It shall be the responsibility of the father or stepmother to deliver the children to the home of the maternal grandparents and pick them up at the dates and times hereinabove set forth until further Order of Court.

Each party to pay his or her own costs.

COMMONWEALTH v. SCRUTON, C.P. Cr.D. Franklin County Branch, No. 326, 1974

Criminal Actions - Disorderly Conduct - Appeal of Summary Conviction - Lesser Included Offense

1. Obscene language uttered in the course of a backyard dispute is not in a public place as required by Pennsylvania Crimes Code definition of disorderly conduct.

2. Two features of the crime of disorderly conduct include: (1) a public unruliness which leads to tumult and disorder and (2) the crime of disorderly conduct is not to be used as a dragnet for all the irritations which happen in a community.

3. A defendant who cannot be found guilty of the offense charged may be found guilty of a lesser included offense.

4. Harrassment as defined is a misdemeanor of the third degree, and not a lesser included offense of the summary violation of disorderly conduct.

5. On appeal from a summary conviction, a Common Pleas Court may impose a sentence greater than that originally imposed in the Justice of the Peace Court.

John R. Walker, District Attorney, Attorney for the Commonwealth

William H. Kaye, Esq., Attorney for the Defendant

OPINION AND ORDER

EPPINGER, P.J., August 18, 1975:

This criminal action arose out of an incident which occured on June 25, 1974, near State Line, Franklin County, Pennsylvania, in which the defendant, Katrina J. Scruton (Scruton), made various obscene comments to her neighbor, Glen R. Shockey (Shockey), during the course of an argument in the parties' back yards. On June 28, 1974, as a result of this incident, Shockey, a private citizen, filed charges before District

Justice Robert E. Eberly, alleging that Scruton had violated Section 5503 of the Pennsylvania Crimes Code, 1972, Dec. 6, P.L. _____, No. 334, Sect. 1, 18 P.S. 5503. The specific nature of Scruton's conduct complained of by Shockey was that she was guilty of disorderly conduct under Section 5503(3) because she "did unlawfully and intentionally cause public annoyance by using obscene language to the annoyance of the general public." A summary trial was held before Squire Eberly on July 29, 1974, and Scruton was found guilty and sentenced to pay a fine of $25.00 and $11.00 costs. In accordence with Pa. R. Crim. P. 67 and 68, Scruton took an appeal to this Court and a de novo trial was held on October 31, 1974. Thus, the issue before the Court for decision is whether Scruton's obscene language was uttered in a "public place", which is necessary in order to find her guilty of disorderly conduct under Section 5503(3).

The facts, which are fairly simple, center around a dispute which arose between Scruton and her neighbor, Shockey, as a result of Scruton's mowing off one of Shockey's shrubs. This shrub was approximately 10 feet within Shockey's boundary line and Shockey testified that he saw Scruton back her riding lawn mower onto his property and over the shrub. When Shockey came out of his house to complain about the damage, Scruton responded: "You go to hell, you son of a bitch". Later, during the argument, Scruton told Shockey to tell his "bitchy" wife to come out of the house and Scruton would "smash" her.

The entire argument lasted no longer than five minutes. This argument was heard by several people; Scruton's mother and sister and Gene Creager and his children, who were neighbors of both Shockey and Scruton. Scruton's mother and sister both testified that Scruton used obscene language toward Shockey. Creager also testified that he heard Scruton use obscene language. However, none of the witnesses of Scruton's obscene remarks were prompted to intervene in the dispute and only seemed suprised by her language.

The area in which this dispute took place was approximately 180 feet from the nearest public road, the Hykes Road. There was nothing but an open field for approximately 500 feet to the rear of the place where the argument took place. There are also no alleys between the properties in this area, nor are there sidewalks existing in this area. The surrounding area where this dispute took place is still primarily rural, the various properties having undoubtedly been sold off of a farm.

As mentioned in the beginning of this opinion, the central issue before the Court for decision is whether Scruton's

language, taking place where it did, makes her guilty of disorderly conduct under Section 5503(3) of the Pennsylvania Crimes Code. The statute, itself, provides that:

> "(a) *Offense defined*: A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, he:
>
> (3) Uses obscene language, or makes an obscene gesture;"

Section 5503 defines "public" to mean affecting or likely to affect persons in a place where the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public.

The defendant's counsel correctly points out in his brief that in order for Scruton to be guilty of disorderly conduct, the uttering of obscene language must occur in a "public" place. The Commonwealth contends that Scruton's obscenities were spoken in a "public" place, citing the "any neighborhood" language in the statute. However, considering the surroundings of the area and the responses of the people who heard the argument, the Court believes that Scruton's language did not happen in a public place, as Section 5503 of the Pennsylvania Crimes Code requires, but was a private backyard dispute. The language of the statute does not make every neighborhood a public place, it merely makes it possible for a neighborhood to be a public place if it otherwise fits within the definition in the act.

Unfortunately, there are no cases on the appellate level in Pennsylvania which can give guidance to this Court in interpreting Section 5503, which was revised in 1972 to bring it more in line with the Model Penal Code. However, in *Commonwealth v. Greene*, 410 Pa. 111, 189 A. 2d 141 (1963), which was an appeal taken from our Franklin County Court on a conviction of disorderly conduct under a previous statute, Justice Musmanno pointed out two things that are relevant to the case at bar. First, he noted that a cardinal feature of the crime of disorderly conduct is public unruliness which does lead to tumult and disorder. Second, he indicated that the crime of disorderly conduct is not intended as a catchall for every act which annoys or disturbs people; it is not to be used as a dragnet for all the irritations which happen within a community. Since criminal statutes must be narrowly construed, and considering the description of the area where the incident took place and the reactions of the witnesses to the

argument, the Court cannot find Scruton guilty of disorderly conduct.

The State of New York has a disorderly conduct statute similar to that in Pennsylvania and in two cases it was held that an individual could not be found guilty of disorderly conduct if his actions failed to show conspicuous disruptive intent to the public (mere gathering out of curiosity was held not to constitute a conspicuous disruptive intent). *People v. Pritchard*, 27 N.Y. 2d 246, 265 N.E. 2d 532 (1970); *People v. Gingello*, 67 Misc. 2d 224, 324 N.Y.S. 2d 122 (1971).

There is a doctrine in the law which permits a court to find a defendant guilty of a lesser included offense if a defendant cannot be found guilty of the offense charged. On this basis we are urged by the Commonwealth to find Scruton guilty of harassment by communication or address, a violation of Section 5504 of the Crimes Code, supra. This section provides:

> "(a) *Offense defined.* -- A person commits a misdemeanor of the third degree if, with intent to harass another, he:
>
> (1) makes a telephone call without intent of legitimate communication or *addresses* to or about such other person any lewd, lascivious or indecent words or language or anonymously telephones another person repeatedly;" (Emphasis supplied.)

It is apparent that Scruton's obscene comments addressed to Shockey fall within the definition of this crime. In *People v. Gingello*, supra, the New York court held that an individual's conduct which did not constitute disorderly conduct was sufficient to constitute harassment under the doctrine of lesser included offenses. New York's harassment statute is substantially the same as that in Pennsylvania.

Harassment as defined above is a misdemeanor of the third degree, the lowest form of misdemeanor. However, there is a lower grade of crime and that is a summary violation. Scruton was convicted before a Justice of the Peace of a summary violation. Therefore, while the Court believes that Scruton's language did constitute harassment, since harassment is a misdemeanor, on a trial for a violation of that section, defendant would be entitled to a jury. It is obvious therefore that this Court could not in an appeal from a summary violation, convict defendant of a misdemeanor. To do so would not only violate her right to a jury trial but would also convict her of a greater, not a lesser included, offense. This would be true even though upon an appeal from a summary conviction, a Common Pleas Court may impose a sentence greater than that

originally imposed in the Justice of the Peace Court. *Commonwealth v. Moore and Battle*, 226 Pa. Super. 58, 312 A. 2d 422 (1973).

ORDER OF COURT

NOW, August 18, 1975, the Court finds the defendant not guilty of disorderly conduct.

NEWLIN v. STIMMLER, C.P. Montgomery County, No. 73-7474

Assumpsit - Motion for Non-suit - Fraud in Inducement of Real Estate Contract - Expert Witness

1. A claim of error on the part of the judge in not granting a non-suit is not grounds for a new trial.

2. The plaintiffs are entitled to have the testimony reviewed in the light most favorable to them because they are the verdict winners.

3. In support of an allegation of fraud, it is competent to show false statements which induced execution of a sales agreement.

4. A mere misstatement of the amount of land is not sufficient to prove fraud unless the deficiency is great in proportion to the whole and the misrepresentation has been made by a real estate broker as agent for the seller. This establishes a prima facie case for the jury.

5. The law implies that real estate brokers, bankers, attorneys, etc. will exercise competent skill and proper care when they act in their respective realms of expertise.

6. In the case of a real estate expert, essential elements of his competency to testify include his knowledge of the property and the real estate market in which it is situated, as well as his evaluating skill and experience as an appraiser.

Michael J. O'Donoghue, Esq., Attorney for Plaintiffs

Francis P. O'Hara, Esq., Attorney for Defendants

OPINION AND ORDER

Opinion by EPPINGER, P.J., 39th Judicial District, Specially Presiding, December 12, 1975:

Joseph and Harriet Stimmler, husband and wife, sold a property to Paul and Joanne Newlin. Mr. Stimmler had placed an advertisement in the Philadelphia Inquirer offering for sale "approximately 10 wooded acres of land" located on the Grebe Road in Limerick Township, Montogomery County. This was just the size tract the Newlins were interested in because they wanted to have horses, so they contacted Mr. Stimmler about the property. He took them out and pointed out three boundaries. The fourth was obscured by a woods. At the time the property was shown the ground was covered with slush and mud and the weather was cold. Mr. Newlin said he relied on statement made by Mr. Stimmler that the property contained 10 acres. He knew the Stimmlers had lived on the property and that Mr. Stimmler was a real estate broker. Mr. Newlin didn't know how many acres were in the tract except by the representations of the owners.

Mr. Newlin even questioned Mr. Stimmler on the language of the agreement, "10 acres or less", because he wanted to be sure he was getting 10 acres. Mr. Stimmler indicated that this was simply the way real estate agents wrote up agreements and said there was 9.872 acres. Mr. Newlin spoke about getting a survey. Mr. Stimmler said it wouldn't be necessary, noting surveys were expensive. Mr. Newlin, in turn, trusted Mr. Stimmler and eventually settled for the property for $39,000.00 without getting any information about the acreage except that which he received from Mr. Stimmler.

A month after settlement Mr. Newlin was again concerned about not haing a survey and again Mr. Stimmler told him a survey was unnecessary. Apparently after settlement the deed was left for record and ultimately mailed to the Newlins. When they received it no acreage was mentioned in the description. Again they became concerned and finally had a survey made. They found the tract contained 7.423 acres.

This news led to this law suit filed on three counts: (1) an action in assumpsit for breach of contract against the Stimmlers; (2) an action in trespass against Joseph Stimmler only, alleging that with knowledge of the falsity of his statement and with the intent to deceive and defraud the Newlins, or with reckless disregard of the truth or falsity of his statements, he represented to the Newlins that the property contained 10 acres; and (3) an action in trespass against Joseph Stimmler only, alleging that he was a real estate broker and as such negligently represented the tract contained 10 acres.

The case was heard by a jury with President Judge George C. Eppinger, of the 39th Judicial District, specially presiding. At