasioned by the fact that then a doubt existed as to her competency to consent because her continued refusal was accompanied by delusions which began about 3 or 4 months after surgery was first suggested. The rule of the *Yetter* case seems to be that if the person was competent while being presented with the decision and in making the decision, the Court should not interfere even

though the decision might appear unwise, foolish or ridiculous and even though the person may have later become delusional.

Mrs. Moore, however, was incompetent when the treatment question was presented to her and she refused it. One's mental capacity is best determined by her spoken words, her acts and conduct. *Denner v. Beyer*, 352 Pa. 386, 42 A.2d 747 (1945); *In re Owens' Estate*, 167 Pa. Super 10, 74 A.2d 705 (1950). While there was psychiatric testimony concerning Mrs. Moore's incompetency, her statements to the Court revealed that she could not make a rational decision for the treatment of her leg. She responded to questions with confusing, irrelevant ramblings and she repeatedly denied the existence of the ulcer. A similar denial of a gangreneous feet condition by a 72-year-old woman confronted the Tennessee Court of Appeals in *State Dept. of Human Services v. Northern*, 563 S.W. 2d 197 (1978). There the court said:

> "In order to avoid the unpleasant experience of facing death and/or loss of feet, her mind or emotions have resorted to the device of denying the unpleasant reality so that, to the patient, the unpleasant reality does not exist. This is the 'delusion' which renders the patient incapable of making a rational decision as to whether to undergo surgery to save her life or to forego surgery and forfeit her life."

563 S.W. 2d at 210. The court found that the woman lacked the capacity to consent to protective medical services.

If Mrs. Moore is a competent adult, she has the absolute right to refuse or accept medical recommendations which may prolong her life or which appear to others to be in her best interest. But she is not a competent adult. Therefore the petition for the appointment of a temporary guardian of the person of Florence Moore was granted.

CONRAD, ET. AL. v. GREENCASTLE-ANTRIM SCHOOL DISTRICT, ET. AL., C.P. Franklin County Branch, E.D. Vol. 7, Page 196

Equity - Compulsory Non-suit - Reservation of Ruling

1. The court's authority to grant a non-suit is limited to cases where the defendant has offered no evidence.

2. Where the court defers ruling on plaintiff's motion for a compulsory non-suit, and allows defendant to present its case to conserve time and to prepare briefs, by failing to object to the court's decision to reserve ruling, the plaintiffs have waived the right to assert the rule.

3. In granting a non-suit in this situation, the court must rely strictly on the plaintiff's evidence.

Frederic G. Antoun, Jr., Esq., Attorney for Plaintiffs

Henry W. Rhoads, Esq., and *Rudolf M. Wertime, Esq.*, Attorneys for Defendants

OPINION AND ORDER

EPPINGER, P.J., August 24, 1979:

In an opinion in this matter filed June 6, 1979, *Conrad et al. v. Greencastle Antrim School District, et al.*, 3 Fr. Co. Leg. J.* 103, we dealt with four issues raised by plaintiffs: (1) that the decision of the defendants to build a school was arbitrary and an abuse of discretion, (2) that the board did not act in accordance with regulations promulgated by the Department of Education, (3) that a swimming pool and administrative area were considered an alternate and not properly included in the project, and (4) that the school board failed to properly adopt the project costs.

At the trial, after the plaintiffs presented their evidence, defendants' demurrer to the case was presented and their motion for a compulsory nonsuit was made. The record shows we reserved ruling on the demurrer.** For the conservation of judicial time, the convenience of the parties and witnesses, and to give counsel time to prepare briefs and argue the issues raised by the demurrer and the motion for nonsuit we took the defendants' evidence. In our earlier opinion we granted the compulsory nonsuit and sustained the demurrer. Plaintiffs now ask us to remove the compulsory nonsuit, saying nothing about the court's sustaining of the demurrer.

We are asked to remove the compulsory non-suit (1) as procedurally erroneously granted, (2) because the plaintiffs do not have an adequate administrative remedy, and (3) because viewed in the light most favorable to the plaintiffs, the evidence does not indicate there are no grounds for relief.

*Editor's Note - The designation "Franklin" was selected by the Board of Directors of Franklin County Legal Journal, by resolution, as a proper method of citing this publication; thus, the citation, "3 Franklin 103" would seem to be a suitable alternative, there being no Court rule requiring otherwise.

**It is our recollection we reserved ruling on the compulsory non-suit motion too, but the record does not show it. But plaintiffs presented this argument as though we had reserved ruling on the motion for non-suit.

In our earlier opinion we dealth with all of the issues now raised except the procedurally improvident granting of the non-suit.

> "Whenever the defendant...shall offer no evidence, it shall be lawful for the judge...to order a judgment of non-suit to be entered, if, in his opinion, the plaintiff shall have given no such evidence as in law is sufficient to maintain the action...." Act of March 11, 1875, P.L. 6 Sect. 1, as amended, 1971, June 3, P.L. 120 No. 6, Sect. 1 (Sect. 509(a) (25)), 12 P.S. Sect. 645 [repealed by Sect. 2(a)[653] of Act of 1978, April 28, P.L. 202, No. 53, to take effect June 27, 1980.]

The cases which we reviewed, *Liebendofer v. Wilson*, 175 Pa. Super 632, 107 A.2d 133 (1954), *Highland Tank v. Duerr*, 423 Pa. 487, 225 A.2d 83 (1966), *Atlantic Richfield Co. v. Razumic*, 480 Pa. 366, 390 A.2d 736 (1978), and *Smith v. Standard Steel Car Co.*, 262 Pa. 550, 106 A.2d 102 (1919), make it clear that a motion for non-suit may be considered only on the basis of evidence favorable to the plaintiff. In *Atlantic Richfield Co.*, supra, the court stated that the act expressly limits the court's authority to grant a non-suit to cases where a defendant has offered no evidence.

When we reserved ruling in this case and announced that we would continue to take the evidence, the plaintiffs did not object. A party may not sit idly by and take his chances on the outcome of the case, then later, when the outcome is not to his liking, complain of something he could have objected to earlier. *Cf. Evans v. Otis Elevator Co.*, 403 Pa. 13, 27, 168 A.2d 573, 580 (1961).

In this case, had the plaintiffs called the court's attention to the rule which they contend makes our deferring action of the defendant's motions erroneous, despite the costly expenditure of time, the court could have decided to recess the trial, proceed to the arguments on the defendants' demurrer and motion for a non-suit and make a decision. By failing to object to the court's decision to reserve ruling, the plaintiffs have waived the right to assert the rule.

However, even if the plaintiffs have waived that right, it is clear from the cases that the court has no authority to grant a non-suit unless it does so strictly on the basis of the plaintiffs' evidence. In our earlier opinion, we carefully noted that plaintiffs in their case did not meet the heavy burden which would permit a court of equity to interfere in the operations of a school board (*Conrad, et al.*, supra. 3 Fr. Co. Leg. J. at 104) and found that plaintiffs' evidence established that, as a matter

of law, Equity was not the forum in which to adjudicate their claim that the school board had not complied with the regulations of the Department of Education (*Conrad, et al.*, supra, 3 Fr. Co. Leg. J. at 105).

The entire matter may be academic, however, because whether the case is decided by virtue of our granting the non-suit or sustaining the demurrer, the result is the same.

ORDER OF COURT

NOW, August 24, 1979, the motion to remove the compulsory non-suit is denied and the order of the court dated June 6, 1979 granting the non-suit and sustaining the demurrer is affirmed. All costs to be paid by the plaintiff.

PRICE, ET UX. v. GLASS, ET UX., C.P. Franklin County Branch, E.D. Vol. 7, Page 150, E.D. Vol. 7, Page 180

Equity - Injunction - Right-of-Way - Easement by Prescription

1. Easements by prescription may be acquired by adverse user for twenty-one years.

2. An easement by prescription cannot be acquired if the use is permissive regardless of how long it is continued.

David C. Cleaver, Esq., Attorney for Parties, Price

David W. Rahauser, Esq., Attorney for Parties, Glass

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DISCUSSION AND DECREE NISI

EPPINGER, P.J., August 20, 1979:

There are two cases here, one filed by John E. Price and Beryl Jean Price, husband and wife, against John W. Glass and Bertha M. Glass, husband and wife, to enjoin the Glasses from using a right-of-way. The other is a suit by the Glasses against the Prices to enjoin them from obstructing their access to the right-of-way. The cases were tried together, and from the evidence taken the Court makes the following

FINDINGS OF FACT

1. The Glasses own a property which fronts on U. S. Route 11 in Greene Township, Franklin County, Pennsylvania.

2. South of the Glasses' property is a 20 foot right-of-way that leads to lands owned by the Prices.

3. This right-of-way was originally laid out by Bruce O. McCleary and others to provide access to the eight-acre tract now owned by the Prices which they acquired from McCleary.

4. When the right-of-way was laid out it was the intention of McCleary to hold the same for access to the eight-acre tract.

5. Between 1955 and 1978 the Glasses used the right of way as an exit from their own driveway, for parking their car and for other purposes.

6. On several occasions Mrs. Glass asked McCleary whether they could buy the right-of-way. McCleary refused to sell it, saying it was intended for use as an access to the eight-acre tract but that there was no need for the Glasses to buy the right-of-way because they could use it as long as he owned it.

7. The use made by the Glasses continued while McCleary was the owner but terminated September 16, 1978, when the Prices excluded the Glasses from using it.

CONCLUSIONS OF LAW

1. The use the Glasses made of the right-of-way was by permission of Bruce O. McCleary, one of the record owners of the right-of-way.

2. The Glasses did not acquire an easement by prescription.

3. The use made by the Glasses of the right-of-way, had it been adverse, would have ripened into an easement by prescription.

4. The prayer of the Glasses' complaint must be denied and that of the Prices' granted.

DISCUSSION

Easements by prescription may be acquired by adverse user for twenty-one years. Generally, the same elements necessary for acquisition of title by adverse possession must be present for the acquisition of an easement by prescription. Thus, the user must be continuous, visible, notorious and hostile for the statutory period. The legal theory behind easements by prescription is that such continuous, open, visible,