The Pittmans' second basis for relief is that the Elliotts are tortiously interfering with prospective contractural 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.

**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)

*John N. Keller, Esq.*, Attorney for Ted Alexander Henson

*Denis M. DiLoreto, Esq.*, Attorney for Donald E. Barnhart, Jr.

*Gerald E. Ruth, Esq.*, Attorney for Joseph E. Henson, Jr.

*Robert P. Shoemaker, Esq.*, Attorney for Joseph E. Henson, Sr.

*Christopher S. Underhill, Esq.*, Attorney for Charles S. Daley, Duane L. Smith, William Starliper and Donald Barnhart

OPINION AND ORDER

EPPINGER, P.J., February 27, 1979:

Donald E. Barnhart, Jr. (Barnhart) was in the barroom of the Hotel Greencastle. An encounter lasting for a period of time culminated in the proprietor, Joseph E. Henson, Jr. (Joseph) shooting Barnhart with a pistol. Joseph's brother, Ted, was involved in the "scuffle" when Joseph and his father restrained Barnhart, but Ted left the hotel before the shooting and states that he had gone to summon help.

Barnhart's amended complaint stated that all of the Hensons conspired to assault and batter him and that all of them acting in concert, maliciously, wantonly, wilfully and intentionally assaulted and battered him. The complaint alleges certain acts done by the Hensons. In making a motion for summary judgment, which we must deny, Ted says that Barnhart received the injuries complained of as a result of being shot, that he had effectively withdrawn from the episode at the time of the shooting and that he was not part of a conspiracy to shoot Barnhart.

This position raises at least one jury question, namely whether Ted effectively withdrew from the conspiracy (if one can be proved). By analogy to criminal cases, withdrawal from a conspiracy is a question of fact for the jury. See e.g. *Commonwealth v. Griffey*, 453 Pa. 142, 307 A.2d 283 (1973).

Other questions as to Ted's liability exist. "All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation and request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him." Prosser, *Law of Torts*, Sect. 46, p. 292 (4th ed., 1971).

Solomon David Barr, a patron in the hotel barroom during the incident testified to seeing Ted, along with the other Hensons, holding Barnhart down on the floor. If Ted aided or encouraged the others, he may be equally liable in trespass to Barnhart regardless of whether he was present when the actual shooting occurred. Here we are not dealing with a case which is clear and free from doubt, and summary judgments are meant only for those cases. See 2 Goodrich-Amram 2d Sect. 1035(b):2.

In making his motion for summary judgment, Ted relies on his deposition and those of his co-defendants and others. In *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932), the court stated that testimonial, non-documentary evidence of the moving party or his witnesses will not afford sufficient basis for the entry of a summary judgment because the credibility of the testimony is still a matter for the jury. This is so even though the testimony is uncontradicted. See 2 Goodrich-Amram, Sect. 1035(b):4 and *Bremmer v. Protected Hom Mutual Life Insurance Company*, 436 Pa. 494, 260 A.2d 785 (1970) where it was held that in granting summary judgment the trial court erred in passing on the credibility of the depositon witness whose testimony supported the motion.

In the more recent case of *Amabile v. Auto Kleen Car Wash*, 249 Pa. Super 240, 376 A.2d 247 (1977) the court held that if the depositions on file show there is no genuine issue as to material facts and that the moving party is entitled to judgment as a matter of law, then summary judgment may be granted in favor of the moving party. The depositions in this case do not establish that there are no genuine issues of material facts.

In the alternative, Ted has requested a partial summary judgment. He claims not to be liable for any of Barnhart's damages resulting from the gunshot wound. Whether he can be found liable on a conspiracy, is, as we said before, a matter for the jury so this request will also be denied.

ORDER OF COURT

NOW, February 27, 1979, the motions for summary judgment are denied.

COMMONWEALTH v. STRODE, C.P. Cr.D. Franklin County Branch, No. 264 of 1978

*Crimes - Driving Under the Influence - Elements*



1. The elements of the offense of driving under the influence which the Commonwealth must prove beyond a reasonable doubt are: (1) the defendant was operating a motor vehicle; (2) the defendant was under the influence of alcohol; and (3) the defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving.

2. That a defendant is under the influence of alcohol is established beyond a reasonable doubt by the evidence of odor of alcohol on his breath, his glassy eyes, his slurred speech, his statement that he was drunk or was not exactly drunk, and a blood alcohol test result of 0.12.

3. That a defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving is established beyond a reasonable doubt where it is shown that the defendant rapidly accelerated after each stop, exceeded the speed limit, veered five times within several streets from his established lane of travel into an adjoining lane, and failed to promptly come to a stop upon being signaled to do so by a police officer.

*John F. Nelson, Assistant District Attorney*, Attorney for the Commonwealth

*Lawrence C. Zeger, Esq.*, Counsel for the Defendant

OPINION AND ORDER

KELLER, J., Frebruary 7, 1979:

On July 28, 1978, the defendant was charged with operating a motor vehicle under the influence of alcohol, violation of Section 3731(a)(1) and violation of Vehicle Code Section 3309(1), driving on roadways laned for traffic-driving within single lane. The matter was bound over for court and on November 13, 1978, the defendant waived trial by jury on the misdemeanor charge and requested a trial without jury which was approved by the Court. On November 17, 1978, trial without jury was held.

The evidence established that:

1. At about 4:45 A.M. on July 28, 1978, Officer Haldeman of the Chambersburg Police Department was on routine patrol and observed a green Ford pickup truck proceeding East on West Louden Street at the speed of approximately 45 mph in a 35 mph zone. He followed the truck without activating his flashing lights or siren.

2. As the pickup truck entered West Queen Street it moved to the center of the road to effect the rather gradual right turn.