

ORDER OF COURT

NOW, this 11th day of October, 1990, the motions of Harvey Shapiro, M.D. for summary judgment as to:

Count I is denied;  
Count II is granted.

Exceptions are granted the plaintiff and defendant, Harvey Shapiro, M.D.

HOCKENBERRY VS. MURRAY VS. SHOCKEY, ET AL., C.P.  
Franklin County Branch, No. A.D. 1989 - 397

*Decedent's Estate - Dead Man's Act - Waiver - Discovery*

1. An estate loses the right to object to the competency of a witness under the Dead Man's Act when it directs discovery to an adverse party.
2. Where decedent's estate requests discovery in one of two virtually identical unconsolidated cases arising out of the same incident, it waives the Dead Man's Act in both cases.
3. It is unfair to permit an estate to discover all relevant facts from its adversary and then seal its opponent's lips through the Dead Man's Act.

*Thomas J. Finucane, Esquire, Attorney for Plaintiff Perry M. Hockenberry*

*David Mills, Esquire, Attorney for Terry E. Shockey*

*Jan G. Sulcove, Attorney for Terry L. Smith, Admr. Timothy M. Smith, Deceased*

*Todd A. Dorsett, Esquire, Attorney for Nancy M. Toepfer*

*Daniel Gallagher, Esquire, Attorney for Peoples Drug Stores, Inc.*

*John N. Keller, Esquire, Attorney for Defendant, Shawn C. Murray*

*William Addams, Esquire,*

*Richard Sadlock, Esquire, Attorney for Terry E. Shockey*

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**LEGAL NOTICES, cont.**

**SALE NO. 12**  
**Writ No. AD 1990-430**  
**Judg. No. AD 1990-430**  
**First National Bank and Trust Co.,**  
**Waynesboro, Pennsylvania**  
—vs—  
**Harvey D. West, Jr. and**  
**Elizabeth A. West**  
**Atty: Timothy W. Misner**

ALL THAT CERTAIN following described real estate, lying and being situate in Waynesboro, Franklin County, Pennsylvania, improved by a double dwelling, known as 228 230 Ridge Avenue, bounded and described as follows:

BEGINNING at the southeast corner of Lot No. 7 and running west with same 120 feet 10 inches to a 12 foot alley, thence along said alley 76 feet to the northwest corner of Lot No. 10, thence along said lot east 120 feet 10 inches to Ridge Avenue, thence north along said Ridge Avenue 76 feet to the place of beginning. The same being known as Lots Nos. 8 and 9 of a plot of lots laid out by J. I. Beck and John G. Corbell, and being part of a larger tract purchased by them from A. H. Strickler and Clara A. Strickler, his wife, by deed dated May 31, 1900, and recorded in Franklin County Deed Book 118, Page 172.

BEING the same real estate conveyed to Harvey D. West, Jr. and Elizabeth West, husband and wife, by deed of Harvey D. West, Jr. and Elizabeth A. West, husband and wife, and Ariel Gonzalez and Miriam Gonzalez, husband and wife, dated May 30, 1986 and recorded in Franklin County Deed Book 957 Page 557.

SUBJECT to all conditions, restrictions, easements and other matters legally affecting the same.

SAID real estate is improved with a two and one-half story double brick dwelling and has a street address of 228 230 Ridge Avenue, Waynesboro, Pennsylvania 17269.

BEING sold as the property of Harvey D. West, Jr. and Elizabeth A. West, Writ No. AD 1990-430.

**TERMS**

As soon as the property is knocked down to 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 June 24, 1991 at 4:00 P.M., prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on June 28, 1991 at 1:00 P.M., prevailing time 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**

5/24, 5/31, 6/7/91

**OPINION AND ORDER**

**WALKER, J. October 23, 1990:**

This court is called upon to now rule whether Terry L. Smith, (hereinafter "Smith") Administrator of the estate of Timothy M. Smith, has waived application of the Dead Man's Act in the above-docketed case by directing formal discovery to additional defendant Shawn C. Murray ("Murray") in a separate, but related case.

This appears to be an issue of first impression, no cases having been identified by either party which clearly discuss whether a personal representative can indeed waive the Dead Man's Act through discovery when there are two related but unconsolidated actions. However, the court must find that Smith has indeed waived the Dead Man's Act by directing discover to Murray.

We will forego a recitation of the facts, noting only that there are three separate lawsuits arising out of a single one-vehicle accident. In the suit filed by Smith as personal representative of the Terry L. Smith estate, docketed at 1988-198, Smith directed formal discovery to Murray in the form of interrogatories and requests for production of documents. Murray answered the interrogatories and produced the documents, including statements given to his insurance company, insurance company memoranda, names of witnesses, documentary material, and identification of Murray's expert witness, his opinions and the factual basis for those opinions. Murray argues that by directing discovery which will be useful to him not only in the case in which he is the plaintiff, but also those in which he is an additional defendant, Smith has waived the application of the Dead Man's Act in all three cases and, as such, Murray may testify as to the decedent's action prior to his death. The court agrees.

The Dead Man's Act, found at 49 Pa.C.S., section 5930, provides in part that:

Neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased . . . party, shall be a competent witness in any matter occurring before the death of said party . . .

42 Pa.C.S. section 5930.

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Pennsylvania courts, however, have held that a personal representative of an estate loses the right to object to the competency of the witness under the Dead Man's Act when he directs discovery to an adverse party.

In *Perlis v. Kubns*, 202 Pa.Super. 80, 195 A.2d 156 (1963), the Superior Court addressed the issue, rejecting the administrator's contention that he had not waived protection under the statute because the answers to the interrogatories were not used at trial and disclosed nothing insofar as the liability of the respective parties was concerned:

The very use of depositions and interrogatories requires the adverse party to give testimony in a way sanctioned by the Pennsylvania Rules of Civil Procedure . . . . This is the equivalent of placing him on the witness stand. As stated in *Cox v. Gettys* . . . and quoted by the court below: 'Any other construction of the statute would enable one party to search the conscience of his adversary, drag to light his private papers and other evidence, and then repudiate the result, if the experiment proved unsatisfactory.

202 Pa. Super. at 84, 195 A.2d at 158-159.

In this case, Smith could very well use the evidence that he gathered from discovery in the earlier action against Murray in the present action. He cannot now ask this court to keep Murray silent. It is the act of requiring Murray to testify through interrogatories and requests for documents that waives the Dead Man's Act, not the use of the testimony.

Other courts have also held that a personal representative waives any objection based on the Dead Man's Act when he directs pre-trial discovery to an adverse party. See *Anderson v. Hughes*, 417 Pa. 87, 208 A.2d 789 (1965), and *Brown v. Saladoff*, 209 Pa. Super. 263, 228 A.2d 205 (1967).

Smith concedes that the act can be waived when discovery is sent to an otherwise disqualified party. He argues, however, that it is not waived here, where he has sent Murray interrogatories and requests for documents in another case. We find his argument unpersuasive.

The lawsuit Smith brought on behalf of the decedent's estate, docketed at 1988-198, is, in all respects, identical to this one. Both

actions arise out of a single occurrence and involve the same parties and same questions of fact and law. This court chose not to consolidate all three of the lawsuits brought because of the number of parties involved and the fear that a jury may become confused, not because each in and of itself is distinguishable from the others. It would be unreasonable to force Murray to now remain silent simply because Smith decided that his testimony would be less of a threat in one of the suits and directed discovery accordingly.

It would be inherently unfair to permit the administratrix herein to discover the bulk of claimant's written evidence and then permit the administratrix to shield herself via the Dead Man's Act. The administratrix may not use a two-headed coin in its gamble for discovery. Therefore, the request for documents resulted in a waiver of the Dead Man's Act.

*Estate of Wilford W. Bolinger*, 24 Pa.D.&C.3d 760 (1980).

The thrust of the *Perlis*, *Anderson*, *Brown* and *Bolinger* decisions was directed at fairness of procedure. It seems fundamentally unfair to permit a decedent's estate to discover all relevant facts from his adversary, and then, at trial, seal his opponent's lips simply by citing the Dead Man's Rule.

While this court has not found any appellate cases which have extended waiver of the Dead Man's Act beyond the principal case, this court finds that the principle of fairness which requires waiver rings just as true in two separate, but virtually identical, cases as it does in a single action. In *Brennan v. Bell*, 37 Pa.D. & C. 2d 707 (1965), a personal representative filed suit against the defendant in Pennsylvania, where the alleged accident occurred, and Florida, where the defendants resided; however, he directed discovery only in the Florida action. Nevertheless, the Pennsylvania court held that the act of directing discovery in Florida waived application of the Dead Man's Act in Pennsylvania.

This court is not extending waiver of the dead man's statute beyond its reasonable application. Interpreting principles already enunciated by the courts, we simply hold today that where there are two lawsuits arising out of the same incident and which involve the same questions of law and fact, a personal representative waives the right to object to the competency of an otherwise incompetent witness under the Dead Man's Act when he directs interrogatories

and other discovery to that witness. <sup>1</sup>

### ORDER OF COURT

October 23, 1990, the court holds that Terry L. Smith, Administrator of the estate of Timothy M. Smith, has waived the application of the Dead Man's Act by directing formal discovery to additional defendant, Shawn Murray, in a separate but related case.

FORSYTHE VS. FRANKLIN COUNTY TAX CLAIM BUREAU,  
ETAL., C.P. Franklin County Branch, Misc. Doc. Vol. AA, Page 56

*Tax Sale - No Knowledge of Sale - Jointly Held Property Judicial Sale*

1. Where there are joint owners of real estate, notice of sale must be given to all owners.
2. The burden of proving compliance with the statutory notice provisions is on the Tax Claim Bureau.
3. There is a distinction between a judicial sale which is based on an order directing the sale and a situation where there is judicial assent to a sale.

*Philip S. Cosentino, Esq.*, Counsel for Petitioner

*John Mc.D Sharpe, Jr., Esq.*, Counsel for Respondent, Franklin County Tax Claim Bureau

*H. Anthony Adams, Esq.*, Counsel for Respondents

### OPINION AND ORDER

KAYE, J., October 4, 1990:

The instant proceeding arises out of a sale of real estate situate in Lurgan Township, Franklin County, Pennsylvania by the Franklin County

<sup>1</sup>Counsel for Smith argues that *Thomas v. Tomay*, 394 Pa. 299, 147 A.2d 321 (1959) stands for the proposition that, if all three cases arising out of this accident had been consolidated, all of the passengers would have been incompetent to testify in any matter adverse to the decedent's estate. We disagree. The case simply did not concern waiver of protection under the Dead Man's Act through discovery.

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