DISCUSSION

The Wilsons contend that they are not bound to accept the indenture of right of way recorded by the Shores on April 3, 1990. The court agrees with this contention.

The Wilsons' complaint regarding the recently recorded right of way is that the location is subject to change by the defendants, and that the width is unspecified. The Wilsons wish to proceed with the damages hearing which follows the report of the board of viewers and avoid the possibility of future litigation regarding the width or location of the right of way.

The statutory authorization to designate a board of viewers to open a private road is found in Purdons Pennsylvania Statutes Annotated, Title 36, Section 2731. This section states as follows:

> The several courts of quarter sessions shall, in open court as aforesaid, upon the petition of one or more persons, associations, partnerships, stock companies, or corporations, for a road from their respective lands or leaseholds to a highway or place of necessary public resort, or to any private way leading to a highway, or upon the petition of the chief executive officer of any executive or administrative department of the State Government for a road from any public highway across any lands of any person, association, or corporation to the boundary line of any lands owned, controlled, or administered by the commonwealth, direct a view to be had of the place where such road is requested, and a report thereof to be made, in the same manner as is directed by the said act of thirteenth June, one thousand eight hundred and thirty-six. (Footnote omitted)

36 P.S. §2731. This procedure is bifurcated to include two separate proceedings. First there is a determination whether a private road is necessary, and second to determine what damages are owed to the landowner. The damages procedure is set out in section 2736 which states as follows:

> The damages sustained by the owners of the land through which any private road may pass shall be estimated in the manner provided in the case of a public road, and shall be paid by the persons, associations, partnership, stock companies, corporations, or executive or administrative department of the Commonwealth, at whose request the road was granted or laid out: Provided, That no such road shall be opened before the damages shall be fully paid.

36 P.S. §2736. In the case at bar, the board of viewers has filed its report, finding that a private road is necessary, and recommending a location and width for the private road, but the board of viewers has not yet held a hearing to determine damages.

Since no exceptions to the report of the board of viewers were filed by either party, the court finds that the Wilsons are not bound to accept the right of way which was filed by the Shores, and that the matter should proceed to a damages hearing before the board of viewers.

The indenture of right of way states in pertinent part as follows:

> the said right of way to follow initially the existing road bed but its location shall be subject to change if deemed necessary by the Grantors and the proposed location not inconvenient to Grantees and shall be of unspecified witdth but shall at all times and seasons permit Grantees their heirs, successors and assigns to travel upon, along and over the right of way with any vehicle, equipment or machinery of any width without violating this indenture.

(Indenture of Right of Way recorded in Fulton County Deed Book 160, pages 330-332). The court finds that the above right of way may cause future litigation regarding its location or width.

Based on the above, the court finds that the Wilsons are not bound to accept the indefinite right of way granted by the Shores, and the court directs that this matter proceed to a damages hearing before the board of viewers as provided for in 36 P.S. §2736.

ORDER OF COURT

August 31, 1990, the court confirms the report of the board of viewers and finds that the Wilson are not bound to accept the indefinite right of way granted by the Shores. The court directs that this matter proceed to a damages hearing before the board of viewers as provided for in 36 P.S. §2736.

KOSAR VS. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, C.P. Franklin County Branch, Misc. Doc. Vol. AA, Page 53

Operating Privileges - Suspension - Failure to Submit to Test - Physical Control of Vehicle

1. Where police officer found defendant slumped over steering wheel of legally parked vehicle with the lights off and which was not running, defendant is in physical control of the vehicle and may be charged with driving under the influence.

David C. Wertime, Esq., Attorney for Appellant Kosar
Philip L. Zulli, Esq., Attorney for the Commonwealth

OPINION AND ORDER

KAYE, J., September 14, 1990:

OPINION

In this proceeding, Franklin J. Kosar, ("petitioner" or "Mr. Kosar"), challenges the action of the Pennsylvania Department of Transportation's ("PennDOT") action in suspending his operating privileges for one (1) year for violation of 75 Pa. C.S.A. §1547, i.e., for failing to submit to a test to determine the alcohol content of his blood. In his petition, Mr. Kosar alleges, in the alternative, that; 1/ he was not driving, operating or in actual physical control of the movement of a motor vehicle; and 2/ he was not advised that a failure to comply with the proffered test would result in a suspension of his driver's license for one (1) year.

A hearing thereon was held on August 16, 1990, and the parties have submitted memoranda of law in support of their respective positions, and the matter is before the Court for resolution.

On May 5, 1990, at about 11:30 o'clock p.m., Officer Stephen T. Bourn of the Borough of Greencastle Police Department was on patrol on Carl Street in the Borough where he observed a white vehicle parked along the street, extending about one (1') foot beyond the line of other vehicles parked along the street. After close examination, he determined that a white male, whom he identified as petitioner, was alseep behind the steering wheel, and the keys were in the vehicle's ignition, although the engine was not running, and the transmission was not in gear. The officer knocked on the auto window several times, and roused petitioner. After detecting the odor of alcoholic beverage about petitioner, he ordered

NOTICE OF LEGAL NOTICE ADVERTISING RATE CHANGE

NOTICE is hereby given that, at meeting held on February 19, 1991, the Board of Directors of Franklin County Legal Journal adopted the following changes in Legal Notice Advertising rates, for publication of such notices in the Journal:

	Present Rate	New Rate
Per Line:	75¢ per line per issue	85¢ per line per issue
Estate Grant of Letters:	$35.00 per ad per three issues	$40.00 per ad per three issues
Fictitious Name Notices:	$25.00 per ad per issue	$28.00 per ad per issue

The changes will be effective with the issue of the Journal expected to be published April 5, 1991, and will remain effective thereafter, until further action of the Board.

John M. Lisko, Secretary

NOTICE WITH RESPECT TO "FAXED" MATERIALS

Inquires have been made, from time to time, about the "Faxing" of notices and other advertisements, to be submitted to Franklin County Legal Journal. The Journal does not have "Faxing" equipment, nor does the Journal presently contemplate acquiring same. At Board of Directors meeting held on February 19, 1991, however, it was decided that we have no policy against the submission of "Faxed" material for publication, provided such material is delivered to us, at the advertiser's expense, by the time of our deadline of noontime on the Friday preceding the Friday of publication and provided it is in legible form, and with full identification of advertiser's address, for billing purposes. If the Faxed material meets these conditions, it will be received, in some cases deposit of advertising costs is also required to be advanced. Check with the editor as to this.

Managing Editor

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ioner out of the car.

Petitioner appeared to have blood shot eyes, and had difficulty in walking. After petitioner failed several field sobriety tests, the officer placed him under arrest for driving under the influence, 75 Pa. C.S.A. §3731. The officer explained the provisions of the implied consent law to petitioner, including the provision that if he refused to take the proffered test, his license would be suspended for one (1) year. Petitioner told the officer that he would not submit to the test, and he was transported to Greencastle Police Headquarters.

At headquarters, petitioner once again was advised of the implied consent law by Officer Bourn, and was told he would be taken to Waynesboro Hospital for the test. Once again, petitioner refused to undergo the testing. Thereafter, petitioner was formally charged with driving under the influence, and was taken before a District Justice for preliminary arraignment, following which he was released on his own recognizance.

On May 17, 1990, PennDOT notified Mr. Kosar of the suspension of his driving privileges for violation of the "implied consent" provision of the Vehicle Code, 75 Pa.C.S.A. §1547, which provides, in part, as follows:

> (a) *General rule.* - Any person who drives, operates or is in actual physical control of the movement of a motor vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating, or in actual physical control of a motor vehicle:
>
> (1) while under the influence of alcohol or a controlled substance or both;...
>
> [75 Pa. C.S.A. §1547].

Petitioner claims initially that PennDOT's action is illegal as the implied consent law is applicable in the factual scenario set forth in this case, viz. that he was not operating, driving or in actual physical control of the movement of a motor vehicle, and thus, the averment

is, the police authority did not possess the authority to request that he submit to a blood alcohol test.

It is clear that for the implied consent provision to apply, the request for testing must be supported by reasonable grounds for the officer to believe that petitioner was in violation of the DUI law, 75 Pa. C.S.A. §3731 (a). *Commonwealth, Department of Transportation Wysocki,* 517 Pa. 175, , 535 A.2d 77, 70-80 (1987).

This case is somewhat unusual due to the fact that the petitioner was asleep in a lawfully parked vehicle, whose engine was turned off, and all mechanical and electrical features of the vehicle were turned off at the time of the officer's observation. While the keys were in the ignition, the ignition switch was in the intermediate "on" position, which causes dashboard lights to be on, and the petitioner was sleeping heavily. At that time, the only additional information the officer possessed was that his department had received a complaint of a suspicious vehicle, presumably petitioner's at the location at which petitioner was found.

There is no question that the officer acted properly to inquire of petitioner's intentions, and that his subsequent observations of petitioner could lead a reasonable person to conclude that petitioner was under the influence of alcohol to such an extent that he was incapable of safe driving. The more significant question is whether a person in the position of Mr. Kosar, and the information available to the officer at the time, would lead a reasonable person to believe that petitioner was "driv[ing], operat[ing] or[] in actual physical control of the movement of any vehicle." 75 Pa. C.S.A. §1547(a).

Clearly, the officer did not have information that petitioner was "driving" the vehicle. The vehicle was not in motion, nor did the officer possess information that would lead a reasonable person to conclude that it had recently been in motion. However, the question remains as to whether the observations of the officer would allow a reasonable person in the position of the officer to conclude that petitioner was either operating or in actual physical control of the movement of the vehicle.

We have found no appellate case dealing with this precise factual scenario. However, in *Commonwealth v. Crum,* 362 Pa.Super. 110, 523 A.2d 799 (1987), the Court dealt with interpreting these provisions:

> ". . .the concept 'actual physical control' in the present chemical test section conveys the same meaning as that which the Superior Court had accorded to the concept of operating and having physical control as involving control of the movements of either the machinery of the motor vehicle or of the management of the vehicle itself, without a requirement that the entire vehicle be in motion."
>
> [citing from *Commonwealth v. Farner,* 90 Pa. Cmwlth. 201, 205, 494 A.2d 513, 515-516 (1985)].

In *Crum, supra,* defendant was found by a police officer slumped over the front seat of his motor vehicle which was parked along a state highway, with its lights on and engine running. Those observations were found sufficient to constitute a violation of the DUI statute, on the ground the occupant was in actual physical control of the machinery of the vehicle. While the facts in *Crum* obviously are somewhat different than those in the instant case, most significantly the fact the engine was running and the lights were on in *Crum,* while they were not in the instant case, nonetheless, we feel compelled to reach the same result.

We observe little logical difference in the two situations as, in either case, the intoxicated front seat occupant of the vehicle clearly was in a position to exercise control over the machinery of the vehicle. *Crum* simply would have had to reach the transmission lever to engage the vehicle to commence movement, while petitioner simply had to turn the key and move the transmission lever, and we think that in including the provision regarding "being in actual physical control of the movement of a motor vehicle" is intended to apply to this situation.

Further, it is noted that a license suspension case, based upon a violation of the implied consent law, it is necessary that the Commonwealth prove four elements: 1/ an arrest for DUI; 2/ a request that the defendant submit to chemical testing; 3/ a warning that refusal would result in a suspension of the operating privileges; and 4/ a refusal. *Luckey v. Commonwealth,* Pa. Cmwlth. , , 569 A.2d 1008, 1009 (1990). All four elements have been proven herein, and thus the Commonwealth has met its burden of proof. We note specifically that, contrary to petitioner's assertion, we find that petitioner was warned of the effect of a

refusal to submit to the testing.

Finally, petitioner alleges, as we understand it, that the police acted in a manner that did not comply with the requirements set forth in *Commonwealth v. O'Connell,* 521 Pa. 242, 555 A.2d 873 (1989), in which it was held, *Inter al.,* that

> " ... where an arrestee requests to speak to or call an attorney, or anyone else, when requested to take a breathalyzer test, we insist that in addition to telling an arrestee that his license will be suspended for one year if he refuses to take a breathalyzer test, the police instruct the arrestee that such rights are inapplicable to the breathalyzer test and that the arrestee does not have the right to consult with an attorney or anyone else prior to taking the test."
> 521 Pa. at , 555 A.2d at 878.

There is a dispute in the instant case as to whether or not the petitioner requested an attorney. We find more credible the officer's testimony that petitioner made no such request, and thus the holding in *O'Connell, supra,* is inapplicable.

However, even if we accept petitioner's version, which is that he requested an attorney, and was told he could not have one, in essence, in connection with the breathalyzer, the advice essentially was correct. As noted in *Commonwealth, Department of Transportation v. Tomczak,* Pa. Cmwlth. , , 571 A.2d 1104, 1107 (1990), the rule established in *O'Connell* is applicable in a case where a person is confused about the interplay between the right to an attorney (from the *Miranda* warnings) and the request that he submit to a chemical test to determine the presence of alcohol. In *O'Connell* the confusion may have led the driver to refuse the proffered test in the mistaken belief he could consult with an attorney first.

In the instant case, there is no such confusion, even under petitioner's version, in which he was flatly told he could not see an attorney prior to deciding on whether to take the proffered test. He was also told that his refusal would lead to a one (1) year suspension of his driver's license, but he nonetheless refused to take the test, and we thus on a factual basis reject petitioner's second argument.

Under the circumstances, we find PennDOT's position is correct.

ORDER OF COURT

NOW, September 14, 1990, the license suspension appeal of Franklin J. Kosar is DENIED, and the license suspension previously imposed by the Pennsylvania Department of Transportation may be reimposed upon due notice to petitioner by the Commonwealth.

NELSON V. STINE, DAVIS, PECK INSURANCE, ET AL., C.P. Fulton County Branch, No. 110 of 1988C

Fire Insurance - Consumer Protection Law - Fraud

1. Averments of fraud must be pled with particularity (Pa RCP 1019 (b)).
2. Misrepresentation by an insurance agent concerning the sending of re newal notices and witholding notice of cancellation are not sufficient to bring suit under the Pennsylvania Consumer Protection Law.
3. There must be some showing of intentional misconduct on the part of the defendant to violate the catchall provisions of the Pennsylvania Consumer Protection Law.

Kenneth A. Wise, Esquire, Counsel for Plaintiff
John W. Heslop, Jr., Esquire, Counsel for Defendant Stine
James M. Schall, Esquire, Counsel for Defendant Schoen
Jeffrey B. Rettig, Esquire, Counsel for Old Guard

OPINION AND ORDER

WALKER, J., September 10, 1990:

STATEMENT OF FACTS

This is a companion case to *Scott H. Nelson, M.D.v. Old Guard Mutual Insurance Company, Richard's Insurance Service, and Elton Schoen,* Fulton County Branch, Civil Action - Law, No. 105 of 1988-C. Defendant Stine, Davis, Peck Insurance (hereinafter "Stine Davis") has succeeded to the assets and liabilities of Richard's Insurance Service ("Richard's).