

preparing to go to town, and the boys went with him, returning about 11:00 o'clock a.m. For the next hour the three of them watched wrestling on television in the living room of Souder's trailer. Around noon, Souders called the boy into the back bedroom, and had him take off his clothes and lie face down on the bed, whereupon Souders had anal intercourse with the boy. About half an hour later, the boy returned to the living room where his cousin, who had remained, was still watching television. In the living room, Souders gave the boy five dollars.

After this, Souders drove the boys to his father's house where they picked up some wood to repair a bridge on his lane. They returned to work on the bridge for about twenty minutes, then Souders took the two boys to the Valley Treat Restaurant and finally, around 3:00 o'clock p.m., drove them to the boy's grandmother's apartment at the Fulton Terrace Apartments.

Souders had another version of the events. That Saturday morning, according to his evidence, he got up between 9:30 and 10:30, then his son Brian arrived. Relatives, including his children, brother, and sister-in-law, came in and out of the home until noon. The defendant and his brother worked on the bridge for about fifteen minutes. Then after getting mail in McConnellsburg, he, his brother and sister-in-law went to the Chambersburg Hospital to visit Souder's father, arriving about 1:00 o'clock p.m. Witnesses to support defendant's version testified that neither the boy nor his cousin were present at defendant's trailer that day.

Souder's contention is that since his evidence exonerates him, he cannot be convicted. A conflict of testimony, as is presented in this case, does not render the evidence insufficient. *Commonwealth v. Stephany*, 228 Pa. Super. 184, 187, 323 A.2d 368, 369. Rather it creates an issue of credibility properly left to the jury, which is free to believe all, part or none of the evidence it hears, *Commonwealth v. Arms*, 489 Pa. 35, 39, 413 A.2d 684, 686 (1980), and the court will not disturb these findings absent manifest error. *Id.*

Souders further argues that the crime of involuntary deviate sexual intercourse, 18 P.S. §3123, involves coercion as an essential element and the evidence is not sufficient to find that the boy did not consent to defendant's acts. This is not a correct statement of the law because §3123(d) makes it a crime to engage in deviate sexual intercourse with another person who is less than sixteen

years of age. In addition, Richard testified he did not resist or call for help because he was afraid. See *Commonwealth v. Tuck*, 169 Pa. Super. 35, 38, 82 A.2d 288, 290 (1951); *Commonwealth v. Doyle*, 275 Pa. Super. 373, 379, 418 A.2d 1336, 1339 (1979).

Whether a verdict is against the weight of the evidence sufficiently to warrant an arrest of judgment or a new trial is addressed to the sound discretion of the trial court. *Commonwealth v. Fields*, Pa. Super. , 464 A.2d 375, 380 (1983). Here, after a review of the entire record, *Commonwealth v. Meadows*, supra, we conclude the evidence is sufficient to sustain the verdict.

ORDER OF COURT

November 21, 1984, the motions for a new trial and in arrest of judgment are denied, and defendant will be sentenced only on the crime of involuntary deviate sexual intercourse, the other charges having merged into that crime. A presentence investigation report shall be prepared and filed by the Probation Office of Fulton County, and the defendant shall appear before the Court for sentencing on December 4, 1984, at 9:30 a.m. in the Fulton County Court House, McConnellsburg, Pennsylvania. A copy of this Order shall be a sufficient warrant for the Sheriff of Fulton County to remove the defendant from the Bedford County Prison to be brought before the Court for sentencing.

ARMSTRONG V. SHEARER, C.P. Franklin County Branch,
A.D. 1984 - 87

Real Property - Sale - Failure to Disclose Defect - Measure of Damages

1. Pennsylvania law distinguishes between those injuries to property which are permanent and those which are remedial.
2. Where injury is permanent, depreciation in value is the measure of damage.
3. Where injury can be easily remedied, the cost of repair is the measure of damages.
4. The measure of damages for failing to disclose an inadequate well is the cost of drilling a new well, the pump and necessary piping.

Gregory L. Kiersz, Esq., Counsel for Plaintiffs

Courtney J. Graham, Esq., Counsel for Ruth B. Shearer and John R. Shearer, Defendants

George E. Wenger, Jr., Esq., Counsel for Simpson Associates, Defendant

OPINION AND ORDER

EPPINGER, P.J., December 5, 1984:

Betty and Elwood Armstrong, plaintiffs, purchased a house in Saint Thomas from the defendants, Ruth and John Shearer, on March 14, 1983. Simpson Associates, also a defendant, acted as the Shearer's real estate agent throughout the transaction.

Plaintiffs have filed a claim for \$2,898.00, asserting that when they purchased the property the existing well was shallow and inadequate to serve the needs of the house. After taking possession, the well went dry. Plaintiffs allege that all defendants knew or should have known of this condition prior to the sale and that the failure to disclose this condition amounted to fraud.

Defendant Simpson Associates has filed preliminary objections in the nature of a motion for a more specific complaint and a motion to strike, saying paragraphs 8, 9, 12 and 26 of the complaint need more specificity. Counsel for both parties have agreed that plaintiffs may file an amended complaint. Therefore, the only issue before us pertains to the motion to strike.

In the motion to strike, Simpson argued that an improper measure of damages is asserted in paragraphs 17 and 18. Plaintiffs contend that the measure of damages is the cost of replacing and drilling a new well. Simpson argues that the proper measure of damages should be the difference in fair market value of the property with the misrepresented condition and without the misrepresented condition.

Pennsylvania law distinguishes between those injuries to property which are permanent and those which are remedial. *Bogar v. Sperry Rand Corp.*, 504 F. Supp. 872, 876 (E.D. Pa. 1980). Where the injury will be permanent, the injured party may recover for the depreciation in value, but where as here the injury can be easily remedied the cost of repair or restoration will serve as the



13 West Main St.
P.O. Drawer 391
717-762-8161



TRUST SERVICES
COMPETENT AND COMPLETE



WAYNESBORO, PA 17268
Telephone (717) 762-3121

THREE CONVENIENT LOCATIONS:
Potomac Shopping Center - Center Square - Waynesboro Mall
24 Hour Banking Available at the Waynesboro Mall

| | | |
|---------------------------------|--|--|
| FARNER, Ronald & Patricia | | |
| GETTEL, Jay E. & Erma M. | | |
| GETTEL, Jay E. & Erma M. | | |
| GREINER, Arthur K. & Catherine | | |
| HOCK, C. Walter Jr. & Mervin D. | | |
| KNOLL, Paul D. | | |
| LAKE, Calvin L. | | |
| RHONE, Albert & Jessie Est. | | |
| ROMANE, Bruce T. & Roberta | | |
| STATUM, Pinkie | | |
| TOWN RADIO INC. | | |
| FARNER, Ronald & Patricia | | |
| GETTEL, Jay E. | | |
| GETTEL, Jay E. | | |
| GETTEL, Jay E. | | |
| GETTEL, Jay E. | | |
| GILBERT, Robert & Candy | | |
| GRINER, Arthur | | |
| KRINER, John | | |
| STATUM, Pinkie & Joseph | | |

| | | |
|--|--|---------|
| SOUTHAMPTON | | |
| N-17-73 1343 Mainsville Rd. | | 250.73 |
| N-5-44 110 acres E. of Mongul Rd. | | 5556.13 |
| N-14F-21 Mainsville Road | | 169.84 |
| N-1-15 13 Acres McClays Ridge | | 207.92 |
| N-16-7 194 Acres Rd. 612 | | 3546.37 |
| N-17-97 Twp. 616 | | 456.85 |
| N-6N-4A Rt. 533, Tract 2 | | 1926.07 |
| N-20-22A | | 87.74 |
| N-6-11J 2187 Halls Avenue | | 1335.05 |
| N-20-15 Mainsville to White Church Rd. | | 144.83 |
| N-10-81 5 Acres Possum Hollow Rd. | | 223.63 |
| 72 Schultz | | 554.03 |
| 71 Homette | | 273.28 |
| 66 Amherst | | 159.37 |
| 73 Fleetwood | | 305.65 |
| 75 Hollypark | | 327.23 |
| 70 Enterprise | | 527.89 |
| 66 Brookwood | | 200.77 |
| 66 Vandyke | | 448.33 |
| 70 Rembrant | | 318.72 |

| | | |
|----------------------------------|--|--|
| BEELER, Paul & Jane | | |
| BURKETT, Franklin E. & Linda | | |
| EAST, David | | |
| GIFT, Kenneth & Nancy | | |
| GREENE, Lester C. Jr. & Judy | | |
| HULL, Edward H. & Patricia A. | | |
| KNOTT, Ronald E. & Terrie | | |
| LARSEN, Ronald E. | | |
| LIGHT, Donna Mae | | |
| LONG, Donald & Judith | | |
| SANDERS, Harold L. Jr. & Connie | | |
| SHOCKEY, Elmer A. Sr. & Lovella | | |
| WETZEL, Amos F. | | |
| WINEBRENNER, Luther | | |
| BEELER, Paul E. & Jane | | |
| BEELER, Paul E. & Jane | | |
| COLEMAN, Larry L. & Gloria A. | | |
| GRISSON, William & Shirley | | |
| HALEY, Louise W. | | |
| HARBAUGH, Timothy L. & Beulah J. | | |
| MILLER, Kenneth | | |
| MUMMERT, Robert | | |
| MYERS, James & Janet | | |
| SHOCKEY, Elmer A. & Lovella | | |
| SNYDER, Richard E. | | |

| | | |
|------------------------------------|--|---------|
| WASHINGTON | | |
| Q-17-44 14647 Wayne Hwy. | | 72.70 |
| Q-19-46 12751 Old Pen Mar Rd. | | 650.22 |
| Q-8-67 10076 Old Forge Rd. | | 2386.97 |
| Q-7-53A 11538 Anthony Hwy. | | 1299.62 |
| Q-13M-6B Beartown | | 573.34 |
| Q-19A-84 11478 Buchanan Trail East | | 1484.15 |
| Q-19B-35 12054 Old Rt. 16 | | 345.93 |
| Q-16-71 Iron Bridge Road | | 547.30 |
| Q-7-190 8419 Sheffield Manor Blvd. | | 1618.34 |
| Q-8-159 10510 Fish & Game Road | | 1230.87 |
| Q-19F-13 11960 Pen Mar Road | | 814.54 |
| Q-20K-36A 13493 Blue Ridge Avenue | | 58.91 |
| Q-13R-20 Beartown | | 690.31 |
| Q-19-53 Rt. 367 | | 701.83 |
| 56 Homemaker | | 185.64 |
| 63 Atlas | | 390.98 |
| 68 Atlantic | | 103.18 |
| Mobile Home | | 673.33 |
| 65 Detroit | | 338.49 |
| 72 Atlantic | | 609.32 |
| 68 Pacemaker | | 455.39 |
| 73 West Brook | | 568.99 |
| 62 Homette | | 313.97 |
| 81 Brigadeer | | 727.95 |
| 58 Brentwood | | 153.64 |

| | | |
|--------------------------------|--|--|
| ALDRIDGE, Issac A. Jr. & Alice | | |
| GATES, Michael L. & Paula K. | | |
| GUYER, Larry G. & Mary L. | | |
| HILL, Michael & Barbara | | |
| MORNINGSTAR, Ora | | |
| OWENS, William C. & Charla Y. | | |
| SHOCKEY, Robert R. | | |
| SMITH, Dennis E. & Mary Lou | | |
| VALLEY INVESTORS | | |
| WAGAMAN, Paul | | |
| WALTER, Gary L. | | |

| | | |
|----------------------------|--|---------|
| WAYNESBORO | | |
| 31 Cottage Street | | 1288.25 |
| 34 Hollinger Avenue | | 608.19 |
| 121 North Potomac | | 1084.50 |
| 403 North Potomac Street | | 1882.28 |
| 332 Ringgold | | 1000.51 |
| 250 Wayne Avenue | | 344.47 |
| 44 S. Potomac | | 1063.16 |
| 31 West Second St. | | 629.29 |
| 329-331 West Fourth Street | | 757.55 |
| Cleveland Ave. & Fifth St. | | 1488.63 |
| 225 Cleveland Avenue | | 566.29 |

measure of damages. *Id.*, citing *Rabe v. Shoenberger Coal*, 213 Pa. 252, 62 A. 854 (1906). Here, the drilling of a new well corrected the problem and the cost thereof should serve as the measure of damages.

As a sidenote, we cite *Sturtz v. Yoder's Milk Transport, Inc.*, 30 Somerset 1 (1975), and *Parkes v. Opfermann*, 180 Pa. Super. 184, 119 A.2d 624 (1956). In *Sturtz*, the cost of drilling a new well, pump, and piping were the appropriate measure for damage to water supply as being necessary to restore an adequate water supply. *Id.*, at 26. In *Parker*, when the basement and garage of a recently constructed home did not meet the specifications of the contract, the damages were the cost of correcting the defective condition. *Id.*, at 188, 626; Restatement of Contracts, Section 346(1)(a).

Accordingly, we deny defendant's motion to strike paragraphs 17 and 18 of plaintiff's complaint.

ORDER OF COURT

December 5, 1984, plaintiffs shall file an amended complaint pursuant to the agreement and stipulation of counsel within twenty (20) days from this date. It is further ordered that defendant Simpson Associates' motion to strike paragraphs 17 and 18 of plaintiffs' complaint alleging the cost of replacing and drilling a new well as the measure of damages is denied.

COMMONWEALTH VS. WILLHIDE, C.P. Franklin County Branch, No. 124 of 1984

Criminal Law - Bad Check - Post-Trial Motions - Boilerplate - Post-Dated Check

1. Boilerplate motions will be preserved if a thorough memorandum is filed in support of the motions.

2. A post-dated check is one which is tendered with notice to the payee that no money is presently on deposit to cover the amount but impliedly assures that sufficient funds will be on deposit on the day it becomes due.

3. A defendant is guilty of issuing a bad check if he passes a check knowing it will not be honored, and an intent to defraud is no longer necessary.