mother, and Robert L. Kirk, father. The shared physical custody shall be exercised by the parents in manner following:

1. Residential custody of the children shall be exercised by Robert L. Kirk and Kathy Kirk, his wife, at their home from 4:00 o'clock p.m. on Friday, August 19, 1983 until Friday, August 26, 1983.

2. Residential custody of the children shall be exercised by Minta L. Kirk at her home from 4:00 o'clock p.m. on Friday, August 26, 1983 until Friday, September 16, 1983.

3. Thereafter residential custody on alternating periods of the week for father and stepmother and three weeks for mother.

4. Alternating the following national holidays: Labor Day, Thanksgiving, New Year's Day, President's Day, Easter, Memorial Day and July 4th from 9:00 o'clock a.m. until 7:00 o'clock p.m. Minta L. Kirk shall commence with Labor Day 1983.

5. Robert L. Kirk shall have custody of the children in even-numbered years from Noon on December 23 until Noon on December 25, and in odd-numbered years from Noon on December 25 until Noon on December 27.

6. The children shall be enrolled in and attend public school in the Chambersburg Area School District, and Minta L. Kirk, who resides in the said District, shall have educational responsibility for the children.

7. Unless the parents agree in writing to the contrary, Robert L. Kirk shall be responsible for arranging for the transportation of the children from the Trinity Lutheran Church Day-Care Center to his home on those Friday afternoons when his week of residential custody begins, and returning them to the same place on the Friday mornings when his week ends.

8. Unless the parents agree in writing to the contrary Robert L. Kirk shall pick up and return the children at the home of Minta L. Kirk when exercising holiday custody as above provided.

9. Neither party shall exercise overnight custody of the children in the presence of a member of the opposite sex not related by blood or marriage.

Robert L. Kirk shall pay the costs of this proceeding.

CALECO V. WILSON COLLEGE AND SQUIRES APPLIANCES, C.P. Franklin County Branch, No. A.D. 1982 - 79

Breach of Contract - Damages - Attorneys fees - Disqualification of Counsel

1. The usual and ordinary consequence of a breach of contract is lost profits and any value realized as a result of defendant entering into a more advantageous agreement with a third party is not an appropriate measure of damages.

2. The award of counsel fees as costs is not appropriate until it is determined who will ultimately prevail and upon proof by the prevailing party of his right to such fees.

3. Disciplinary Rules 5-105 (B) and 5-105 (C) do not bar one law firm from representing both defendants at the preliminary objection stage where there is a community of interest in requiring the plaintiff to properly plead its claim.

Benson Zion, Esquire, Counsel for Plaintiff

Allen Cech, Esquire, Counsel for Plaintiff

Robert C. Schollaert, Esquire, Counsel for Defendants

OPINION AND ORDER

KELLER, J., January 10, 1983:

This action in assumpsit and trespass was commenced by the filing of a complaint on March 17, 1982. In Count I in Assumpsit, the plaintiff alleges and incorporates by attachment a written agreement with defendant Wilson College for the supplying to defendant of certain coin automatic washing machines and drying machines; the performance of its obligations under the agreement; notice of the defendant's termination of the contract due to dissatisfaction with the service provided by plaintiff by Philip S. Cosentino of Black & Davison, Counsel for Defendant; communications exchanged which included notice from Robert C. Schollaert of Black & Davison that plaintiff breached its contract and the washers, dryers and other equipment should be removed or the defendant College would remove them and store them at plaintiff's expense; the disconnection, removal and secreting of plaintiff's appliances and the installation of other appliances under an agreement with a third party. In Count II in Trespass against defendant Wilson College and defendant Squires Appliances, the plaintiff alleges the defendants acted covertly and willfully in a conspiracy to disrupt, interfere and destroy the

obligations and performance between the plaintiff and the defendant College; the installation by defendant Squires Appliances of coin operated appliances; the negotiation of an agreement between the two defendants for idential subject matter to that in the agreement between plaintiff and defendant College; the knowledge of defendant Squires of plaintiff's agreement with defendant College; and the action of both defendants in disconnecting plaintiff's appliances. On April 5, 1982, Robert C. Schollaert of the law firm of Black & Davison filed preliminary objections in the nature of motions to strike and for a more specific pleading on behalf of both defendants. The affidavit of counsel for the defendants filed on April 12, 1982 evidences service of the preliminary objections upon counsel for the plaintiff by mailing a true and attested copy on April 6, 1982. On May 3, 1982 counsel for the plaintiff filed a document entitled "Plaintiff's Answer to Preliminary Objections, Motions for Sanctions, and Motion to Disqualify Counsel." The document is signed by Benson Zion, Attorney for Plaintiff. It is not verified by Mr. Zion or any representative of the plaintiff. Nothing of record indicates that the document was served upon the defendants or counsel for the defendants. On November 8, 1982 counsel for the plaintiff filed its praecipe directing the Prothonotary to list for Argument the preliminary objections, motion for sanctions pursuant to J.A.R.A., and motion to disqualify counsel. Argument was heard on December 2, 1982. The plaintiff was represented at argument by Attorney Alan E. Cech of the law firm of Apple & Bernstein, Dauphin County, Penna. rather than counsel from the law firm of Benson Zion & Associates who had filed all of the papers including briefs in the case.

I
PRELIMINARY OBJECTIONS

The preliminary objections raised by defendants are in the forms of a motion to strike and motion for a more specific complaint. These matters will be separately addressed.

The first two objections raised in the motion to strike are aimed at plaintiff's claim for "enhancement" damages and for "loss in receipts." As discussed thoroughly by this Court in *College v. Gothie,* 4 Frank. Co. Leg. J. 58 (1980), the usual and ordinary consequence of a breach of contract is lost profits. Since the measures of damages in a breach of contract action is compensation for the loss sustained, *Donahue v. R. C. Mahon Co.,* 219 Pa. Super. 210, 280 A. 2d 563 (1971), the proper claim for damages in this action would be one for lost profits. The aim of the law is to put

the injured party in the position he would have been had there been no breach, and plaintiff is entitled to no more nor no less than his reasonable expectation interest in the bargain. *Ready v. Motor Sport, Inc.,* 201 Pa. Super. 528, 193 A. 2d 766 (1963). Consequently, plaintiff is permitted to seek only what it would have obtained under its contract with defendant Wilson College and not any enhancement value realized as a result of defendant Wilson College's entering into a more advantageous agreement with a third party. Defendant's first two motions to strike are sustained.

Defendants' third motion to strike was abandoned at argument and will not be considered by this Court. The last motion to strike concerns plaintiff's claim for punitive damages in the sum of $100,000.00. Clearly, such a claim offends Pa. R.C.P. 1044(b) which provides:

> "Any pleading demanding relief for unliquidated damages shall without claiming any specific sum, set forth only whether the amount is in excess of, or not in excess of $10,000.00."

Such a patent violation of the above-quoted rule of civil procedure will not be condoned. Defendant's motion to strike will be granted. See also *Hershberger Chevrolet, Inc. v. Romala Corp.,* 4 Frank. Co. Leg. J. 107 (1980).

Defendants also object to the lack of facts pled by plaintiff to justify its claim for punitive damages. While this may have been more properly raised as a motion for a more specific pleading rather than a motion to strike, we do find merit in this objection. Counsel for plaintiffs contended throughout his written brief and oral argument that more specifics can be gathered through defendants use of discovery procedures. As this Court observed in *College v. Gothie,* supra, at page 61:

> "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."

Plaintiff's complaint abounds in unsupported conclusions of law regarding its claims for damages. Once again, we refer plaintiff's counsel to *College v. Gothie,* supra. That case exhaustively sets forth this Court's view concerning the need for specificity in pleading a claim for damages. We suggest that plaintiff's out-of-county counsel familiarize himself with the local practice of this Court and prepare his pleadings to conform with practice procedures in the 39th Judicial District which are well within the bounds of the Pennsylvania Rules of Civil Procedure.

Defendants are entitled to be more specifically advised of the factual background supporting plaintiff's claim for punitive damages and loss of profits resulting from defendants' alleged breach of contract. The specifics in any complaint seeking damages for a breach of contract must include the method employed by plaintiffs to calculate their lost profit damages. A claim for tortious interference with contractual relations must also be sufficiently pled to inform both the defendants and the Court of the factual basis to support such an action.

Defendants' second motion for a more specific pleading concerns plaintiff's failure to identify and describe the appliances for which it seeks damages and/or recovery thereof. Plaintiff submits that because the appliances are in defendant Wilson College's possession at the present time, it should be excused from pleading specifics regarding such appliances. This contention clearly has no merit when considered in the context of the Pennsylvania Rules of Civil Procedure regarding procedures for pleadings. As stated in *Standard Pennsylvania Practice,* Goodrich Amram 2d., Sec. 1019.1, at pp. 110-111:

> "Plaintiff cannot excuse the omission of essential facts on the ground that the defendant has the information in his possession. If plaintiff cannot secure it otherwise, discovery is available for this purpose."

In the case at bar, plaintiffs need not resort to discovery to obtain the needed information concerning the appliances, for as counsel for defendant stated at argument, defendants have repeatedly requested plaintiff to remove its appliances from the premises of Wilson College and are not impeding or obstructing in any way

Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: February 2, 1984.

CRIM First and final account, statement of proposed distribution and notice to the creditors of Cecile C. Friedly, executrix of the estate of Hazel G. Crim late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

DANZBERGER First and final account, statement of proposed distribution and notice to the creditors of Harry M. Danzberger, executor of the estate of Mary Catherine Danzberger late of Antrim Township, Franklin County, Pennsylvania, deceased.

MENTZER First and Partial account, statement of proposed distribution and notice to the creditors of Olive I. Mentzer, Joyce M. Shockey and Earl Glenn Mentzer, Jr., executors of the estate of Earl G. Mentzer late of Quincy Township, Franklin County, Pa. deceased.

REMMEL First and final account, statement of proposed distribution and notice to the creditors of Paul W. Remmel, executor and Marjorie E. Koutris, executrix of the Last Will and Testament of Dorothy K. Remmel late of The Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

SHOOP First and final account, statement of proposed distribution and notice to the creditors of Edith K. Shoop, executrix under the Will of Glenn A. Shoop late of Guilford Township, Franklin County, Pennsylvania, deceased.

WINGERT First and final account, statement of proposed distribution and notice to the creditors of The Farmers & Merchants Trust Company of Chambersburg, executor for the estate of Carrie S. Wingert late of Guilford Township, Franklin County, Pennsylvania, deceased.

Glenn E. Shadle
Clerk of Orphans' Court of
Franklin County, Pa.

1-6, 1-13, 1-20, 1-27

LEGAL NOTICES, cont.

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the intention to file, with the Department of State of the Commonwealth of Pennsylvania, on January 4, 1984, an application for a certificate for the conducting of a business under the assumed or fictitious name of THE SHEET & TOWELL OUTLET, with its principal place of business at Corner of Walnut and Third Streets, Waynesboro, PA 17268. The name and address or the person owning or interested in said business is Bernard J. McGarity, 301 Cottage Street, Waynesboro, PA 17268.

Maxwell, Maxwell & Dick
92 West Main Street
Waynesboro, PA 17268
Leroy S. Maxwell, Jr.
Attorney

1-13

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing with the Department of State of the Commonwealth of Pennsylvania, on December 30, 1983, an application for a certificate of conducting of a business under the assumed or fictitious name of SUNSHINE TRAIL CYCLES & SALVAGE, with its principal place of business at 11585 Buchanan Trail East, Waynesboro, PA 17268. The names and addresses of the persons owning or interested in said business are Foster G. Warren, P.O. Box 491, Cascade, MD 21719 and Foster H. Warren, P.O. Box 401, Blue Ridge Summit, PA 17214.

Stephen E. Patterson, Esq.
Patterson, Kaminski,
Keller & Kiersz
239 E. Main Street
Waynesboro, PA 17268

1-13

plaintiff's right to inspect and remove them.

These appliances are the basic subject matter of plaintiff's suit for recovery and certainly defendants are entitled to know with specificity the number and description of all items that form the basis for plaintiff's claim for damages. The general rule providing that a pleading should be sufficiently specific so as to enable the defendant to prepare his defense holds true in this case as in all others. *Laursen v. General Hospital of Monroe County,* 259 Pa. Super. 150, 393 A. 2d 761 (1978).

Defendants' last motion for a more specific pleading concerns paragraph 20 of plaintiff's complaint wherein it is alleged that defendants negotiated an agreement "initiating in the fall." No further specificity is supplied regarding the year during which such negotiations are alleged to have taken place. The failure of plaintiff to identify at the very least the year during which these negotiations transpired is an obvious violation of Pa. R.C.P. 1019(f) which provides: "Averments of time, place and items of special damage shall be specifically stated."

Defendants' counsel stated at argument that he was withdrawing objections 1 and 4 of his motion for a more specific complaint. All other objections raised in defendants' motion for a more specific complaint do indeed have merit and are hereby sustained.

II

The plaintiff's motions added to its answer to defendants' preliminary objections allege:

> "Plaintiff moves for an Order of this Court against the Defendants and counsel for reasonable attorneys fees to be assessed hereafter for the vexatious and bad faith Preliminary Objections that obviously are written to create a delay. Such Order is appropriate under 42 Pa. C.S.A. Sec. 2503. *Boyer v. Hicks,* 19 D & C 3d 301 (1981).
>
> "Plaintiff moves to disqualify Black and Davison, Esquires, and all members of their firm for incapacity under case law as codified by DR 5-101(B), DR 5-102 and DR 5-105(B). In the instant case this law firm was an active participant in the breach. As such, they acted as agents and cannot represent themselves. *Maher v. Miller,* 18 D&C 3d 767 (1980). Further, the averments against the two Defendants are distinct (one being breach and the other infererence with a contract). To have both represented by the same counsel would lay the foundation for a subsequent claim of impropriety. The

obvious solution provided by case law is to have separate counsel. *Harrison v. IVB et al* No. 78-1230 (E.D. PA February 2, 1982) Judge Broderick; *U.S. v. Flanagan* et al. No. 81-270 (E.D. Pa. December 2, 1981) Judge Luongo; and *Jedwabny v. PTC,* 390 231, 135 A. 2d 252 (1957).

Accompanying plaintiff's brief which was delivered to the Court Administrator on November 30, 1982 was a proposed Order which provided inter alia:

> ". . . it is hereby Ordered and Decreed that:. . . .; (2) Defendants and counsel, Black and Davison, are directed to pay to the plaintiff the sum of Dollars ($), representing counsel fees; and (3) All members of the law firm of Black and Davison are disqualified from further representation of defendants from the date of this Order."

Local Rule 56 requires the party who shall open the argument to serve a copy of his brief upon the attorney of the opposite party on the seventh day preceding the day of argument. The plaintiff as the moving party on the motions here under consideration had the burden of opening the argument and thus the duty of serving its supporting brief upon opposing counsel on or before November 25, 1982. Plaintiff's brief on the motions was included as Parts IV and V on the brief on all matters plaintiff listed for argument and was not served upon defense counsel or delivered to the Court Administrator until November 30, 1982. As a result of the non-compliance, defense counsel did not respond to plaintiff's motions in his brief or oral argument.

Sua sponte and for the guidance of counsel appearing in this Judical District we note:

1. When preliminary objections aver facts of record, an answer to preliminary objections is neither required nor a proper pleading. 2 Anderson Pa. Civil Practice 1017.40.

2. Pa. R.C.P. 1017(a) specifically allows the pleading of answers to preliminary objections under proper circumstances. However, there appears to be no authority for the combining of such a pleading with motions.

3. Considering the averments of facts and forms of relief claimed in plaintiff's motions, it would appear they are petitions rather than motions and in any event must comply with all appropriate procedural rules. See Pa. R.C.P. 206 and 207 and Local Rules 160 et seq. "The court may not consider any matter not appearing of record in the absence of a verification." 1A Anderson Pa. Civil Practice 206.4.

The plaintiff's failure to comply with the applicable Rules of Civil Procedure and Local Rules would in our judgment justify dismissal of both motions. However, we feel the economical use of judicial time dictates that we address both motions on a substantive as well as procedural level.

A. MOTION FOR SANCTIONS PURSUANT TO J.A.R.A. The Act of 1976, July 9, P.L. 586, No. 142 Sec. 2, 42 Pa. C.S.A. 2503(6) (7) (9) provides:

> "2503. Right of participants to receive counsel fees The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:
>
> (6) Any participant who is awarded counsel fees as a sanction against another participant for violation of any general rule which expressly prescribes the award of counsel fees as a sanction for dilatory, obdurate or vexatious conduct during the pendency of any matter.
>
> (7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.
>
> (9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith."

As previously noted the plaintiff included a proposed order requiring defendants and their counsel of record to pay an unspecified sum of money as sanctions. Quite obviously plaintiff's expectations are premature, for:

1. Costs will not be taxed until it is determined which of the parties will utlimately prevail.

2. If plaintiff should be the verdict winner, and if plaintiff should establish by competent evidence its right to recover counsel fees, plaintiff would still have the burden of establishing by a preponderance of the evidence the dollar value of those counsel fees.

See *In Re: Estate of Roos,* Pa. Super. , 451 A. 2d 255 (1982); *Flohr Pools, Inc. v. Paul E. Miller* et al., 5 Frank. Co. Leg. J. 24 (1981).

The thrust of plaintiff's motion and the one paragraph brief in support of the motion is that defendants' preliminary objections were filed without reasonable cause and for the purposes of delay.

In the light of our decisions in Part I of this Opinion, it must be evident that defendants' objections were well taken, will compel the plaintiff to comply with the Rules of Civil Procedures, and the conclusions of plaintiff's counsel were unjustified and incorrect as a matter of law.

Plaintiff's motion for sanctions will be dismissed.

B. MOTION TO DISQUALIFY COUNSEL

This motion by plaintiff alleges the law firm of Black and Davison and all members of the firm should be immediately disqualified to represent the defendants in this case by virtue of the provisions of the Disciplinary Rules 5-101(B), 5-102, 5-105(B), and 9-101. The Rules cited by the plaintiff provide:

"DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in this firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

"DR 5-102. Withdrawal as Counsel When the Lawyer Becomes a Witness

(A) If, after undertaking employment in contemplated or pending ltigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on December 23, 1983, an application for a certificate for the conducting of a business under the assumed or fictitious name of E. L. M. SHOES with its principal place of business at 3 Center Square, Greencastle, Franklin County, Pennsylvania 17225. The names and addresses or the persons owning or interested in said business are Lester E. Martin, 8795 Browns Mill Road, Greencastle, Pa. 17225 and Ruth L. Martin, 8795 Browns Mill Road, Greencastle, Pa. 17225.

Rudolf M. Wertime
Wertime, Guyer & Gingrich
11 S. Washington St.
Greencastle, Pa. 17225
1-20

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing with the Department of State of the Commonwealth of Pennsylvania, on January 4, 1984, an application for a certificate for the conducting of a business under the assumed or fictitious name of BLONDIE'S with its principal place of business at 11737 Old Route 16, Rouzerville, Pa. 17250. The name and address of the persons owning or interested in said business are Robert D. Backer and Annice V. Backer, 5796 Iron Bridge Road, Waynesboro, Pa. 17268.

Deborah K. Hoff, Esq.
80 West Main Street
Waynesboro, Pa. 17268
1-20

NOTICE IS HEREBY GIVEN THAT Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on the 30th day of December, 1983, for the purpose of obtaining a Certificate of Incorporation of a proposed close business corporation to be organized under Section 373 of the Business Corporation Law of the Commonwealth of Pennsylvania, Act of May 5, 1933, P.L. 364, as amended.

The name of the proposed corporation is KEYSTONE RENTALS, INC.

The purposes for which it is organized are: Rental of commercial and industrial equipment, and to engage in and to do any lawful act concerning any lawful business for which

LEGAL NOTICES, cont.

businesses may be incorporated under the Business Corporation Law.

William C. Cramer, Esq.
414 Chambersburg Trust Bldg.
Chambersburg, Pa. 17201
1-20

in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudical to his client.

"DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

"DR 9-101. Avoiding Even the Appearance of Impropriety

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."

In support of this motion counsel for plaintiff in his brief contends that the motion should be granted because:

1. The law firm was an active participant in the breach of contract complained of and due to that participation they have acted as agents and cannot represent themselves.

2. The two defendants represented by the law firm are alleged to be liable to plaintiff on separate and distinct courses of action and such multiple representation lays a foundation for a subsequent claim of impropriety.

We have searched the pleadings in vain for any allegation or hint of an allegation that the law firm of Black and Davison or any member of that firm participated in any way in the alleged breach of the contract between the plaintiff and defendant College.

Attorney Cosentino, formerly of Black and Davison, and Attorney Schollaert of that firm wrote as counsel for the defendant College asserting their client's position that the plaintiff had breached the contract by its failure of service and plaintiff should remove its appliances or defendant would do so, and store them for plaintiff at plaintiff's expense. We find the letters of the attorneys to be lawyer-like and entirely professional in all respects. Indeed, when Attorney Cech, who argued on behalf of the plaintiff, was queried on the subject he readily agreed that he found nothing unprofessional, unethical or improper in the conduct of defense counsel as alleged by the plaintiff.

DR 5-101(B) and 5-102 address the professional responsibility of an attorney when he or a member of his firm "ought to be called as a witness" [5-101(B)], he or a member of his firm "ought to be called as a witness on behalf of his client" [5-102(A)], or he or a member of his firm "may be called as a witness other than on behalf of his client" [5-102(B)]. The responsibility of the attorney and his law firm differs in each of these situations according to the circumstances of the case, and the nature of the testimony to be given. In the case at bar, the plaintiff has failed utterly to plead any facts upon which we could feel any assurance that any past or present member of Black and Davison need or will be called as a witness by any party, and we are certainly unable to rule on the present state of the pleadings whether the attorney's testimony, if one be called, would prohibit further representation.

DR 5-105(B) bars the representation of multiple clients, but DR 5-105(C) specifically permits such representation "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Due to the procedural errors made by counsel for plaintiff, we do not have the benefit of a responsive pleading to the plaintiff's motions which might indicate whether DR 5-105(C) would be applicable in the case at bar.

At argument we queried Attorney Schollaert on the potential for a conflict of interest between the two defendants, and we were advised that he and his firm of Black and Davison are representing both defendants through the current stage of the pleadings, but defendant Squires Appliances has retained separate counsel to represent it in subsequent stages of the litigation. Nothing presented to us by the plaintiff by way of brief or oral argument persuades us that any conflict of interest exists between the two defendants which would prohibit one attorney or one law firm

from representing both at the preliminary objection stage where there is a community of interest in requiring the plaintiff to properly plead its claim pursuant to the Rules of Civil Procedure. Under the circumstances, we are unable to conclude that any violation of DR 105(B) has occurred or that it will occur.

The plaintiff's brief cites *G.M. Harrison v. Industrial Valley Bank,* No. 78-1230 (E.D. Pa. Feb. 2, 1982) Judge Broderick; *U.S. v. Flanagan,* No. 81-270 (E.D. Pa. December 2, 1981) Judge Luongo; *Jedwabny v. Philadelphia Transportation Company,* 390 Pa. 231, 135 A.2d 252 (1957). We believe it highly unlikely that the two U.S. District Court cases had not been published in the Federal Supplement by the time plaintiff's brief was drafted. If they were published, they should have been properly cited; if not, copies of the opinions presumably relied upon by plaintiff should have been attached to the brief, for time does not permit us the luxury of hunting for the authority relied upon by counsel. We did read the *Jedwabny* case and found it totally inapplicable to the facts in the case before us.

Parenthetically, we are constrained to observe that we have serious doubts as to the standing of plaintiff to object to the multiple representation in the case at bar. Assuming arguendo that one or both of the defendants should conclude that some right of theirs had been prejudiced by such representation, it is difficult to imagine on what basis the plaintiff could complain.

Nothing in the pleadings, in the briefs or in argument remotely suggests that Attorney Cosentino, Attorney Schollaert or any member of the Black and Davison law firm acted in "a judicial capacity" or in the capacity of a "public employee" in any way, shape or form involving this matter or stated or implied an ability to influence improperly or upon irrelevant grounds this or any other tribunal. Thus, we find the reference to DR 9-101 not only unjustified and unwarranted but also highly improper.

Plaintiff's motion for disqualification of all members of the law firm of Black and Davison will be dismissed.

In the case at bar, we will expect counsel who have prepared either the briefs or any challenged pleadings to appear at future arguments or proceedings.

ORDER OF COURT

NOW, this 10th day of January 1983:

A. Defendants' motion to strike No. 3 and motions for more specific pleadings Nos. 1 and 4, are dismissed. All other preliminary objections are sustained.

B. Plaintiff's motions for sanctions and to disqualify defense counsel are dismissed.

Plaintiff is granted leave to file an amended complaint within twenty (20) days of date hereof.

Exceptions are granted Plaintiff and Defendants.

COUNTY OF FRANKLIN V. L.B.T. CORPORATION, C.P., Franklin County Branch, No. 219, Civil, 1980

Trespass - Non-suit - Negligence - Forseeability harm.

1. A non-suit on the question of liability is granted when plaintiffs evidence, together with all reasonable inferences of fact arising therefrom, viewed in a light most favorable to the plaintiff is insufficient to make out a prima facie case of negligence.

2. The controlling factor in a negligence case involving theft of a vehicle is whether the action of the thief could have been forseen by the defendant.

3. Where defendant had not left keys to a truck in the ignition and the area where the truck was parked had not experienced a number of thefts, defendant could not be expected to forsee the actions of a thief.

James Flower, Jr., Esquire, Attorney for County of Franklin

Jeffrey Rettig, Esquire, Attorney for Chambersburg Area Jaycees

Walter Swartzkopf, Jr., Esquire, Attorney for L.B.T. Corporation d/b/a Hoxie Brothers Circus

OPINION AND ORDER

EPPINGER, P.J., March 4, 1983:

In July of 1978 the Chambersburg Area Jaycees sponsored the Hoxie Bros. Circus. The Jaycees borrowed a dump truck from a local contractor and delivered it on July 14, 1978. Early in the morning of July 15, 1978, William Anderson, a former employee of the Circus, took the truck without permission from the Circus grounds and led the Chambersburg police on a high speed chase which ended when the dump truck struck the corner of the Farmers and Merchants Trust Company and the Franklin County Courthouse. William Anderson died as a result of the injuries sustained in the accident.

The case went to the jury on the question of whether the Defendants were negligent for violation of a statute. The Court entered a verdict for the Defendants based on the jury's answers to the interrogatories. The Court granted a nonsuit on the issue of whether Defendants were liable under general negligence theories, finding that harm to third parties as a result of the theft was not forseeable. The Plaintiffs filed a motion to remove the nonsuit.

The Court may properly refuse to allow the jury to consider the liability question and grant a nonsuit only when the Plaintiff's evidence, together with all reasonable inferences of fact arising therefrom, viewed in a light most favorable to the Plaintiff, is insufficient to make out a prima facie case of negligence. *Quirk v. Girard Trust Bank,* 98 Montg. 17 (1974).

Plaintiffs allege that William Anderson was intoxicated at the time of the accident to such a degree as to have impaired his driving ability, that he was an irresponsible employee, and that after he was fired the circus employees did not follow up to be sure that he had collected his belongings and left. These factual allegations are not supported by the evidence. A prima facie case was not made out by the Plaintiffs and accordingly the trial court did not err by refusing to let the question go to the jury.

The Court properly granted the nonsuit. Plaintiffs rely upon *Anderson v. Bushong Pontiac Co.,* 404 Pa. 382, 171 A.2d 771 (1961), citing it as the leading case in the area of liability where keys have been left in the ignition. That case is not controlling and can be distinguished from the case at bar in that the jury found that the keys were not left in the ignition.

The controlling factor for determining negligence is whether the actions could have been forseen by the Defendant. The Court in *Liney v. Chestnut Motors, Inc.,* 421 Pa. 26, 218 A.2d 336 (1966), held that although the automobile had been left in the street with