

# Franklin County Legal Journal

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September 18, 2020

Pages 75 - 94

Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

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### **Franklin County Legal Journal**

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**POSTMASTER:** Send address changes to the Franklin County Legal Journal, 100 Lincoln Way East, Suite E, Chambersburg, PA 17201-2291.

## NOTICE OF ADMINISTRATIVE SUSPENSION

Notice is hereby given that **William Scott Arnoult** of **Franklin County** has been **Administratively Suspended** by Order of the Supreme Court of Pennsylvania dated August 12, 2020, pursuant to Rule 219, Pa.R.D.E, which requires that all attorneys admitted to practice in any court of this Commonwealth must pay an annual assessment of \$225.00. The Order became effective **September 11, 2020**.

Suzanne E. Price  
Attorney Registrar  
The Disciplinary Board of the  
Supreme Court of Pennsylvania

**IN THE COURT OF COMMON PLEAS  
OF THE 39<sup>TH</sup> JUDICIAL DISTRICT OF PENNSYLVANIA  
FRANKLIN & FULTON COUNTIES**

In Re: William Scott Arnoult, )

Misc. Docket No.

2020-2669

**ADMINISTRATIVE ORDER**

**AND NOW** this 16th day of September, 2020,

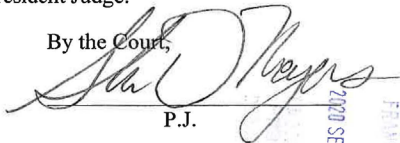
**WHEREAS**, the Pennsylvania Supreme Court of Pennsylvania issued an order on August 12, 2020 administratively suspending William Scott Arnoult from practicing law before the courts of the Commonwealth of Pennsylvania; (*A copy of the Supreme Court of Pennsylvania's order is attached*). The effective date of the order is September 12, 2020;

**AND WHEREAS**, the Pennsylvania Supreme Court has directed the President Judge of the 39<sup>th</sup> Judicial District to enter such orders as are necessary to protect the rights of William Scott Arnoult's clients or fiduciary entities with which he is involved;

**IT IS HEREBY ORDERED**, that for a period of 30 days all cases in which William Scott Arnoult is counsel of record are stayed to afford his clients or fiduciaries the opportunity to secure their files and obtain new counsel;

**IT IS FURTHER ORDERED**, that the Prothonotary and Clerks of Court of Franklin County and Fulton County shall immediately forward any pleading filed of record in cases in which William Scott Arnoult is an attorney of record to Court Administration for disposition by the President Judge.

By the Court,



P.J.

Distribution:  
Mark Singer, Court Administrator  
Franklin County Law Journal  
Franklin/Fulton County Board of Judges

PROTHONOTARY  
FRANKLIN COUNTY, PA  
2020 SEP 16 PM 12:56  
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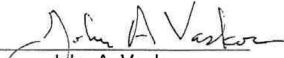
ATTEST A TRUE COPY  
  
TIMOTHY S. SPANGELLER PROTHONOTARY

**IN THE SUPREME COURT OF PENNSYLVANIA**

IN RE: : No. 53 ID  
: :  
Administrative Suspension :  
Pursuant to Rule 219 of the :  
Pennsylvania Rules of :  
Disciplinary Enforcement :

**ORDER**

**AND NOW**, this 12<sup>th</sup> day of August, 2020, it is hereby Ordered that the attorneys named on the attached list are administratively suspended pursuant to Rule 219, Pa.R.D.E. Said administrative suspension shall take effect 30 days after the date of this order pursuant to Rule 217(d), Pa.R.D.E.


  
\_\_\_\_\_  
John A. Vaskov  
Deputy Prothonotary

A True Copy Patricia Nicola  
As Of 08/12/2020

Attest:   
Chief Clerk  
Supreme Court of Pennsylvania

## CERTIFICATION

I certify that the attorneys on the attached list have their mailing address in the county referenced therein and have been **administratively suspended** pursuant to the Supreme Court's Order dated August 12, 2020, effective September 11, 2020.

  
\_\_\_\_\_  
Suzanne E. Price  
Attorney Registrar  
The Disciplinary Board of the  
Supreme Court of Pennsylvania

**Disciplinary Board of the Supreme Court of Pennsylvania**  
**Attorneys Certified for Administrative Suspension**

Year: 20-21

09/11/2020

Franklin County  
Active

ID#  
92129

Attorney  
Arnoult, William Scott

# PUBLIC NOTICES

## **ESTATE NOTICES**

Notice is hereby given that in the estates of the decedents set forth below, the Register of Wills has granted letters testamentary or of administration to the persons named. All persons having claims or demands against any of said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay, to the respective personal representatives thereof or their attorneys named below.

### **First Publication**

Estate of Catherine L. Bricker, late of the Borough of Chambersburg, Franklin County, Pennsylvania.

Personal Representative:  
Phyllis J. Martin  
2365 Molly Pitcher Highway  
Chambersburg, PA 17201  
Attorney:  
Lawrence R. Rife, IV  
Hoskinson, Wenger & Rife  
147 East Washington Street  
Chambersburg, PA 17201

9/18, 9/25, 10/2/2020

Estate of Joan Dionne, late of Guilford Township, Franklin County, Pennsylvania.

Personal Representative:  
Carol Sokol  
159 Pinehurst Drive  
Meriden, CT 06450  
Attorney:  
Lawrence R. Rife, IV  
Hoskinson, Wenger & Rife  
147 East Washington Street  
Chambersburg, PA 17201

9/18, 9/25, 10/2/2020

Estate of Anna J. Ecker, late of Waynesboro, Franklin County, Pennsylvania.

Personal Representative:  
Allen E. Ecker  
c/o R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201  
Attorney:  
Jared S. Childers  
R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201

9/18, 9/25, 10/2/2020

Estate of Caroline L. Grove, late of Quincy Township, Franklin County, Pennsylvania.

Personal Representative:  
Carl K. Grove  
c/o R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201  
Attorney:  
Jared S. Childers  
R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201

9/18, 9/25, 10/2/2020

Estate of Phyllis L. Hurst, a/k/a Phyllis Louise Hurst, a/k/a Phyllis L. Cox, late of Antrim Township, Franklin County, Pennsylvania.

Personal Representative:  
Robert Lee Cassner  
4055 Buchanan Trail West  
Greencastle, PA 17225  
Attorney:  
Tracy J. Ross  
Keller, Keller, Beck and Ross, LLC  
1035 Wayne Avenue  
Chambersburg, PA 17201

9/18, 9/25, 10/2/2020

Estate of Marvin G Stahl, a/k/a Marvin Glendean Stahl, late of the Borough of Chambersburg, Franklin County, Pennsylvania.

Personal Representatives:  
Anna M. Kennedy  
Clinton O. Stahl  
c/o R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201  
Attorney:  
Jared S. Childers  
R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201

9/18, 9/25, 10/2/2020

Estate of Sylvia Annette Warrenfeltz-Rentfrow, late of Waynesboro, Franklin County, Pennsylvania.

Personal Representative:  
Aaron C. Jackson  
1215 Manor Drive, Suite 202  
Mechanicsburg, PA 17055  
Attorney:  
Kristen Snyder  
1215 Manor Drive, Suite 202  
Mechanicsburg, PA 17055

9/18, 9/25, 10/2/2020

### **Second Publication**

Estate of June I. Barton, a/k/a June Barton, late of Wells Township, Fulton County, Pennsylvania.

Personal Representative:  
Randy Barton  
c/o R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201  
Attorney:  
R. Thomas Murphy  
R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201

9/11, 9/18, 9/25/2020

## **PUBLIC NOTICES**

Estate of Mildred Marie Daihl, late of the Borough of Shippensburg, Franklin County, Pennsylvania.

Personal Representatives:

Debra K. Ocker  
Joanne D. Schrader  
c/o Thomas P. Gleason  
825 West King Street, Suite E  
Shippensburg, PA 17257  
Attorney:  
Thomas P. Gleason  
825 West King Street, Suite E  
Shippensburg, PA 17257

9/11, 9/18, 9/25/2020

Estate of Travis M. Fortney, a/k/a Travis Fortney, late of Quincy Township, Franklin County, Pennsylvania.

Personal Representative:

Rachel Fortney  
11129 South Mountain Road  
Fayetteville, PA 17222  
Attorney:  
Timothy W. Misner  
39 South Broad Street  
Waynesboro, PA 17268

9/11, 9/18, 9/25/2020

Estate of Joretta A. McKibben, late of the Borough of Greencastle, Franklin County, Pennsylvania.

Personal Representative:

Dodie M. Bingaman  
c/o R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201  
Attorney:  
R. Thomas Murphy  
R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201

9/11, 9/18, 9/25/2020

Estate of Betty I. Newcomer, a/k/a Betty Newcomer, a/k/a Betty Irene Cook Newcomer, a/k/a Betty I. Cook, late of Washington Township, Franklin County, Pennsylvania.

Personal Representative:

Barbara J. Oaks  
c/o R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201  
Attorney:  
R. Thomas Murphy  
R. Thomas Murphy & Associates, P.C.  
237 East Queen Street  
Chambersburg, PA 17201

9/11, 9/18, 9/25/2020

Estate of Catherine L. Sadler, a/k/a Catherine Louise Sadler, late of Antrim Township, Franklin County, Pennsylvania.

Personal Representative:

Charles R. Sadler  
14899 Robinhood Circle  
Greencastle, PA 17225  
Attorney:  
Tracy J. Ross  
Keller, Keller, Beck and Ross, LLC  
1035 Wayne Avenue  
Chambersburg, PA 17201

9/11, 9/18, 9/25/2020

Estate of John R. Shields, a/k/a John Randall Shields, late of the Borough of Waynesboro, Franklin County, Pennsylvania.

Personal Representative:

Daniel C. Shields  
c/o Walker, Connor & Spang, LLC  
247 Lincoln Way East  
Chambersburg, PA 17201  
Attorney:  
David F. Spang  
Walker, Connor & Spang, LLC  
247 Lincoln Way East  
Chambersburg, PA 17201

9/11, 9/18, 9/25/2020

Estate of Geraldine Mae Stoltzfus, late of Metal Township, Franklin County, Pennsylvania.

Personal Representative:

Sue Forssmark  
1667 Lenini Drive  
West Chester PA 19382  
Attorney:  
Thomas B. Steiger, Jr.  
Steiger & Steiger  
56 South Main Street  
Mercersburg, PA 17236

9/11, 9/18, 9/25/2020

### **Third Publication**

Estate of Wayne P. Cave, late of the Borough of Chambersburg, Franklin County, Pennsylvania.

Personal Representative:

Madison D. Cave  
26710 Chatham Lane  
Millsboro, DE 19966  
Attorney:  
Suzanne M. Trinh  
Zullinger-Davis-Trinh, PC  
74 North Second Street  
Chambersburg, PA 17201

9/4, 9/11, 9/18/2020

## **PUBLIC NOTICES**

Estate of Ceedie Rae Smith, a/k/a Ceedie R. Smith, late of Washington Township, Franklin County, Pennsylvania.

Personal Representatives:

Michael R. Smith

Stanley R. Smith

c/o R. Thomas Murphy & Associates, P.C.

237 East Queen Street

Chambersburg, PA 17201

Attorney:

Jared S. Childers

R. Thomas Murphy & Associates, P.C.

237 East Queen Street

Chambersburg, PA 17201

9/4, 9/11, 9/18/2020

Estate of Jay A. Wadel, late of Greene Township, Franklin County, Pennsylvania.

Personal Representative:

Barbara E. Wadel

c/o Weigle & Associates, P.C.

126 East King Street

Shippensburg, PA 17257

Attorney:

Jerry A. Weigle

Weigle & Associates, P.C.

126 East King Street

Shippensburg, PA 17257

9/4, 9/11, 9/18/2020

### **ORPHANS' COURT NOTICE**

IN THE COURT OF COMMON PLEAS OF THE  
39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY,  
PENNSYLVANIA – ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans Court Division for CONFIRMATION: October 1, 2020.

CARBAUGH: Amended First and Final Account of proposed distributions and notice to creditors of Heidi J. Green, Executrix of the Estate of Keith A. Carbaugh, a/k/a Keith Allen Carbaugh, late of Quincy Township, Franklin County, Pennsylvania, deceased.

RIESS: First and Final Account of proposed distributions and notice to creditors of Jacqueline A. Thomas, a Co-Personal Representative of the Estate of Jack W. Riess, Sr., a/k/a Jack W. Riess, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

SANDERS: First and Final Account of proposed distributions and notice to creditors of Timothy W. Misner, Executor of the Estate of Donald J. Sanders, a/k/a Donald John Sanders, late of Washington Township, Franklin County, Pennsylvania, deceased.

WHITMORE: First and Final Account of proposed distributions and notice to creditors of Harry B. Stouffer, Jr., Executor of the Estate of Mary R. Whitmore, late of Hamilton Township, Franklin County, Pennsylvania, deceased.

Todd A. Rock  
Clerk, Orphans' Court Division  
Franklin County, Pennsylvania

9/18, 9/25/2020



## Candleheart, Inc., Plaintiff v.

**Amy Brown, in her capacity as Administrator of the Estate of Calvin  
M. Gardner, Deceased, Defendant**

Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch, Civil Action – Quiet Title No. 2019-2025

**HOLDING:** The Court holds that it is not “clear and free from doubt that . . . [Candleheart] will be unable to prove facts legally sufficient to establish the right to relief[]” because of the disqualification of Mr. Newcomer’s testimony under the Dead Man’s Act or a preclusive bar of *res judicata*. Therefore, Count I and Count III of Defendant’s Preliminary Objections are overruled. Defendant will be permitted to plead over within twenty (20) days from the date of this Order and Opinion.

### HEADNOTES

#### *Judicial Notice*

1. The Court may take judicial notice of descriptions of facilities in limited circumstances. *Cf. Figueroa v. Pennsylvania Bd. of Probation and Parole*, 900 A.2d 949, 950 fn.1 (Pa. Commw. Ct. 2006) (taking judicial notice of description of privately run community corrections center on Pennsylvania Department of Corrections website).

#### *Preliminary Objections – Standard of Review*

2. The Court’s standard of review is as follows: “[p]reliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.” *American Interior Construction & Blinds Inc. v. Benjamin’s Desk, LLC*, 206 A.3d 509, 512 (Pa. Super. Ct. 2019) (citing *Khawaja v. RE/MAX Central*, 151 A.3d 626, 630 (Pa. Super. Ct. 2016)).

3. The Court need not accept—“legal conclusions, unwarranted factual inferences, argumentative allegations, or expressions of opinion[]”—as true. *C.S. v. Commonwealth Dep’t of Human Services, Bureau of Hearings and Appeals*, 184 A.3d 600, 600 n.3 (Pa. Commw. Ct. 2018) (citing *Armstrong Cty. Mem’l Hosp. v. Dep’t of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Commw. Ct. 2013)).

4. The Court is limited to an examination of the “averments in the complaint, together with the documents and exhibits attached thereto . . . in order to evaluate the sufficiency of the facts averred.” *Denlinger, Inc. v. Agresta*, 714 A.2d 1048, 1050 (Pa. Super. Ct. 1998).

#### *Judgment – Necessity of Pleading Former Adjudication in General*

5. *Res judicata* is an affirmative defense that typically must be responsively pleaded as new matter pursuant to Pa.R.C.P. No. 1030(a), and not as preliminary objections. *Weinar v. Lex*, 176 A.3d 907, 926 (Pa. Super. Ct. 2017).

### *Judgment – Raising Question by Demurrer or Motion*

6. Two exceptions to the requirement of raising *res judicata* as an affirmative defense is when either: a complaint makes reference to the prior proceeding and “contains facts and issues pleaded by the prior action,” or the plaintiff fails to raise the procedural defect in her own preliminary objection (to the purportedly improper preliminary objection). *Duquesne Slag Products Co. v. Lench*, 415 A.2d 53, 54 (Pa. 1980) (second exception); *Del Turco v. Peoples Sav. Ass’n*, 478 A.2d 456, 461 (Pa. Super. Ct. 1984) (first exception).

### *Pleading – Mode of Objecting; Preliminary Objections*

7. Because Candleheart did not file its own preliminary objections (nor raise the procedural defect), the Court finds that Candleheart has waived any claim that Defendant improperly raised this defense. *See Lench*, 415 A.2d at 54. Thus, the Court “may entertain the merits of [this] affirmative defense[.]” *Corman v. Nat’l Collegiate Athletic Ass’n*, 74 A.3d 1149, 1167 (Pa. Commw. Ct. 2013), to the extent it reviews *res judicata* pursuant to its standard of review. *See also* Pa.R.C.P. No. 1032(a) (waiver of objection not presented).

### *Statute of Frauds – Necessity*

8. The statute of frauds is an affirmative defense that must be responsively pleaded as new matter pursuant to Pa.R.C.P. No. 1030(a). *See Bocchicchio v. Gen. Pub. Util. Corp.*, 689 A.2d 305, 307 (Pa. Super.Ct. 1997) (“The language of Rule 1030 is clear and unambiguous; it mandates that a party allege the Statute of Frauds defense by way of new matter.”).

### *Pleading – Preliminary objections*

9. Pa.R.C.P. No. 1028(b) mandates that “[a]ll preliminary objections shall be raised at one time.” *See Martin v. Gerner*, 481 A.2d 903, 906 (Pa. Super. Ct. 1984) (“The basis for the rule that all preliminary objections must be raised at one time is that otherwise the court would have to rule on preliminary objections on a piecemeal basis.”).

### *Witnesses – Nature and Grounds of Exclusion in General*

10. “[T]he invocation of the protection based on the Dead Man’s Statute is not an ‘affirmative defense.’” *Davis v. Wright*, 156 A.3d 1261, 1268 (Pa. Super. Ct. 2017).

### *Pleading – Preliminary Objections*

11. It is proper for the Court to consider the Dead Man’s Act, 42 Pa.C.S. § 5930, when deciding preliminary objections. *See Pagnotti v. Old Forge Bank*, 631 A.2d 1045, 1046 (Pa. Super. Ct. 1993); *Matter of Kulbitsky*, 536 A.2d 458, 460 (Pa. Commw. Ct. 1988).

### *Witnesses – Subject-Matter Testimony*

12. A surviving party to a transaction who has an interest adverse to that of a decedent, or any other person having the same, is disqualified from testifying on matters that occurred prior to the decedent’s death. *See In re: Hendrickson’s Estate*, 130 A.2d 143, 146 (Pa. 1957) (citations omitted); *Davis*, 156 A.3d at 1267 (citing *Estate of Kofsky*, 409 A.2d 1358, 1359 (Pa. 1979)).

*Witnesses – Surviving Party to Contract or Other Transaction or Cause of Action*

13. A witness is not only disqualified from testifying on the “actual transaction or agreement giving rise to a claim against the decedent, but also to any matter occurring before [decedent’s] death which had any bearing on the claim being made.” *In re: Estate of Cecchine*, 485 A.2d 454, 458 (Pa. Super. Ct. 1984) (citing *Hendrickson’s Estate*, 130 A.2d at 147).

*Witnesses – Nature and Grounds of Exclusion in General*

14. The Dead Man’s Act is “an exception to the general rule of evidence in this Commonwealth that: ‘no interest or policy of law . . . shall make any person incompetent as a witness.’” *Larkin v. Metz*, 580 A.2d 1150, 1152 (Pa. 1990) (quoting 42 Pa.C.S. § 5921).

15. The Act’s purpose is to “prevent the injustice that may result from permitting a surviving party to a transaction to give testimony favorable to himself and adverse to the decedent, which the decedent’s representative would be in no position to refute by reason of the decedent’s death.” *Larkin v. Metz*, 580 A.2d 1150, 1152 (Pa. 1990).

16. For the Dead Man’s Act to apply, three conditions must exist, the second of which is what the case turns on and what is lacking, and thus, makes the Act inapplicable. (1) First, the deceased “must have had an actual right or interest in the matter at issue[.]” *Punxsutawney Mun. Airport Auth. v. Lellock*, 745 A.2d 666, 670 (Pa. Super. Ct. 2000) (citations omitted), meaning “an interest in the immediate result of the suit.” *Hendrickson’s Estate*, 130 A.2d at 146 (citations omitted). (2) Second, the *interest* of the proposed witness, and not merely his *testimony*, must be adverse to the interest of deceased’s estate. *Punxsutawney Mun. Airport Auth. v. Lellock*, 745 A.2d at 670. (3) Third, the right or interest of the deceased must have passed to a party of record who represents the deceased’s interests. *Punxsutawney Mun. Airport Auth. v. Lellock*, 745 A.2d at 670.

17. The test to determine whether an interest is adverse is whether: “[the witness] will either gain or lose, as the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote, or contingent.” *In re: Mihordin*, 162 A.3d 1166, 1173 (Pa. Super. Ct. 2017) (citing *In re: Groome’s Estate*, 11 A.2d 271, 273 (Pa. 1940)).

18. Any other non-adverse interest that a witness may have goes to a witness’s credibility. *In re: Gatson’s Estate*, 62 A.2d 904, 906 (Pa. 1949). See *Estate of Grossman*, 406 A.2d 726, 732-33 (Pa. Super. Ct. 1979) (“The fact that a witness may be unfriendly to a decedent’s cause and partial to that of the survivor may affect credibility, but does not affect competency.”) (citing *Billow v. Billow*, 61 A.2d 817, 819 (Pa. 1949)).

19. Officers or directors, who are also stockholders of a corporation, involved in the litigation, have an adverse interest to that of decedent’s estate, and are therefore, disqualified under the Act. *Keystone Printed Specialties Co., Inc. v. Fischer*, 430 A.2d 650, 652 (Pa. Super. Ct. 1981).

*Witnesses – Member, Stockholder, or Officer of Corporation*

20. Officers or directors of a corporation have an adverse interest because, as stockholders, they, personally, have a pecuniary interest that would be directly affected by operation of the law upon disposition of the proceeding. See *In re Swoope’s Estate*, 177 A. 748, 748 (Pa. 1935) (“[A]s a shareholder, . . . the witness had a pecuniary interest directly affected by the allowance of the claim.”) (citations omitted); *Olson v. N. Am. Indus. Supply, Inc.*, 658 A.2d 358, 360, 364 (Pa. Super. Ct. 1995) (“If [shareholder] prevailed at trial, . . . he would clearly stand to gain additional money.”).

### *Witnesses – Persons Interested in Event*

21. Officers or directors who are not stockholders of a corporation that is involved in the litigation, or employees of a party-entity involved in the litigation, do not have, by their status alone, the requisite adverse interest to decedent's estate to disqualify them under the Dead Man's Act. *Visscher v. O'Brien*, 418 A.2d 454, 456, 458 (Pa. Super. Ct. 1980); *Com., Dep't of Transp. v. Estate of Crea*, 483 A.2d 996, 998-99 (Pa. Commw. Ct. 1977); *In re: Diamond Furnishing Co., Inc.*, 42 B.R. 638, 639, 641 (Bankr. M.D. Pa. 1984).

### *Courts – Decision of United States Courts as Authority in States Courts*

22. Decisions of lower federal courts may provide the Court with persuasive, although not binding, authority. *Verdini v. First Nat'l Bank of Pennsylvania*, 135 A.3d 616, 619 n.5 (Pa. Super. Ct. 2016).

### *Preliminary Objections – Standard of Review*

23. The complaint is the operative pleading the court reviews on preliminary objections. *Denlinger, Inc. v. Agresta*, 714 A.2d 1048, 1050 (Pa. Super. Ct. 1998).

### *Equity – Answer*

24. Court may not consider counsel's statement made at oral argument on matter that does not appear of record. *Cf. Int'l Union of Operating Engineers, Local No. 66, AFL-CIO v. Linesville Const. Co.*, 322 A.2d 353, 356 (Pa. 1974) ("[Pa.R.C.P. No. 1028], which authorizes the filing of preliminary objections to a complaint, never intended that testimony or anything outside of the complaint is to be considered in disposing of the questions of law raised by a demurrer to the complaint. Such issues are to be resolved by the court on the basis of the pleadings alone."); *Claremont Properties, Inc. v. Bd. of Twp. Supervisors of Middlesex Twp.*, 546 A.2d 712, 715 (Pa. Commw. Ct. 1988) ("[A] court may not properly base an adjudication on matters stated in oral argument that do not appear of record.").

### *Judgment – Nature and Requisites of Former Recovery as Bar in General*

25. *Res judicata*, or claim preclusion, bars claims and issues that have been previously litigated. *Matternas v. Stehman*, 642 A.2d 1120, 1123 (Pa. Super Ct. 1994).

26. The rule is that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties[,] and thus, bars "a subsequent action involving the same claim, demand or cause of action." *Robinson Coal Co. v. Goodall*, 72 A.3d 685, 689 (Pa. Super. Ct. 2013) (quoting *Stoekinger v. Presidential Fin. Corp. of Delaware Valley*, 948 A.2d 828, 832 n.2 (Pa. Super. Ct. 2008)).

27. Claim preclusion also bars claims that could have been litigated but were not. *Matternas v. Stehman*, 642 A.2d 1120, 1125 (Pa. Super Ct. 1994) (citing *Martin v. Poole*, 336 A.2d 363, 367 (Pa. Super. Ct. 1975)).

28. "The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights." *Chada v. Chada*, 756 A.2d 39, 43-44 (Pa. Super. Ct. 2000) (quoting *Hammel v. Hammel*, 636 A.2d 214, 218 (Pa. Super. Ct. 1994) (citations omitted)).

29. Inquiry is whether the former and current action, both, possess the following elements: (1) identity of the thing sued upon; (2) identity of the cause of action; (3) identity of the

parties; and (4) identity of the capacity of the parties. *Robinson Coal Co. v. Goodall*, 72 A.3d 685, 689 (Pa. Super. Ct. 2013) (quoting *Stoeckinger v. Presidential Fin. Corp. of Delaware Valley*, 948 A.2d 828, 832 (Pa. Super. Ct. 2008)).

*Pleading – Mode of Objecting; Preliminary Objections*

30. Defendant has the right to plead over within twenty (20) days from the date of this Order and Opinion. Pa. R.C.P. No. 1028(d); *City of Philadelphia v. Berman*, 863 A.2d 156, 162 (Pa. Commw. Ct. 2004) (“The cases that have construed [Pa.R.C.P. No. 1028(d)] have held uniformly that a defendant’s right to file an answer is absolute.”) (citations and internal quotation marks omitted).

Appearances:

J. Gregory Hannigan, Esquire, *Counsel for Plaintiff*

Brian W. Mains, Esquire, *Counsel for Defendants*

**OPINION OF COURT**

Before Meyers, P.J.

Before the Court are Defendant’s *Preliminary Objections*. Defendant challenges Candleheart Inc.’s (“Plaintiff” or “Candleheart”) *Complaint for Quiet Title* for legal insufficiency on the grounds of the Dead Man’s Act and *res judicata*.<sup>1</sup> The Court holds, for the reasons that follow, that it is not “clear and free from doubt that . . . [Candleheart] will be unable to prove facts legally sufficient to establish the right to relief[]” because of the disqualification of Mr. Newcomer’s testimony under the Dead Man’s Act or a preclusive bar of *res judicata*. Therefore, Count I and Count III of Defendant’s *Preliminary Objections* are overruled. Defendant will be permitted to plead over within twenty (20) days from the date of this Order and Opinion.

**PROCEDURAL & FACTUAL HISTORY**

This case concerns title of certain real property as between a Pennsylvania non-profit corporation (Plaintiff) and the estate of the property’s previous owner (Defendant, as administrator of the estate). *Complaint* ¶ 1, 3. Candleheart operates a transitional housing program at the Subject Property, which is funded by HUD.<sup>2</sup> *Id.* ¶ 2, 13. H. The property

<sup>1</sup> Defendant’s preliminary objection as to the absent verification to Plaintiff’s *Complaint* is moot because Plaintiff subsequently filed a verification to it. *See also Brief in Support of Preliminary Objections* fn. 2.

<sup>2</sup> The extent of which the transitional housing program is funded by HUD is unknown by the Court, and not relevant for the Court’s disposition of preliminary objections. However, the Court takes judicial notice that HUD stands for

is 1332-1334 S. Fourth Street, Chambersburg, PA of Franklin County (the “Subject Property”), and was previously owned by Calvin M. Gardner (“Mr. Gardner” or “Decedent”) by virtue of an April 5, 2007 deed. *Complaint* ¶ 1-2; *Praecepte to Index Action as Lis Pendens*, attached Deed. Mr. Gardner died intestate (*i.e.*, without a will) on December 27, 2016. *Id.* ¶ 2-3. His daughter, Amy Brown, was named administrator of his Estate (“Defendant” or “Administrator”). *Id.* ¶ 3.

Prior to Mr. Gardner’s death, Candleheart leased the Subject Property from him for a monthly rent of \$2,500. *Id.* ¶ 5. In addition, Candleheart, through its Director, Craig Newcomer, and Mr. Gardner struck, at some point, a “verbal contract” where Mr. Gardner would apply any monies paid by Candleheart above the rent amount towards Candleheart’s purchasing and ownership of the Subject Property. *Id.* Then, in December of 2008, Candleheart and Mr. Gardner reached an agreement<sup>3</sup> setting the remaining balance due for Candleheart’s purchase of the Subject Property at \$240,000. *Id.* ¶ 6. From December of 2008 to Mr. Gardner’s death in December of 2016, Candleheart paid \$201,000 of that balance. *Id.* ¶ 7. Following Mr. Gardner’s death, Candleheart continued its arrangement with Defendant, continuing to lease the Subject Property from January 2017 to July 2017 and contributing an additional \$14,000 towards the balance for the purchase of the Subject Property. *Id.* at 8-9. In sum, Candleheart paid \$215,000 of the \$240,000 purchase price. *Id.* ¶ 9.

At some point after July 2017, Candleheart decreased its monthly payment—rent plus monies towards the balance—to Defendant. *Id.* ¶ 13. B. Defendant subsequently brought an ejectment action against Candleheart in a separate action in the Court of Common Pleas concerning the Subject Property. *Id.* ¶ 13. F. Defendant dropped the ejectment action, and later brought an action against Candleheart for unpaid rent in the Magisterial the U.S. Department of Housing and Urban Development, Common HUD Terms and Acronyms, HUD.gov, <https://www.hud.gov/about/acronyms> (last accessed November 27, 2019), and of the following description of “transitional housing” from SAMHSA, the federal agency within the U.S. Department of Health and Human Services:

Transitional or supportive housing and homeless shelters can help stabilize people with mental health issues and substance use disorders who are experiencing homelessness. [ . . . ] Housing and shelter programs can help address the root causes of homelessness through a range of essential recovery support services, including mental and substance use disorder treatment, employment, and mainstream benefits. Types of housing and shelter programs include: [ . . . ] Transitional housing typically involves a temporary residence of up to 24 months with wrap-around services to help people stabilize their lives.

Housing and Shelter, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/housing-shelter> (last updated March 29, 2019). *Cf. Figueroa v. Pennsylvania Bd. of Probation and Parole*, 900 A.2d 949, 950 fn.1 (Pa. Commw. Ct. 2006) (taking judicial notice of description of privately run community corrections center on Pennsylvania Department of Corrections website). The Court takes judicial notice of the description of “transitional housing” because the Court was without knowledge as to the nature of what such a program, generally, might be. This is relevant to the extent that the Court relies on *In re: Groome’s Estate*, 11 A.2d 271, 273 (Pa. 1940), *see* fn.18 of this Opinion, *infra*.

3 Candleheart’s *Complaint* does not state whether this later agreement setting the remaining balance due for the purchase of the Subject Property was oral or written.

District Justice Court (the “MDJ” Court).<sup>4</sup> *Id.* ¶ 13. F. The MDJ Court issued judgment against Candleheart, which Candleheart appealed to the Court of Common Pleas. *Id.* ¶ 13 I. The Court of Common Pleas struck Plaintiff’s appeal and ordered that Candleheart pay Defendant the monies owed to it. *Id.* ¶ 13 L, M.

Candleheart then filed a *Complaint for Quiet Title and Other Relief* on May 20, 2019. Defendant filed her *Preliminary Objections* on June 20, 2019 that contained a Notice to Plead. On July 10, 2019, the Court set oral argument on Defendant’s Preliminary Objections for September 12, 2019. Candleheart filed an *Objection to Preliminary Objections* on July 11, 2019 that the Court construes as an answer or response to Defendant’s Preliminary Objections (and not as preliminary objections to Defendant’s *Preliminary Objections*) because Candleheart did not raise any ground enumerated under Pa.R.C.P. No. 1028 and answered with admittals or denials of averments of fact. *See* Pa.R.C.P. No. 1017, 1029. Defendant then filed her brief on August 9, 2019 and Candleheart filed its brief the morning of oral argument on September 12, 2019.

Following oral argument, a review of the parties’ pleadings and briefs and applicable law, Defendant’s Preliminary Objections are ripe for disposition.

## DISCUSSION & ANALYSIS

A party may file preliminary objections for “legal insufficiency of a pleading (demurrer)[.]” Pa. R.C.P. No. 1028(a)(4). The Court’s standard of review is as follows:

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

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<sup>4</sup> The Court notes that there is a discrepancy between the parties in how they describe these particular series of events. Candleheart describes the events as stated above, *i.e.*, an eviction action in the Court of Common Pleas brought by Administrator against Candleheart, subsequently dropped, and then a later action before the MDJ Court for unpaid rent. Meanwhile, Administrator describes the events as a single “MDJ Eviction” action. Because the Court admits as true “all material facts set forth in the challenged pleadings[.]” *see* Court’s Standard of Review, *supra* on page 4, the Court describes these events as Candleheart does.



*American Interior Construction & Blinds Inc. v. Benjamin's Desk, LLC*, 206 A.3d 509, 512 (Pa. Super. Ct. 2019) (citing *Khawaja v. RE/MAX Central*, 151 A.3d 626, 630 (Pa. Super. Ct. 2016)). In addition, the Court need not accept—“legal conclusions, unwarranted factual inferences, argumentative allegations, or expressions of opinion[.]”—as true. *C.S. v. Commonwealth Dep't of Human Services, Bureau of Hearings and Appeals*, 184 A.3d 600, [600 n.3] (Pa. Commw. Ct. 2018) (citing *Armstrong Cty. Mem'l Hosp. v. Dep't of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Commw. Ct. 2013)). The Court is limited to an examination of the “averments in the complaint, together with the documents and exhibits attached thereto . . . in order to evaluate the sufficiency of the facts averred.” *Denlinger, Inc. v. Agresta*, 714 A.2d 1048, 1050 (Pa. Super. Ct. 1998).

Thus, the issue before the Court is whether Candleheart's *Complaint* has, on its face, “failed to assert a cause of action as a matter of law.” *In re Estate of Jordan*, 650 A.2d 895, 899 (Pa. Super. Ct. 1994). Defendant challenges Candleheart's *Complaint* on the basis of the application of the Dead Man's Rule, 42 Pa.C.S. § 5930, and the purported *res judicata*<sup>5</sup> effect of the MDJ Court action on the instant quiet title action.<sup>6</sup>

## 1. The Dead Man's Act

### a. Consideration of Dead Man's Act on Preliminary Objections

Initially, the Court finds it proper to consider the Dead Man's Act, 42 Pa.C.S. § 5930 (“Dead Man's Act” or “Act”), when deciding preliminary objections.<sup>7</sup> See *Pagnotti v. Old Forge Bank*, 631 A.2d 1045, 1046 (Pa.

<sup>5</sup> *Res judicata* is an affirmative defense that typically must be responsively pleaded as new matter pursuant to Pa.R.C.P. No. 1030(a), and not as preliminary objections. *Weinar v. Lex*, 176 A.[3]d 907, 926 (Pa. Super. Ct. 2017). However, two exceptions to this requirement are when either: a complaint makes reference to the prior proceeding and “contains facts and issues pleaded by the prior action,” or the plaintiff fails to raise the procedural defect in her own preliminary objection (to the purportedly improper preliminary objection). *Duquesne Slag Products Co. v. Lench*, 415 A.2d 53, 54 (Pa. 1980) (second exception); *Del Turco v. Peoples Sav. Ass'n*, 478 A.2d 456, 461 (Pa. Super. Ct. 1984) (first exception). Because Candleheart did not file its own preliminary objections (nor raise the procedural defect), the Court finds that Candleheart has waived any claim that Defendant improperly raised this defense. See *Lench*, 415 A.2d at 54. Moreover, Candleheart referenced the prior MDJ Court action in its *Complaint*. See *Complaint* ¶ 13. Thus, the Court “may entertain the merits of [this] affirmative defense[.]” *Corman v. Nat'l Collegiate Athletic Ass'n*, 74 A.3d 1149, 1167 (Pa. Commw. Ct. 2013), to the extent it reviews *res judicata* pursuant to its standard of review. See also Pa.R.C.P. No. 1032(a) (waiver of objection not presented).

<sup>6</sup> Although Defendant in its *Brief in Support of Preliminary Objections* raises the statute of frauds as a secondary ground to sustain its demurrer, the Court finds that considering the statute of frauds at this stage of the litigation is improper for two reasons, and therefore, will not. First, the statute of frauds is an affirmative defense that must be responsively pleaded as new matter pursuant to Pa.R.C.P. No. 1030(a). See *Bocchicchio v. Gen. Pub. Util. Corp.*, 689 A.2d 305, 307 (Pa. Super.Ct. 1997) (“The language of Rule 1030 is clear and unambiguous; it mandates that a party allege the Statute of Frauds defense by way of new matter.”). Second, even if the statute of frauds was a proper issue to raise on preliminary objections, Defendant failed to raise it in its *Preliminary Objections*, instead, raising it for the first time in its *Brief in Support of Preliminary Objections*. Pa.R.C.P. No. 1028(b) mandates that “[a]ll preliminary objections shall be raised at one time.” See *Martin v. Gerner*, 481 A.2d 903, 906 9 [] (Pa. Super. Ct. 1984) (“The basis for the rule that all preliminary objections must be raised at one time is that otherwise the court would have to rule on preliminary objections on a piecemeal basis.”). Thus, the Court will not presently pass on the statute of frauds.

<sup>7</sup> Cf. “[T]he invocation of the protection based on the Dead Man's Statute is not an ‘affirmative defense.’” *Davis v. Wright*, 156 A.3d 1261, 1268 (Pa. Super. Ct. 2017).



Super. Ct. 1993) (describing trial court’s consideration of Act on preliminary objections to statement of claim); *Matter of Kulbitsky*, 536 A.2d 458, 460 (Pa. Commw. Ct. 1988) (describing trial court’s consideration of Act on preliminary objections in forfeiture proceeding). *See also In re: Estate of Rawlings*, No. 274 WDA 2018, No. 329 WDA 2018, 2019 WL 3290643, at \*4 (Pa. Super. Ct. July 22, 2019) (describing, and not questioning, trial court’s consideration of Act on preliminary objections in *Pagnotti, supra*).<sup>8</sup>

### **b. Dead Man’s Act<sup>9</sup>**

The Act provides, in pertinent part:

[I]n any civil action or proceeding, where any party to a thing or contract in action is dead, . . . and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, 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 . . . , shall be a competent witness to any matter occurring before the death of said party[.]

§ 5930. In other words, a surviving party to a transaction who has an interest adverse to that of a decedent, or any other person having the same, is disqualified from testifying on matters that occurred prior to the decedent’s death. *See In re: Hendrickson’s Estate*, 130 A.2d 143, 146 (Pa. 1957) (citations omitted); *Davis*, 156 A.3d at 1267 (citing *Estate of Kofsky*, 409 A.2d 1358, 1359 (Pa. 1979)).<sup>10</sup>

The Dead Man’s Act is “an exception to the general rule of evidence in this Commonwealth that: ‘no interest or policy of law . . . shall make any person incompetent as a witness.’” *Larkin*, 580 A.2d at 1152 (quoting 42 Pa.C.S. § 5921). The Act’s purpose is to “prevent the injustice that may result from permitting a surviving party to a transaction to give testimony

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<sup>8</sup> Cf. Pa.R.[A].P., Rule 126(b)(1)-(2) states that unpublished non-precedential memorandum decisions of the Superior Court filed after May 1, 2019 may be cited for its persuasive value.

<sup>9</sup> The party challenging the competency of a witness has the burden of proving incompetency. *Pagnotti*, 631 A.2d at 1046 (Pa. Super. Ct. 1993) (citing *Estate of Rider*, 409 A.2d at 399).

<sup>10</sup> Under the Act, a witness is not only disqualified from testifying on the “actual transaction or agreement giving rise to a claim against the decedent, but also to any matter occurring before [decedent’s] death which had any bearing on the claim being made.” *In re: Estate of Cecchine*, 485 A.2d 454, 458 (Pa. Super. Ct. 1984) (citing *Hendrickson’s Estate*, 130 A.2d at 147. *See Estate of Cecchine*, 485 A.2d at 456, 458-59 (disqualifying attorney from testifying on alleged “facts regarding the contract of hiring” and “nature and value of the services performed[.]” when attorney claimed he had provided decedent with legal services during decedent’s lifetime that were unpaid when decedent died). Importantly, the Act “applies only to oral testimony[;] [w]ritten evidence offered by an adverse surviving party is not rendered incompetent by the Dead Man’s Act and is admissible.” *Larkin v. Metz*, 580 A.2d 1150, 1152 (Pa. 1990) (citing *In re: Estate of Rider*, 409 A.2d 397, 400 (Pa. 1979) and *Rauenzahn v. Sigman*, 101 A.2d 688, 690 (Pa. 1954)). *See Larkin*, 580 A.2d at 1153 (disqualifying alleged buyers from testifying as to agreement with decedent for title to real property but permitting “written receipts issued by the decedent to the [buyers]” and “canceled checks issued by the [buyers] to the decedent[.]”).

favorable to himself and adverse to the decedent, which the decedent's representative would be in no position to refute by reason of the decedent's death." *Id.*

### c. Operation of Dead Man's Act

For the Dead Man's Act to apply, three conditions must exist, the second of which is what the case turns on and what is lacking, and thus, makes the Act inapplicable. (1) First, the deceased "must have had an actual right or interest in the matter at issue[,]" *Punxsutawney Mun. Airport Auth. v. Lellock*, 745 A.2d 666, 670 (Pa. Super. Ct. 2000) (citations omitted), meaning "an interest in the immediate result of the suit." *Hendrickson's Estate*, 130 A.2d at 146 (citations omitted). (2) Second, the *interest* of the proposed witness, and not merely his *testimony*, must be adverse to the interest of deceased's estate. *Punxsutawney Mun. Airport Auth. v. Lellock*, 745 A.2d at 670. (3) Third, the right or interest of the deceased must have passed to a party of record who represents the deceased's interests. *Punxsutawney Mun. Airport Auth. v. Lellock*, 745 A.2d at 670.

The test to determine whether an interest is adverse is whether:

[the witness] will either gain or lose, as the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote, or contingent.

*In re: Mihordin*, 162 A.3d 1166, 1173 (Pa. Super. Ct. 2017) (citing *In re: Groome's Estate*, 11 A.2d 271, 273 (Pa. 1940)). *See also In re: Estate of Hall*, 535 A.2d 47, 54 n.4 (Pa. 1987) ("There is no evidence that [employee-witness] would have been *directly* affected, benefitted or harmed by the judgements entered in this case in any way.") (citations omitted) (emphasis added)). Any other interest that a witness may have goes to a witness's credibility. *In re: Gatson's Estate*, 62 A.2d 904, 906 (Pa. 1949). *See Estate of Grossman*, 406 A.2d 726, 732-33 (Pa. Super. Ct. 1979) ("The fact that a witness may be unfriendly to a decedent's cause and partial to that of the survivor may affect credibility, but does not affect competency.") (citing *Billow v. Billow*, 61 A.2d 817, 819 (Pa. 1949)).

The question, then, before the Court is whether a non-profit corporation's director or officer has the requisite adverse interest to that of a decedent's estate where the non-profit corporation allegedly entered into a contract with the decedent for purchase of real property and the corporation subsequently sues the decedent's estate in a quiet title action concerning the same.

The Court is guided by several general principles in answering this

question, ultimately: “no”.<sup>11</sup>

First, officers or directors, who are also stockholders of a corporation, involved in the litigation, have an adverse interest to that of decedent’s estate, and are therefore, disqualified under the Act. *Keystone Printed Specialties Co., Inc. v. Fischer*, 430 A.2d 650, 652 (Pa. Super. Ct. 1981).<sup>12</sup> The interest of these officers or directors is adverse because, as stockholders, they, personally, have a pecuniary interest that would be directly affected by operation of the law upon disposition of the proceeding. *See Swoope’s Estate*, 177 A. at 748 (“[A]s a shareholder, . . . the witness had a pecuniary interest directly affected by the allowance of the claim.”) (citations omitted); *Olson*, 658 A.2d at 364 (“If [shareholder] prevailed at trial, . . . he would clearly stand to gain additional money.”).

Second, as a corollary to the first, is that officers or directors who are not stockholders of a corporation that is involved in the litigation, or employees of a party-entity involved in the litigation, do not have, by their status alone, the requisite adverse interest to decedent’s estate to disqualify them under the Dead Man’s Act. *Visscher v. O’Brien*, 418 A.2d 454, 456, 458 (Pa. Super. Ct. 1980); *Com., Dep’t of Transp. v. Estate of Crea*, 483 A.2d 996, 998-99 (Pa. Commw. Ct. 1977); *In re: Diamond Furnishing Co., Inc.*, 42 B.R. 638, 639, 641 (Bankr. M.D. Pa. 1984)<sup>13, 14</sup> These non-stockholder officers or directors, or employees, are thus, properly distinguished, and not disqualified on the basis of their position with the litigant party, because they do not stand to gain or lose, personally, from “the direct legal operation and effect of the judgment[.]” *Mihordin*, 162 A.3d at 1173 (citing *Groome’s Estate*, 11 A.2d at 273).

Third, courts distinguish between those witnesses that possess pecuniary interests that are affected by the direct operation of the law upon

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11 More specifically, the Court cannot conclude that Defendant has carried her burden of proving that Mr. Newcomb is disqualified under the Act, as is her burden. *Pagnotti*, 631 A.2d at 1046 (Pa. Super. Ct. 1993). *See* Application of Dead Man’s Act, *infra* at § 1.d.

12 *See Pittsburgh No. 8 Coal Corp. v. Newcomer*, 76 A.2d 371, 374 (Pa. 1950) (disqualifying stockholder of profit corporation from testifying under Competency of Witness Act of 1887, 28 P.S. § 322 (repealed)); *In re Swoope’s Estate*, 177 A. 748, 748-49 (Pa. 1935) (disqualifying stockholder of bank under 28 P.S. § 322); *Olson v. N. Am. Indus. Supply, Inc.*, 658 A.2d 358, 360, 364 (Pa. Super. Ct. 1995) (disqualifying corporation’s sole shareholder, who also held officer and director title, under Dead Man’s Act).

The Bar Association Comment to 42 Pa.C.S. § 5930 states that the Dead Man’s Act, in its current form, is “[s]ubstantially a reenactment of act of May 23, 1887 (P.L. 158) (No. 89), § 5(e) (28 P.S. § 322).”

13 Decisions of lower federal courts may provide the Court with persuasive, although not binding, authority. *Verdini v. First Nat’l Bank of Pennsylvania*, 135 A.3d 616, 619 n.5 (Pa. Super. Ct. 2016).

14 *See Visscher*, 418 A.2d at 456, 458 (holding that real estate broker who entered into oral agreement, on behalf of employer-litigant party, with decedent was not disqualified from under Act); *Estate of Crea*, 483 A.2d at 998-99 (holding that high supervisory level employees of PennDOT, an accident investigation expert and an engineer, were not disqualified under Act); *Diamond Furnishing Co., Inc.*, 42 B.R. at 639, 641 (applying Pennsylvania’s Dead Man’s Act) (holding that officer of debtor-corporation not disqualified under Act because “[s]imply having the status of an officer of a corporation that is in the midst of litigation with one who represents the interest of a deceased party does not provide the necessary nexus needed to establish an interest adverse to the deceased party”).

disposition of the proceeding (*i.e.*, adverse interest) and those witnesses that have interests that are only indirectly affected by the same (*i.e.*, non-adverse interest). *Compare In re: Estate of Gadiparthi*, 632 A.2d 942, 945-46 (Pa. Commw. Ct. 1993) (finding adverse interest for decedent’s spouse where spouse claimed decedent held parcels in trust for him, rather than own, because spouse would, if successful, avoid transfer taxes and disinherit decedent’s children who were set to receive 2/3 of decedent’s estate) *with Gatson’s Estate*, 62 A.2d at 906-08 (finding spouse—who released interest in decedent’s estate and became guardian of decedent’s minor children—did not have adverse interest despite spouse potentially benefitting from a larger estate—*i.e.*, more compensation for services as guardian—where question in case was whether administrator waived commissions in prior oral contract with decedent because spouse might be removed as guardian or not compensated at time of removal, and thus, had no “present, certain and vested interest[]”). The explanation for the difference in outcomes in *Estate of Gadiparthi* and *Gatson’s Estate* is that in *Estate of Gadiparthi*, decedent’s spouse would either benefit or not via transfer taxes and operation of intestacy laws upon the court’s determination of whether certain parcels were included in decedent’s estate, 632 A.2d at 945, whereas in *Gatson’s Estate*, there remained the possibility that subsequent to the court’s ruling on whether administrator commissions for decedent’s estate had been waived, decedent’s spouse could still be removed as guardian and/or not compensated for his services. *Gatson’s Estate*, 62 A.2d at 907. Furthermore, in *Gatson’s Estate*, the court stated that whatever “personal interest and bias or lack of it” the spouse had in the court’s ruling would weigh upon his credibility as a witness, and not his competency. *Id.* at 908.

#### **d. Application of Dead Man’s Act**

Here, although the Act is unquestionably implicated by the face of the *Complaint*,<sup>15</sup> and the first and third conditions for the Act to apply are easily satisfied,<sup>16</sup> the Court finds, for the reasons that follow, that Mr. Newcomer is not adverse—within the meaning of the Act—to Mr. Gardner’s estate. Therefore, it is not “clear and free from doubt” that the Dead Man’s Act will apply to disqualify Mr. Newcomer’s testimony.<sup>17</sup>

<sup>15</sup> Candleheart alleges that it and Mr. Gardner “had a long standing verbal contract that the monies paid to Mr. Gardner over and above the fair rent amount . . . would be applied to [Candleheart’s] purchase and ownership of the [S]ubject Property[.]” and that the parties later “agreed and established the balance due for the purchase of the [Subject] Property[.]” *Complaint* ¶ 5-6.

<sup>16</sup> The first and third conditions for the Act to apply are satisfied because Mr. Gardner had an interest in the Subject Property, by virtue of the 2007 deed, as the owner of the property prior to his death. His interest then passed on to the Defendant as she is the administrator of his estate, representing the estate in the current litigation concerning the Subject Property.

<sup>17</sup> To the extent that Candleheart has alleged that it “Plaintiff and Mr. Newcomer will provide documentation and non-adverse witnesses[.]” *Objection to Preliminary Objections* ¶ 5 and at oral argument, the Court has not considered it. First, the same was not set forth in Candleheart’s *Complaint*, the operative pleading that the Court reviews when deciding preliminary objections. *Denlinger, Inc.*, 714 A.2d at 1050. Moreover, its inclusion as an averment of fact in

At first glance, Mr. Newcomer appears to have an interest adverse to that of Mr. Gardner's estate. Indeed, Candleheart filed suit against the estate and the parties have briefed the Court on this assumption. However, Candleheart is a non-profit corporation whereas Mr. Newcomer is merely a director or officer of it. Candleheart does not seek title to the Subject Property in Mr. Newcomer's name nor does Candleheart seek Defendant to pay Mr. Newcomer its requested amount. Likewise, Candleheart alleges that Candleheart and Mr. Gardner had a contract for the Subject Property, not Mr. Newcomer and Mr. Gardner. While it is axiomatic to say that Candleheart, like any other corporation, must act through its officers and directors, this distinction between corporations and its officers and directors is a distinction with a difference, in the eyes of the Dead Man's Act.

For one, courts clearly distinguish between officers and directors of corporations who are shareholders and officers and directors of corporations who are not, with the reason being that only the former possess the necessary interest that is directly affected by the disposition of the proceeding. Compare *Olson v. N. Am. Indus. Supply, Inc.*, 658 A.2d at 364 with *Diamond Furnishing Co., Inc.*, 42 B.R. at 639. In this case, Mr. Newcomer is not a shareholder of Candleheart, and therefore, his interest, as merely a director or officer of Candleheart, is one that is not recognized as "adverse" under the Act. Compare with *Swoope's Estate*, 177 A. at 748 ("[A]s a shareholder, . . . the witness had a pecuniary interest directly affected by the allowance of the claim.") (citations omitted) (emphasis added)); *Olson*, 658 A.2d at 364 ("If [shareholder] prevailed at trial, . . . he would clearly stand to gain additional money.") (emphasis added)). Here, Mr. Newcomer would not stand to gain or lose, personally, from "the direct legal operation and effect of [a] judgment[]" for or against Candleheart. *Mihordin*, 162 A.3d at 1173 (citing *Groome's Estate*, 11 A.2d at 273).

For another, the Superior Court has held that an employee's entry into an oral agreement, on behalf of his employer, with a decedent does not mean that the employee "ha[s] an interest in the outcome of the litigation[]" for purposes of the Act. *Visscher*, 418 A.2d at 456, 458. In *Visscher*, decedent and employee, a real estate broker employed by a brokerage firm, entered into an oral agreement, on behalf of the firm, that authorized employee to act as a broker to try and sell decedent's farm in exchange for a commission. *Id.* at 456. The decedent later sold his farm to a

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Candleheart's *Objection to Preliminary Objections*, which the Court construes as an answer, is unverified, as required by Pa.R.C.P. No. 1024. Second, as to Plaintiff's counsel's statement on it at oral argument, the Court cannot consider it, being, of course, outside of the Court's standard of review. Cf. *Int'l Union of Operating Engineers, Local No. 66, AFL-CIO v. Linesville Const. Co.*, 322 A.2d[d] 353, 356 (Pa. 1974) ("[Pa.R.C.P. No. 1028], which authorizes the filing of preliminary objections to a complaint, never intended that testimony or anything outside of the complaint is to be considered in disposing of the questions of law raised by a demurrer to the complaint. Such issues are to be resolved by the court on the basis of the pleadings alone."); *Claremont Properties, Inc. v. Bd. of Twp. Supervisors of Middlesex Twp.*, 546 A.2d 712, 715 (Pa. Commw. Ct. 1988) ("[A] court may not properly base an adjudication on matters stated in oral argument that do not appear of record.").

buyer that employee had engaged with, however, the decedent did not pay a commission to the firm. *Id.* at 456-57. The real estate broker firm then sued decedent's estate, claiming it was entitled to the commission. *Id.* at 457. The decedent's estate argued that employee was disqualified from testifying as to his dealings with decedent. *Id.* at 458. The court, however, held that employee did not "have an interest in the outcome of the litigation[.]" and therefore, did not have an interest adverse to that of decedent's estate. *Id.* Similarly, in the present case, Defendant contends that Mr. Newcomer is disqualified under the Act to testify as to his dealings with Mr. Gardner. And in similar fashion, the Court must find that Mr. Newcomer's interest in the instant litigation, between Candleheart and Defendant, is not adverse under the Act, and thus, Mr. Newcomer is not disqualified to testify under the Act.

Finally, more generally, the Court finds further support in the fact that there is no indication that Mr. Newcomer, personally, will gain or lose as a result of the Court's later determination as to Candleheart's quiet title action. Therefore, Mr. Newcomer can be distinguished from the spouse in *Estate of Gadiparthi* because the spouse there would benefit (or not) upon the court's determination by operation of law (*i.e.*, the court would either find that decedent held parcels as trustee for spouse, and therefore, the spouse would avoid transfer taxes of the parcels and would disinherit decedent's children, with respect to the parcels, that would otherwise pass, at a two-thirds percentage, to decedent's children, or the court would find that decedent, in fact, owned the parcels, and therefore, spouse would, in short, suffer the opposite consequences). *Estate of Gadiparthi*, 632 A.2d at 945-46. Here, whether Mr. Newcomer will benefit (or not) from the Court's determination of the quiet title action is uncertain, as was the case for the spouse in *Gatson's Estate*, because he does not possess a "present, certain and vested interest[]" in the outcome of the litigation, as recognized and interpreted under the Act. *Gatson's Estate*, 62 A.2d at 906-08. Whether Mr. Newcomer's interest is adverse or not, it must be remembered, is whether he will "either gain or lose, as the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action." *Mihordin*, 162 A.3d at 1173 (citing *Groome's Estate*, 11 A.2d at 273[]). The Court is constrained to see this how this would be the case, here, where he is not a party to the alleged contract, is not a shareholder of Candleheart, and would not become the owner of the Subject Property or the recipient of the amount of money requested, if Candleheart was successful on its claim.

Therefore, the Court cannot conclude that it is "clear and free from doubt" that Mr. Newcomer's testimony will be disqualified under the Dead



Man’s Act.<sup>18</sup>

Thus, Count I of Defendant’s *Preliminary Objections* are **OVERRULED**.

## 2. Res Judicata

Administrator makes two *res judicata* arguments with respect to either the eviction or landlord-tenant action between the parties, both actions occurring prior to Candleheart’s instant lawsuit. First, in its *Preliminary Objections*, Administrator contends that because the Court, in that separate action, deemed all averments of fact in Administrator’s *Petition to Strike* admitted by Candleheart, pursuant to Pa.R.C.P. No. 206.7(a), Candleheart is bound by the fact therein, that Administrator “is the owner of the real property and all improvements erected thereon located at 1332-1334 South Fourth Street, Chambersburg, Pennsylvania.” *Preliminary Objections* ¶ 14-15. Second, in its *Brief in Support of Preliminary Objections*, Administrator argues that Candleheart had the opportunity to raise its issue with title of the Subject Property either during the proceeding, pursuant to Pa.R.C.P.M.D.J. 513, or on its de novo appeal of the proceeding to this Court. *Brief in Support of Preliminary Objections*, page 6. The Court will take each argument in turn.

### a. Effect of Pa.R.C.P. No. 206.7

Pa.R.C.P. No. 206.7, governing petition practice, subdivision (a) provides that “[i]f an answer is not filed, all averments of fact in the petition may be deemed admitted for the purposes of this subdivision and the court shall enter an appropriate order.” Administrator broadly interprets this rule to mean that a fact so admitted, should be admitted against that party in future proceedings, as is suggested here. However, Administrator did not cite any authority to the Court for this proposition, nor does it take up the argument in its *Brief in Support of Preliminary Objections*. In contrast, Candleheart cites to *HSBC Bank, NA v. Donaghy*, 101 A.3d 129 (Pa. Super. Ct. 2014) that interprets the rule more narrowly, to mean that an averment of fact is admitted for the purposes of the instant petition, and not against that party in future proceedings, as Administrator suggests. *HSBC Bank, NA*, 101 A.3d at 132 n.7.

On this point, the Court agrees with Candleheart’s interpretation of

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<sup>18</sup> *Accord Groome’s Estate*, 11 A.2d at 272-73 (holding, first, that board of trustees or board of directors of eleemosynary corporations are not owners of assets of corporations but merely, “trustees to manage them for the public good” and, second, that these such corporations are not “fairly within the letter and spirit of the statute disqualifying the surviving or remaining party parties to a contract”) (citing *Hempstead v. Meadville Theological Sch.*, 130 A. 421, 423 (Pa. 1925)).

Black’s Law Dictionary, 11<sup>th</sup> Edition, defines “eleemosynary corporations” by way of “charitable corporation” as: “[a] nonprofit corporation that is dedicated to benevolent purposes and thus entitled to special tax status under the Internal Revenue Code.”

Candleheart is a non-profit corporation that operates a transitional housing program. *Complaint* ¶ 2, 13.

the rule. To start, Administrator has not pointed the Court to any contrary authority on the question. Additionally, Pa.R.C.P. No. 103(a), a construction principal of interpretation for the Pennsylvania Rules of Civil Procedure, provides that “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]” The common usage of the term “deemed admitted for the purposes of this subdivision[.]” Pa.R.C.P. No. 206.7(a), would seem to denote that those facts so admitted are admitted for a specific purpose (*i.e.*, purposes of this subdivision) and not admitted more broadly, for other purposes. This interpretation is consistent with the notion, with respect to judicial notice of adjudicated facts in a separate proceeding, that “[a] trial court, should not, at the preliminary objection stage of [the] action, . . . accept[] as true[,] facts which were in direct conflict with the well pleaded facts of the complaint.” *220 Partnership v. Philadelphia Elec. Co.*, 650 A.2d 1094, 1097 (Pa. Super. Ct. 1994) (holding trial court’s dismissal of complaint on preliminary objections improper because “[when] material facts are in dispute, judicial notice may not be used to deny a party an opportunity to present contrary evidence[]” where partnership alleged ownership of property in complaint but trial court relied on federal district court order—that partnership “‘owned no real estate’”—to dismiss it). Of course, here, accepting—the averment of fact admitted by Candleheart pursuant to Pa.R.C.P. No. 206.7(a) in that separate action—as true, is directly in conflict with the material facts set forth in Candleheart’s *Complaint*.

Therefore, the Court finds that it is not “clear and free from doubt” that the averment of fact admitted by Candleheart pursuant to Pa.R.C.P. No. 206.7(a) in that separate action would act as a *res judicata* bar to Candleheart’s instant action.

### **b. Pa.R.C.P.M.D.J. 513**

As an initial matter, neither party disputes the fact that a quiet title action could not be brought before a magisterial district judge, pursuant to 42 Pa.C.S. § 1515. Additionally, Pa.R.C.P.M.D.J. No. 513 does “set[] forth the procedures when there is a dispute concerning title.” Note to Pa.R.C.P.M.D.J. No. 513. The procedure, in essence, provides for a stay of the proceedings before the magisterial district judge when “the title to the real property is disputed and claimed by some named person other than the plaintiff by virtue of a right or title accruing by descent from or deed or will of the landlord since the commencement of the lease[.]” No. 513(A), or when “the real property is held and claimed by [defendant] as a joint tenant or tenant in common with the plaintiff[.]” No. 513(B), provided the person other than the plaintiff or defendant prosecutes her claim in the court of common pleas. No. 513.



Here, Candleheart does not claim the Subject Property as a joint tenant or tenant in common with Administrator, and thus, No. 513(B) is inapplicable. No. 513(A) does not, however, speak on whether the other person other than the plaintiff disputing and claiming title must prosecute her claim in the court of common pleas, or risk forfeiting that right.

Administrator takes the position that Candleheart, in order to preserve its claim, must have either asserted it pursuant to the procedure under No. 513, or alternatively, included it in its de novo appeal of the MDJ Court action to the court of common pleas. Candleheart's position is that because it could not bring a quiet title action before the MDJ Court, it could not have raised the issue in a de novo appeal of the proceeding to the court of common pleas, pursuant to 210 Pa. Code Rule 302(a), which provides that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal."

Each parties' respective position turns on the ultimate question of whether a later action for quiet title by Candleheart is barred by *res judicata* because of Candleheart's failure to prosecute its claim under No. 513. In other words, Candleheart would only need to bring its quiet title action under No. 513 if a subsequent, separate action for the same was barred by *res judicata*. Therefore, the Court will turn to the familiar standards for it.

### **c. Res Judicata Standards**

*Res judicata*, or claim preclusion, bars claims and issues that have been previously litigated. *Matternas v. Stehman*, 642 A.2d 1120, 1123 (Pa. Super Ct. 1994). The rule is that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties[.]" and thus, bars "a subsequent action involving the same claim, demand or cause of action." *Robinson Coal Co. v. Goodall*, 72 A.3d 685, 689 (Pa. Super. Ct. 2013) (quoting *Stoeckinger v. Presidential Fin. Corp. of Delaware Valley*, 948 A.2d 828, 832 n.2 (Pa. Super. Ct. 2008)). This includes claims that could have been litigated but were not. *Matternas*, 642 A.2d at 1125 (citing *Martin v. Poole*, 336 A.2d 363, 367 (Pa. Super. Ct. 1975)).

"The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights." *Chada v. Chada*, 756 A.2d 39, 43-44 (Pa. Super. Ct. 2000) (quoting *Hammel v. Hammel*, 636 A.2d 214, 218 (Pa. Super. Ct. 1994) (citations omitted)). Typically, this inquiry takes the form of determining whether the former and current action, both, possess the following elements: (1) identity of the thing sued upon; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the capacity of the parties. *Goodall*, 72 A.3d at 689 (quoting *Stoeckinger*, 948 A.2d at 832).

Here, the only element in question is the identities of the cause of action.

The Court begins by noting that neither party has cited to any authority of similar factual circumstances to the present case (*i.e.*, either an eviction or landlord-tenant action against tenant followed by tenant's quiet title action against landlord). However, in a comparable scenario, in *Roberts v. Estate of Pursley*, 700 A.2d 475 (Pa. Super. Ct. 1997), the Superior Court held that appellants were not barred by *res judicata* in bringing an ejectment action against appellees, where appellees had initially brought a quiet title action against appellants, both actions concerning the subject property. *Roberts*, 700 A.2d at 477, 480. In so doing, the Superior Court distinguished between the natures of two causes of action, finding that the issues applicable to each are "significantly different." *Id.* at 480. In contrast, in *Miller v. Com., Bd. of Property*, 533 A.2d 819 (Pa. Commw. Ct. 1987), the Commonwealth Court found *res judicata* to apply to petitioner's quiet title action following petitioner's condemnation proceeding. *Miller*, 533 A.2d at 820. There, the Commonwealth Court found that the ultimate issue in both actions, although styled differently, concerned the same ultimate issue "whether, due to the alleged abandonment of DOT's easement, ownership ha[d] reverted to Petitioner." *Id.* at 821.

Finally, in *Kean v. Forman*, 752 A.2d 906 (Pa. Super. Ct. 2000), the Superior Court concluded that *res judicata* did not bar a quiet title claim by appellee against appellant-spouse of the decedent, the decedent previously a general partner with appellee, where appellee and appellant-spouse were previously involved in litigation involving the disposition of property following dissolution of a partnership, which was the same property at issue in the appellee's current quiet title action. *Kean*, 752 at 909. The Superior Court distinguished the two actions, although they concerned the same property, because the former litigation involved the disposition of the property, in reference to the dissolution of the partnership, whereas the current action concerned a cloud on the property. *Id.* The issue in the quiet title action, the Superior Court continued, was the validity of the mortgage, an issue that was not implicated in the prior action. *Id.* The Superior Court, concluding, stated that "[w]hile there may have been some common 'background facts,' the validity of the mortgage clearly involved facts unique to that cause of action." *Id.*

Here, the Court cannot conclude that it is "clear and free from doubt" that *res judicata* will bar Candleheart's quiet title action. While identities of the cause of action are merely a starting point in the Court's analysis, the ending point is the ultimate issue in the two cases. Of course, it's plain to see that the causes of action of eviction or landlord-tenant are significantly

different than the nature of a quiet title action. The former involves a dispute between landlord and tenant while the latter concerns a myriad of issues falling under quiet title. See *Sutton v. Miller*, 592 A.2d 83, 86 (Pa. Super. Ct. 1991) (discussion of consolidation of actions and procedures now under umbrella of quiet title, Pa.R.C.P. No. 1061). As such, there will be “facts unique to [each] cause of action.” *Kean*, 752 at 909. Candleheart’s quiet title action is not simply a later “action involving the same claim, demand or cause of action.” *Robinson Coal Co.*, 72 A.3d at 689 (quoting *Stoeckinger*, 948 A.2d at 832 n.2[]). Compare with *Miller*, 533 A.2d at 821 (ultimate issue in condemnation proceeding and subsequent quiet title action were same: “whether, due to the alleged abandonment of DOT’s easement, ownership ha[d] reverted to Petitioner”). Although Administrator has identified No. 513 as a procedure to stay proceedings before a magisterial district judge where a dispute between the parties concerns title, Administrator has not provided the Court with any authority that supports the contention that a party’s failure to do so forfeits their right to do so. Because the Court must resolve any doubt in favor of overruling preliminary objections, *American Interior Construction & Blinds Inc.*, 206 A.3d at 512 (citing *Khawaja*, 151 A.3d at 630, and such a doubt exists,

Count III of Defendant’s *Preliminary Objections* are **OVERRULED**.

## CONCLUSION

At this point, it is not “clear and free from doubt that . . . [Candleheart] will be unable to prove facts legally sufficient to establish the right to relief[] because of the disqualification of Mr. Newcomer’s testimony under the Dead Man’s Act or a preclusive bar of *res judicata*. Therefore, Count I and Count III of Defendant’s *Preliminary Objections* are **OVERRULED**. In addition, Count II of Defendant’s *Preliminary Objections* are **DENIED AS MOOT**.

Defendant has the right to plead over within twenty (20) days from the date of this Order and Opinion. Pa. R.C.P. No. 1028(d); *City of Philadelphia v. Berman*, 863 A.2d 156, 162 (Pa. Commw. Ct. 2004) (“The cases that have construed [Pa.R.C.P. No. 1028(d)] have held uniformly that a defendant’s right to file an answer is absolute.”) (citations and internal quotation marks omitted). An appropriate Order follows.

## ORDER OF COURT

AND NOW THIS 10<sup>th</sup> day of December, 2019, upon review of Defendant's *Preliminary Objections*, filed on June 20, 2019, the record, oral argument on September 12, 2019, and the applicable law,

**THE COURT HEREBY ORDERS** that Count I of Defendant's *Preliminary Objections* are **OVERRULED**, Count II of Defendant's *Preliminary Objections* are **DENIED AS MOOT**, and Count III of Defendant's *Preliminary Objections* are **OVERRULED**. Defendant shall have **twenty (20) days from the date of this Order** to plead over and file a responsive pleading.

This Order is pursuant to the attached Opinion.

*Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.*



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