

LEGAL NOTICES, cont.

Citizen's National Bank and Trust Company of Waynesboro, Pennsylvania, executor of the estate of Rebecca W. Varner, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of the Orphans' Court
Franklin County, Pennsylvania

(4-6, 4-13, 4-20, 4-27)

READERS, PLEASE NOTE . . .

We expect to complete printing of the opinion pages for Bound Volume 2 by the end of April, 1979. Volume 3 of the advance sheets will probably commence on May 4, 1979. While it will probably be several months more before Bound Volume 2 is ready for distribution, we must now start to plan for the quantity to be prepared for binding. Subscribers in Franklin County who want **extra** copies of Bound Volume 2 should therefore immediately notify the managing editor. Persons outside Franklin County who want copies of Bound Volume 2 should get in touch with Geo. T. Bisel Company in Philadelphia.

PITTMAN, ET AL v. ELLIOTT, ET AL, C.P. Franklin County Branch, Eq. Doc. Vol. 7, Page 181

Equity - Preliminary Injunction - Unfair Competition - Business Signs

1. A preliminary injunction will be granted where a motel posts several confusing signs which tell the traveler to register at it when in fact the traveler may be interested in registering at a competing motel located nearby.
2. Confusing advertisements coupled with an apparent deceitful purpose meet the unfair competition requirements for a preliminary injunction.

Arthur J. Greif, Esq., Reed, Smith, Shaw & McClay, Attorneys for Plaintiff

John N. Keller, Esq., Attorney for Defendants

OPINION AND DECREE

EPPINGER, P.J., February 5, 1979:

William and Patricia Elliott (Elliotts) own the Willow Hill Motel and another establishment which they call Elliotts Motel; the latter consists of cottages. Both are just south of the Turnpike exit on Pa. Route 75. Across the road is the Val-E Motel which is owned by William and Hilda Pittman (Pittmans). The Elliotts have erected several signs, two of which say: "Register At Willow Hill Motel On Right For Both Our Motels". One of these is a painted sign, the other accommodates changeable letters. The third sign reads: "Register Here For Both Our Motels".

In filing this equity action, the Pittmans ask us to require the Elliotts to change the wording on the signs to avoid any implication that a prospective customer of the Val-E Motel can register for that motel at the Willow Hill Motel and also to award monetary damages.

From the evidence we conclude that the signs erected by the Elliotts falsely import or could lead a traveler to the conclusion that the Elliotts are the owners of the Val-E Motel.

Location is important in the determination of this matter. Both the Willow Hill Motel, which we believe qualifies as a motel in the modern sense, and Elliotts Motel, which gives the appearance of being two residential properties and four bungalow-type buildings, are on the right hand side as one travels south on Pa. Route No. 75. Between them is a residential

property. Before coming to the Willow Hill Motel there is a Willow Hill Restaurant and a Val-E Garage and Restaurant building. The restaurant is no longer in operation. Across the road, approximately between the Willow Hill Motel and Elliotts Motel is the Val-E Motel. As one goes South, the cabins of Elliotts Motel are virtually obscured by the other buildings and trees.

Identification is a second consideration. There is nothing to suggest that what is called Elliotts Motel, which at the time of the hearing was barely identifiable as such, is in any way in common ownership with the Willow Hill Motel. Natives might know that the Elliotts own both of them, but surely the traveler who is not familiar with the area has no knowledge of that fact. The most prominent sign in front of Elliotts Motel advertises campsites, camping, picnicking, supplies, firewood and picnic tables. At the time of the hearing, the sign identifying the complex as a motel was very small and difficult to see.¹

Confusion is the next factor and all of this leads to confusion. Observing two motels and wanting a place to rest, the weary traveler sees several signs on his right, the convenient side, telling him to register here for both motels. The only two motels that are really evident are the Willow Hill and the Val-E, so the traveler concludes that by turning into the Willow Hill Motel he can have a room in whichever one there is a vacancy. A sign which the Pittmans have erected to counter this idea is lost in the first decisions that are made.

Purpose is another thing. We must inquire why the Elliotts believe it necessary to use this particular wording, not once but three times, if the purpose is not to deceive. We can think of many other ways of telling travelers that if they want to stay at Elliotts Motel they can register at Willow Hill Motel.² Why not use one of them?

We are asked to grant the Pittmans a preliminary injunction. Such an injunction preserves the status quo of a controversy until its merits can be fully heard and determined. The status quo which is preserved is the last actual, peaceable, non-contested status which preceded the pending controversy. *Pennsylvania Public Utility Commission v. Israel*, 356 Pa. 400, 407, 52 A.2d 317, 321 (1947). See generally, 8 Standard Pennsylvania Practice 390-93.

¹We have been advised that since the hearing, a sign identifying the premises as Elliotts' Motel has been erected. But that fact would not change the outcome of this case.

²No office is maintained at Elliotts Motel.

A preliminary injunction should be granted only where the rights of the plaintiff are clear, where there is an urgent necessity to avoid injury which cannot be compensated for by damages, and where greater injury will be done by refusing it than by granting it.³ *Sameric Corp. v. Goss*, 448 Pa. 497, 499, 295 A.2d 277, 278-79 (1972).

The first requirement is that the plaintiffs' rights be clear. The plaintiffs here, the Pittmans, claim that the Elliotts' conduct constitutes both unfair competition and tortious interference with prospective contractual relationships.

Our Supreme Court has said: "the unfairness of competition is primarily a question of fact and the test is whether the public is likely to be deceived." *Consolidated Home Specialties Co. v. Plotkin*, 358 Pa. 14, 20, 55 A.2d 404, 407 (1947). The Unfair Trade practices and Consumer Protection Law, the Act of December 17, 1968, P.L. 1224, as amended, 73 P.S. Sect. 201-2, defines certain behavior as unfair methods of competition or unfair or deceptive acts or practices. These include: "passing off goods or services as those of another"; "causing likelihood of confusion or misunderstanding as to the source [or] sponsorship... of goods or services"; "causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with or certification by another". If one trades on another's business reputation by using deceptive selling practices and such activity is reasonably likely to produce confusion in the public mind, equity will restrain such practices and compel an accounting of the profits gained thereby. *Morgan's Home Equipment Corporation v. Martucci*, 390 Pa. 618, 635, 136 A.2d 838, 848 (1958). In a New York case, a businessman erected a sign that misled people intending to patronize an adjoining business into patronizing his own business. The Court found that although the legend was factually correct, it was designed to mislead the public. The Court therefore enjoined the businessman from "conducting [his] business or advertising in front of [his] place of business so that the public [would] be misled." *Bargain Barn, Inc. v. Zipper*, 189 N.Y.S. 2d 28, 32 (N.Y. Sup. Ct. 1959).

³Two of the signs have removable letters similar to those on the marquee of a theater. They could be changed without any problems at all. As for the third sign, the painted one, pending a final disposition of this case it can be covered over with something like black plastic and the Elliotts will still have a lot of advertising and identification visible to the travelling public.

The Pittmans' second basis for relief is that the Elliotts are tortiously interfering with prospective contractual relationships. This involves the unprivileged diversion of customers from a businessman, and for the Pittmans to succeed, the diversion must be intentional and cause harm. See *Birl v. Philadelphia Electric Co.*, 402 Pa. 297, 300-01, 167 A.2d 472, 474 (1960); Restatement of Torts Sect. 766 (1939). On the basis of the testimony heard at the preliminary injunction hearing, we can only say that the Pittmans may or may not prevail on this claim. While we said a party's rights must be clear before granting a preliminary injunction and the party seeking it must show he will probably succeed at a final hearing, a preliminary injunction hearing is not a final hearing on the merits. *Northvue Water Co., Inc. v. Municipal Water & Sewer Authority*, 7 Pa. Cmwlth. 141 n.l, 298 A.2d 677, 679 n.l (1972). In this case the Pittmans have shown enough to meet the unfair competition requirements for a preliminary injunction.

The second requirement is urgent necessity to avoid injury that cannot be compensated for by damages. The harm must be immediate and irreparable. "An injury is regarded as irreparable . . . if it is such as to cause damages which can be estimated only by conjecture, and not by any accurate pecuniary standard. . . ." 8 Standard Pennsylvania Practice 410-11. Injury to good will causes this type of damage. 4 R. Callmann, *The Law of Unfair Competition, Trademarks & Monopolies*, Sect. 88.3. (3ed., 1970). See *Chas. H. Elliott Co. v. Skillkrafters*, 271 Pa. 185, 114 A. 488 (1921). An injury is also irreparable if the wrongs are of a repeated and continued character. *Gamlen Chemical Co. v. Gamlen*, 79 F. Supp. 622, 635, (W.D. Pa., 1948) (applying Pa. law).

The third requirement is that greater injury will be done by refusing a preliminary injunction than by granting it. In this case the Elliotts can adopt alternate wording for the signs with removable letters and cover the painted sign; this imposes no hardship. We are not requiring them to do something complex, costly or irreversible. Should the Elliotts prevail at trial, restoring what has been changed will require little effort.

Trial courts are afforded broad discretion in granting or refusing preliminary injunctions after hearings. *Commonwealth v. Schall*, 6 Pa. Cmwlth. 578, 581, 297 A.2d 190, 191 (1972). It is only necessary that there be apparent grounds for the court's action. *Albee Homes, Inc. v. Caddie Homes, Inc.*, 417 Pa. 177, 181, 207 A.2d 768, 770 (1965), citing *Lindenfelser v. Lindenfelser*, 385 Pa. 342, 343-44, 123 A.2d 626, 627 (1956).

We are urged by the Elliotts to refuse the preliminary injunction because the Pittmans do not have "clean hands". It was stated and denied that Mr. Pittman said he'd put the Elliotts out of business. It was stated that the Elliotts had some false and misleading signs, but if this was so, it was because the signs were not immediately removed when the circumstances changed. In this respect, there was no showing that the Pittmans' signs were erected to be deceptive. We do not believe these acts taint the Pittmans' right to a preliminary injunction.

DECREE OF COURT

NOW, February 5, 1979, it is ordered that within seven days from this date William G. and Patricia Elliott, the defendants above named, are required to:

- (1) Change the lettering on the signs with removable letters so that the signs do not lead to the conclusion that the defendants are the owners of both the Willow Hill Motel and the Val-E Motel.
- (2) Either change the lettering on the painted sign to achieve the result as required in (1) above or cover the sign so that it cannot be read by passers-by.

This is a preliminary injunction decree and shall remain in full force and effect until there is a further decree of court. During the pendency of this decree William S. Pittman, Jr. and Hilda M. Pittman, plaintiffs, shall file and maintain a preliminary injunction bond in the amount of \$300.00.

BARNHART v. HENSON, ET AL (NO. 2), C.P. Franklin County Branch, No. 97 Nov. Term, 1976

Trespass - Motion For Summary Judgment - Conspiracy to Commit a Tortious Act

1. Whether a person withdraws from a conspiracy to commit a tortious act is a question of fact for the jury.
2. Though a defendant was not present when a plaintiff was shot, where there is testimonial evidence that he aided and encouraged other defendants in holding the plaintiff pinned to the floor subsequent to the shooting, the defendant may equally be liable in trespass to the plaintiff.
3. Summary judgments are granted only in cases which are free and clear from doubt.