PITTSBURGH LEGAL JOURNAL

# OPINIONS

## ALLEGHENY COUNTY COURT OF COMMON PLEAS



*Corporate Deadlock–Custodian –Winding Up–Dissolution*

*Plaintiff, as founder, CEO and President of educational training and consulting company filed suit against his brother, parents and company and sought to dissolve the company due to corporate deadlock and Defendants' attempt to deprive him of membership in and management of the company. Trial Court granted an Emergency Motion for a Temporary Restraining Order to restore Plaintiff's access to company property and computer systems. The Trial Court later granted a motion for summary judgment concerning Plaintiff's request for a declaration that the amended operating agreement drafted by Defendants without his knowledge and consent is void and also appointed a Custodian Pendente Lite, who was tasked with issuing a report on whether the parties were deadlocked or could continue to carry on the company's business. Following a hearing on Plaintiff's petition to dissolve and wind-up the company, the Trial Court granted the petition and Defendants appealed on multiple grounds. The Trial Court's Rule 1925 (a) (1) Opinion set forth the following. First, Plaintiff pled facts sufficient to state a count for dissolution. Second, the Trial Court found that Defendants' actions in seeking to frustrate Plaintiff's management of the company, the parties' irreconcilable views over major company decisions and the parties' ongoing personal distrust and animosity provided sufficient support for the Court-ordered dissolution. Third, the Court did not abuse its discretion in ordering dissolution as an appropriate equitable remedy under the facts and under the specific nature of the dissolution plan, which split the company into two entities to be owned separately by the feuding parties.*



*Injunction–Irreparable Harm–Nature of Lease Similar to Services Contract–Adequacy of Monetary Damages*

*Plaintiff sought injunctive relief after the Allegheny County Airport Authority terminated its lease with Plaintiff; the lease was set to run through December 31, 2029. In the summer of 2021, the Airport Authority asked Plaintiff to consider early termination of the lease. After Plaintiff refused the request, the Airport Authority notified Plaintiff of alleged "Events of Default" by Plaintiff, which ultimately led to the Airport Authority terminating the lease without notice. The Court determined that the lease, under which Plaintiff managed Airport Authority's commercial space and carried out related acts, had characteristics more similar to a commercial services contract rather than a true real property lease. The Court further noted that specific performance of service contracts is extremely rare because monetary damages are an adequate remedy. Considering the unique business opportunity presented by a lease at the Pittsburgh Airport, Plaintiff argued it would suffer irreparable harm because termination of the lease would cause it to lose business opportunities such that Plaintiff would cease operations altogether. However, the Court found that Plaintiff's damages were not so incalculable as to warrant specific performance by the Airport Authority. Finally, in clarifying that self-help eviction does not always equate to irreparable harm, the Court held that Plaintiff had an adequate remedy at law. As such, the Court concluded that Plaintiff could not establish irreparable harm that would justify injunctive relief.*



*Property–Prescriptive Easements–Tacking–Open and Notorious–Adverse–Width of Easement–Injunction*

*Plaintiff and Defendant own property adjacent to each other. Historically, vehicles had accessed the Plaintiff's property, in part, through a paved lot on the Defendant's property. Defendant never objected to this until a cease and desist letter was sent to Plaintiff in 2017. Because of this, Plaintiff alleged that it had acquired a prescriptive easement over this portion of the paved lot on Defendant's property. To obtain a prescriptive easement, a plaintiff must show that it and its predecessors used the portion of the property for a period of 21 years in a manner that was (1) continuous and uninterrupted, (2) open and notorious, and (3) adverse. Plaintiff had the burden of showing each of these elements by clear and convincing evidence. Defendant argued that Plaintiff could not show the 21 year period because, in order to do so, Plaintiff had to "tack" the prescriptive use of the prior owners of Plaintiff's property. Defendant argued that tacking required each successive owner to be in privity with one another. The Court disagreed and found that the requirements for adverse possession and a prescriptive easement differ, and declined to find a requirement of privity to invoke "tacking", relying on Predwitch v. Chroback, 142 A.3d 388 (Pa. Super. 1958) which stated that because easements are appurtenances of the dominant tenement, rights to a prescriptive easement pass to successive owners by conveyance of the dominant tenement. In order to be "open and notorious", the use must be visible and of such a nature and of such a frequency as to give reasonable notice to the servient land owned that the right or easement is claimed against him. As to adverse use, once the Plaintiff established sufficient evidence that the use of the land occurred for more than 21 years without evidence to explain how it began, the use is presumed to be adverse and the burden shifted to the Defendant to prove otherwise. Finally, the width of the prescriptive easement must be established by the extent of actual use during the prescriptive period. Having found Plaintiff met all of the requirements by clear and convincing evidence, the Court found that Plaintiff was entitled to a prescriptive easement, and that Defendant was enjoined from interfering with the easement rights.*

**Judges who would like to submit their opinions for publication can do so by emailing their opinions as a Microsoft Word document to *opinions@acba.org*. Paper copies of opinions and .pdf versions of opinions cannot be considered for publication.**

# PLJ

*The* Pittsburgh Legal Journal Opinions *are published fortnightly by the*
*Allegheny County Bar Association*
*400 Koppers Building*
*Pittsburgh, Pennsylvania 15219*
*412-261-6255*
*www.acba.org*

*Circulation 5,116*

# PLJ Editorial Staff



# Opinion Selection Policy

*Opinions selected for publication are based upon precedential value or clarification of the law. Opinions are selected by the Opinion Editor and/or committees in a specific practice area. 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. All opinions submitted to the Pittsburgh Legal Journal (PLJ) are printed as they are received and will only be disqualified or altered by Order of Court, except it is the express policy of the Pittsburgh Legal Journal (PLJ) not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.*

# 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. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.*

# MICHAEL D. TOTH and LINAWATI TOTH v. BRYAN E. TOTH, EUGENE W. TOTH, MARIE TOTH and LEARNING SCIENCES INTERNATIONAL, LLC

*Corporate Deadlock–Custodian –Winding Up–Dissolution*

*Plaintiff, as founder, CEO and President of educational training and consulting company filed suit against his brother, parents and company and sought to dissolve the company due to corporate deadlock and Defendants' attempt to deprive him of membership in and management of the company. Trial Court granted an Emergency Motion for a Temporary Restraining Order to restore Plaintiff's access to company property and computer systems. The Trial Court later granted a motion for summary judgment concerning Plaintiff's request for a declaration that the amended operating agreement drafted by Defendants without his knowledge and consent is void and also appointed a Custodian Pendente Lite, who was tasked with issuing a report on whether the parties were deadlocked or could continue to carry on the company's business. Following a hearing on Plaintiff's petition to dissolve and wind-up the company, the Trial Court granted the petition and Defendants appealed on multiple grounds. The Trial Court's Rule 1925 (a) (1) Opinion set forth the following. First, Plaintiff pled facts sufficient to state a count for dissolution. Second, the Trial Court found that Defendants' actions in seeking to frustrate Plaintiff's management of the company, the parties' irreconcilable views over major company decisions and the parties' ongoing personal distrust and animosity provided sufficient support for the Court-ordered dissolution. Third, the Court did not abuse its discretion in ordering dissolution as an appropriate equitable remedy under the facts and under the specific nature of the dissolution plan, which split the company into two entities to be owned separately by the feuding parties.*

Case No.: GD-21-000372. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

## OPINION

### I. Factual Background

Plaintiff, Michael Toth ("Michael"), is founder, Chief Executive Officer ("CEO"), and President of Learning Sciences International ("LSI"), a Pennsylvania Limited Liability Company that engages in educational training and consulting to help underprivileged students in public school districts across multiple states. Michael's wife, Linawati Toth ("Lina"), also a Plaintiff in this case, is a manager and employee of LSI. Defendants are Michael's brother, Bryan Toth ("Bryan"), and his parents, Eugene Toth ("Eugene") and Marie Toth ("Marie") (Collectively, "Defendants"). Michael founded LSI in 2002, and shortly thereafter gifted Bryan, Eugene, and Marie each a twenty-five percent (25%) equity interest in the company, each of whom made no capital contribution to LSI. Michael retained for himself the remaining twenty-five percent (25%) equity interest, having been the only one to contribute capital. Pursuant to Article 1.39 of LSI's 2012 Operating Agreement, Michael and Bryan each own fifty percent (50%) voting interest in the company. Over time, LSI grew and eventually developed a profitable business presence in the state of Florida. Sometime before 2019, both Plaintiffs and Defendants moved to Palm Beach County, Florida. During this time, LSI maintained offices in both Florida and Pennsylvania.

The animosity between the parties, which culminated in Michael's petition before this Court to dissolve LSI due to the parties' deadlock, seems to have originated in a souring of familial relations sometime in the Fall of 2020.[1] Then, on January 8, 2021, Bryan, Eugene, and Marie met with legal counsel in Florida where they executed, without Michael's knowledge or consent, inter alia, an "Amended and Restated Operating Agreement of Learning Sciences International, LLC" ("Purported Agreement"). The Purported Agreement was an attempt by Defendants to unilaterally unseat Michael as a member and CEO of LSI and to reorganize the company as a Florida LLC with headquarters in Florida. The Defendants also physically locked Michael and Lina out of LSI's offices and disabled their access to LSI's email and computer systems. On January 19, 2021, this Court granted Plaintiffs' Emergency Motion for a Temporary Restraining Order which ordered Defendants to restore Plaintiffs' access to LSI's email and computer systems and physical access to LSI's offices.[2]

This Court eventually determined that the Purported Agreement was void when it granted Plaintiffs' cross-motion for summary judgment on their request for declaratory judgment.[3] By granting summary judgment, this Court declared that the 2012 Operating Agreement was the controlling agreement of the LLC and that Defendants' execution of the Purported Agreement was in violation of the 2012 Operating Agreement. Amending the 2012 Operating Agreement required the unanimous consent of both voting members (i.e. Michael and Bryan).[4] As such, the Defendants' conduct constituted a brazen attempt to unilaterally deprive Michael of his membership and management of LSI.

Aside from this attempt to remove Michael from the company in violation of the 2012 Operating Agreement, the parties are incapable of carrying on the business of the company due to irreconcilable differences that will only cause harm to the company if allowed to persist. This Court appointed a Custodian Pendente Lite ("Custodian") on August 4, 2021 to issue preliminary findings of fact on whether the parties were deadlocked and whether it would be reasonably practicable for the parties to carry on the business of the company.[5] The Custodian found that "[the parties'] disagreements are not over issues that arise in the day-to-day operation of a business, but rather go to core issues such as the governing law applicable to a limited liability company, the allocation of voting rights, hence power among members, and the primary areas of corporate investment."[6]

The parties have divergent opinions about LSI's business strategy moving forward; whereas Michael wants to continue offering LSI's current array of services to school districts, the Defendants want to focus on "transactional" products geared towards individual teachers. Perhaps more significantly, the parties' competing visions for LSI differ on whether Michael will continue in his capacity as CEO and President, or whether his employment will be terminated. Michael also wishes to continue marketing and selling a proprietary model for teacher performance evaluations, which has historically been one of LSI's primary revenue drivers. Dr. Robert Marzano, the proprietor of the model, licenses this model to LSI and works closely with Michael. Dr. Marzano, however, has made clear that he will no longer license his model to LSI if the current litigation continues to disrupt the business or if Michael ceases to run the company. The current litigation and deadlock, therefore, concern fundamental issues of the company's management and strategy and will cause harm to the company financially in the long term.

Additionally, as Defendants point out, Article 7.11 of the 2012 Operating Agreement requires that the members attempt to resolve any deadlock through binding mediation before seeking a court ordered dissolution. Although Defendants contend otherwise, the parties have sought to resolve their disputes through formal mediation and informal settlement discussions throughout this litigation. None of these attempts to resolve the parties' differences amicably proved fruitful and have only highlighted the intractable positions of the parties with respect to the management and ownership of LSI.

On December 13, 2021, Plaintiffs submitted to the Court their Amended Petition to Dissolve and Wind-Up Learning Services International, LLC. On March 22, 2022, this Court held a hearing on the petition. On April 5, 2022 this Court issued an Order granting the petition to dissolve and Defendants filed a Notice of Appeal the same day. This Court also issued an Order the same day directing Defendants to submit a Concise Statement of Errors and Defendants within twenty-one (21) days of that Order. On April 26, 2022, Defendants timely submitted their Concise Statement of Errors..

**II. Errors Complained of on Appeal**

Defendants' Concise Statement of Errors Complained of on Appeal, pursuant to Rule 1925, providess that this Court has erred as follows:

1. Whether this Court erred by ordering the dissolution of Learning Sciences International, LLC ("LSI"), insofar as the factual and legal predicates for a court-ordered dissolution of LSI were unsatisfied?

2. Whether this Court erred by ordering the dissolution of LSI upon the request of Plaintiff, Michael D. Toth ("Michael Toth"), insofar as Michael Toth improperly sought dissolution via a motion, having failed to plead a cause of action in equity via complaint, as required by Pennsylvania law?

3. Whether this Court erred by ordering the dissolution of LSI, insofar as the Court's decision was grounded in an improper determination, on a motion for summary judgment, that LSI and its members were subject to the Operating Agreement dated January 1, 2012 (the "2012 Agreement") rather than the amended and restated Operating Agreement dated January 1, 2021, the adoption of which displaced the predecessor 2012 Agreement?

4. Whether this Court erred by ordering dissolution of LSI, insofar as the Members are not deadlocked in the management of LSI's affairs in light of, inter alia, the exception set forth in 7.11 of the Operating Agreement and the fact that Michael Toth purported to self-impose a deadlock in order to achieve a court-ordered dissolution?

5. Whether this Court erred by ordering the dissolution of LSI, insofar as LSI is not being threatened with or suffering irreparable injury as a result of any alleged deadlock; nor is it the case that LSI's business and affairs can no longer be conducted as a result of any alleged deadlock?

6. Whether this Court erred by ordering the dissolution of LSI, insofar as it has been and remains reasonably practicable to carry on LSI's business in conformity with the Operating Agreement?

7. Whether this Court erred by ordering the dissolution of LSI where, under Pennsylvania law, the equities favored a less drastic remedy that was available here, e.g., a forced acquisition of Michael Toth's interest in LSI by the Defendants?

8. Whether this Court erred by ordering the dissolution of LSI, insofar as the Plan of Dissolution proposed by Michael Toth and incorporated into this Court's Order is grossly wasteful; does not adequately preserve LSI's value; would unnecessarily force LSI toward insolvency; is unlikely to achieve its stated goals per Michael Toth's own expert witness; and unlawfully favors Michael Toth over the other Members?

**III. Analysis**

*A. An Action to Dissolve Was Properly Plead in the Complaint*

As an initially matter, Defendants contend that this Court erred in ruling on Plaintiffs' Petition to Dissolve because Plaintiffs did not plead a count for dissolution in their complaint. Defendants are mistaken, however, because Pennsylvania is not a notice pleading state, but a fact pleading state. Griffin v. Rent-A-Center, Inc., 843 A.2d 393, 395 (Pa. Super. Ct. 2004) ("[C]ourts are presumed to know the law and plaintiffs need only plead facts constituting the cause of action and the courts will take judicial notice of the statute involved.") (internal citations omitted). As such, causes of action and legal theories need not specifically be alleged in a complaint, as long as the legally operative facts underlying those causes of action have been pleaded. Id.

Here, the legally operative facts upon which Plaintiff's Petition to Dissolve was brought were sufficiently plead in Plaintiffs' Complaint and were sufficient to support a cause of action to dissolve the company. Plaintiffs plead that Defendants attempted to execute agreements that would remove Plaintiffs from LSI in violation of the 2012 Operating Agreement and that the personal relations between the parties are dissentious. Further facts to support dissolution were developed and litigated as the case progressed. Even if it was error for this Court to allow dissolution when that cause of action was not specifically pleaded in Plaintiffs' Complaint, it was harmless error. Defendants were aware of legally operative facts at issue in this case and had an opportunity to prepare a defense and be heard in court on the matter of dissolution. As such, this Court's Order dissolving the company should not be reversed for this reason.

*B. This Court Did Not Err in Finding Deadlock or Impracticability*

Under the Pennsylvania Uniform Limited Liability Company Act, a court may, upon petition by a member, dissolve the LLC when "[a]n event or circumstances that the operating agreement states causes dissolution" occurs, or "it is not reasonably practicable to carry on the company's activities and affairs in conformity with the certificate of organization and the operating agreement." 15 Pa. C.S. § 8871(a)(1), (a)(4)(ii). The 2012 Operating Agreement provides that the company shall be dissolved if "the Members are deadlocked in the management of the Company's affairs, and irreparable injury to the corporation is threatened or being suffered…."[7] Thus, upon a finding of deadlock or impracticability in carrying on the business of the company, this Court must order a dissolution of LSI when a member so petitions.

Although Pennsylvania case law is sparse on what circumstances are sufficient to give rise to a ground for dissolution, a court may look to dissolution in similar forms of business associations, such as partnerships and close corporations, for guidance. Staiger v. Holohan, 100 A.3d 622, 624 (Pa. Super. 2014). This Court is also guided by persuasive authority from other jurisdictions in determining the contours of deadlock and impracticability. Because the analyses and facts to support a finding of deadlock and impracticability are virtually indistinguishable in this case, this Court's analysis will treat them as one and the same. Ultimately, there are three major factors in this case that support such a finding: (1) Defendants' violation of the 2012 Operating Agreement in order to circumvent Michael's control and management of the LLC, (2) the irreconcilable views of both parties over major structural decisions of the LLC, and (3) the utter distrust and animosity between the parties personally.

i. Violation of the 2012 Operating Agreement

In Staiger, the Superior Court upheld a dissolution of an LLC where there were two fifty percent (50%) members "such that when they disagree, the result is a deadlock and decisions cannot be made pursuant to the operating agreement." Id. at 625. The Pennsylvania Supreme Court has cautioned, however, that "[a] going and prosperous business will not be dissolved merely because of friction among the partners; [equity] will not interfere to determine which contending faction is more at fault." Potter v. Brown, 195 A. 901, 904 (Pa. 1938). The Superior Court distinguished the type of friction that arose in Potter with the type of friction between the members in Staiger. Whereas in Potter the defendant partner had not conducted himself in any way other than

in accordance with the partnership agreement, the defendant member in Staiger unilaterally excluded the plaintiff member from management decisions, in violation of the membership agreement, in order to bypass the need for the unanimous consent of both members. Staiger, 100 A.3d at 625.

In Potter, the plaintiffs' grievances stemmed from the fact that they lacked management rights in the company, for which the plaintiffs failed to bargain when they signed the partnership agreement. The plaintiffs' action in equity did not lie where the defendant, whose sole control over management of the partnership was vested by the agreement, would not relinquish those rights. The Defendants here are no different. Defendants are parties to a membership agreement that requires Michael's consent in order to make the structural changes to LSI that the Defendants desire. In an attempt to circumvent this roadblock, the Defendants sought to unilaterally alter the power structure and jurisdictional home of LSI in violation of the 2012 Operating Agreement. This is the same type of conduct that warranted dissolution in Staiger.

The Defendants have contended that, since the commencement of this litigation, they have allowed Michael to remain in control of the company and to run the day-to-day operations. As such, Michael has not been excluded from management of the company. However, the Defendants overlook the critical detail that this would not be the case were it not for this Court's intervention in the matter. But for this Court's injunction, Michael likely would still be physically locked out of the company's offices and without access to the company's email or computer systems. Moreover, Michael's management of the day-to-day has allowed the company to remain operational, but this status quo is not sustainable long-term. The status quo still fails to address the other major roadblocks to practicably operating the business, namely the parties' disparate visions for LSI's future and the parties' mutual animosity.

ii. Differences in Major Decisions of the Company

Due to the dearth in Pennsylvania case law addressing deadlock and dissolution, this Court looks to persuasive authority from other jurisdictions that have more closely analyzed the issue. The Supreme Court of Massachusetts collected a variety of authorities from other jurisdictions to analyze the circumstances that give rise to deadlock and found the following four common factors: (1) the existence of a stalemate between the members on the primary functions of management, including business strategy; (2) the size of the business association, where a 50-50 split of decision-making authority between two members makes impasses more irreconcilable; (3) whether a party has purposefully engineered a deadlock; and (4) the degree and extent of distrust and antipathy between the members. Koshy v. Sachdev, 81 N.E.3d 722, 730-31 (Mass. 2017).

Here, the voting shares of LSI, and hence the decisional authority to make the kinds of structural changes to LSI over which the parties disagree, is split equally between Michael and Bryan.[8] This makes the differences between the parties all the more likely to be incapable of resolution. See Black v. Graham, 464 S.E.2d 814, 815 (Ga. 1996) (finding that a company owned in equal shares by two contending parties who could not agree on business decisions presented the "classic situation of deadlock" and warranted dissolution). This is especially so where the parties disagree over rather fundamental issues of business governance, such as whether Michael should remain in control of the company's management. The parties also disagree as to the types of products and services LSI should offer, the type of clients it should pursue, the tax classification of the business, its headquarters, and its state of incorporation.

Furthermore, Michael has done nothing to engineer this deadlock. Michael is not the party that seeks to alter the company's operating agreement, that has violated the operating agreement, or that has breached his fiduciary duties to other members. Instead, Defendants' conduct has resulted in LSI's deadlock for the purpose of seeking a forced buy-out of Michael's interest. This Court cannot, in the interests of equity, reward Defendants' violative conduct by giving them exactly what they intended to accomplish: forcing Michael out of the company.

iii. Mutual Animosity

The fourth factor considered by the Massachusetts Supreme Court was mutual animosity between the members of the company. Koshy, 81 N.E.3d at 731 ("Mutual antipathy can transform what may begin as a run of the mill disagreement into irreconcilable conflict and stalemate where hostility precludes compromise.").

In this case, any trust the parties may have had in each other and willingness to compromise was irretrievably lost when the Defendants went behind Plaintiffs' backs to force them out of the company. Defendants did not just stop at executing the Purported Agreement without Michael's knowledge of consent, but they prevented Michael's access to LSI's offices, emails, and computers. Defendants went even further to spread rumors amongst employees that Michael was mentally unwell and no longer able to lead the company, despite having no reasonable basis for such accusations.[9] Defendants have taken the position, conveniently after the institution of the current proceedings against them, that they have been willing to compromise during mediation and that Plaintiffs have not.[10] However, at no point before Defendants' unilateral attempt to remove Michael from LSI did they reach out to Michael to try to resolve their differences amicably. Instead, Defendants created an atmosphere of hostility from the start and tarnished any possibility of rebuilding trust.

Moreover, the personal and familial nature of the dispute that underlies this deadlock is such that "hostility precludes compromise." Koshy, 81 N.E.3d at 731. It is the unfortunate but frequent truth that closely held businesses will often be unable to overcome personal differences and animosity that develops wholly apart from any business-related disagreements. Michael testified that he is not on speaking terms with either his mother, father, or brother. His father also made his antipathy known in testimony, describing Michael as "a snot," "extremely vain," "condescending," "arrogant," and possessing a "debased character."[11] See id. at 732 ("The record is replete with personal insults, questioning of motives, and general acrimony between the parties."). Even during discovery in the parties' concurrent litigation in Florida state court,[12] the Defendants sought to compel production of immigration and work authorization status from Michael's wife, who is a lawful immigrant. Given the irrelevance of this information to the parties' dispute, one can only assume this request was made out of spite. This is preeminently demonstrative of the parties' personal animosity. Such dispositions are not conducive of compromise and are unlikely to be resolved – indeed, have not been resolved – through legal dispute resolution.

iv. Irreparable Harm

In considering whether deadlock or the impracticability of carrying on the business presents irreparable harm to the company, a court cannot only look to the company's short-term profitability, but to the likelihood of its long-term success. Koshy, 81 N.E.3d at 733-34. Additionally, financial harm is not the only thing a court may consider; a court may also "take[] into account factors like 'harm to a corporation's reputation, goodwill, customer relationships, and employee morale.'" Shawe v. Elting, 157 A.3d 152, 161 (Del. 2017) (internal citations omitted).

Although the Defendants have allowed the Plaintiffs to maintain business operations as normal, enabling to company to maintain a slight margin of profitability during the course of litigation, as long as the parties' relationship remains acrimonious

and intractable it will be impossible to make long-term decisions for LSI. Once the specter of this Court's supervision over the parties' behavior is gone, it seems unavoidable that the parties will slide back towards the same maneuvering and jockeying for control of the company that caused this litigation to ensue in the first place. The parties' irreconcilable differences are such that any short- or long-term decision on behalf of LSI is likely to be challenged with litigation, as the parties have demonstrated their unwillingness to compromise amicably. The continued threat of divisiveness and litigation will likely exhaust the company's financial resources and scare away customers.

This litigation has already had such an effect on LSI's employees and business partners. It has thus far caused the apprehension of Dr. Marzano, whose licensed evaluation model is critical for LSI's current financial success. In a letter to LSI, Dr. Marzano stated that he would no longer license his model to LSI if the parties continued to litigate and if Michael ceased to manage the company. Likewise, other essential personnel have resigned, such as LSI's former Finance Manager, Michelle Dean, who has stated that she will only return to the company once the litigation has ended, and only if Michael continues to run the company. Thus, LSI is not only at risk of revocable financial loss, but irrevocable loss of intellectual property, talent, employee satisfaction, and reputation. In such circumstances, a finding of deadlock or impracticability is appropriate.

*C. The Court Fashioned an Appropriate Equitable Remedy*

Although Pennsylvania's Business Corporation Law specifically authorizes dissolution, 15 Pa. C.S.A. § 8871, this does not otherwise limit a court's powers of equity to fashion other appropriate remedies. 15 Pa. C.S.A. § 104; Baron v. Pritzker, 52 Pa. D. & C.4th 14, 19 (Pa. Ct. Com. Pl. 2001). A court is not required by the statute to grant dissolution upon a showing of deadlock but may grant equitable relief as it deems necessary. Baron, 52 Pa. D. & C.4th at 19. "Courts sitting in equity hold broad powers to grant relief that will result in an equitable resolution of a dispute." Williams Twp. Bd. of Supervisors v. Williams Twp. Emergency Co., Inc., 986 A.2d 914, 921 (Pa. Commw. Ct. 2009); see also Matter of Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) ("The appropriateness of an order of dissolution is in every case vested in the sound discretion of the court considering the application."). However, "[t]here is no hard and fast rule applicable alike to all partnership dissolutions; rather, 'a wide discretion is necessarily vested in a court of equity.'" Hankin v. Hankin, 420 A.2d 1090, 1108 (Pa. Super. Ct. 1980). Again, due to the dearth in Pennsylvania precedent, this Court is guided by persuasive authority.

As such, courts in other jurisdictions have held that dissolution should not be granted merely because the statutory requirement of deadlock was met, but also where equitable considerations warrant dissolution as a remedy. See, e.g., Henry George & Sons, Inc. v. Cooper-George, Inc., 632 P.2d 512, 517 (Wa. 1981). A court should consider whether dissolution would be beneficial to all members, the company, and the public. Id.; Hankin, 420 A.2d at 1108-09. A court should determine "whether some remedy short of or other than dissolution constitutes a feasible means of satisfying both the petitioner's expectations and the rights and interests of [the other members.]" Matter of Kemp & Beatley, 473 N.E.2d at 1180. "[B]ut when fulfillment of the oppressed petitioner's expectations by these means is doubtful, such as when there has been a complete deterioration of relations between the parties, a court should not hesitate to order dissolution." Id.

A court should also consider the seriousness of the deadlock or dissension between the parties. Henry George & Sons, 632 P.2d at 517. For example, Pennsylvania courts, as well as courts of other states, have found dissolution warranted where the deadlock goes beyond mere disagreement and one partner or shareholder attempts to freeze out or oust the other. See Staiger, 100 A.3d at 625; Delaney v. Georgia-Pacific Grp., 564 P.2d 277, 288 (Or. 1977) (dissolution warranted where defendant shareholder's effective ouster of the plaintiff shareholder from management was unjustified and a breach of fiduciary duty).

This Court's determination as to the appropriate equitable remedy is reviewed for abuse of discretion. See Hankin, 420 A.2d at 1109 (applying abuse of discretion standard). "'[A]ppellate review of equity matters is limited to a determination of whether the chancellor committed an error of law or abused his discretion. The scope of review of a final decree in equity is limited and will not be disturbed unless it is unsupported by the evidence or demonstrably capricious.'" First Capital Life Ins. Co. v. Schneider, Inc., 608 A.2d 1082, 1084 (Pa. Super. 1992) (internal citations omitted).

This Court did not err or abuse its discretion by dissolving LSI and fashioning an appropriate remedy by adopting Plaintiff's proposed plan of dissolution.[13] The facts in this case warrant dissolution because any other form of equitable relief, including the forced buy-out that Defendants suggest, would have been inadequate to satisfy the Plaintiffs' expectations and would not have been in the best interests of LSI. This Court appropriately found that the parties are hopelessly deadlocked and that their differences are irreconcilable. Both the 2012 Operating Agreement[14] and Pennsylvania's statute authorize dissolution on these grounds. 15 Pa. C.S.A. § 8871(a)(1), (a)(4)(ii). The instant deadlock is serious enough to justify dissolution, where here, as in the case law cited above, the Defendants attempted to force Plaintiffs out of the company in violation of the Operating Agreement and in breach of their fiduciary duties.

Ordering a forced buy-out, as Defendants requested of this Court, would have been wholly inconsistent with the exercise of this Court's equitable powers. This action was initially brought by Plaintiffs to enjoin Defendants from forcing them out of the company in violation of the terms of the Operating Agreement. Rather than unlawfully seize control of the company, Defendants would have this Court judicially order Michael's departure. As such, Defendants have requested, with unclean hands, that this Court order a form of equitable relief more favorable to them. Defendants suggest that it would be equitable for this Court to grant a form of relief not much different from the conduct that Plaintiffs requested this Court to enjoin in the first place. It was not an abuse of discretion, therefore, for this Court to order dissolution, finding that a forced buy-out would be inadequate to remedy Plaintiffs' grievances. A forced buy-out also likely would have had poor consequences on LSI, as none of the Defendants are nearly as well-versed in the business's management, and multiple employees and business partners have expressed their unwillingness to work with the Defendants. A forced buy-out would have been, for all intents and purposes, the least equitable form of relief.

Moreover, the relief actually granted by this Court is not as drastic as Defendants contend. Although this Court ordered a "dissolution," as it were, it provided more specifically for LSI to continue as a going concern in the form of two separate companies, one owned by Plaintiffs and one owned by Defendants. According to the dissolution plan, each of these companies will have free and unfettered access to LSI's intellectual property, the right to offer employment to all of LSI's current employees, and to solicit business from all of its current clients.[15] Not only does this plan permit LSI to continue operations as normal, it allows the Defendants to pursue their vision of the company without being hindered by deadlock. Defendants will be the sole members of their own LSI spinoff. Should they choose, Defendants are free to employ a new CEO and President, as was their wish. Defendants are free to develop different types of products and clients, as was their wish. Defendants are free to execute a new operating agreement that incorporates the company under Florida law. Defendants will also be entitled to a distribution of seventy-five percent (75%) of LSI's remaining assets, according to their pro rata equitable share of the company, upon dissolution.

As such, this Court's "dissolution" was, in fact, a narrowly tailored plan to remove the deadlock that would have inhibited the success of LSI in the long-term. The plan then provides a means for both parties to pursue their separate visions for LSI without the need for further litigation and disharmony. The decision to grant this equitable relief cannot be described as "demonstrably capricious" and, therefore, not an abuse of discretion. First Capital Life Ins. Co., 608 A.2d at 1084.

*IV. Conclusion*

For the aforementioned reasons, this Court did not err in ordering the dissolution of LSI. The facts pertinent to establishing a cause of action to dissolve were sufficiently plead in the Plaintiffs' Complaint, and it was appropriate for this Court to consider dissolution as a remedy. The facts in this case support a finding both that the parties were hopelessly deadlocked and that LSI's business could not practicably be carried on. This Court also did not abuse its discretion in finding that dissolution was the appropriate form of equitable relief. As such, the Superior Court should affirm this Court's Order dissolving LSI in all material respects.

BY THE COURT:
Hon. Christine A. Ward

[1] This friction was apparently due, in part, to the parties' opposing views on the 2020 presidential election.

[2] Order of Court, January 19, 2021.

[3] Order of Court, February 15, 2022.

[4] 2012 Operating Agreement, art. 13.5.

[5] Order of Court, August 4, 2021.

[6] Interim Custodian John R. McGinley, Jr.'s Interim Findings of Fact and Conclusions of Law Pursuant to the Court's August 4, 2021 Order, ¶ 50.

[7] 2012 Operating Agreement, art. 12.1.

[8] 2012 Operating Agreement, art. 1.39.

[9] Dr. Robert Marzano confirmed, when interviewed by the Custodian, that Defendants rumored that Michael had stepped down from leadership in LSI due to emotional or mental problems.

[10] Article 7.11 of the 2012 Operating Agreement requires the parties to pursue alternative dispute resolution before seeking dissolution. As noted above, these attempts at resolution have proved unfruitful, reinforcing the determination that the parties are deadlocked.

[11] July 20, 2021 Hrg. Tr. at 138:15-19, 142:11-25, 143:1-2.

[12] Toth v. Toth, No. 50-2021-CA 003506-XXXX-MC (Fla. 15th Cir. Ct., filed Mar. 16, 2021).

[13] Pl. Michael D. Toth's Amended Petition to Dissolve, Ex. A.

[14] 2012 Operating Agreement, art. 12.1.

[15] Pl. Michael D. Toth's Amended Petition to Dissolve, Ex. A.

# FRAPORT PITTSBURGH INC., formerly known as Airmall Pittsburgh, Inc. v. ALLEGHENY COUNTY AIRPORT AUTHORITY

*Injunction–Irreparable Harm–Nature of Lease Similar to Services Contract–Adequacy of Monetary Damages*

*Plaintiff sought injunctive relief after the Allegheny County Airport Authority terminated its lease with Plaintiff; the lease was set to run through December 31, 2029. In the summer of 2021, the Airport Authority asked Plaintiff to consider early termination of the lease. After Plaintiff refused the request, the Airport Authority notified Plaintiff of alleged "Events of Default" by Plaintiff, which ultimately led to the Airport Authority terminating the lease without notice. The Court determined that the lease, under which Plaintiff managed Airport Authority's commercial space and carried out related acts, had characteristics more similar to a commercial services contract rather than a true real property lease. The Court further noted that specific performance of service contracts is extremely rare because monetary damages are an adequate remedy. Considering the unique business opportunity presented by a lease at the Pittsburgh Airport, Plaintiff argued it would suffer irreparable harm because termination of the lease would cause it to lose business opportunities such that Plaintiff would cease operations altogether. However, the Court found that Plaintiff's damages were not so incalculable as to warrant specific performance by the Airport Authority. Finally, in clarifying that self-help eviction does not always equate to irreparable harm, the Court held that Plaintiff had an adequate remedy at law. As such, the Court concluded that Plaintiff could not establish irreparable harm that would justify injunctive relief.*

Case No.: GD-22-007444. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

## OPINION

**I. Factual Background**

This case arises out of a lease agreement between the Defendant, Allegheny County Airport Authority ("ACAA"), and Plaintiff, Fraport Pittsburgh Inc. ("Fraport") at the Pittsburgh International Airport ("the Airport"). The ACAA is a municipal authority of Allegheny County, which owns and operates the Airport. Fraport is a business engaged in the operations and management of retail and concessions at the Airport. Fraport Pittsburgh is a subsidiary of Fraport USA and, as a business entity, exists solely for the performance of its obligations under its lease agreement with the ACAA. No other entity leases the Airport's commercial space from the ACAA, and Fraport serves no other airport.

The Fourth Amended and Restated Master Lease, Development and Concession Agreement (the "Lease" or "Master Lease"), which grants an exclusive lease in the Airport's commercial space to Fraport, was originally signed in 1991 between the ACAA and Fraport's predecessor. The current lease term, which was renewed on December 27, 2012, runs until December 31, 2029. The Lease places Fraport in the role of the Airport's Master Concessionaire and Lessee, in charge of subletting the Airport's commercial spaces to restaurants, retail businesses, and other concessions. Among Fraport's duties as Master Concessionaire are identifying and entering into subleases with commercial subtenants, managing logistics of the commercial spaces, collecting rent, and ensuring subtenant compliance with safety guidelines and regulations. The Lease requires Fraport to inspect subtenants "daily" for compliance issues and to ensure that the subtenant is properly stocked, staffed, and operating. Although the Lease does not expressly impose a security duty upon Fraport, responsibility generally for the safety and security of the Airport is shared broadly among Fraport, the Transportation Security Administration ("TSA"), the ACAA, the Allegheny County Police, and other Airport personnel. The Lease also requires Fraport to pay rent to the ACAA each month, based upon rent revenue received from subtenants during that month in the prior year, but this amount may be adjusted upon agreement of the parties. Fraport also retains a portion of the rent collected as part of its revenue.

Section 12 of the Lease provides for the procedures whereby the ACAA may terminate the Lease before expiration of the term. The ACAA can terminate the Lease if it notifies Fraport in writing of an Event of Default, which Event goes uncured for five days. An Event of Default is itself established upon the ACAA's written notification to Fraport of a breach of the Lease agreement. If a breach is left uncured for more than thirty days it becomes an Event of Default. The current dispute between the parties concerns whether and to what extent Fraport may have breached its duties under the Lease, whether Fraport successfully cured any alleged breach, and whether the ACAA followed the proper procedures in notifying Fraport of alleged breaches and ripening those alleged breaches into Events of Default before terminating the Lease.

In the summer of 2021, the ACAA approached Michael Mullaney, the newly-appointed CEO of Fraport's parent, Fraport USA, to discuss the possibility of prematurely terminating the Lease pursuant to a mutually agreeable arrangement. Namely, the ACAA offered to buy Fraport out of the remainder of the lease term for $5 million. Although Mr. Mullaney rejected the offer, he indicated Fraport USA's willingness negotiate a higher price. The ACAA, on the other hand, indicated it was not willing to negotiate further. Prior to these events, the relationship between the ACAA and Fraport was, to all appearances, cordial and successful. Nevertheless, after Fraport's refusal, the ACAA began to find issues in the parties' arrangement.

From September of 2021 through June of 2022, the ACAA attempted to identify, in writing, several Events of Default of the Lease agreement by Fraport. Among the Events of alleged Default were Fraport's failure to conduct "daily" inspections, the insufficiency of those inspections, the unilateral reduction in rent paid by Fraport during the height of the COVID-19 pandemic, the relaxation of certain safety regulations regarding access badges, and the failure to report and/or cure security risks of varying types in subtenant locations. Despite Fraport's attempts to cure those alleged Events of Default, the ACAA continued to find new ones. This back-and-forth ultimately culminated in the ACAA summarily, and without prior notice, terminating the Lease and removing Fraport from the Airport premises on the morning of June 15, 2022. In addition to escorting Fraport's employees off the premises with police officers, the ACAA took possession of personal property and confidential files that remained in Fraport's offices.

Because the merits of the underlying dispute are not at issue in this appeal, this Court need not discuss these events at length. Suffice it to say that the ACAA's grounds for terminating the Lease are dubious, given its desire to prematurely buy Fraport out of the Lease, and the procedure by which it terminated the Lease seems, at first blush, to contravene the procedures for notice and cure in Section 12 of the Lease.

Fraport promptly filed motions for special and preliminary injunctions. On June 16, this Court granted the special injunction pending resolution of the motion for preliminary injunction. The special injunction returned Fraport and its employees to the premises to conduct their business as usual. The personal property and files were also returned to Fraport's possession. However, it remained clear that the injunction was untenable long term, as Fraport's employees were escorted nearly everywhere and under

constant supervision by ACAA personnel, hampering the performance of their jobs and keeping tensions raised. This Court held an evidentiary hearing on the preliminary injunction over the course of three nonconsecutive days. On August 17, 2022, this Court issued a memorandum and order denying the preliminary injunction. Fraport appealed. This Court's reason for denying the injunction, and the subject of this appeal, was Fraport's failure to show an irreparable harm that could not be compensated adequately by money damages.

**II. ASSIGNMENTS OF ERROR**

Fraport makes the following assignments of error on appeal of this Court's Order of August 17, 2022:

1. The Court's ruling is based on the erroneous determination that the Master Lease is not a true lease involving a real property interest but rather is more in the nature of a commercial contract for services.

2. The Court's finding that Fraport did not establish irreparable harm is erroneous due to the unrebutted evidence that Fraport will likely cease to exist as an on-going business entity and this will constitute the non-compensable loss of business opportunities.

3. The Court's finding that Fraport did not establish irreparable harm is erroneous due to the evidence that implementing the concessions program at Pittsburgh Airport is a unique business opportunity, the loss of which is not compensable with damages.

4. The Court committed reversible error by failing to find that the ACAA's use of self-help to evict Fraport from the Airport constituted irreparable harm as a matter of law.

**III. STANDARD OF REVIEW**

A review of a trial court's denial of a preliminary injunction is limited to a determination of whether any apparently reasonable grounds exist for the denial. Sovereign Bank v. Harper, 674 A.2d 1085, 1091 (Pa. Super. Ct. 1996). The trial court's ruling is reversed only if there are no reasonable grounds to support the decision or the rule of law relied upon was either erroneous or misapplied. Id.

**IV. ANALYSIS**

There are six requirements for the issuance of a preliminary injunction: (1) the injunction is necessary to prevent an irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing the injunction than from granting it; (3) the injunction will restore the parties to the status quo ante; (4) the party seeking the injunction is likely to prevail on the merits; (5) the injunction is suited to abated the offending activity; and, (6) the injunction will not harm the public interest. Marcellus Shale Coalition v. Dept. of Envt'l Protection of Pa., 185 A.3d 985, 986 n.4 (Pa. 2018).

While this Court believes that Fraport may successfully meet the other elements of a preliminary injunction, this Court ultimately denied the injunction based on its failure to meet the first of these. Thus, this Opinion will be limited to addressing whether Fraport can demonstrate an irreparable harm that cannot be adequately compensated by money damages. Fraport puts forth three main bases for demonstrating an irreparable harm: (1) that its leasehold is a real property interest, the forfeiture of which is not compensable with damages; (2) that it will cease to exist as a business and/or will suffer the loss of a unique business opportunity; and (3) that self-help eviction is an irreparable harm as a matter of law.

**A. Real Property Interests**

Although, due to the multifaceted nature of property interests, injunctions are often appropriate where real property is at issue, Big Bass Lake Community Ass'n v. Warren, 950 A.2d 1137, 1145 (Pa. Commw. Ct. 2008), this Court's review of caselaw in this Commonwealth discloses no broad pronouncements that the forfeiture of property must be enjoined. To the contrary, the Superior Court has held that there is no such hard and fast rule. Consolidated Eagle, Ltd. v. BL GP, LLC, No. 407 EDA 2019, 2019 WL 6330587, *5-6 (Pa. Super. Ct. Nov. 26, 2019) (rebuffing the argument that deprivation of a real property interest constitutes irreparable harm without further showing). Rather, injunctions are often granted for real property interests when such injunctions are prohibitory in nature, such as to enforce easements and restrictive covenants. Big Bass Lake, 950 A.2d at 1145. On the other hand, the Supreme Court has cautioned against injunctions that are mandatory in nature, even when property interests are involved. Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1005, n. 13 (Pa. 2003); see also Petry v. Tanglwood Lakes, Inc., 522 A.2d 1053, 1056 (Pa. 1987).

Moreover, leases are in the nature of contracts and are controlled by contract principles. Bayne v. Smith, 965 A.2d 265, 266 (Pa. Super. Ct. 2009). "Thus, contract remedies are available to both landlord and tenant." Id. To that end, courts have often ordered specific performance (see: mandatory injunction) of real estate contracts due to real property's quintessentially unique nature. See, e.g., Oliver v. Ball, 136 A.3d 162, 166-67 (Pa. Super. Ct. 2016) ("Specific performance generally is described as the surrender of a thing in itself, because that thing is unique and thus incapable – by its nature – of duplication."). However, at bottom, the analysis comes down to the specific facts of a given case and the court's weighing of the equities. Petry, 522 A.2d at 1055-56. Importantly, equity looks primarily to substance rather than form. Edirose Silk Mfg. Co. v. First Nat'l Bank & Trust Co., 12 A.2d 40, 42 (Pa. 1940) ("[I]n equity … substance is more important than form…."). Thus, the mere recital that an interest is one of real property is insufficient to move a court of equity.

This Court's determination that Fraport has not proven irreparable harm in this specific case is based on its finding that the lease is, in substance, more in the nature of a contract for personal services rather than a transfer of a real property interest. Courts rarely, if ever, order the specific performance of personal service contracts and have instead held that damages are an adequate remedy in such cases. McMenamin v. Philadelphia Transp. Co., 51 A.2d 702, 703 (Pa. 1947); Clark v. Pa. State Police, 436 A.2d 1383, 1384-85 (Pa. 1981).[1] Such injunctions are mandatory and, as such, are reserved for extreme cases. Summit Towne Centre, 828 A.2d at 1005, n. 13. The hesitancy to enjoin wrongful termination of service contracts stems from the equitable principle that specific performance is withheld if it would cause undue hardship. Petry, 522 A.2d at 1056; Barr v. Deiter, 154 A.2d 290, 293 (Pa. Super. Ct. 1959). Specific performance is also withheld if it lacks mutuality of enforcement. Gogel v. Bazofsky, 142 A.2d 313, 316 (Pa. 1958); Bodine v. Glading, 21 Pa. 50, 53 (1853). Thus, Fraport cannot compel the ACAA to accept its performance any more than the ACAA can compel Fraport's indentured servitude.

It is an unavoidable truth that certain aspects of service contracts cannot be compensated by money damages, such as the opportunity to build skills, reputation, and relationships. However, courts often find these insufficient to overcome the problems attendant with enforcement of mandatory injunctions. See Petry, 522 A.2d at 1056-57 (burden of enforcement outweighs the uniqueness of the performance sought); Furniture Unlimited, Inc. v. Lineage Home Furnishings, Inc., Civ. A. No. 94–6276, 1995 WL 92381, *4 (E.D. Pa. Mar. 2, 1995). Equity is loath to force people to work together who do not wish to work together. Forcing people to work together necessitates constant court supervision over, and the enforcement of, a continuing series of acts that

requires cooperation and trust between the parties where none remains. Furniture Unlimited, 1995 WL at *4.[2] Here, the parties lack the cooperation and trust necessary for the continued performance of the Lease agreement that would be attendant to a preliminary injunction. Cooperation and trust are especially necessary at the Airport, where the safety and security of passengers is dependent on the ability of both parties to work as a team. Moreover, this Court would be constantly called upon to supervise and judge the quality of Fraport's performance, which would be unduly burdensome.

To be sure, this Court does not presume that the Master Lease is not a lease in any sense. The Master Lease clearly grants a leasehold interest in the Airport's commercial property to Fraport, and it contains other characteristics of a lease, such as a covenant of quiet enjoyment. However, there are other, more predominant characteristics to the contract that can only be characterized as the performance of personal services. These include managing the Airport's commercial space, collecting rent, finding and entering into subleases with businesses, performing inspections, and other related tasks. These obligations are inextricably linked with the grant of the leasehold interest. Fraport's possession of the lease means nothing without the concurrent performance these services for the benefit of the ACAA. This Court could not enforce the quiet enjoyment of Fraport's leasehold without also mandating that the ACAA accept Fraport's performance under the lease. The alternative would mean that Fraport employees could enter their office space, sit at their desks, and idly walk through the Airport's commercial space free from interference, but without performing any of their functions for the ACAA. This would be a fruitless exercise, and even office space is easily replaceable and compensable with expectation damages. Thus, the personal service nature of the Lease overshadows the leasehold interest. In such cases, courts have found damages to be an adequate remedy.

**B. Loss of Business Opportunity**

Fraport also argues that it will suffer irreparable harm because it will lose business opportunities and likely cease to exist as a business. Fraport also considers its position as Master Lessor at the Airport to be unique and irreplaceable. While several cases in this Commonwealth have recited the rote phrase that "the impending loss of a business opportunity or market advantage may be aptly characterized as an irreparable injury," the reasoning behind these decisions requires deeper analysis. The York Group, Inc. v. Yorktowne Caskets, Inc., 924 A.2d 1234, 1242-43 (Pa. Super. Ct. 2007); Carlini v. Highmark, 756 A.2d 1182, 1188 (Pa. Commw. Ct. 2000); West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295, 299 (Pa. Super. Ct. 1999); Sheridan Broadcast Networks, Inc. v. NBN Broadband, Inc., 693 A.2d 989, 995 (Pa. Super. Ct. 1997); Constantakis v. Bryan Advisory Servs., LLC, 275 A.3d 998, 1028 (Pa. Super. Ct. 2022). Much like property interests, merely reciting that one would lose a business opportunity or that one's business is unique is insufficient without also demonstrating that the loss is incalculable.

The discussion of New York's highest court on this subject in ¬Van Wagner Advertising Corp. v. S&M Enterprises, 492 N.E.2d 756 (N.Y. 1986) is instructive and helps identify plainly the common thread among Pennsylvania's precedent. In that case, the defendant breached an agreement to lease certain property for advertising space and the plaintiff sought specific performance on the grounds that the property was unique as to its location and as to plaintiff's advertising goals. Id. at 759. However, the Court of Appeals stated that uniqueness is not a "magic word" that will entitle a party to equitable relief. Id. The Court reasoned that nearly every piece of property or subject matter of a contract may be conceivably unique in some sense, but "[b]y the same token, at some level all property may be interchangeable with money." Id. Thus, the line to be drawn between what is replaceable and what is irreplaceable lies not in the abstract "uniqueness" of the contract's subject matter, but "instead in the uncertainty of valuing it." Id. at 760.

A review of the relevant Pennsylvania caselaw demonstrates that the courts of this Commonwealth are, likewise, principally concerned with the uncertainty of valuing the loss of business opportunities. In every case, the courts have reiterated that irreparable harm is, first and foremost, a type of harm that "can be estimated only by conjecture." The York Group, 924, A.2d at 1242; West Penn, 737 at 299; Carlini, 756 A.2d at 1188; Sheridan, 693 A.2d at 995. This fundamental principle carries through the analysis of business losses. In The York Group, for example, the court held that irreparable harm is met by "the disruption of established business relations which would result in incalculable damage should the competition continue in violation of the covenant. The effect of such disruption may manifest itself in a loss of new business not subject to documentation, the quantity and quality of which are inherently unascertainable." 924 A.2d at 1242 (quoting West Penn, 737 A.2d at 299) (emphasis added). Thus, it is the unascertainable nature of the loss of business opportunities which often makes it an irreparable harm. However, not in every case will these losses be unascertainable.

Fraport's argument that its opportunity to manage the commercial space at Pittsburgh Airport is unique because it is the only international airport in the metropolitan area and that it only exists as an entity to manage this commercial space is countervailing to its argument that its business loss is incalculable. In each of the cases cited above, the contractual relationships at issue existed within dynamic and competitive markets where the nonperformance of the contract would not merely result in a loss of value arising from the contract itself – which is calculable – but the concomitant loss of new customers, expanded market share, and future contracts – which is incalculable. See, e.g., Sheridan, 693 A.2d at 995 (plaintiff suffered a "potential loss of customers, profits, good will, and market advantages."); Constantakis, 275 A.3d at 1128 (plaintiffs stood to lose "clients, business opportunities, and customer goodwill."). Whereas the contracts in these cases secured for the plaintiffs a portion of the business within a wider market and would influence that enterprise's position within that market, the contract at issue here is a contract for the market itself.

The market in which Fraport operates is far from uncertain and is, in fact, rather finite. It contains only one participant: Fraport. Fraport essentially has a monopoly on commercial space at the Airport, which is, as Fraport admits, the only international airport in this geographic market. The value of the contract is represented by the whole share of the market, not just a portion of it. As such, Fraport cannot experience any loss of market advantage because either all of the commercial rent in the Airport accrues, in part, to Fraport or none of it does. There is no loss of goodwill or relationships with Fraport's subtenants because those subtenants have no option but to lease from Fraport if they want access to commercial space at the Airport. A subtenant who is dissatisfied with Fraport could not simply move to a different concourse and lease from a different master concessionaire. This is not to say that Fraport does not compete with other concession service businesses to be awarded an airport contract; but once awarded, Fraport's position is that of a monopoly for the term of the contract, making its future earnings for the remainder of the term definitively ascertainable. The only future contract to be lost in this market is another renewal of the lease term, and the only goodwill to be lost is that of the ACAA, both of which Fraport has already lost and neither of which this court is empowered to compel.

The traveling public that is present at the Airport – solely by virtue of the Airport being the location of their arrival, departure, or layover – will patronize the Airport's commercial spaces regardless of whether Fraport is there to manage those spaces. This Court appreciates that there may be some uncertainty, due to the fact that Fraport has control over the selection of businesses that operate in the Airport, which may have an effect on the volume of consumer spending and profits. Nevertheless,

this case is one where future profits are more ascertainable than not, and this Court need not speculate too greatly. The only thing susceptible to change here would be the size of the market, rather than Fraport's share of that market. After all, courts frequently must determine and award damages pursuant to a given thing's market value. There is sufficient information available, especially given Fraport's decades of presence at the Airport, to determine the general trend of Fraport's revenue and the market value of its business. There is, of course, some risk that Fraport may be undercompensated or overcompensated, but this risk is inherent in any award of relief, be it specific performance or damages. See Van Wagner, 492 N.E.2d at 760 ("In asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee.")

In any event, any such uncertainty is, again, outweighed by the attendant difficulties of enforcing the service aspects of the contract. Because Fraport's selection of businesses to occupy the commercial spaces is an aspect of its personal service for the benefit of the ACAA, this Court cannot compel the ACAA to accept Fraport's selection of businesses or other management decisions. Thus, it is a matter of weighing any uncertainty in the calculation of damages against the feasibility of enforcing specific performance of the parties' arrangement. See Petry, 522 A.2d at 1057 (ability to ascertain money damages and burden of enforcement outweighed plaintiff's interest in the uniqueness or special value of having a lake constructed on the property). This Court does not believe that the damages in this case are so incalculable as to render specific performance the preferable outcome.

**C. Self-Help Eviction**

Lastly, Fraport argues that it is entitled to a preliminary injunction because the ACAA's eviction of Fraport outside of the judicial process is itself an irreparable harm. Although this Court does not approve of the ACAA's self-help method or its unnecessary show of force by involving county police officers, this Court does not believe that any injury thereby caused to Fraport is irreparable.

Fraport sites to Berman v. Philadelphia, 228 A.2d 189 (Pa. 1967), for the proposition that wrongful removal of a tenant is an irreparable harm. However, the situation in Berman is quite different than the instant case. In Berman, the plaintiff tenants were evicted from their leased property by the City of Philadelphia's Licensing Department without use of judicial process and with the involvement of city police. The city, however, was not the tenants' landlord and did not have a contractual relationship with the tenants. Moreover, the city was protected by municipal immunity. In that situation, the Supreme Court found there to be no adequate remedy at law.

To that end, the Commonwealth Court has readily distinguished Berman on these grounds:

Appellants rely heavily upon [Berman] as authority for equitable intervention where the lessor physically repossessed leased property. We note that Berman and Vernon v. Borough of Darby, 59 Pa. Commonwealth Ct. 11, 428 A.2d 770 (1981), which followed in this Court, both dealt with the authority of a municipality to forcibly evict one in possession of a premises for an alleged violation of a zoning ordinance. In both cases, the Court held that equity could intervene to prevent forcible seizures where less drastic and more orderly procedures were available. Appellants argue that similar less drastic and more orderly procedures could have been used here. But it is the nature of the available remedy, not the use of less onerous procedures to accomplish possession, that is the issue which distinguishes those cases from the one now before us.... No [adequate] remedy was afforded to the ousted possessors of real estate in Berman or Vernon because there was no lessor/lessee relationship existing between the parties nor was there an exclusive remedy statutorily provided.

Independence Hall Parking, Inc. v. Pa. Dep't of Transp., 486 A.2d 534, 538, n. 7 (Pa. Commw. Ct. 1984). Under the reasoning of Independence Hall, where a remedy exists at law, such as where a contractual relationship exists between the parties as landlord/tenant, a court may properly find that the remedy at law is adequate. Id. As such, self-help eviction is not, as a matter of law, always an irreparable harm.

The Superior Court more recently found that an adequate remedy at law existed where tenants were evicted without use of proper judicial procedures, in violation of the Landlord/Tenant Act. Brewneer Realty Two, LLC v. Catherman, No. 188 MDA 2021, 2021 WL 971990, *3 (Pa. Super. Ct. Mar. 31, 2022). Violation of the Act alone, by resort to self-help eviction, did not necessitate a finding of irreparable harm. Id. Therefore, this Court need not find that Fraport suffered an irreparable harm due to the ACAA's flaunting of proper judicial procedures. To the contrary, and for the reasons already stated herein, this Court finds that Fraport has an adequate remedy at law.

**V. CONCLUSION**

Ultimately, this Court's denial of Fraport's request for a preliminary injunction is based on several "apparently reasonable grounds." Sovereign Bank, 674 A.2d at 1091. There were sufficient reasonable grounds to find that this Lease was predominantly a services contract, the performance of which should not be mandatorily enjoined. There were also sufficient grounds to find that, despite Fraport's loss of business, this loss is readily calculable and, therefore, adequate. Having reasonably found that Fraport has an adequate remedy at law, this Court did not abuse its discretion in denying the preliminary injunction merely on the grounds that the ACAA resorted to self-help. Thus, this Court did not err in denying Fraport's request for a preliminary injunction.

BY THE COURT:
Hon. Christine A. Ward

[1] See also RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (Am. L. Inst. 1981).

[2] See also RESTATEMENT (SECOND) OF CONTRACTS § 367, cmt. a ("The refusal [to order specific performance] is based in part upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone....").

# DELLAPOSTA PROPERTIES, LLC v. PACKAGING CORPORATION OF AMERICA, and THREE CROSSINGS 2.0, L.P. and ROBERT C. BAIERL and CATHY J. BAIERL

*Property–Prescriptive Easements–Tacking–Open and Notorious–Adverse–Width of Easement–Injunction*

*Plaintiff and Defendant own property adjacent to each other. Historically, vehicles had accessed the Plaintiff's property, in part, through a paved lot on the Defendant's property. Defendant never objected to this until a cease and desist letter was sent to Plaintiff in 2017. Because of this, Plaintiff alleged that it had acquired a prescriptive easement over this portion of the paved lot on Defendant's property. To obtain a prescriptive easement, a plaintiff must show that it and its predecessors used the portion of the property for a period of 21 years in a manner that was (1) continuous and uninterrupted, (2) open and notorious, and (3) adverse. Plaintiff had the burden of showing each of these elements by clear and convincing evidence. Defendant argued that Plaintiff could not show the 21 year period because, in order to do so, Plaintiff had to "tack" the prescriptive use of the prior owners of Plaintiff's property. Defendant argued that tacking required each successive owner to be in privity with one another. The Court disagreed and found that the requirements for adverse possession and a prescriptive easement differ, and declined to find a requirement of privity to invoke "tacking", relying on Predwitch v. Chroback, 142 A.3d 388 (Pa. Super. 1958) which stated that because easements are appurtenances of the dominant tenement, rights to a prescriptive easement pass to successive owners by conveyance of the dominant tenement. In order to be "open and notorious", the use must be visible and of such a nature and of such a frequency as to give reasonable notice to the servient land owned that the right or easement is claimed against him. As to adverse use, once the Plaintiff established sufficient evidence that the use of the land occurred for more than 21 years without evidence to explain how it began, the use is presumed to be adverse and the burden shifted to the Defendant to prove otherwise. Finally, the width of the prescriptive easement must be established by the extent of actual use during the prescriptive period. Having found Plaintiff met all of the requirements by clear and convincing evidence, the Court found that Plaintiff was entitled to a prescriptive easement, and that Defendant was enjoined from interfering with the easement rights.*

Case No.: GD-17-005321. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

## MEMORANDUM

### I. FACTS

This case arises out of Plaintiff's, Dellaposta Properties, LLC ("Dellaposta"), claim that it has acquired the rights to a prescriptive easement over neighboring property owned by Defendant, Packaging Corporation of America ("PCA"). PCA has owned that property for the entire period in question, but is in the process of selling the property to Three Crossings 2.0, L.P. ("Three Crossings"), a party Defendant to this case. Three Crossings aims to develop the property, including the section over which Dellaposta claims a prescriptive easement. PCA sent Dellaposta a letter in 2017 which requested that Dellaposta cease and desist from using PCA's property for ingress and egress. It is in the context of this sale and planned development that the instant action was commenced to protect Dellaposta's interests.

#### A. The Properties

Dellaposta has owned the property located at 2735 Railroad Street, Pittsburgh, PA ("the Dellaposta Property") since 2013. From 2006 until 2013, the property was owned by Robert and Cathy Baierl ("the Baierls"); and from 1988 until 2006, a general partnership consisting of the Baierls and their son, Robert Baierl Jr., owned the property. Adjoining the Dellaposta property to the northeast is property located at 1 28th Street, Pittsburgh, PA ("the PCA Property") owned by PCA. The PCA Property borders the Dellaposta Property on both the Dellaposta Property's northeastern edge and its northern edge.

During the period in question, buildings sat on each property.[1] The building on the Dellaposta Property has a front loading dock, which faces Railroad Street, and two side loading docks toward the rear of the property, which face the PCA Property. In between the two buildings is a paved lot and/or driveway, most of which sits on the PCA property. The northeastern property line between the Dellaposta and PCA properties is demarcated on the paved lot by a metal guardrail that sits on the Dellaposta Property. The guardrail begins on the edge of the Dellaposta Property abutting Railroad Street and traverses the northeastern boundary of the two properties along the paved lot, but it does not extend the full length of the paved lot. The paved lot continues around to the rear of the Dellaposta Property, along its northern boundary. As such, vehicles may access the rear of the Dellaposta Property by ingress and egress through the paved lot on the PCA Property.

Several telephone poles stand along Railroad Street where the paved lot abuts the street. The distance between the guardrail on the Dellaposta Property and the closest of these telephone poles to the guardrail is approximately thirty six (36) feet. This telephone pole, which will be referenced intermittently herein as "the telephone pole," is a useful landmark in describing the use and scope of the prescriptive easement. Vehicles accessing the rear of the Dellaposta Property through the paved lot may enter the paved lot from Railroad Street either between the guardrail and the telephone pole or on the other side of the telephone pole.

Dellaposta, their predecessors in interest, and their invitees and tenants used this paved lot for ingress and egress to and from the rear of the Dellaposta Property. As such, it is over a portion of this paved lot which Dellaposta now claims to have acquired a prescriptive easement.

#### B. The Period of Prescriptive Use

The Baierls' general partnership acquired the Dellaposta Property in 1988. From the time the Baierls took ownership, the Dellaposta Property was leased to and used by Wright Office Furniture, Inc. ("Wright"). Robert Baierl owned Wright. From the beginning, Wright used portions of the paved lot on the PCA's Property for ingress and egress, particularly for receipt of deliveries at the Dellaposta Property's two side loading docks. Randal Doman, warehouse manager for Wright, testified that from the early 1990s until 2013, Wright received deliveries multiple times a day at the rear loading docks. Deliveries came from third party common carriers in trucks and trailers of varying sizes, ranging from box vans to 40- and 53-foot trailers. Although Mr. Doman testified that he would provide instructions to the delivery drivers to use the Dellaposta Property's front loading dock, the drivers drove their trucks across the lot on the PCA Property to reach the Dellaposta Property's rear loading docks more often than not. Mr. Baierl testified that many of the larger trucks had difficulty maneuvering the trucks into the front loading dock, due to its location and the existence of railroad tracks on Railroad Street, and preferred to drive across the PCA Property to reach the rear loading docks. Sometimes trucks would simply pull up alongside the Dellaposta Property and would be unloaded with forklifts.

Mr. Baierl further testified that he never once conferred with PCA about his business's use of the PCA property, and that PCA never objected to the use. Indeed, neither party contends that PCA's first and only objection to the use of its property was in

its 2017 cease and desist letter sent to Dellaposta. When asked whether he ever considered that Wright's use of the PCA Property to access the rear of the Dellaposta Property was trespassory, Mr. Baierl testified that he never considered it. Curtis Lang, a PCA employee who was in charge of PCA's shipping department, offered contradictory testimony that Mr. Baierl had approached him to request permission to cross the PCA property to access the rear loading docks. However, Mr. Lang's testimony regarding this occasion was inconsistent. In his deposition, Mr. Lang testified that Mr. Baierl approached him in the early 1990s on one occasion to request permission. However, in his trial testimony, notably after the deceased Mr. Baierl was unavailable to examine, Mr. Lang testified that Mr. Baierl requested permission to access the rear loading docks through PCA's Property in order to unload carpet as part of an internal renovation of the Dellaposta Property. This purportedly occurred in 2000, not the early 1990s, and Mr. Lang testified that Mr. Baierl requested this permission as often as twice a week. The absence of this apparently significant event from Mr. Baierl's deposition testimony is telling.

Trucks that entered the paved lot normally did so between the guardrail and the telephone pole. This was a regular course of conduct throughout the Baierls' and Wright's possession of the Dellaposta Property. Mr. Lang testified that it was impossible for delivery trucks to have taken this route throughout the 1990s because that route was blocked. The basis of Mr. Lang's testimony was an arial photograph depicting the two properties of unknown date and origin. The photograph shows the paved lot between the properties, and that the area between the guardrail and the telephone pole is completely occupied by several detached trailers. Mr. Lang testified that those detached trailers were a permanent fixture of the paved lot throughout the 1990s and, as such, it would have been impossible for delivery trucks to take this route to reach the rear of the Dellaposta Property.

Although Mr. Lang testified that the photograph accurately depicted the state of the lot in the 1990s, the photograph looks to be considerably older. Even assuming that the photograph accurately depicts the properties in the 1990s, Mr. Lang testified that PCA itself received round-the-clock deliveries from trailers throughout the 1990s. Mr. Doman also testified that Wright received deliveries daily. Clearly, despite the alleged existence of trailers blocking a portion of the lot, trucks were still able to enter and access the rear of the lot in order to make deliveries at either property's loading docks.

In 2009, the Baierls engaged attorney Joseph Lawrence because they intended to place the property on the market. As part of that engagement, Attorney Lawrence wrote a memorandum to the Baierls in which he discussed their possible ownership of an express easement or a prescriptive easement over a portion of the adjoining lot. Based on language in the Baierls' chain of title regarding a certain railroad siding easement, Attorney Lawrence concluded that that easement may have extended over a portion of the paved lot. Because the railroad tracks had long since been removed, it was uncertain where that express easement was located. However, Plaintiff in this case formally withdrew its claim that the express easement granted a right of way over the lot, conceding that it did not. Attorney Lawrence's memorandum also discussed the possibility that the Baierls had acquired a prescriptive easement due to their continued use of the lot for ingress and egress without objection from PCA.

Although this memorandum did not, and does not, conclusively determine the Baierls' acquired rights over the lot, it is nevertheless helpful to understanding the Baierls' state of mind with respect to their use of the lot. At the least, Attorney Lawrence's engagement itself demonstrates that the Baierls had no real knowledge of how far the Dellaposta Property's boundary extended over the lot and were uncertain whether they possessed a right to ingress and egress over the lot. From Attorney Lawrence's memo, the Baierls would have understood that they did not own title to any portion of the paved lot over which delivery trucks regularly crossed, but that there was a possibility that they had acquired an easement due to their use.

In 2013, Dellaposta bought the property from the Baierls. The deed that conveyed the property, however, made no mention of any alleged prescriptive easement. After Dellaposta received PCA's cease and desist letter in 2017, the Baierls executed a "confirmatory deed" which purported to clarify the prior deed and/or expressly convey the purported prescriptive easement. Dellaposta continued to use the adjoining paved lot in a similar manner to their predecessors by receiving shipments from trucks of various sizes at the rear loading docks, which trucks would cross over the lot. The usual route was also the same – the trucks would enter the lot in between the guardrail and the telephone pole. This course of conduct was consistent until the 2017 letter from PCA.

**II. DISCUSSION**

To prove that an easement has been acquired by prescription, the Plaintiff must show that it and its predecessors in interest used the portion of the property in question for a period of twenty-one (21) years in a manner that was (1) continuous and uninterrupted, (2) open and notorious, and (3) adverse. Keefer v. Jones, 359A.2d 735, 736-37 (Pa. 1976). The burden of proof is on the Plaintiff to show each element by clear and convincing evidence. Vill of Four Seasons Ass'n v. Elk Mountain Ski Resort, Inc., 103 A.3d 814, 822 (Pa. Super. Ct. 2014).

**A. Continuous and Uninterrupted**

Plaintiff has, prima facie, established by clear and convincing evidence that its use of the lot as a right of way for delivery vehicles was continuous and uninterrupted for 21 years. The Baierls owned the Dellaposta Property beginning in 1988. From the beginning, Wright used all three loading docks on the property. Mr. Baierl and Mr. Doman both testified that delivery vehicles more frequently used the rear loading docks, which were only accessible by crossing over the lot on the PCA Property. This conduct continued through both the Baierl general partnership's ownership of the property and the Baierls' personal ownership of the property, which lasted until 2013. The period from 1988 to 2013 is greater than the 21-year period required. This use was also continued by Dellaposta after acquiring the property in 2013.

The Defendants contest that the use of the PCA Property in this manner was not continuous for the full 21-year period on two main grounds. First, the Defendants argue that the Plaintiff cannot satisfy the requirements of tacking the periods of use and ownership by the Baierl general partnership, which owned the Dellaposta Property from 1988 to 2006, and the Baierl family, which owned the property from 2006 to 2013. Second, the Defendants argue that Wright could not have used the lot to access the rear loading docks continuously during the 1990s, because the route between the guardrail and the telephone pole was physically blocked.

i. Tacking

Because Plaintiff, Dellaposta, has only owned the Dellaposta Property since 2013, it has not used the purported right of way for the 21 years required. As such, Defendants argue that Dellaposta must "tack" the prescriptive use of their predecessors in order to meet the requirement that the use was continuous for 21 years. Tacking requires that successive owners be in privity with one another in order to add together their successive periods of possession. Baylor v. Soska, 658 A.2d 743, 745 (Pa. 1995). The Supreme Court described the requirement of privity as "a succession of relationship to the same thing, whether created by deed or by other acts or by operation of law." Id. (internal quotations omitted). With respect to adverse possession, the Supreme Court held that "a deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but

occupied by the grantor….” Id. (internal quotations omitted). As such, inchoate rights to incomplete adverse possession cannot be tacked by successive owners unless they are explicitly included in the instrument of conveyance. Id.

However, adverse possession is notably different than an easement by prescription. While adverse possession applies to possessory estates (e.g. fee simple, life estates, etc.), prescriptive easements apply to servitudes (e.g. rights of way). Thus, their requirements differ because the nature of the right acquired differs. For example, in Pennsylvania, adverse possession requires exclusivity of possession, but prescriptive easements do not. See Percy A. Brown & Co. v. Raub, 54 A.2d 35, 44-45 (Pa. 1947). Therefore, it is not clear that the principles expressed in Baylor with respect to adverse possession are equally applicable to prescriptive easements. The Defendants cite Ocirne, Inc. v. New Trees Co., L.P, Nos. 715 EDA 2013, 885 EDA 2013, 2014 WL 10979686 (Pa. Super. Ct. Mar. 24, 2014), a Superior Court case, for the proposition that Baylor’s privity requirements apply to prescriptive easements. However, Ocirne is an unpublished opinion and is, therefore, persuasive authority that is not binding upon this Court. For the following reasons, the Ocirne opinion fails to persuade this Court.

First and foremost, Ocirne is in direct conflict with a prior, published Superior Court opinion. In Predwitch v. Chroback, 142 A.2d 388 (Pa. Super. Ct. 1958), the Superior Court reasoned that, because easements are appurtenances of the dominant tenement, rights to a prescriptive easement pass to successive owners by conveyance of the dominant tenement. The Predwitch court was invited by the appellants to apply Masters v. Local Union No. 472, 22 A.2d 70 (Pa. Super. Ct. 1941)[2], an adverse possession case that required an express conveyance to establish privity for tacking purposes. Id. at 389. Recognizing the difference between adverse possession and prescriptive easements, the Superior Court replied that “[t]hat case involved a claim of fee title to land. Such a rule has never been applied to easements, which are appurtenances of the dominant estate and require no deed or writing to support them.” Id. This distinction makes sense, because a grantor cannot convey a possessory estate in land outside the calls of the deed. Baylor, 658 A.2d at 745. However, an easement is, by definition, within the calls of the deed of the estate to which it is appurtenant. Predwitch, 142 A.2d at 389.

This reasoning also comports with the Restatement (Third) of Property: Servitudes. In comment l to section 2.17, the Restatement discusses the requirement of tacking as applied to prescriptive easements, stating that successive prescriptive users can tack prior periods of use if there is a transfer of the estate benefited by the inchoate easement.[3] The comment goes on to state that, “[t]he transfer can be made without formality, and there is no requirement that the servitude be described in any document used to transfer the dominant estate.”[4]

By contrast, the Ocirne court cites no authority to support its holding that the reasoning in Baylor “should be equally applicable to tacking prescriptive easement claims or rights.” 2014 WL at *5. The court does not discuss the legal distinctions between adverse possession and prescriptive easements or support its reasoning behind abandoning that distinction, much less address its prior decision in Predwitch. Therefore, this Court declines to follow the holding in Ocirne and instead applies the law as expressed by Predwitch.

Here, there is no dispute that there were lawful conveyances of the Dellaposta Property pursuant to a valid deed between the Baierl general partnership and the Baierls, and between the Baierls and Dellaposta. Rights to the inchoate prescriptive easement began under the ownership of the Baierl general partnership. These rights were appurtenances of the dominant estate, i.e. the Dellaposta Property. Predwitch, 142 A.2d at 389. As such, the conveyance of the Dellaposta Property, even without an express conveyance of rights to the easement, was sufficient to convey the rights to the easement to each successive owner of the dominant estate. Therefore, Dellaposta is able to satisfy the requirements of tacking the periods of prescriptive use of their predecessors in interest.

ii. The Blocked Route

Even if Dellaposta can tack the prior periods of prescriptive use, Defendants argue that Dellaposta still falls short of the 21-year requirement because the Baierls’ prescriptive use did not begin before 2000 due to the route between guardrail and the telephone pole being physically blocked. Defendants proffered a photograph of unknown date and origin which depicts the lot on the PCA Property. The area of the lot between the telephone pole and the guardrail is completely occupied by several trailers sitting next to each other. The photograph is helpful insofar as it is a visual demonstrative accompanying Mr. Lang’s testimony that trailers were parked in that location throughout the 1990s. The photograph itself, however, does little to corroborate Mr. Lang’s testimony because no approximate date with respect to when the photograph was taken has been established. Therefore, Mr. Lang’s testimony stands on its own in this regard.

While Mr. Lang testified that the area between the guardrail and the telephone pole was permanently blocked throughout the 1990s, he concluded that it would have been impossible for Wright to use the lot on the PCA Property to reach the rear loading docks on the Dellaposta Property. The Court, however, cannot reach the same factual conclusion. For one, Mr. Lang himself went on to testify that PCA received deliveries on a constant basis, almost 24 hours a day, throughout the 1990s. Like Wright, PCA’s deliveries would have arrived at its loading docks toward the rear of the paved lot. As such, it could not have been impossible for trucks to access the lot and the loading docks. Thus, either the area between the guardrail and the telephone pole was not blocked during that timeframe, or trucks were able to access the lot regardless. Given the contrary evidence of use by both parties and inability of the photograph to corroborate, this Court does not credit Mr. Lang’s testimony that the area between the guardrail and the telephone pole was permanently blocked throughout the 1990s. Therefore, prescriptive use was continuous throughout the 1990s, and Dellaposta will be able to meet the 21-year requirement.

**B. Open and Notorious**

In order to establish that use was open and notorious, “the use must be visible and of such a nature and of such frequency as to give reasonable notice to the servient land owner that the right or easement is claimed against him.” Digirolamo v. Phila. Gun Club, 89 A.2d 357, 358 (Pa. 1952). In Adshead v. Sprung, 375 A.2d 83, 84-85 (Pa. Super. Ct. 1977), the Superior Court found use of a neighbor’s driveway to be open and notorious “in light of the fact that the driveway was located immediately adjacent to the [neighbor]’s property.” Similarly, here, the lot over which delivery vehicles traversed was adjacent to the PCA Property in a manner visible from the PCA Property. This occurred during normal business hours, when PCA’s own loading docks were active.

The Defendants contend that this activity would not have placed PCA on notice because the trucks and vans entering the lot were owned and operated by third-party common carriers. As such, PCA was unable to distinguish between trucks delivering to PCA and trucks delivering to Wright. The Court, however, finds this contention unavailing. Mr. Lang testified that, in his position in PCA’s shipping department, he was involved in the scheduling, planning, and directing of inbound and outbound shipments from the PCA Property. Thus, Mr. Lang, and PCA’s shipping department generally, would have known when deliveries were expected to come and from which carriers. Delivery vehicles entering the property at unscheduled times and from unexpected carriers

would be distinguishable as destined for the Dellaposta Property, and not the PCA Property. Moreover, if a truck backed up to the rear loading docks on the Dellaposta property, it would be fair to assume that delivery was not destined for PCA. Therefore, delivery vehicles entering the property destined for the Dellaposta Property would have been visible and identifiable. As such, PCA was on sufficient notice of the Baierls' and Wright's use of the adjacent lot.

**C. Adverse**

As to the requirement of adversity, the Supreme Court has held that "where one uses an easement whenever he sees fit, without asking leave, and without objection, it is adverse…." Garrett v. Jackson, 20 Pa. 331, 335 (1853). "The owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with a claim of right by the other party." Id. at 336. Thus, where the plaintiff has adduced sufficient evidence to establish continuous use of land for more than 21 years "without evidence to explain how it began," a presumption is established that the use was adverse and the burden shifts to the defendant to prove otherwise. Id.; see also Wampler v. Shenk, 172 A.2d 313, 315-16 (Pa. 1961). However, this presumption "is not rebutted by equivocal and inconsistent declarations upon the part of the defendant." Wampler, 172 A.2d at 316. Similarly, "declarations of a predecessor in title of the one asserting the prescriptive right to the effect that he enjoyed the right of way by sufferance … were held insufficient to overcome the presumption of a grant." Steigleman v. Pa. Yacht Club, Inc., 246 A.2d 116, 119 (Pa. 1968); see also Fec v. Mickail, 265 A.2d 800, 802 (Pa. 1970).

This case is one where there is a presumption in favor of adversity because Mr. Baierl and Mr. Doman testified that they began using, and continued to use, the lot without leave or objection from PCA. The evidence also does not establish when or how this use began. Although Mr. Baierl testified that he did not know how the property was used before he bought it, he testified that the building contained all three loading docks when he bought it. Surely, the loading docks would not have been built if they were not intended to be used, and the only means of access to them is over the PCA Property. This creates a clear inference that, for as long as the building contained the rear loading docks, those loading docks were similarly used and, therefore, accessed via the lot on the PCA Property. As such, PCA has the burden to prove that Wright's use of the property was with permission. As evidence that Wright's use was not adverse, PCA proffers (1) Mr. Baierl's mistaken belief of ownership and (2) Mr. Lang's testimony that Mr. Baierl expressly sought, and was granted, permission. For the following reasons, the Court does not believe that PCA has carried its burden.

As evidence of Mr. Baierl's state of mind that he owned or had a right to access a portion of the lot, PCA points to a lone statement by Mr. Baierl in his deposition testimony that "we had ownership," and to Attorney Lawrence's memorandum to Mr. Baierl that suggested Mr. Baierl had either an express or prescriptive easement over the PCA property. As an initial matter, Pennsylvania follows the majority jurisdiction rule that subjective intent or mistake is irrelevant to the element of hostility or adversity. Zeglin v. Gahagen, 812 A.2d 558, 562, n. 6 (Pa. 2002) ("Mistake, however, does not in and of itself negate application of adverse possession in Pennsylvania."); Schlagel v. Lombardi, 486 A.2d 491, 494 (Pa. Super. Ct. 1984) ("The fact that appellant was under the false impression that he owned the land does not automatically mean that his possession was not 'hostile.'") (citing numerous precedent). As applied to prescriptive easements, the possessor's state of mind is only probative insofar as it helps the owner of the servient estate prove that possession was under "some license, indulgence, or special contract." See Genoa v. Liberatoschioli, 21 Pa. D. & C.3d 462, 470-71 (Pa. Ct. Com. Pl. 1980) ("[U]nder the great weight of authority the intent of the person seeking to assert the right to a prescriptive easement is only relevant as it may relate to or reveal the existence of factors which would establish that the property was being used by permission….").

Moreover, even if mistaken ownership negated adversity, the evidence in this case does not clearly establish that Mr. Baierl was ever mistaken. Mr. Baierl's off-handed comment in his deposition that "we had ownership" should be taken with a grain of salt due to his being a lay person upon whom the fine legal distinctions between ownership, permission, rights of way, and trespass would be lost. See Fec, 265 A.2d at 802 (holding that a lay person's statement that she had "permission" to use another's driveway was not intended to mean "permission" in the legal sense). Mr. Baierl's comment, in context, was intended to elaborate on his sentiment that "I didn't feel I had to [ask permission]." Mr. Baierl also testified that he "never really thought about" whether he was trespassing on PCA's property. Attorney Lawrence's memorandum also does not establish a mistaken belief by Mr. Baierl. In Fec, the Supreme Court held that a party's belief that they had a right of way because "I was told after 21 years that I had a right to use the driveway" was insufficient to rebut the presumption of adversity. Id. If a prescriptive user's belief that they have a valid claim for a prescriptive easement negated adversity, establishing a prescriptive easement would become a legal impossibility. Thus, Attorney Lawrence's memo does not defeat adversity.

PCA's only evidence of permission, then, is Mr. Lang's testimony that he was approached by Mr. Baierl to gain permission to use the PCA Property to access the rear loading docks. Mr. Lang's testimony is inconsistent about whether this occurred around 1993 or 2000. These events are missing from Mr. Baierl's deposition, and Mr. Baierl was not present at trial to either explain or deny these out-of-court statements. They are also inconsistent with Mr. Baierl's repeated testimony that he never asked for permission, never thought about whether he was trespassing, and did not think he needed to ask for permission. It also seems unlikely that, after using the lot for ingress and egress for a decade, Mr. Baierl suddenly decided to ask for permission. Thus, the Court finds that Mr. Baierl neither sought nor was granted permission to use the lot. As such, the Defendants have not carried their burden of establishing permissive use.

**D. Scope of the Easement**

"The width of a prescriptive easement must be established by the extent of actual use during the prescriptive period." Hash v. Sofinowski, 487 A.2d 32, 36 (Pa. Super. Cr. 1985). In this case, Plaintiff seeks to establish an easement width of 36 feet, which is the width between the guardrail and the telephone pole. The testimony established that the use of the lot to access the rear loading docks would have varied depending on the driver or the direction the truck traveled on Railroad Street. Routinely, the trucks would enter the lot between the guardrail and the telephone pole, but Mr. Doman testified to trucks also entering on the further side of the pole. Mr. Baierl testified in his deposition that, while the trucks entering between the guardrail and the telephone pole would use some portion of that 36 feet, he never witnessed a truck use the entire 36 feet of width. Thus, the use of the easement varied slightly during the course of the prescriptive period.

In this regard, Bedik Corp. v. Herrick Road Holdings, LLC, 90 N.Y.S.3d 839 (2018), a New York court opinion, is instructive. With near identical facts to the case at hand, the court held that where drivers of varying skills would not have traversed a single, specific lane of travel, a claim for a prescriptive easement was not defeated by slight variations in the path taken. Id. at 841-43. Nevertheless, a court exercising its equitable powers could limit the easement to the scope necessary for its purpose despite the variations. Id. at 843.

Although the trucks traversing the PCA Property to access the rear loading docks on the Dellaposta Property did not follow a specific lane of travel, no single truck ever used the full 36 feet of width that Plaintiff seeks. Defendants' expert on this issue testified that a typical roadway lane of travel is 9 to 12.5 feet in width. A width of 12.5 feet would account for the size of some of the larger tractor trailers entering the property, as well as provide a few feet on either side to account for the variations of different drivers. The scope of the easement, therefore, should be appropriately limited to a lane of travel of 12.5 feet in width.

**III. Conclusion**

Plaintiff has established by clear and convincing evidence that it used a portion of the PCA Property to access the rear loading docks on its property continuously, notoriously, openly, and adversely for a period greater than 21 years. The easement will extend the length of the boundary line between the two properties and be 12.5 feet in width. The use of the easement is limited for ingress and egress to access the rear of the Dellaposta Property.

**ORDER OF COURT**

AND NOW, to wit, this ¬18th day of August, 2022, the Court finds on Count I, Declaratory Judgment for a Prescriptive Easement, in favor of Plaintiff, and on Count II, Injunction, in favor of Plaintiff. Defendants are hereby enjoined from interfering with Plaintiff, its employees, agents, and/or tenants' easement rights over the property located at 1 28th Street, Pittsburgh, PA.

BY THE COURT:
Hon. Christine A. Ward

[1] Currently, the building on the Dellaposta property remains but the building on the PCA property has since been torn down.

[2] Note that Masters, 22 A.2d 70, has been abrogated by the Supreme Court in Zeglin v. Gahagen, 812 A.2d 558 (Pa. 2002), wherein the Supreme Court held that the privity requirement for tacking as expressed in Masters and in Baylor, 658 A.2d 743, was inapplicable to cases of boundary by acquiescence where Pennsylvania courts had applied a less rigorous privity requirement to pass the right to successors in interest. Based on this abrogation, it seems likely that the Supreme Court would similarly decline to extend Baylor's application to prescriptive easements.

[3] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.17, cmt. l (Am. L. Inst. 2000)

[4] Id.