



PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Commonwealth of Pennsylvania v. James Edward Cole, Jr., O'Toole, J.Page 497
Post-Conviction Relief Act—Plea Agreement

Roth Cash Register Company, Inc. v. Micros Systems, Inc., Frontier Business Technologies, Inc., Micros Fidelio Direct North Central, Inc., Mark Gillie and Larry Lange
Shenango Systems Solutions, Inc. v. Micros Systems, Inc., Frontier Business Technologies, Inc., Micros Fidelio Direct North Central, Inc. and Mark Gillie, Friedman, J.Page 498
Coordinate Jurisdiction Rule—Gist of the Action Doctrine

Stephen Blazczak and Fiona Blazczak v. Township of West Deer, O'Reilly, J.Page 504
Zoning Regulations—Non-Conforming Use Predates Zoning Ordinances—Variance by Estoppel

In re: Petition to Change Boundary Lines of Lot and Block No. 1572-N-192, O'Reilly, J.Page 507
Change of Township Boundary Lines

PLJ

The Pittsburgh Legal Journal is a supplement to the Lawyers Journal, which is published fortnightly by the Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
(412)261-6255
www.acba.org
©Allegheny County Bar Association 2009
Circulation 6,759

PLJ EDITORIAL STAFF

Frederick N. Egler, Jr.Editor-in-Chief and Chairman
Jennifer A. PuliceEditor
Joanna TaylorAssistant Editor
David A. BlanerSupervising Editor
Lynn E. MacBethOpinion Editor
Sharon A. AntillTypesetter/Layout

OPINION EDITORIAL VOLUNTEERS

Mary Ann C. Acton	Daniel McIntyre
Kenneth M. Argentieri	Laura A. Meaden
William Barker	Linda A. Michler
Shannon F. Barkley	Ronald D. Morelli
Joseph H. Bucci	C. Kurt Mulzet
Meg L. Burkardt	Rhoda Shear Neft
Norma M. Caquatto	Jana S. Pail
Margaret M. Cassidy	Peter C.N. Papadakos
Elizabeth F. Collura	Diane Barr Quinlin
Robert A. Crisanti	Jeffrey Alan Ramaley
William R. Friedman	Danielle D. Rawls
Margaret P. Joy	Angel L. Revelant
Sandra Lewis Kitman	Carol L. Rosen
Patricia Lindauer	Amy R. Schrempf
Ingrid M. Lundberg	Joan O'Connor Shoemaker
Mary Kay McDonald	Carol Sikov-Gross

FAMILY LAW OPINIONS COMMITTEE

Reid B. Roberts, Chair	Sally R. Miller
Mark Alberts	Sophia P. Paul
Christine Gale	David S. Pollock
Mark Greenblatt	Hilary A. Spatz
Margaret P. Joy	Mike Steger
Patricia G. Miller	William L. Steiner

OPINION SELECTION POLICY

Opinions selected for publication are based upon precedential value, clarification of the law, procedure in Allegheny County courtrooms and elucidation of points of law. Opinions are selected by the Opinion Editor and/or committees in a specific practice section. An opinion may also be published upon the specific request of a judge.

Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. The guide to publication is the helpfulness of the opinion to practitioners in the particular area of law. All opinions submitted to the PLJ are reviewed for publication and will only be disqualified or altered by Order of Court.

OPINIONS

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. Each opinion, which is published in this section, begins with a brief description or a "head-note" of the opinion that follows. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.

CAPSULE SUMMARIES

The Pittsburgh Legal Journal provides the ACBA members with precedent-setting, "Capsule Summaries" or a brief description of opinions from the Family Division of the Court of Common Pleas of Allegheny County.

BINDERS

The Allegheny County Bar Association is taking orders for 3-ring binders for easy storage of PLJ opinions. Call Peggy for details, (412) 261-6255.

Commonwealth of Pennsylvania v. James Edward Cole, Jr.

Post-Conviction Relief Act—Plea Agreement

1. Defendant was juvenile when he participated in rape and assault with two accomplices. Defendant entered into agreement to cooperate with prosecution and testify against accomplices. As part of agreement, Commonwealth would recommend transfer of Defendant's trial to juvenile Court. No discussion was had regarding court approval of the agreement or impact of court rejection of agreement.

2. Two judges rejected transfer to juvenile court as being inappropriate given acts of defendant in participating in crime. Juvenile court rejected transfer as defendant was fast approaching 21 years of age and could not be assisted by services offered to juvenile.

(William F. Barker)

Rusheen Petitt for the Commonwealth.
Scott Rudolf for Defendant.

No. CC200209417. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION AND ORDER OF COURT

O'Toole, J., June 16, 2009—This Opinion and Order of Court are the result of a remand from the Superior Court, pursuant to a Memorandum Opinion dated October 3, 2008, directing this Court to hold an evidentiary hearing and file a supplemental opinion for the purpose of:

(1) Clarifying the terms of the oral cooperation Agreement entered into between the Defendant and the Commonwealth. Specifically, the Superior Court stated that the record was unclear on the following points: First, as to whether the parties contemplated that the Agreement was conditioned on judicial authorization; and second, as to whether the parties agreed that the Defendant would be tried in adult criminal court or not subject to any prosecution, in the event that the trial court refused to enforce the Agreement;

(2) Determining whether Defendant's trial counsel had a reasonable basis for not filing a Motion to Dismiss Prosecution; and

(3) Clarifying whether the charges against the Defendant were ever filed in the Juvenile Section of the Family Division and if so, if the Agreement had been approved by a Juvenile Section Master.

Procedural History

The Defendant, who was seventeen (17) years of age at the time, turned himself into the police on June 7, 2002. A discussion ensued between the Commonwealth, defense counsel, and the Defendant with regard to the Defendant cooperating in the prosecution of certain crimes committed by him and two accomplices. It was agreed by the parties that the Defendant would be prosecuted as a juvenile in exchange for him identifying his accomplices, providing information about the crimes, and testifying against the accomplices, if necessary.

The Defendant was then charged with Rape, 18 Pa.C.S.A. §3121, Involuntary Deviate Sexual Intercourse, 18 Pa.C.S.A. §3123, Robbery (2 counts), 18 Pa.C.S.A. §3701, Burglary, 18 Pa.C.S.A. §3502, Unlawful Restraint (2 counts), 18 Pa.C.S.A. §2902, Terroristic Threats (2 counts), 18 Pa.C.S.A. §2706, Recklessly Endangering Another Person (2 counts), 18 Pa.C.S.A. §2705, Simple Assault (3 counts), 18 Pa.C.S.A. §2701, and Criminal Conspiracy, 18 Pa.C.S.A. §903.

In accordance with the Agreement, it is undisputed that the Defendant provided information to the Commonwealth

regarding the names and whereabouts of the two accomplices (Booker Watson, Jr. and Elijah Watson), that the Defendant testified at the preliminary hearing of Elijah Watson, and that the Defendant was willing to testify against both accomplices had they chosen to go to trial. Once the accomplices were both sentenced, the Defendant's case proceeded forward.

The Defendant appeared before the Honorable John Zottola and requested that the matter be transferred to the Juvenile Section, per the Agreement. Due to the very serious nature of the charges, including the fact that the Defendant had been a participant in the rape of the victim, Judge Zottola was unwilling to accept the Commonwealth's plea offer for the Defendant to be prosecuted in the juvenile system and he recused himself. The case was then assigned to this Court. Similarly, this Court was unwilling to agree that the case be transferred to juvenile court; however, this Court agreed that such a transfer could occur if a judge in the Juvenile Section approved the transfer.

On May 12, 2005, a hearing was held before the Honorable Kim Berkeley Clark, the then-Administrative Judge of the Family Division. At the conclusion of the hearing, Judge Clark refused to permit the transfer because the Defendant was, by the time of the decertification hearing before her, six (6) months from his twenty-first (21st) birthday and she did not believe that was sufficient time to provide the Defendant with treatment, rehabilitation, and supervision as a juvenile.

Due to Judge Clark's ruling, the matter was returned to this Court. On March 21, 2006, pursuant to a plea agreement with the Commonwealth, the Defendant pled guilty to all charges and was sentenced to serve a period of incarceration of not less than six (6) years nor more than twelve (12) years.

No direct appeal was filed.

On November 17, 2006, the Defendant filed a Petition under the Post-Conviction Relief Act. Counsel was appointed and an Amended Petition was filed alleging ineffective assistance of counsel. The Commonwealth filed an Answer. On November 19, 2007, an Order of Court was issued dismissing the Defendant's Petition without a hearing.

The Defendant appealed the dismissal to the Superior Court. As indicated above, the Superior Court issued a Memorandum Opinion dated October 3, 2008 remanding the matter to this Court.

Pursuant to the remand, this Court held an evidentiary hearing on March 24, 2009. The testimony at that hearing was as follows:

Bryan Washowich, the captain of detectives of the City of McKeesport Police Department, stated that he met with the Defendant and his mother in a conference room at the police station on June 7, 2002. The Defendant's counsel, Jack Conflenti, Esquire, and the on-call district attorney, Jennifer DiGiovanni, Esquire were on the telephone. Attorney DiGiovanni stated that if the Defendant cooperated, she would "recommend" that he be originally charged as an adult, but then be "decertified" to juvenile court. There was nothing discussed about what would happen if a judge refused to decertify the case. (N.T. 03/24/09, pp. 10-14)

Attorney Jack Conflenti, Esquire, who represented the Defendant, testified that the terms of the Agreement were "simple." The Defendant would testify "and in exchange for his testimony he would be treated as a juvenile, the case would proceed through juvenile court." He did not recall any discussion at that time about what would happen in the event that the Court would not agree to treat him as a juvenile. Mr. Conflenti further stated that he did not have a reason for not filing a Motion to Dismiss Prosecution, other than he did not think that it would be granted and he was concerned that it

would negatively effect the plea agreement. (N.T. 03/24/09, pp. 20-22, 27-29)

Leslie Cole, the Defendant's mother, stated that she was contacted by Detective Washowich regarding an incident involving her son. After discussing the situation with her son, she called Attorney Conflenti and she, her husband, and her son met with him at his law office. They then met with Detective Washowich at the police station. It was her understanding that if her son cooperated "to the fullest," he would be prosecuted as a juvenile. There was no discussion about what would happen if a judge would not agree to prosecute the Defendant as a juvenile. (N.T. 03/24/09, pp. 35-39)

Attorney Jennifer DiGiovanni, Esquire, an assistant district attorney, testified that she received a telephone call regarding the Defendant on June 7, 2002. The call was directed to her because she was the prosecutor assigned to Judge Clark's courtroom at that time and the Defendant "was active" in Judge Clark's courtroom. The call was from Detective Washowich, with Attorney Conflenti also on the line. A "plea agreement" was reached at that time. The words "cooperation agreement" were never used during the course of the conversation. The terms of the plea agreement were "if defendant, Mr. Cole, cooperated fully with the police by telling them everything he knew, by testifying if need be against the other two people involved that we would recommend a transfer to juvenile court once his testimony or cooperation was complete in adult court." She did not "promise" that the case would be tried in juvenile court. She does not have the authority to do so, as that is a judicial decision and plea agreements are always subject to judicial approval. She never agreed, or even suggested, that the charges would be dismissed if the case could not be transferred to juvenile court. This case was originally filed in adult criminal court. It was not filed in juvenile court. (N.T. 03/24/09, pp. 42-46) Attorney Bruce Beemer, Esquire, an assistant district attorney, stated that he presented the plea agreement to both Judge Zottola and this Court and both judges rejected the agreement. He also stated that he appeared before Judge Clark and she refused to grant decertification and have the Defendant tried as a juvenile. At that point, he and Attorney Conflenti negotiated another plea agreement wherein the Defendant would plead guilty to all charges and be sentenced to six to twelve (6-12) years on the charge of Rape and no further penalty on the remaining charges. Mr. Beemer indicated that this was a lenient sentence based upon the charges. (N.T. 03/24/09, pp. 44-55)

Issues to be Addressed Per Superior Court Remand

First, with regard to clarifying the terms of the oral cooperation Agreement entered into between the Defendant and the Commonwealth, the Court finds the following: The parties did not discuss whether the Agreement was subject to judicial approval, nor did they discuss the possibility that transferring the case to juvenile court would be rejected by a judge; as this latter issue was never addressed, there was no agreement as to whether the Defendant would be tried as an adult or the charges would be withdrawn. The discussion between the parties never got that far; rather, the discussion ended with the Commonwealth agreeing to recommend that the Defendant be tried as a juvenile in exchange for his full cooperation. However, it is well known that all plea agreements are subject to judicial approval.

Second, the Court finds that Defendant's trial counsel had a reasonable basis for not filing a Motion to Dismiss Prosecution because the Motion would have been denied on the basis that the law is very clear that the Court is permitted to reject a plea agreement. As the Defendant can only prevail on this claim if the Motion would have been granted,

this claim fails.

Third, according to the record, the charges against the Defendant were not filed in the Juvenile Section of the Family Division and the Agreement was not approved by a Juvenile Section Master.

ORDER OF COURT

AND NOW, to wit this sixteenth day of June, 2009, after a hearing in open court and a review of the record, it is hereby ORDERED that the Defendant's PCRA Petition was properly dismissed.

BY THE COURT:

/s/O'Toole, J.

Roth Cash Register Company, Inc. v. Micros Systems, Inc., Frontier Business Technologies, Inc., Micros Fidelio Direct North Central, Inc., Mark Gillie and Larry Lange

Shenango Systems Solutions, Inc. v. Micros Systems, Inc., Frontier Business Technologies, Inc., Micros Fidelio Direct North Central, Inc. and Mark Gillie

Coordinate Jurisdiction Rule—Gist of the Action Doctrine

1. Defendant, Micros Systems makes point of sale computer systems. Plaintiffs were distributors and serviced systems made by Defendant. Contract with plaintiffs included exclusive territory. Contract automatically renewed unless termination notice was given three months prior to expiration of current term.

2. Defendant Micros breached contract by authorizing another dealer (Frontier) to sell in the exclusive territory of plaintiffs.

3. Plaintiffs previously won awards on breach of contract in arbitration. Claims in this action were in tort. Initial trial court's grant of summary judgment based on contract award was overturned by Superior Court. Superior Court applied coordinate jurisdiction rule to determine "that which has been in arbitration shall remain in arbitration." Thus, claims in tort were allowed to go to trial despite defendants' claim of *res judicata*.

4. Trial revealed tortious activities separate from contract as prior to trial all actions were being lumped together as sole acts of Micros.

5. Jury awarded damages against defendant Frontier for tortious interference with current or prospective contractual relations with customers.

6. Frontier appealed damage rule using gist of action doctrine to claim that the gist of the action is a breach of contract. Court rejected this argument as court was bound by Superior Court's ruling.

(William F. Barker)

Richard B. Sandow for Roth Cash Register Company, Inc.
Richard G. Lewis for Shenango Systems Solutions, Inc.
Robert L. Byer for Frontier Business Technologies, Inc., and
Mark Gillie and Larry Lange.

Eleanor Roy Barrett and Thomas J. Farnan for Micros Systems and Micros Fidelio Direct North Central, Inc.

No. GD 00-10961 and GD 00-18464. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

INTRODUCTION

Friedman, J., July 1, 2009—The transcript for the captioned cases was made from the videotape record of the trial. The trial began on April 28, 2008 with argument on motions *in limine* and concluded on May 26, 2008, with the jury's answers to interrogatories. There are several volumes of the trial transcript, each covering groups of dates. Citations herein are to Trial Transcript ("TT") with relevant dates, rather than volume numbers.

Roth Cash Register Company, Inc. ("Roth") and Shenango Systems Solutions, Inc. ("Shenango") are dealers in and servicers of certain computerized equipment made by MICROS Systems, Inc. ("MICROS").¹ MICROS makes what is commonly known as POS equipment and related software. POS means Point of Sale and refers to the sophisticated computerized systems that have replaced the old-fashioned cash registers formerly used by restaurants and hotels. POS equipment manages much more than the sales transactions with members of the public who eat at the restaurants and stay at the hotels. POS equipment can do such things as keep track of inventory and transmit instructions from the wait-person to the kitchen; it can also be programmed to serve the individual needs of each purchaser.

The dealers who sold MICROS equipment, such as instant plaintiffs, earned money from the sales in two main ways, first by selling the equipment and programs and second by selling post-warranty service agreements. In addition, the plaintiffs would do repairs when called and would sometimes service MICROS's "Major Accounts." Although the meaning of "Major Accounts" was not in dispute, nevertheless there was much discussion of Major Accounts during the course of the trial. Since Major Accounts involve nationwide chains, that type of account, under the contracts at issue, was handled differently from each dealer's own customers' accounts.

Both Roth and Shenango had a long-time relationship with MICROS, based on contracts that would automatically renew annually "unless either party notifies the other not less than three (3) months" prior to their expiration that it does not wish to renew. Plaintiff Exhibit 7, ¶16(b). Roth was a larger dealership than Shenango was. Roth and Shenango each had an exclusive territory, (referred to as APR, for "area of primary responsibility") as did other MICROS dealers around the country. At some point prior to the events in question, MICROS had decided that it was going to eliminate the exclusive territories of its various dealers, including Roth and Shenango, and allow any dealer to sell in any other dealer's territory. MICROS had also decided that it would eventually eliminate outside dealers altogether, at least in the territories of Roth and Shenango, and would establish its own distribution outlets.

The problems in these cases arose because MICROS jumped the gun, putting its plans into effect while it still had unfulfilled contracts in place with Roth and with Shenango. MICROS did this in two ways: it permitted another dealer, Frontier Business Technologies, Inc. ("Frontier"), to invade the exclusive territories of both Roth and Shenango and it terminated the contract with Roth improperly and not as required by the contract itself. In response, Roth and Shenango brought the instant lawsuits, and, after very lengthy pre-trial proceedings, including a prior appeal

which established the law of the case, the dispute was presented to a jury. It should be noted that the two cases were tried together but were not consolidated, and that the same counsel acted for the parties in each case and the same jury decided both cases, answering one set of combined interrogatories.

The jury found in favor of both Roth and Shenango and against MICROS and Frontier on some but not all of the counts; it also found in favor of the two individual defendants, Gillie and Lange. The verdict was molded based on the jury's answers to interrogatories, and Post-Verdict Motions were filed by two of the Defendants, MICROS and Frontier, and also by both Roth and Shenango. After argument, we concluded that there was sufficient evidence to support the jury's various findings for and against the various parties as to the different counts. Judgment was then entered on the verdict as molded and these appeals followed.

A difficulty that has probably led to some confusion in the record is the tendency to lump both plaintiffs together and all defendants together. Everyone, at some point, has said "MICROS" when what was meant was "Frontier" or "MICROS and Frontier." This can result in one's forgetting that, despite the many similarities in the pleadings and in the evidence, the plaintiffs are not related to each other; it also can lead to one's forgetting that at some of the times in question MICROS and Frontier were unrelated entities who later did become related. Each plaintiff has a slightly different set of material facts pertinent to its claims, and each defendant has significantly different duties to each plaintiff. For example, MICROS's duties to each plaintiff arise chiefly out of its contract with each. However, MICROS also had duties separate from its contract and related to its being a member of society with duties that arise under the law of tort. Frontier, on the other hand, had only *non-contractual* duties to Plaintiffs, the breaches of which Roth and Shenango sought to vindicate in tort. To add to the confusion, as of June 30, 2000, MICROS acquired all of Frontier's common stock. See Plaintiff Exhibit 36. It is believed this purchase included Frontier's obligations to Roth and Shenango, yet MICROS and Frontier have maintained their separate identities during the trial and through this appeal.

Another unusual aspect is that some of the disputes between MICROS and each Plaintiff were decided by an arbitrator. The arbitrator decided contract damages relating to a discrete time period and did not deal with the *future* damages that flowed from MICROS's breach. The effect of the arbitrator's decision was the subject of the prior appeal, and it continues to be a thorn in the side for all concerned.

The cases also have a confusing twist resulting from different understandings of the prior Order of the Superior Court which reversed our grant of summary judgment in favor of Defendants on all counts. We had originally decided that the gist of all the counts in both complaints was in contract even though most of the counts were in tort. We had also decided that those counts had been previously decided (favorably to Plaintiffs) in arbitration proceedings pursuant to the contracts between MICROS and each Plaintiff. Based on this evaluation and analysis, we concluded that the doctrine of *res judicata* barred the captioned actions, except for the small period of time not covered by the arbitrator.

The Superior Court disagreed, based on the coordinate jurisdiction rule and the fact that another judge of this Court had ruled, at the preliminary objection stage, that "that which has been in arbitration shall remain in arbitration." (Order of November 13, 2000.) The Superior Court therefore refused to consider the issue of *res judicata* and remanded the case so that Defendants could argue other bases for a motion for summary judgment as to the various tort claims

asserted. Defendants then asked for summary judgment on the tort claims and reiterated their *res judicata* arguments, as they have done throughout this appeal.

While we confess that we were less than thrilled at the time with the Superior Court's decision, the trial itself demonstrated that it was indeed correct. Part of our own confusion came from the fact, mentioned earlier, that the three corporate defendants had been generally treated as being one and the same entity, even though at the times at issue, (i.e. prior to June 30, 2000), Frontier was not a part of MICROS Systems, Inc. and MICROS Fidelio may not even have existed. We had also assumed that the individual Defendants were acting as employees of MICROS when, in fact, they were employees of Frontier. We had therefore analyzed all the tort counts as being against MICROS only, as were the contract claims submitted to arbitration, when in fact many of the tort counts were against Frontier, and rightly so, as became clear once the evidence was presented.

VERDICTS AND JUDGMENTS AT ISSUE

The verdict against Frontier and in favor of Shenango was in the amount of \$1,000,000 for Tortious Interference with Shenango's "current or prospective contractual relations with its customers." See the jury's answer to Interrogatory No. 4.

The verdict against Frontier and in favor of Roth was in the amount of \$1,600,000, also for Tortious Interference with the current and prospective customers of Roth. See the jury's answers to Interrogatory No. 3.

The verdict against MICROS and in favor of Roth was based on two causes of action, one for Breach of Contract, where the jury awarded Roth damages of \$4.5 million (jury's answers to Interrogatory No. 1), and one for Tortious Interference with Roth's *other* contractual relations, current or prospective, with Roth's customers, where the jury awarded Roth \$400,000 (jury's answers to Interrogatory No. 3). The total verdict against MICROS and in favor of Roth is in the amount of \$4,900,000.

The jury found in *favor* of MICROS and against Shenango on both the Breach of Contract claim and the claim for Tortious Interference.

The jury also found *against* both Roth and Shenango on their claims that MICROS and Frontier engaged in a civil conspiracy, the only counts for which the Court had allowed an amendment to the complaint to seek punitive damages.

Judgments were entered on the above verdicts and the instant appeals followed. The appellants have each filed Statements of Matters Complained of on Appeal, hereinafter "Rule 1925(b) Statements."

FRONTIER'S APPEALS

Regarding its appeal of the judgment in favor of Shenango, Frontier complains of five matters in its Rule 1925(b) Statement:

Matters #1-3 involve the applicability of the Gist of the Action Doctrine, the *Res Judicata* Doctrine and the Law of the Case Doctrine to the jury verdicts against *Frontier* and in favor of *Shenango*. Frontier's essential point is that Shenango was fully compensated in arbitration for the harm it suffered. Frontier forgets that it was MICROS, not Frontier, that was involved in the arbitration, and also forgets that the arbitration itself involved a contract with MICROS, and had nothing to do with Frontier's *tortious* conduct.

Matter #4 involves the sufficiency of the evidence as to Shenango's claim against Frontier for tortious interference with existing or prospective contracts

with Shenango's *customers*. Frontier omits or ignores some of the elements of the tort, which are found in Sections 766 and 766B of the Restatement 2nd of Torts, quoted below:

§766. Intentional Interference with Performance of Contract by Third Person

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

§766B. Intentional Interference with Prospective Contractual Relation

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

Matter #5 involves the sufficiency of the evidence, particularly the expert testimony, on *damages*. In addition, Frontier asserts, in effect, that it is entitled to a credit against the judgment amount for the contract arbitration award against MICROS.

Regarding its appeal of the judgment against it in favor of *Roth*, Frontier filed a joint Rule 1925(b) Statement with MICROS, in which Frontier raises the same five matters listed above.

MICROS's Appeal

There is only one judgment against MICROS, that in favor of Roth. MICROS asserts six matters in its Rule 1925(b) Statement. Five are identical to those raised by Frontier and listed above.

The sixth (actually listed as No. 4 in the Statement) asserts that "the Court erred in failing to rule that Roth's breach of contract claim fails as a matter of law because Roth did not establish that MICROS breached any provision of the dealer agreement and erred in submitting those claims to the jury without instructions regarding the proper interpretation of the contract."

Roth's Cross-Appeal

Roth focuses on four areas in its Rule 1925(b) Statement: (1) our rulings regarding pre-judgment and post-judgment interest under *Maryland* law on the awards in its favor; (2) our refusal to grant judgment n.o.v. as to Roth's Civil Conspiracy claims (only) against Frontier and MICROS; (3) our refusal to re-instruct the jury on circumstantial evidence when the jury had questions regarding the elements of Civil Conspiracy, and (4) our refusal to allow the jury to consider punitive damages in connection with Roth's claims of Tortious Interference with current and prospective contractual relations because we had not permitted Plaintiffs to amend their complaints to seek those damages as to any claim but civil conspiracy.

Shenango's Cross-Appeal

Shenango's Rule 1925(b) Statement also focuses on four areas, three of which are identical to those raised by Roth regarding civil conspiracy, circumstantial evidence, and punitive damages. Shenango's fourth matter (actually No. 1 in its Statement) is that we erred in failing to charge the jury that any ambiguity in its contract with MICROS must be interpreted against MICROS and also that the contract "was clearly ambiguous," although without specifying where the ambiguity lay.

DISCUSSION

Rather than discussing *seriatim* the above listed matters, we have grouped the areas of alleged error as follows:

1. The applicability of the inter-related doctrines of *res judicata*, gist of the action, and the Law of the Case, including the effect of the *contractual* arbitration award against MICROS on the jury's verdicts against MICROS and Frontier for their *tortious* conduct.
2. The sufficiency of the evidence to support the jury's findings as to the claims of Breach of Contract, Tortious Interference, and Civil Conspiracy.
3. The sufficiency of the evidence on *damages*.
4. The adequacy of the Court's charge to the jury on law of contracts.
5. The exercise of our discretion regarding our responses to the jury's questions on the elements of Civil Conspiracy.
6. The exercise of our discretion regarding Plaintiffs' motion to amend their complaints at trial to ask for punitive damages in addition to the compensatory damages already at issue, for the claims of Tortious Interference and Civil Conspiracy.
7. The denial of Plaintiffs' motions for judgment *n.o.v.* as to Civil Conspiracy only.
8. The applicability of Maryland law to the issues of pre-judgment and post-judgment interest.

1. The Law of the Case Doctrine renders the Superior Court's prior rulings on Plaintiffs' tort claims binding at trial, so we properly refused to "reconsider Frontier's gist of the action and *res judicata* arguments at the post-trial motion stage."

Before, during, and after the trial, the Defendants' counsel sought to re-visit the Court's refusal to grant them summary judgment on remand based on the doctrine of *res judicata*. As stated earlier, the Superior Court had decided that this Court's earlier grant of summary judgment as to most of Plaintiffs' claims, which we had based on the doctrine of *res judicata*, was incorrect.

As we indicated earlier, the Superior Court did not reach the *res judicata* issue, instead holding that an earlier ruling on preliminary objections by a judge of coordinate jurisdiction could not be ignored at the summary judgment stage and was binding on the parties for these two actions.

The Law of the Case doctrine is summarized as follows in Standard Pennsylvania Practice:

The doctrine of the "law of the case" is that, when an appellate court has considered and decided a question submitted to it on appeal, it will not, upon a subsequent appeal on another phase of the case, reverse its previous ruling,

even where the court is convinced that its previous decision was erroneous. This doctrine prohibits an appellate court from revisiting an issue that has been decided in an earlier appeal in the same case between the same parties. However, this rule is not inflexible and does not have the absolute preclusive effect of *res judicata*. Instead, it must be accommodated to the needs of justice by the discriminating exercise of judicial power.

16 Standard Pennsylvania Practice 2d §91:82, citing *Burke v. Pittsburgh Limestone Corp.*, 375 Pa. 390, 100 A.2d 5959 (1953) and *Benson v. Benson*, 425 Pa.Super. 215, 624 A.2d 644 (1993).

We felt and feel that we were bound by the Law of the Case, which bars any re-argument or reversal of the earlier decision of the Superior Court, *even if that decision was incorrect*, which does not seem to be the case, in retrospect. In fact, now that the trial has taken place, we can see that *Frontier's* conduct versus Plaintiffs was not covered at all by the two arbitration proceedings involving MICROS because Frontier was not a party to the arbitration and was not a party to the contract that called for the arbitration. This fact is not changed by MICROS's acquisition of Frontier. In addition, as previously indicated, the arbitration dealt only with damages that were incurred during a limited time frame. The jury verdicts for *tortious* conduct should not be affected by an arbitration award that involved breach of contract. The jury verdict against MICROS for breach of contract also should not be affected since the trial covered a much longer period and included *future* damages, whereas the arbitration covered a short period of *past* damages, for which a credit will be given.

2. There was sufficient evidence of record to support the verdicts of the jury.

A useful and fair summary of the facts supportable by evidence in favor of each Plaintiff was made by Plaintiffs' attorney in his closing argument. See TT May 19-22, 2008, pp. 111-173. We incorporate his detailed and lengthy version of the facts by reference. We do not incorporate any of his legal conclusions.

The jury were given eleven fairly specific interrogatories which dealt with each count of each complaint. The interrogatories had been agreed to by counsel and approved by the Court. We have previously summarized the verdicts that were molded based on the jury's answers to those interrogatories.

The jury's answers were amply supported by the evidence, and it is well-settled that we may not overturn the jury's findings as to weight or credibility except in extraordinary circumstances. We note in particular that all the elements (set forth earlier) of Tortious Interference with existing or prospective contractual relations were supported by sufficient evidence which the jury was entitled to believe.

As to the Breach of Contract claim by Roth against MICROS, it was virtually undisputed that MICROS gave Roth inadequate notice under the contract. As a result, that contract should have been honored by MICROS through January 8, 2001. Instead, it was undisputedly breached no later than June 30, 2000. There was also evidence for the jury to believe that the failure to give Roth the three months notice of intent not to renew deprived Roth of the opportunity to take steps to retain its customers. This led to long-term consequences as described by Dr. Kenkel. Defendants failed to contradict that aspect of Dr. Kenkel's testimony.

We should also note that the entire issue of the existence of the arbitration and the award was kept from the jury by

consent of counsel and with the Court's approval, with the understanding that credit for the award would be given against any jury verdict in favor of Plaintiffs on the Breach of Contract claims.

We will discuss the evidence related to Civil Conspiracy later herein.

3. The amount of damages was supported by expert testimony that was virtually uncontradicted.

The amount of the verdict of the jury on the issue of Breach of Contract by MICROS was based on the largely uncontradicted testimony of Plaintiffs' expert James Kenkel (TT, May 7-8, pp. 255-376.) Dr. Kenkel's testimony dealt primarily with the calculation of *future* harm to Roth that MICROS's premature breach of the contract caused. Roth was entitled to its contract rights through January 8, 2001. MICROS denied Roth those contract rights for approximately six months.

There was testimony for the jury to believe that compliance with the notice terms of MICROS's contract with Roth would have given Roth an opportunity to preserve its relations with its customers and diminish the effect of the breach. There was also expert testimony that the loss generated by what would seem an insignificant breach, would actually be large and would be felt over a period of years. Dr. Kenkel explained to the jury how this loss could be calculated. His testimony also applied to the losses both Plaintiffs suffered because of the tortious interference with their customer contracts and prospective contracts.

There was no expert testimony offered by Defendants to contradict Dr. Kenkel. Defendants' expert, Robert Rosenthal, apparently used the same report that had been used for the arbitration, which involved a different time period than did the trial. He was therefore unable to attack Dr. Kenkel's testimony regarding the calculation of Plaintiffs' *future* losses. Those losses were substantial. The jury's verdict amounts had valid, if surprising, evidentiary support.

4. The Court correctly charged the jury on the applicable contract law.

MICROS asserts that we should have given the jury "instructions regarding the proper interpretation of the contract" with Roth.

Shenango asserts that we should have charged the jury that any ambiguity in the contract between MICROS and Shenango "must be interpreted against MICROS."

The portion of the charge dealing with the Breach of Contract claims is found at TT May 19-22, 2008, pp. 18-26. A review of that charge, as a whole, reveals that both MICROS's and Shenango's objections to the contract charge are baseless and without merit.

Regarding Shenango's position in particular, our review of the charge to the jury indicates that the ambiguity we were aware of involved whether the APRs were exclusive or not. We left that question to the jury. There was no objection made that Shenango was asserting a *different* ambiguity. (TT May 19-22, p. 19, ll. 6-18.) Even though we did not say the ambiguity had to be interpreted against MICROS, it is hard to see how any *harm* resulted to Shenango. The *breach* of contract alleged did not involve MICROS itself doing anything in Shenango's APR. The breach Shenango may be referring to now could be MICROS's failure to *stop* Frontier from invading Shenango's APR. Since Shenango's 1925(b) Statement fails to state what ambiguity it refers to, we are unable to address this with any specificity. The evidence in favor of exclusivity was overwhelming. The duty of MICROS to take affirmative steps to control Frontier was less clear. Any error regarding this part of the charge is not only harm-

less, it has been waived, both at trial and, by omission, in the 1925(b) Statement.

5. The Court's instruction on civil conspiracy that was repeated at the jury's request was not incomplete merely because the Court did not also repeat the instruction on circumstantial evidence. There was no abuse of discretion.

The jury questions were as follows:

FIRST QUESTION

May 20, 2008

Dear Judge Friedman,

1. Could you please read for us the instructions regarding civil conspiracy?
2. What is the legal definition of civil conspiracy?

Sincerely,
Thomas Songer
5/20/08

SECOND QUESTION

May 21, 2008

Dear Judge Friedman,

We have a few questions that will help us in our deliberations.

1. Could you please read again your instructions regarding civil conspiracy.
2. What is the legal definition of malice?
3. Could you please re-read the instructions regarding damages for each of the fundamental areas; breach of contract, tortious interference, tortious use of trade secrets, etc., tortious impact of defamation, and civil conspiracy.
4. Could you re-read the instructions regarding punitive damages.
5. Are we, as a jury, allowed to consider pain and suffering as part of the damages? If yes, to which charges can it legally apply?

Thank you,
Sincerely,
Thomas Songer
Forman

THIRD QUESTION

May 21, 2008

Dear Judge Friedman,

We are missing the expert report of Dr. Kenkel. Can we have access to that?

Thomas Songer

I'm sorry – you cannot.
Judith Friedman, Judge

FOURTH QUESTION

May 22, 2008

Dear Judge Friedman,

We, as jury, have reached a conclusive decision on 10 of the 11 interrogatories. We, however, remain deadlocked on the last charge (#10 – Did MICROS and Frontier engage in a civil conspiracy against Roth?). The current poll is 8 (yes), 4 (no).

We have spent 1 day and one-half day in serious and earnest discussion on this question. The foreman has tried multiple approaches in the discussions as a means for breaking the deadlock. There are entrenched positions on each side at this point, and it is not likely (given the discussion) that they are going to change.

Where do we go from here?

Sincerely,
Thomas Songer
Foreman

LAST NOTE FROM JURY

May 22, 2008

Dear Judge Friedman

We have reached a final decision and a clear decision on all of the interrogatories to the jury.

Sincerely,
Thomas Songer

The jury asked questions on four different occasions; three of those occasions involved civil conspiracy. In keeping with our usual policy, we answered the questions asked each time and also reminded the jury that if they had other questions we would try to answer them. (TT, proceedings of May 19-22, 2008, pp. 192-96, 198-213, 220-235.) At no time did the jury have any question regarding circumstantial evidence or one which suggested that their real concern might involve circumstantial evidence. It was not an abuse of discretion to refuse to re-charge on that point. The instruction on civil conspiracy was complete.

6. The Court did not abuse its discretion in limiting Plaintiffs' amendment to allow punitive damages only as to Civil Conspiracy, and the Court correctly charged the jury regarding punitive damages.

Plaintiffs raised their demands for punitive damages shortly before trial. (TT, April 28-29, 2008, pp. 4-12), and again on May 16, 2008 (TT, May 14-26, 2008, pp. 177-184 and pp. 188-203). They asked leave to amend both the claims for Tortious Interference and those for Civil Conspiracy. We allowed amendment only as to the Civil Conspiracy claims and charged the jury accordingly.

The lengthy discussions of Plaintiffs' motion to amend the complaint to seek punitive damages reveal that Plaintiffs themselves were focusing primarily on the conspiracy count as the one for which punitive damages were sought. We eventually decided that Defendants were on notice since 2003 of Plaintiffs' intent to seek such damages and so found no prejudice to them. The record also demonstrates that we did not abuse our discretion by limiting the possibility of punitive damages to the conspiracy count, as most of Plaintiffs' argument revolved around the facts pertinent to that count and it was those conspiracy facts which the Court felt would permit the jury to consider punitive damages. Plaintiffs' assertion of error on this score is without merit.

7. The Court correctly refused to grant Plaintiffs judgment n.o.v. on their civil conspiracy claims against MICROS and Frontier.

The evidence on civil conspiracy was available for the jury to consider and they made their decisions on credibility and weight. We cannot disturb their findings except in extraordinary circumstances, which do not exist here.

The evidence in support of Roth's conspiracy theory included that of John Currier who claimed to have seen some damning items in the possession of Defendants Gillie and

Lange while they were at Frontier. The jury, apparently, did not credit that portion of Mr. Currier's testimony since they completely exonerated Gillie and Lange.

It would logically follow that the conspiracy of the remaining "conspirators," MICROS and Frontier, would be much harder to prove. The main evidence on that issue would be the testimony by telephone deposition of Carroll Johnson, of MICROS, who Plaintiffs believed had actively conspired with Mr. O'Connor, of Frontier, to steal Plaintiffs' customers. The burden of proof would be by clear and convincing evidence, higher than the burden needed to prove tortious interference. The jury appears to have understood that higher burden and found it was not met. The Court cannot disagree.

The thrust of the evidence in favor of Plaintiffs regarding Frontier's conduct was that Mr. O'Connor, who controlled Frontier at the time in question, was a fairly ruthless person who was indifferent to all but his own interests.

There was evidence tending to show that MICROS was also indifferent to its duties to each plaintiff. However, there was little evidence of a *clear and convincing* nature to support the notion that MICROS actively conspired with O'Connor (and Frontier) to destroy either or both plaintiffs. The fact that the evidence was sufficient to show this by a preponderance is not enough for *conspiracy*.

There was evidence that was sufficient for the jury to find, as it did, by a preponderance of the evidence, that both MICROS and Frontier, for different reasons, each tortiously interfered with existing and future contracts between plaintiffs and their customers. It does not follow that the same evidence was sufficient to prove a *conspiracy* between those two entities by the "clear and convincing" standard.

We also note that the damage awards based on interference by MICROS and Frontier with Plaintiffs' existing and prospective contracts would have been duplicated by any finding of civil conspiracy. Were we even inclined to grant judgment n.o.v. as to the conspiracy count there would be no way to have a jury decide punitive damages only (which seems to be Plaintiffs' hope) without a new trial on *all* the issues, which would be an inappropriate use of scarce taxpayer dollars.

8. Roth is not entitled to the pre-judgment or post-judgment interest allowable under Maryland law.

The arbitration award dealt only with *past* damages for the breach of contract for a period no later than June 30, 2000, and the amount of that award would be a credit against the judgment amount due. The Court understands that Roth does not dispute this credit.

No *pre-judgment* interest is due. Roth's contract losses in excess of the "past" amount awarded by the arbitrator are *future* losses. Therefore, no pre-judgment interest would apply.

As to *post-judgment* interest, since the judgment had been entered in *Pennsylvania*, we saw no reason why any other state's post-judgment interest rate should apply.

We correctly denied pre-judgment interest and correctly refused to order that Maryland's post-judgment interest rate apply to the Pennsylvania judgment at issue.

CONCLUSION

There is no basis for any of the matters raised on appeal. The jury's answers to the interrogatories were well-supported by evidence. The instructions of the Court to the jury were correct. There was no abuse of the Court's discretion regarding the rulings it made. The appeals should all be denied.

BY THE COURT:
/s/Friedman, J.

Dated: July 1, 2009

¹ MICROS Fidelio Direct North Central, Inc. was not involved in the trial for reasons we do not recall but which are of no consequence to the issues at hand.

Stephen Blazczak and Fiona Blazczak v. Township of West Deer

Zoning Regulations—Non-Conforming Use Predates Zoning Ordinances—Variance by Estoppel

1. Appellant property owners appealed Zoning Hearing Board rulings of two violations of the local municipal zoning code.

2. The first alleged violation, the operation of a mechanical garage, is not supported by substantial evidence. Therefore, the decision of the local municipal Zoning Hearing Board is overruled and the appeal of the property owners is sustained.

3. The second alleged violation, the operation of a fuel oil delivery service, predates the local municipal ordinance which prohibits such activity. This non-conforming use of the property was known to the Township for many years, and created a variance by estoppel. Therefore, the decision of the local municipal Zoning Hearing Board is overruled and the appeal of the property owners is sustained.

(Robert A. Crisanti)

Michael J. Yurcheshen for Plaintiffs.

Peter G. Nychis for Defendant.

No. SA-05-705 and SA-05-985. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER

O'Reilly, J., July 7, 2009—The matters before me are two (2) civil statutory appeals filed by Stephen Blazczak and Fiona Blazczak (collectively “Blazczak”) from determinations made by the Zoning Hearing Board (“ZHB”) of the Township of West Deer (“West Deer”). The subject premises are at Blazczak’s property at 115 Kaufman Road, Gibsonia, PA 15044 in West Deer Township (“Property”). What has been called into question is the, “uses” on the Property by the Blazczaks. The case at SA05-705 pertains to alleged mechanical garage operations on that property, while the matter at SA05-985 concerns a fuel oil delivery business.

The Property consists of approximately 35 acres and is zoned for agricultural-rural use; in addition to farming, it has been used as a salvage yard since the 1950’s. (See Blazczak Brief, p. 12). Blazczak’s parents purchased the Property in 1973 from Joe Gastemba, who owned it from 1922 to 1973. (N.T. Hearing #1 (‘H1’), pp. 17 & 35).¹ According to Blazczak’s testimony, during Mr. Gastemba’s ownership, the Property was used for farming and junk storage, which use has been continued by Blazczak. (N.T. H1, p. 17-18). In addition to the salvage yard, the Property contains a concrete block building that has been on the premises for approximately 100 years. (N.T. H1, pp. 24-25).

The parties are not new to each other, nor are these matters new to the Court. In fact, there are two (2) prior cases in Allegheny County at SA 536 of 1979 and GD00-14350 as referenced by Blazczak in their brief (See Blazczak Brief, p. 12).² I take judicial notice of these cases, and in particular, the Consent Decree that was entered at No. GD00-14350 on

November 1, 2001. Reference was also made to this Consent Decree during the Hearing before the ZHB on May 11, 2005. (N.T. H1, p. 9).

I do not find that Decree particularly relevant here since all it did was impose some aesthetic limitations on Blazczak’s continued operation of its salvage yard. Here, the issues are over other uses of this 35 acre tract.

This case represents another instance of that collision between the desire to regulate in a residential fashion the farm and other uses that pre-date the ordinances attempting to impose those new regulations. In my view, the over arching issue is Blazczak’s non-conforming status. It is axiomatic that a non-conforming use cannot be prevented by ordinances passed *after* the establishment of said use. See, 53 P.S. § 10107 and *Hafner v. Zoning Hearing Board of Allen Township*, __A.2d__, 2009 WL 1406301 (Pa. Cmwlth. 2009). Such use and protection can also be “tacked” from one owner of land to the next. Further, non-conforming uses are permitted to reasonably expand and engage in related activities normally associated with such use. See, *Sico v. Indiana Township Zoning Hearing Board*, 646 A.2d 655 (Pa. Cmwlth. 1994).

Blazczak testified that he has always operated a business entity known as “Blazczak Home Heat” since 1983. Home heat obviously contemplates a service to keep one’s home warm in the winter. This could encompass sale of furnaces, stoves, fireplaces and the substances necessary to generate that warmth like firewood, heating oil, propane, and the like. Thus, delivery by truck of oil to heat a home which oil is *not* on the Property, seems well within the concept of “Blazczak Home Heat.”

The rural history of West Deer Township is also indicated by the fact that it is a second-class township operated by a Board of Supervisors. Second-class townships were traditionally rural communities that did not have population density of either boroughs or first-class townships. See, 53 P.S. § 65101, *et seq.* (re: second-class townships); 53 P.S. § 55101, *et seq.* (re: first-class townships); and 53 P.S. § 45101, *et seq.* (re: boroughs).

The farm and buildings thereon are over 100 years old, particularly the building in which the Township contends Blazczak is operating a garage for mechanical repairs. Hard evidence of such “mechanical garage” use was *not* presented and at best the Zoning Officer said that he saw vehicles on the Property. (N.T. H1, Pp. 62-64).

On March 8, 2005, Blazczak was issued a Notice of Zoning Violation and Enforcement Notice by West Deer’s Code Enforcement Officer, Gary Bogan, who contended Blazczak was using the Property for a tire recycling business and a mechanical garage; and that this was not a permitted use in an R-1 District. R-1 is the zoning reference for “rural residential.” This matter was the subject of the Hearing held before the ZHB on May 11, 2005. On June 9, 2005, the ZHB rendered its decision, and issued it in written form on June 30, 2005. It found that the Blazczaks “are operating a mechanical garage” as a result, upheld the Notice and Denied their Appeal. Further, it found that the Blazczaks were “Not operating a tire recycling business,” and accordingly, denied the Notice and Granted their Appeal on this issue. (See #7 of the Record filed 10/5/06 at SA05-705).

On May 26, 2005, Mr. Bogan issued a second Notice of Zoning Violation and Enforcement Notice to the Blazczaks, alleging that the Property was being used as a fuel oil business; and that this was also not a permitted use in an R-1 District. The ZHB heard this matter on August 4, 2005. At the conclusion of the Hearing, the ZHB upheld the Notice and Denied the Appeal of the Blazczaks. The ZHB issued a written decision on August 30, 2005. (See #9 of the Record

filed 10/6/06 at SA05-985).

Thus, the issues before me are the mechanical services and the fuel oil business.

Blazczak filed timely appeals to the Court of Common Pleas from both of these decisions. Both cases were assigned to me. In response to my various Orders, the parties filed Position Statements, attended status conferences, and filed Briefs. The parties opted for a disposition by me on their respective Briefs. Initially, there is no dispute that the Blazczaks are permitted to maintain and operate a salvage yard. That use is permitted under Ordinance 260, and the record reveals that Blazczak has continually received the appropriate salvage permits from the Township.

I have closely reviewed the parties Briefs and the Record filed in each of these matters. The standard of review applicable to my decision is whether the ZHB's decisions are supported by substantial evidence (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See, *Vaughn v. Zoning Hearing Board of the Township of Shaler*, 947 A.2d 218 (Pa. Cmwlth. 2008)); whether Blazczak's constitutional rights were violated; or if an error of law was committed. See, 2 Pa. C.S.A. § 704.

The two (2) relevant West Deer Township Ordinances are Number 260 (relevant to Salvage Yards), enacted May 22, 1996, and Number 269, enacted March 26, 1997. The issue of "non-conforming use" is also raised in these matters. It is defined in the Township's Ordinance as:

A building, structure or premises lawfully occupied at the time of the enactment of this Ordinance by a use that does not conform with the provision of this Ordinance for the district in which it is located; also such use resulting from changes in Zoning Districts or in textual provisions made hereafter.

Ordinance No. 269, Section 4.2.46.

I. The Mechanical Garage matter (SA05-705)

At the hearing held on May 11, 2005 before the ZHB, Mr. Bogan testified that he has been the Code Enforcement Officer since August 18, 1986. (N.T. H1, pp. 60-61). In addition, he has been to the Blazczak Property on many occasions, and as such, is very familiar with it. On average, he sees approximately 8 to 15 vehicles in front of the garage; and that on occasion, some vehicles may be outside the fence. (N.T. H1, pp. 62 & 64). However, he did acknowledge that those vehicles could be moved and he would not know how long they were there because he does not "sit there" and watch continuously. (N.T. H1, p. 69). Obviously, those vehicles could be there just temporarily. Most noteworthy is the fact that he testified that despite these visits and observations, he never cited Blazczak from 1986 through 1997. (N.T. H1, p. 77). Further, the record does not disclose whether the vehicle(s) are there for salvage, for repair or social visits.

Contrast Mr. Bogan's testimony with Blazczak's, who said that the structure used as the "garage" has been on the premises for about 100 years; and that it is *not* used for a repair business. (N.T. H1, pp. 24-25). In fact, the unrefuted testimony was that he only advertises "Salvage" and also owns "Blazczak Home Heat." (N.T. H1, pp. 41 & 16). Specifically, his testimony was:

A. I advertise my salvage business, pick-up salvage.

Q. Do you advertise any mechanical or repair work being done on your premises?

A. No, no, I haven't.

Q. Do you have any edification (sic) or notification

in the telephone directory?

A. No.

Q. How much of the work in that particular aspect of your operation would you say is for personal use?

Mr. Blackwell: What particular operation?

Mr. Yurcheshen: The alleged repair operation or mechanical processing.

Mr. Blackwell: Okay.

THE WITNESS: My big trucks, if I need to work on them, I work on whatever I have to, what I have on my farm or the equipment I do, because it's the only garage I do have.

(N.T. H1, p. 41).

Blazczak acknowledged that on occasion, his employees may work on their vehicles on the Property. (N.T. H1, p. 56).

Other than its Code Enforcement Officer, West Deer offered testimony from the adjoining property owner, Emilio Ledonne, who is now a township supervisor. Counsel for Blazczak immediately voiced an objection. The dialogue on the record was as follows:

Mr. Allen: Good afternoon, Mr. Dialoiso. Mr. Chairman, my name is Robert Allen. I'm appearing for the adjoining property owner, Emilio Ledonne. That's L-e-d-o-n-n-e. My name is Robert Allen. He is the adjoining property owner, shares a common border with Mr. Blazczak. I guess I would call him the defendant in today's action.

We'd ask that the Board consider our motion to intervene and grant it.

MR. DIALOISO: Being this is a public meeting, all residents can speak. I have to grant your motion, and we will take the evidence on its merit.

MR. YURCHESHEN: We would object. On the record we have had—

MR. DIALOISO: Okay, noted.

MR. YURCHESHEN: This is not just something getting talking. This is about intervention.

MR. BLACKWELL: Right, intervention.

MR. YURCHESHEN: I had no prior notice. If Mr. Ledonne in accordance with your rules wants to speak. If he's seeking a formal intervention, I have no notice. I have no due process rights regarding that.

MR. DIALOISO: We will make note of your objection, and we will take the information on its merit, and, okay.

(N.T. H1, p. 12-13)

Although he was permitted to proceed as an "Inteviewer," he has since withdrawn that designation as he has been elected a Township Supervisor. Essentially, his testimony was as to what he saw on a daily basis, which was salvage, farming, home heating oil, auto repairs and tire storage. However, Mr. Ledonne was unable to confirm or deny whether the mechanical operation was for profit or not. Further, his testimony must be viewed with some skepticism since he went from an objecting neighbor to being a member of the Township Board of Supervisors, the entity that has issued the citation to Blazczak.

West Deer contends that working on vehicles in his

garage constitutes a mechanical business; and that such operation is an infraction of Ordinance 269 as being an unpermitted use in an RI zoned area. It also relies on the findings of fact of the ZHB.

Blazczak contends that the ZHB erred by determining that they are operating a mechanical garage on their Property. They contend that the evidence supports the fact that it is not for public, but strictly for private use; and that such use does not violate any Township Ordinance and in fact, duly notes that "private garages" are permitted in an R-1 area. Ordinance 269, Section 7.3.1.

West Deer argues that the ZHB decision can only be disturbed if it is found to be unsupported by the evidence. Although I do, agree with the standard as stated by West Deer, I am not persuaded that there is substantial evidence to support the findings. Substantial evidence is defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, *Vaughn, supra*. Even the ZHB's Solicitor, Mr. Blackwell, commented that "I don't know that a cement mixer gives rise to a cement business." (N.T. H1, p. 47).

The Township never offered direct evidence that Blazczak received payment for mechanical services as one might expect with the operation of a repair station. Instead, the testimony offered was only conjecture. Receiving payment for "costs" only certainly does not rise to operating a service station or a mechanical garage in the traditional sense. (N.T. H1, p. 42-43). In fact, using a garage is also part and parcel to the operation of a salvage as testified to by Blazczak and his witness David Muse who testified that he has been on the Property about 400 times. (N.T. H1, pp. 91-92). It is ancillary to such operation. Moreover, mechanical repairs are part and parcel of fanning. Time and money and the lack thereof on any farm dictates that the farmer and his family become adept at engine repair (both gasoline and diesel), hydraulics, electrical circuitry, welding and the like. When something breaks, the farmer fixes it himself, if he can, and generally does not have the luxury of going to a service or repair facility.

Other than the salvage business, the only evidence of any other business of Blazczak is "Blazczak Home Heating," which I noted above and will address in the Fuel Oil matter below.

Accordingly, applying the standard that I must, I find that the decision by the ZHB that Blazczak is operating a "mechanical garage" is not supported by the evidence. Therefore, the Decision of the ZHB of June 9, 2005 and reduced to writing on June 30, 2005 is Overruled and the Appeal of Blazczak is Sustained.

II. The Fuel Oil Delivery matter (SA05-985)

As to the fuel oil business, Mr. Bogan testified on August 5, 2005 that he saw fuel tanker trucks on the Property which led him to issue the Notice. (N.T. H2, p. 6)³. There is no question from testimony offered by Blazczak from the "Mechanical Garage" operation hearing on May 11, 2005 that he owns "Blazczak Home Heat." (N.T. 111, pp. 18-19).

Mr. Bogan testified that his definition of "fuel oil business" is the storage of vehicles on property, advertising and having employees. He acknowledged that the Ordinance does not define "fuel oil business." However, he did state that if there is no fuel oil in those tankers, then that is not operating such a business. (N.T. H2, pp. 13-16). Additionally, he never physically inspected those tankers, but just speculated based on the name printed on the trucks.

Blazczak's witness, again Mr. David Muse, testified that there is no storage of fuel in those vehicles. They are merely parked on the Property, and are used strictly for trans-

portation of fuel oil. The operation consists solely of delivery of fuel oil that Blazczak obtains from a separate vendor, Glassmere, when it is ordered. The truck leaves the Property, goes to the Glassmere site, gets a load, delivers it to the customers and returns with the empty vehicle. (N.T. H2, pp. 48). He does not produce, nor store any of the fuel on the Property.

It is clear from the Record that no citations or other such notices were issued to Blazczak by Mr. Bogan, despite the fact that he has been the Code Enforcement Officer since 1986 and has admitted that he has visited the Property on numerous occasions. Blazczak's contentions are essentially that: 1. he is not operating a fuel oil business on the Property, just parking/storing the tankers on his Property for use in picking up and delivering fuel oil through a vendor; and 2. even if deemed a "business," then it is within the scope of his prior non-conforming use.

As to the first argument, West Deer contends that the evidence supports the position that "Blazczak Home Heat" is a business, nonetheless; and that simply because there is no storage of fuel in the tankers is of no concern. Additionally, it argues that there is no evidence that the Township acquiesced in this use. However, this ignores the fact that from 1986 to 2005, Mr. Bogan did not issue any citations regarding this use, despite his testimony that he has visited the Property on various occasions.

Blazczak asserts that he has operated such a business since 1982, prior to the Ordinance in question, without objection by the Township until this Notice of Violation in 2005; and that such acquiescence from 1982 through 2005 is tantamount to a variance by estoppel. This type of estoppel is defined as a reliance on "informal" municipal consent to operate a business and/or the "inaction" of the municipality with respect to the operation; the expenditure of money in reliance on that consent or inaction; and to not permit it would result in unnecessary hardship by virtue of the property owner's detrimental reliance on the municipality's inaction, active acquiescence or misrepresentation. See, *Vaugh, supra*.

Initially, I agree that the Fuel Oil issue is within the scope of Blazczak's non-conforming use. The fuel oil business was commenced in 1983, well before the passage of Ordinance 269 in 1997, and has continually been in existence according to the testimony. The law is clear that a "non-conforming use" is an activity or structure which pre-dates the otherwise relevant zoning restrictions; and the property owner has a right to continue that non-conforming use unless it has been abandoned. See, *Action Audio Service, Inc. v. Zoning Hearing Board of Upper Darby Township*, 699 A.2d 1375 (Pa. Cmwlth. 1997).

Second, after reviewing the Record, I am inclined to agree with Blazczak's argument on the variance by estoppel. The evidence clearly supported the fact that the Township knew such trucks were operating on the Property and did nothing about it. As such, this meets all the criteria of a variance by estoppel.

I am not persuaded by the argument in West Deer's Brief that Blazczak did not preserve the issue of "non-conforming use" simply because it was not specifically mentioned in the Position Statement or the Appeal itself, and is thus waived. The Record is replete with evidence that shows a non-conforming use.

The Property history, dating back to the prior owner, Mr. Gastemba, shows that it has continually been used for farming and salvage, and he always had a garage structure on the premises. Ordinance 269, the one in question, was enacted on March 26, 1997. The alleged violative uses were cited in 2005. The testimony revealed that Blazczak has been contin-

ually operating in such a fashion since his family became owner of the Property in 1973, and testified that he owns “Blazczak Home Heat” since 1983. (N.T. H1, p. 18). All of this existed prior to the Ordinance in question. Clearly, this meets the criteria for “non-conforming use.”

The question of “variance by estoppel” is also very persuasive. The evidence clearly establishes that the Code Enforcement Officer was quite familiar with the Property since he became an employee in that capacity with the Township in 1986; and he never cited the Blazczaks until 2005. Therefore, the reliance by the Blazczaks by the “inaction” of the Township also meets the test for variance by estoppel. See, *Vaughn, supra*. Therefore, I find that Blazczak has a non-conforming use that permits the uses presently at issue. Further, I find that the ZHB abused its discretion in its decisions, as its findings are not supported by substantial evidence. The findings of the ZHB belies the clear and substantial evidence that the uses so challenged are in fact permissible uses under the definitions of “non-conforming uses” and “variance by estoppel” theories. As a result, the ZHB misapplied the law to the facts.

Based on the above, I find that the ruling issued by the ZHB on August 4, 2005 is not supported by substantial evidence. To the contrary, the evidence clearly supports Blazczak’s position. Accordingly, I find that the Board abused its discretion. Therefore, the ZHB Decision of August 4, 2005 is Overruled and the Appeal filed by Blazczak herein is Sustained.

BY THE COURT:
/s/O’Reilly, J.

¹ All references to “N.T. H1” are to the Notes of Testimony before the ZHB on May 11, 2005.

² Another case is at Docket No. SA06-226. That was filed by Blazczak regarding his salvage operations. The case was subsequently discontinued by Blazczak.

³ All references to N.T. H2 are to the Notes of Testimony from the August 4, 2005 ZHB Hearing.

In re: Petition to Change Boundary Lines of Lot and Block No. 1572-N-192

Change of Township Boundary Lines

1. Petition was necessitated so that property owner could keep employment in adjoining township. The township boundary line was a road dividing owner’s property on which owner had built new residence in township adjoining township of employment.

2. Initially all parties were in agreement to allow a referendum on transfer of lot from one township to other.

3. After agreement was entered into, Elizabeth Township demanded completion of transfer by June knowing that referendum could only first appear on ballot in November.

4. Appeal of agreement by Elizabeth Township removed lower court’s ability to modify agreement. Court only retained right to preserve status quo which it elected to do.

(William F. Barker)

Petitioners *pro se*.

Gretchen K. Love for Elizabeth Township.

Bernard M. Schneider for Forward Township.

No. GD 09-7147. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

SUPPLEMENTAL OPINION

O’Reilly, J., August 20, 2009—I issued my Opinion in the above matter on July 22, 2009. At that time, the Appellant, Elizabeth Township (“Elizabeth”) had not responded to my 1925(a) Order for a Concise Statement of the basis for this Appeal. I received their response on July 24, 2009, and can now supplement my earlier Opinion.

The record herein is sparse inasmuch as the case was presented to me as one in which all parties agreed, and it was simply a matter of getting the question on the November, 2009 ballot. To briefly recapitulate the case, Petitioner, Benjamin R. Muir, (“Muir”) is an employee on the road crew for Elizabeth. Muir is married to the former Dayna Marie Wycoff, who is also a Petitioner in this case. Her parents owned a tract of about 75 acres, which apparently lay in both Elizabeth and Forward Townships. According to a recorded subdivision plan in the Recorder’s Office of Allegheny County at Plan Book Volume 191, Pages 150-151, the property straddles Round Hill Road, which, according to the Plan, is the boundary between Elizabeth and Forward Township (“Forward”). That plan was approved by both Townships in early 1995, and thereafter recorded. A portion of Lot Number 2 in that plan, which apparently lies in Forward, was deeded by the elder Wycoffs to their daughter Dayna Marie, and her husband, Muir on February 6, 2007, by Deed of record at Deed Book Volume 13140, Page 146.¹ That portion of Lot Number 2 appears to be about 1.3 acres. It is designated as Lot and Block 1572-N-192 in the Allegheny County Deed Registry.

Apparently, Muir built a house on this Lot No. 2, and resides there. The issue is that Muir is now considered a resident of Forward by Elizabeth, and is therefore in jeopardy of losing his job, because Elizabeth requires its employees to live in Elizabeth. Hence, the Petition to Modify the Township property lines so he can become, and/or remain a resident of Elizabeth.

Muir, proceeding on the belief that neither Forward nor Elizabeth opposed this solution, prepared his own Petition, obviously with some professional help, and filed it on April 14, 2009. When it came before me as an agreed upon case, it seemed a simple matter to craft an Order that would permit the voters to vote on this modification. I recited that Order in my original Opinion. I was non-plussed by the appeal.

It must be noted that when the case came to me, I issued an Order on April 24, 2009 directing that the parties submit their position statements to me. Elizabeth did so and stated, *inter alia*:

No. 9...(t)he Township has agreed, for a limited period of time, that it would accept his Forward Township property as property of Elizabeth Township.

No. 10. The Township conditioned its acceptance in three (3) ways: (1) the Township agreement to accept the property would expire on June 1, 2009 and (2) that Mr. Muir maintained his residency in Elizabeth Township during the transition and (3) that the Township incur no expense as a result of the boundary change....

No. 11. The Township is not opposed to accepting the Forward Township property provided [it] incurs no cost....

No. 12...(t)he Township requires that the procedural requirements of the First Class Township Code [be followed]....

Obviously, the June 1, 2009 deadline is unrealistic. In all other respects, it appears Elizabeth is playing “fast and loose” with the Court in filing the foregoing statement, and then, by its appeal, blocking Muir’s effort to comply. See, *Gross v. City of Pittsburgh*, 686 A.2d 864 (Pa.Cmwlth. 1996) and *Sunbeam Corp. v. Liberty Mutual Ins. Co.*, 781 A.2d 1189 (Pa. 2001).

Initially, the attorney representing Elizabeth, one Gretchen Love, at conference, indicated that Elizabeth’s commissioners wanted the matter resolved by June 1, 2009. Obviously, this could not be done since the election would not be until November. The residency requirement was also mentioned tangentially, but never developed. As a result, I said at that conference that I did not believe it appropriate for Elizabeth to take any action against Muir while this ballot procedure was pending. Ms. Love voiced no objection, and I included such language in the Order I issued. That now appears to irk the Elizabeth Commissioners. See in particular paragraphs 2a. through 2d. of the 1925(a) response.

My assessment is that some of the Elizabeth commissioners are nettled by a perceived effort by me to tell them what to do. Their response is, however, counter productive. The wiser course would have been for the current solicitor to seek a modification of the Order (via Motion for Reconsideration) so as to attempt to placate those disturbed, but with the commitment that the status quo would remain until the November election.

Now that an appeal has been filed, I am stripped of jurisdiction over the case, except in the limited circumstances recited in Rule of Appellate Procedure 1701, and the ballot question is most likely deferred to the year 2010. Further, that which appears to gall the commissioners, by their appeal, will be prolonged. Interestingly, one of the powers remaining with the trial court under Pa.R.A.P. 1701(b) is the power “to preserve the status quo.”

As to the merits, I was and am well within my equity powers to ORDER the maintenance of the status quo pending the outcome of this “agreed upon” method of resolving the Muir residency, and his job. Service of a complaint for injunction is not the only way to interdict action adverse to one of the parties in a dispute. Further, Elizabeth attended the conference and filed a position statement, and voiced no objection of any kind.

In addition, Elizabeth, at paragraph 2(f) of its 1925(a) response, asserts that the relief sought by Muir is unavailable, and no “cause of action” exists for this proceeding. It appears that the governing law on this subject is the First Class Township Code, as acknowledged by Elizabeth in paragraph 12 of their position statement, and the ensuing case law. The initial case in that regard is *In re: Annexation to Scott Township of a Portion of Mt. Lebanon Township*, 80 A.2d 89 (Pa.Super. 1951). At that time the legislation governing that procedure appeared at 53 P.S. § 109092-312.3. The First Class Township Code was thereafter amended to add 53 P.S. § 55302 *et. seq.*, which provides that the Court, on petition, may alter the boundary between Townships. That legislation called for the appointment of a commission to establish boundaries after petition by interested citizens.

However, in *In re: Establishment of Boundary between Collier Township and Robinson Township*, 360 A.2d 841, (Pa.Cmwlth. 1976), the Commonwealth Court held that “(S)ince the legislature has not acted [on adopting legislation creating uniform procedures for consolidation, merger, or change of the boundaries of a municipality], the only constitutionally valid procedures for making boundary alterations are *initiative and referendum*.” *Id. at* 842. (Emphasis Supplied). Thus, that Court found the commission process unavailing. My review of the Petition initially filed by Muir

shows me that Muir attempted a modified version of 53 P.S. § 55302. A procedure that I find ingenious and appropriate. Specifically, they cobbled together a hybrid of 53 P.S. § 55302 as modified by *Collier, supra*. The Petition is the “initiative” and the asking of the Court to place the question on the ballot is the “referendum.” Further, the Commonwealth Court in *Township of Connoquenessing v. Township of Butler*, 491 A.2d 288 (Pa.Cmwlth. 1985) held, *inter alia*, that even when two townships agree as to the boundary, the “statutory pattern [of the Township Code] requires the intervention of a court. 53 P.S. §§ 55302, 65302. The interests of the citizens, as well as those of the municipal entities, are involved in all boundary disputes, and the court’s participation functions to protect those concerns.” *Id. at* 290. Thus, the matter is properly before me.

These reasons and my analysis of the law on this issue are the basis for what I did and why I did it. Indeed, they show that my Order of June 17, 2009 was appropriate.

BY THE COURT:
/s/O’Reilly, J.

¹ Later corrected on May 30, 2007 to add a covenant in favor of Pittsburgh History and Landmarks Foundation at Deed Book Volume 13254, Page 101.