County, Pennsylvania, in Deed Book Volume 288C, Page 615.

BEING part of Tract No. 2 of 3 tracts of real estate which Nellie J. McLaughlin, widow, by her deed dated July 24, 1973, and recorded in the Recorder's Office aforesaid in Deed Book Volume 689, Page 1096, conveyed to Santo M. Pantano and Judy A. Pantano, his wife, GRANTORS.

TRACT NO. 2: BEGINNING at an iron pin at corner common to other lands of Santo M. Pantano and wife, Tract No. 1 above described, and other lands of John R. Jarrett and wife; thence by the latter, North 88 degrees 30 minutes East, 154.44 feet to an iron pin at corner of lands now or formerly of John E. and Delma M. Appleby; thence by the latter, North 89 degrees East, 219 feet to an iron pin at lands now or formerly of Glenn E. and Verda B. Fisher; thence by the latter, South 5 degrees 30 minutes East, 107 feet to an iron pin at corner of lands now or formerly of Robert H. Anderson; thence by the latter, North 89 degrees 30 minutes West, 315 feet to an iron pin at corner of other lands of Santo M. Pantano and wife; thence by the latter, North 35 degrees 35 minutes West, 117.93 feet to the iron pin, the place of BEGINNING. CONTAINING .805 acre and being Parcel B on the above recited subdivision plan.

BEING part of Tract No. 3 of 3 tracts of real estate which Nellie J. McLaughlin, widow, by her deed dated July 24, 1973, and recorded in the Recorder's Office aforesaid in Deed Book Volume 689, Page 1096, conveyed to Santo M. Pantano and Judy A. Pantano, his wife, GRANTORS.

BEING sold as the property of Donald F. Chlebowski and Betty L. Chlebowski, his wife, Write No. AD 1986-280.

SALE NO. 5
Writ No. AD 1987-76 Civil 1987
Judg. No. AD 1987-76 Civil 1987
Dauphin Deposit Bank and Trust Company
—vs—
Leland S. Diehl and Marion G. Diehl, his wife
Atty: David P. Perkins

ALL THAT CERTAIN following described lot of land situate in Southampton Township, Franklin County, Pennsylvania, more particularly bounded and described as follows:

BEGINNING at a point in the centerline of PA Route 533 at the corner of Lot No. 2 on the plan designated hereafter and presently owned by John Spidle; thence along the centerline of PA Route 533 South seventy-six (76) degrees fifteen (15) minutes thirty-eight (38) seconds East, two hundred four and no hundredths (204.00) feet to a point; thence south thirteen (13) degrees forty-four (44) minutes twenty-two (22) seconds West twenty-five and no hundredths (25.00) feet to a point into the intersection with Ashton Drive; thence continuing into Ashton Drive by a curve to the right having a radius of forty and no hundredths (40.00) feet, an arc distance of sixty-two and eighty-three hundredths (62.83) feet, a chord distance of fifty-six and fifty-seven hundredths (56.57) feet and a chord bearing of South thirty-one (31) degrees fifteen (15) minutes thirty-eight (38) seconds East to a point at the edge of Ashton Drive; thence continuing by Ashton Drive by a further curve having a radius of three hundred ninety-three and forty hundredths (393.40) feet, an arc distance of one hundred twenty-seven and forty-three hundredths (127.43) feet, a chord distance of one hundred twenty-six and eighty-seven hundredths (126.87) feet and a chord bearing of South twenty-three (23) degrees one (01) minutes seven (07) seconds West to a point at the edge of Ashton Drive; thence continuing by Ashton Drive South thirty-two (32) degrees seventeen (17) minutes fifty-three (53) seconds West thirty-six and seventy hundredths (36.70) feet to a point at corner of lands now or formerly of Kaphoe Development Corporation; thence by lands now or formerly of Kaphoe Development Corporation North seventy-six (76) degrees fifteen (15) minutes thirty-eight (38) seconds West two hundred forty-four and no hundredths (244.00) feet to a point at corner of lands of John Spidle; thence along lands of John Spidle North twenty-one (21) degrees fifty-two (52) minutes eight (08) seconds East two hundred twenty-seven and twenty-eight hundredths (277.28) feet to a point, the place of BEGINNING.

BEING Lot 3 on subdivision plan prepared by Dougal & McCans, Inc., dated October 28, 1977, and revised January 13, 1978 and January 19, 1978 for Kaphoe Development Corporation. Containing 1.272 acres more or less. Said plan being approved by the proper municipal and county authorities and being recorded in the Recorder of Deeds Office in and for Franklin County, Pennsylvania, Plan Book 288C, Page 547.

BEING the same real estate which Kaphoe Development Corporation by deed dated August 25, 1983, and recorded in Franklin County Deed Book Volume 887, Page 266, conveyed to Leland S. Diehl and Marion G. Diehl, husband and wife.

SUBJECT to all conditions, restrictions, and reservations of record.

TOGETHER with the buildings and improvements erected thereon, having a street address of 1020 Orrstown Road, Shippensburg, Pennsylvania 17257.

BEING sold as the property of Leland S. Diehl and Marion G. Diehl, his wife, Writ No. AD 1987-76.

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, June 22, 1987 at 4:00 P.M., E.D.S.T. Otherwise all money previously paid will be forfeited and the property will be resold on June 26, 1987 at 1:00 P.M., E.D.S.T. in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

5-15, 5-22, 5-29

against the defendants Bruce Foster and The Waynesboro Hospital, and the defendants' response thereto, it is ordered that Dr. Foster's counsel shall pay for the additional appearance fee of a stenographer at the continued deposition and the doctor is directed to answer plaintiff's question regarding treatment for a potential liver problem and any other questions at the continued deposition.

HANN AND WIFE, ET AL. VS. SAYLOR AND WIFE, ET AL.
C.P. Franklin County Branch, No. 144 of 1984 C, Equity

Equity - Easement by Implication

1. Where one portion of property is used for thirty years as access to another portion, a burden is established on the subservient property.

2. Evenly spaced tracts across land put the defendant on notice there was a right of way across the land.

3. There is a presumption of permanence of an easement as long as there are no circumstances to indicate otherwise.

4. A purchaser takes subject to visible, notorious easements which are not subject to an exception and he has no claim for damages against the seller for breach of warranty.

James M. Schall, Esquire, Counsel for plaintiffs
Robert B. Stewart III, Esquire, Counsel for defendants, David E. and Sandra P. Saylor
Stanley J. Kerlin, Esquire, Counsel for defendant, Harry E. Brant

OPINION AND DECREE NISI

WALKER, J., April 24, 1987:

Harry Brant owned a piece of property in Fulton County, Pennsylvania. For over thirty years he regularly drove over the southern portion of the property to get to the northern end where he would hunt, haul firewood and dump trash. Robert Hann, one of the plaintiffs, accompanied Brant throughout this period.

In April of 1976, Brant sold a southeastern portion of his property to Frank Mellott. On the deed executed to Mellott, Brant reserved the right of way that had been used as access to the northern property. From 1976 until 1981, Robert Hann used the right of way, which extends along the western edge of Mellott's land, to farm fields.

In June of 1976, Brant sold the land adjacent to, and west of, Mellott's land to defendants, David and Sandra Saylor. A survey attached to defendants' deed indicates that the right of way runs along their eastern border. The deed itself makes no mention of the right of way.

Even after Mellott and defendants bought their properties, Robert Hann regularly used the right of way to hunt and dump trash on the back property. In June, 1979, Robert and Fannie Hann bought the remainder of Brant's land including the northern portion where Brant and Hann had hunted and dumped trash. Sometime in 1984, defendants placed stakes within the right of way, making it inaccessible. In response, plaintiffs filed an action to enjoin defendants from interfering with the right of way, arguing that an easement by implication had been created. A nonjury trial was held before the undersigned judge in February of 1987, and testimony was taken.

The issue presented is whether, under the facts adduced at trial, plaintiff has shown that the right of way through defendant's land is an easement by implication. An implied easement is created when

> "an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way." *Burns Mfg. Co. v. Boehm,* 467 Pa. 307, at 314 (1976).

It is undisputed that Harry Brant originally owned both properties and that he used a right of way through what is now defendants' land as access to the back property where he hunted, gathered firewood and dumped trash. Having established a burden on one part of the property in favor of another part, the remaining consideration is whether the burden was open and visible, permanent and continuous.

There is no doubt that the right of way was, at the time defendants purchased the land, open and visible. Plaintiff and Harry Brant testified that they had used the right of way for over thirty years; plaintiff produced aerial photographs dating back to

1950 in support of his claim. Defendants themselves admit that when they bought the property they observed evenly spaced dirt ruts cutting across their land. They contend, however, that even though the tracks were open and visible, their function as a right of way was not apparent.

The "open and visible" element of implied easements is satisfied if the easement is "notorious", that is, if the parties know of the burden. *See, Motel 6, Inc., v. Pfile,* 718 F.2d 80 (3d Cir. 1983) (underground sewer system as an "open and visible" easement where parties knew of its use). The evidence in the present case strongly indicates that defendants knew or should have known that the tracks across their land were a right of way. The evenly spaced ruts, devoid of grass, put defendants on notice that there was regular vehicular traffic in the area. When defendants bought the land, a survey was attached to, and filed with, their deed, showing the existence of a right of way where they had observed the tracks. While the extent and frequency of use may have been ill-defined when the defendants purchased the property, this court must conclude that the easement was open and visible to them.

The next element, permanence, is a question of whether the original owner intended that the easement was to continue permanently. Under Pennsylvania law, there is a presumption of permanency as long as there are no circumstances to indicate otherwise. *Burns,* supra. *Philadelphia Steel Abrasive Co. v. Gedicke Sons,* 343 Pa. 524 (1942). Here, the right of way had been used for over thirty years as access to the back property to dump trash, collect firewood and hunt. Brant himself testified that he had intended this use to continue permanently. His designation of a right of way on the survey attached to defendants' deed supports his testimony. There are no circumstances in this case to denote a lack of permanency in this easement.

Lastly, defendants argue that plaintiffs' use of the right of way was sporadic rather than "continuous". The court disagrees; plaintiff would make four or five trips over defendants' land during the farming season, they used the right of way throughout the hunting season as well as every other month when they would go back to dump their trash. Plaintiffs have satisfied their burden of proof with respect to all of the elements of an easement by implication.

Defendants protest, nevertheless, that there can be no implied

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SUBJECT to all conditions, restrictions, and reservations of record.

TOGETHER with the buildings and improvements erected thereon, having a street address of 1020 Orrstown Road, Shippensburg, Pennsylvania 17257.

BEING sold as the property of Leland S. Diehl and Marion G. Diehl, his wife, Writ No. AD 1987-76.

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, June 22, 1987 at 4:00 P.M., E.D.S.T. Otherwise all money previously paid will be forfeited and the property will be resold on June 26, 1987 at 1:00 P.M., E.D.S.T. in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

5-15, 5-22, 5-29

easement because there is no express reservation in the deed, there was no consideration paid for the right of way and there is no necessity for the right of way. None of these are required for an easement by implication.

Finally, defendants have named Harry Brant as an additional defendant to this action under the theory that he breached the warranty in the deed he executed to them. A purchaser takes subject to visible notorious easements that exist on the premises and which are not made subject to an exception. *Wood v. Evanitsky,* 369 Pa. 123 (1951). The right of way was visible and notorious to defendants; as such, they have no claim for damages. Even if this court were constrained to hold that Brant breached the warranty, defendant put on no credible evidence as to damages.

Defendants shall be enjoined from interfering with plaintiffs' use of the right of way. Since there is no indication that this suit was vexatious, defendants' request for attorney fees shall be denied.

DECREE NISI

April 24, 1987 defendants David E. Saylor and Sandra P. Saylor, their heirs, representatives and assigns are hereby enjoined from further interference in plaintiffs' right to use the roadbed running 25 feet along the entire length of the eastern boundary of defendants' property. Furthermore, defendants are ordered to remove the stakes that they placed in said roadbed within fifteen (15) days of this order.

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Defendants shall be enjoined from interfering with plaintiffs' use of the right of way. Since there is no indication that this suit was vexatious, defendants' request for attorney fees shall be denied.

DECREE NISI

April 24, 1987 defendants David E. Saylor and Sandra P. Saylor, their heirs, representatives and assigns are hereby enjoined from further interference in plaintiffs' right to use the roadbed running 25 feet along the entire length of the eastern boundary of defendants' property. Furthermore, defendants are ordered to remove the stakes that they placed in said roadbed within fifteen (15) days of this order.

BAKER, ET AL. V. WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, ET AL. C.P. Franklin County Branch, No. A.D. 1984-90

Wrongful Death - Motion for Summary Judgement - 3416 (2nd) and 427 Restatement of Torts - Government Immunity

1. An employer who hires an independent contractor to do particularly dangerous work cannot shield itself from liability.

2. Where a defendant has an inspector at a construction site who observes unsafe activity but takes no action, a duty is imposed on the defendant and liability arises.

3. Where an employee is killed constructing a sewer, he falls under the "utilities service facilities" exception of the Political Subdivision Tort Claims Act.

4. A municipality maintains control of real property where an inspector employed by the municipality stays at the work site and has the right to stop work.

John N. Keller, Esquire, counsel for the plaintiffs
Robert T. Shoop, Esquire, counsel for defendant Washington Township
John J. Sylvanus, Esquire, counsel for defendants D.L. George & Sons Construction Company

OPINION AND ORDER

WALKER, J., April 15, 1987:

On November 9, 1982, Jim Baker was working on a sewer construction project when a trench collapsed and killed him. At the time, Baker was working for D.L. George & Sons Construction Co. who had contracted with Washington Township Municipal Authority ("Township") to install a public sewer facility. The sewer project had been designed by Nassaux-Hemsley, Inc., and under the terms of its contract with the Township, the Township was to self-inspect the work, ensuring compliance with work and safety specifications. According to depositions taken, the Township had an inspector on the work site at all times during construction.

On the day of Baker's death, he was working in an unshored, unbraced seven foot deep trench that violated various state and federal regulations. Decedent's wife, plaintiff Brenda Baker, brought a wrongful death and a survival action against Nassaux-Hemsley, Inc. and the Township on behalf of her and her minor children. Defendants filed motions for summary judgments; briefs were filed with the court and argument was heard.

A motion for summary judgment may be granted if the pleadings, depositions, answers to interrogatories, admissions on file and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. Rule 1035. Plaintiffs posit three seperate theories for imposing liability on the defendant Township; that is, by the defendant's contractual duty to self-inspect the project, by its position as employer of the independent contractor who decedent worked for, or by the failure of its inspector at the scene of the accident to take precautions against a dangerous condition.

If the evidence, when viewed in a light most favorable to the plaintiffs, supports a legally cognizable cause of action then defendant's motion for summary judgment must fail. *Husak v. Berkel, Inc.,* 234 Pa. Super. 452 (1975). In the present case, there