Court Decides Whether Short-Term Rental Broker Requirement Is Constitutional

It is not uncommon for property owners to rent their vacation homes to short-term renters. Some individuals have made a business of marketing these short-term vacation rental properties on their own or through such internet sites as Airbnb and the like.

In *Ladd v. Real Estate Commission*, 2020 Pa. LEXIS 2764 (May 19, 2020) the Pennsylvania Supreme Court recently determined whether the requirements of a real estate "broker" under Pennsylvania's Real State Licensing and Registration Act (RELRA), 63 P.S. Section 455.101 et seq. should be deemed unconstitutional as applied to a short-term vacation property manager.

Requirements of RELRA

As a preliminary matter, RELRA sets forth the statutory licensing requirements for real estate brokers in Pennsylvania.

Under Section 63 P.S. Section 455.201, a real estate 'broker' is defined as, among other things, a "person, who, for another and for a fee,

commission or other valuable consideration … manages real estate” in Pennsylvania.

However, under Section 63 P.S. Section 455.304(10), RELRA specifically exempts from this statutory definition of a real estate “broker” “any person employed by an owner of real estate for the purpose of managing or maintaining multifamily residential property.”

RELRA requires a real estate broker to take an examination before becoming licensed to practice such real estate activities in Pennsylvania.

In order to be eligible to sit for the real estate ‘broker’ examination, a person, among other things, must “have completed 240 hours in real estate instruction in areas of study prescribed by the rules of the commission” and must “have been engaged as a licensed real estate salesperson for at least three years or possess educational or experience qualifications which the commission deems to be the equivalent thereof.”

In order to be eligible to take the examination to become a real estate salesperson that person must first, among other things, “complete 75 hours in real estate instruction in areas of study prescribed by the rules of the” Real Estate Commission.

Upon passing the examination to become a real estate broker, the person must thereafter “maintain a fixed office within this commonwealth.”

Failure to comply with these statutory licensing requirements can result in both civil and criminal sanctions under RELRA.

Ladd Manages Short-Term Vacation Rentals

Sara Ladd, a resident of the state of New Jersey, owned a couple of vacation properties near the Pocono Mountains, the opinion said.

Ladd soon used her digital marketing experience to establish an online system for booking her rental properties, the opinion said.

Other nearby property owners soon learned of Ladd’s success in managing to rent her properties and began hiring her to rent their properties, the opinion said.

Ladd eventually formed a limited liability company and launched a website to “take the hassle out of short-term vacation rentals by handling all of the marketing and logistics that property owners would otherwise have to

coordinate themselves," the opinion said.

According to Ladd, she entered into written agreements with her property owner clients to market their properties on the internet through her own website as well as listing them for rent on such websites as "Airbnb, HomeAway, Flip, Key and VRBO" and to oversee and manage the booking, billing and cleanliness of the short-term vacation rental properties.

Ladd solely owned the business and operated the majority of her business activities from her home in New Jersey, the opinion said.

Ladd's Constitutional Challenge to Application of RELRA

After the commonwealth of Pennsylvania's Bureau of Occupational and Professional Affairs called Ladd to inform her she had been reported for the alleged unlicensed practice of real estate, she shuttered her business to avoid any potential civil or criminal sanctions being levied against her.

She then filed a complaint with the Commonwealth Court of Pennsylvania, seeking declaratory judgment and a permanent injunction, in order to allow her to operate her business without the risk of incurring any civil and criminal sanctions as a matter of law.

In her complaint, Ladd alleged that the application of RELRA's requirements for a real estate broker as to her violated her substantive due process rights pursuant to Article I, Section 1 of the Pennsylvania Constitution because it imposed unlawful burdens on her right to pursue her chosen occupation.

Article I, Section 1 of the Pennsylvania Constitution provides that "all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

In *Nixon v. Department of Public Welfare*, 839 A.2d 277 (Pa. 2003), the Supreme Court found that included within the right to possess property under the cited section of the Pennsylvania Constitution is the right to pursue a chosen occupation.

However, the *Nixon* court stated that, unlike the rights to privacy, marry, or procreate, the right to choose a particular occupation should not be deemed fundamental.

Rather, according to the Nixon court, “the right is not absolute and its exercise remains subject to the General Assembly’s police powers, which it may exercise to preserve the public health, safety, and welfare,” … “but, the General Assembly’s police powers are also limited and subject to judicial review.”

According to the test enunciated by the Supreme Court in *Gambone v. Commonwealth*, 101 A.2d 634 (Pa. 1954), “a Pennsylvania statute that violates substantive due process is subject to a ‘means-end review’ where the court ‘weighs the rights infringed upon by the law against the interest sought to be achieved by it, and also scrutinizes the relationship between the law (the means) and that interest (the end).’”

In *Gambone*, the Supreme Court emphasized that “the level of scrutiny applied to that means-end review is dependent upon the nature of the right allegedly infringed.”

Since the right in *Ladd* was not fundamental, it was subject to rational basis review, which, under Pennsylvania law, is less deferential to the legislature than its federal counterpart, however.

Quoting the *Gambone* court, under heightened rational basis test:

“A law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts.”

The commonwealth filed preliminary objections in the nature of a demurrer, challenging the legal sufficiency of her constitutional claim.

The Commonwealth Court ultimately sustained the commonwealth’s demurrer and dismissed Ladd’s complaint, holding that RELRA’s broker requirements are constitutional as applied to her.

In doing so, the Commonwealth Court applied the heightened rational basis test announced in *Gambone*.

In *Gambone*, the Supreme Court held "a law restricting social and economic rights, like the right to pursue a lawful occupation, 'must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.""

Applying the heightened rational basis test set forth in *Gambone* to the factual circumstances set forth in Ladd, the Commonwealth Court concluded "RELRA bears a real and substantial relationship to the interest in protecting from abuse buyers and sellers of real estate and is similar to licensing requirements in other fields."

In doing so, the Commonwealth Court did recognize that "RELRA's requirements would likely be 'unduly burdensome' to Ladd due to the 'small volume of real estate practice she conducted,' but 'the Pennsylvania Constitution does not require the General Assembly to establish a tiered system for every profession that it regulates" to account for such disparities."

Ladd filed a direct appeal to the Supreme Court and the Supreme Court granted permission to hear the merits of the appeal.

On appeal, the Supreme Court analyzed whether Ladd's complaint raised a colorable claim that RELRA's broker requirements are unconstitutional as they applied to her because they are, in that context, unreasonable, unduly oppressive and patently beyond the necessities of the case, thus outweighing the government's legitimate policy objective.

Justice Kevin M. Dougherty wrote the opinion issued by the majority of the Supreme Court, reversing the Commonwealth Court's order dismissing Ladd's complaint and remanding the case for further proceedings consistent with their opinion.

The Supreme Court first addressed whether the statutory requirements of RELRA, as applied to Ladd, should be deemed unreasonable, unduly oppressive, or patently beyond the necessities of the case.

Acknowledging that the issue is one of first impression for the Supreme Court, it noted that decisions from other jurisdictions that have conducted a *Gambone*-like analysis in the context of occupational licensing requirements were instructive.

The Supreme Court in *Ladd* primarily relied upon the Texas Supreme Court's ruling in *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015).

In *Patel*, the Texas Supreme Court struck down a statute that required eyebrow threaders to obtain a cosmetology license because it violated the due course of law provision of the Texas Constitution.

The *Patel* court applied a rational basis test, similar to the one set forth in *Gambone*, to determine the regulation was unconstitutional as applied to these individuals, who perform a very specific, limited cosmetology service.

The *Patel* court "considered how much of the hundreds of hours of coursework, including practical training, required for cosmetology licensure was completely unrelated to the specific service of eyebrow threading and determined the licensing requirement imposed a significant cost that was an unduly burdensome means to achieve the government's health and sanitation end."

In comparison, the Supreme Court in *Ladd* pointed out that Ladd "similarly faced with 315 hours of coursework (75 hours for her salesperson license and 240 for her broker license) in various topical areas that pertain to the work of traditional real estate brokers, but not to the services contemplated by her unique business model."

The Supreme Court in Ladd emphasized that "[t]he only topics listed that are arguably related to her services are the general two-credit "Commission-developed or approved law course" and maximum four-credit "Real Estate Law" and "Residential Property Management" courses that satisfy at most 150 hours of the 315 hour requirement."

Furthermore, the Supreme Court in *Ladd* stated that, "because the broker coursework cannot be completed until the salesperson coursework and apprenticeship are satisfied, Ladd's burden is substantially increased because she would have to forego her own profits for three years while she completes the licensure requirements."

"Considering both the quantity of nonrelevant hours and the cost of completing those hours, the three- year apprenticeship requirement, adding to the equation the lost opportunity cost of shuttering her business during the apprenticeship", the Supreme Court in Ladd concluded that she "stated a claim that the broker license requirements are unreasonable, unduly oppressive and patently beyond the necessities of the case."

Moreover, the Supreme Court in *Ladd* also reasoned that "the brick and mortar office requirement, as applied to Ladd's self-described business model, appears to be disproportionate to the government's interest in

safeguarding the public from fraudulent practices by those who 'trade in real estate," in that such a requirement to obtain a physical office space in Pennsylvania would be tantamount to an excessive fee for entry into a profession since her business model was only sustainable because she was able to provide quality services with limited overhead, and requiring additional overhead, including rental or mortgage, taxes, insurance, and maintenance of a property would not further the statutory objectives of RELRA.

The Supreme Court in *Ladd* was further persuaded that the application of RELRA to Ladd is unconstitutional when considering that person who manage and facilitate rentals of lodging in apartment complexes and duplexes situated in on behalf of their property owners are completely exempt from the RELRA's broker licensing requirements.

While the Supreme Court in *Ladd* believed that she technically fell within the statutory definition of a real estate "broker", it concluded that her business model—as described in her complaint—was more closely analogous to the services provided by these exempt individuals than to those of a real estate "broker."

Furthermore, the Supreme Court in *Ladd* noted that her business would not operate without regulation and oversight in the absence of a broker license since the services her business provided would, in its estimation, fall under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. Section 201-1 *et seq.*, the state consumer fraud statute which prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

The Supreme Court in *Ladd* then briefly discussed whether the commonwealth's police power was being exercised in a manner that bears a real and substantial relation to the purported policy objective.

In a conclusory statement, the Supreme Court stated that "it is not clear and 'without a doubt' those requirements bear a real and substantial relation to the statutory goal of protecting the public from fraud."

Ruling Illustrates Court's Protective View in Regards to Tenants' Rights

Last week, the Pennsylvania Superior Court in *Frempong v. Richardson*, 2019 Pa. Super. 139 (Apr. 30, 2019) overturned that ruling and, for the time being, clarified the statutory rights and obligations of residential landlords and tenants in Philadelphia under the Philadelphia Code.

Under Section 9-3202 of the Philadelphia Code, which is titled "Rental Licenses," "no person shall collect rent with respect to any property that is required to be licensed pursuant to this section unless a valid rental license has been issued for the property."

In Philadelphia, every property owner who leases a residential dwelling must obtain a housing inspection license for that dwelling. The housing inspection license is issued by the city of Philadelphia's Department of Licenses and Inspections (L&I) and must be renewed on an annual basis for a fee.

Additionally, under Section 9-3903 of the Philadelphia Code, which is titled "Certificate of Rental Suitability; Required Tenant Documents," an "owner of a property for which a rental license is required, at the inception of each tenancy, provide to the tenant a certificate of rental suitability that was issued by the department no more than 60 days prior

to the inception of the tenancy" as well as "a copy of owner's attestation to the suitability of the dwelling unit … and a copy of the City of Philadelphia Partners for Good Housing Handbook."

As a practical matter, the certificate of rental suitability is obtained online on L&I's website.

L&I will only issue a housing inspection license and a certificate of rental suitability for a leased premises if there are no violations of public record existing against the leased premises and the property owner is in good standing with the city of Philadelphia from a financial point of view (i.e., owing no monetary obligations such as taxes, etc. with Philadelphia).

The property owner obtains the certificate of rental suitability from L&I immediately upon applying for it online, assuming the property owner meets the criteria set forth above.

After obtaining the certificate of rental suitability, the property owner must sign and deliver it to the tenant, along with the associated partners for the good housing handbook that may also be obtained online on L&I's website.

The partners for the good housing handbook sets forth the rights and obligations of leasing parties in the context of residential housing in Philadelphia.

Under Section 9-3901(4)(e) of the Philadelphia Code, if a property owner fails to obtain a rental license or provide the tenant with the signed certificate of rental suitability and the associated partners for the good housing handbook, then the property owner "shall be denied the right to recover possession of the premises or collect rent during or for the period of noncompliance."

Interpreting the language set forth in Section 9-3901(4)(e) of the Philadelphia Code, Padilla in *Frempong* concluded that any property owner that does not comply with the requirements to obtain a rental license or provide the tenant with the certificate of rental suitability and the associated governmental handbook may only be denied the right to recover possession of the leased premises or to collect rent during or for the period of noncompliance.

In doing so, Padilla allowed the landlord in *Frempong* to obtain possession of the leased premises even though they failed to comply with the requirements set forth in the Philadelphia Code.

On appeal, the Superior Court in *Frempong* addressed whether Padilla correctly interpreted Section 9-3901(4)(e) of the Philadelphia Code under the circumstances.

The tenants in *Frempong* argued on appeal that the disjunctive word "or" in that section of the Philadelphia Code should be read conjunctively as "and" and, thus, a landlord who fails to obtain a housing inspection license for a leased premises and fails to obtain and deliver a signed certificate of rental suitability and good partners for the housing handbook to a tenant should be barred for recovering possession of the leased premises and obtaining rent from the tenant for the period of noncompliance.

In so arguing, the tenants in *Frempong* emphasized that Padilla ignored Section 9-3902(1)(a) of the Philadelphia Code which provides that "no person shall collect rent with respect to any property that is required to be licensed pursuant to this Section unless a valid rental license has been issued for the property."

In *Frempong*, the Superior Court reviewed the question of statutory interpretation de novo.

Quoting another panel of the Superior Court in *Wagner v. Wagner*, 887 A.2d 282 (Pa. Super. Ct. 2005), the court in *Frempong* noted that "our state appellate courts have consistently held that when 'applying the normal rules of statutory construction, the presence of disjunctive word 'or' in a statute indicates that elements of statute are met when any particular element is satisfied, regardless of whether other elements are also met.'"

Despite the foregoing, the Superior Court in *Frempong* disagreed with Padilla in her application of the word "or" in Section 9-3901(4)(e) and concluded that residential landlords in Philadelphia are prohibited from recovering rent as well as possession of the leased premises when the landlord lacks a housing inspection license and fails to obtain and provide a tenant with a signed certificate of rental suitability and the partners for the good housing handbook.

The Superior Court in *Frempong* pointed out that "the statute is written in the passive voice ('shall be denied') and in reading the entire context of the statute it interpreted Section 9-3901(4)(e) to mean that a noncompliant owner may not recover possession 'or' collect rent, meaning he cannot receive either."

Lesson Learned

The Superior Court's ruling in *Frempong* will almost definitely be appealed to the Pennsylvania Supreme Court. The question remains whether it will hear the appeal or simply allow the ruling to remain as law.

Either way, the ruling did not address what happens if and when a noncompliant landlord becomes compliant under the Philadelphia Code. In other words, the Philadelphia Code does not prohibit landlords from collecting back rent or gaining possession during the period of noncompliance after returning to compliance.

Currently, the judges in the Philadelphia Municipal Court, where most residential landlord-tenant disputes in Philadelphia are adjudicated, will not allow a landlord to collect rent or obtain possession for any period of noncompliance even when the landlord subsequently becomes compliant.

However, I could see a situation where the Supreme Court "cuts the baby in half" so to speak and upholds the Superior Court's interpretation of the Philadelphia Code but rules that a landlord in Philadelphia who eventually becomes compliant may then collect rent and obtain possession for that period of noncompliance.

It Is A Risk For

Real Estate Agents To Represent Both The Seller And Buyer

From my perspective, it is difficult for that real estate agent and broker to zealously represent these competing interests. What is good for the seller may not be good for the buyer, and vice versa.

In *Antantis v. Kolarosky*, 2020 Pa. Super. Unpub. LEXIS 878 (March 11, 2020), the Pennsylvania Superior Court recently upheld a jury verdict entered in favor of a disgruntled married couple against their real estate agent and broker (who also represented the seller during the real estate transaction) after they experienced significant issues with the property they purchased after closing took place.

In *Antantis*, Paul D. Kolarosky retained the services of Remax Community Real Estate to sell his property located in Washington County, Pennsylvania.

Julie Ann Graham, a real estate agent at Remax, was listed as the real estate agent in charge of marketing the property for sale.

William H. Antantis Jr. and Jenna Antantis ultimately retained Graham, through Remax, as their real estate agent. Graham, through Remax, represented the Antantises when they entered into a written agreement with Kolarosky to purchase the property for $149,500.

According to the Antantises, they did not perform an inspection of the property prior to closing because they relied upon advice from Graham

that an inspection was unnecessary.

The Antantises asserted that Graham advised them that "'there was no point' in having a home inspection, and that getting one done prior to closing would be a 'waste of money.'"

Rather, according to the Antantises, Graham offered to provide them with a copy of an inspection report from a prior potential buyer who chose not to purchase the property.

Prior to closing, an issue arose about the size of the property, the opinion said.

According to the advertising materials for the property, the property consisted of 4.46 acres, the opinion said.

When the Antantises received information that the property may only contain approximately 3 acres, they approached Graham about the situation, the opinion said.

Rather than advising the Antantises to obtain a survey of the property, according to the Antantises, Graham indicated to them a survey showing the property contained 4.46 acres was available from Kolarosky and would be provided to them at closing, the opinion said.

Although that survey was supplied to them at closing, Graham later admitted that the survey was unclear and that, prior to her involvement with the Antantises, she changed the property listing acreage from 3 acres to 4.46 acres at the insistence of Kolarosky, the opinion said.

After closing took place, the Antantises discovered that the property was only approximately 3 acres in size and also encountered several problems that were water related that led to the growth of black mold in their home.

The Antantises subsequently filed a complaint against Graham and Remax, among others, as it related to the damages they sustained due to the size and physical condition of the property.

At trial, the Antantises prevailed against Graham on counts of misrepresentation and breach of contract and against Remax on a count of misrepresentation.

The jury entered a verdict in favor of the Antantises on their claim of breach of contract against Graham, awarding them $25,000 to compensate

them for the absence of the 1.46 acres, determined by the percentage breakdown from the tax assessment applied to the property's appraised value.

The jury also found that both Graham and Remax committed fraud regarding the mold on the property and awarded the Antantises additional damages of $52,008, as outlined on a mold remediation plan they submitted into evidence at trial.

Graham and Remax ultimately appealed the jury verdicts to the Superior Court.

The Superior Court in *Antantis* first addressed Graham's contention that the jury's verdict on the breach of contract count could not be proven as a matter of law because the written contract between her and the Antantises was never introduced into evidence.

The Superior Court flatly rejected that contention.

While acknowledging that the written contract was never admitted into evidence at trial, the Superior Court found that there was sufficient evidence to make out the breach of contract claim against Graham, noting that she testified at trial that she acted as the Antantises' real estate agent and that she had explained to them how it would be possible to serve in a dual capacity as a real estate agent of both a buyer and a seller.

Furthermore, the Superior Court noted that the written agreement entered into between the Antantises and Kolarosky also established that a contract existed between Graham and the Antantises.

According to the Superior Court, once the existence of the contract between Graham and the Antantises was established, it was not necessary for the exact written terms of the contract to be introduced, since those terms were irrelevant for present purposes because the issue involved not a breach of a specific term but rather a lack of good faith.

Citing to both *Kaplan v. Cablevision of Pennsylvania*, 671 A.2d 716 (Pa. Super. Ct. 1996) and *LSI Title Agency v. Evaluation Services*, 951 A.2d 384 (Pa. Super. Ct. 2008), the Superior Court in *Antantis* noted that "every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement" and "this duty of good faith and fair dealing may be enforced in a breach of contract action."

The Superior Court in *Antantis* reasoned that the jury had sufficient

evidence to conclude that Graham and Remax breached their contract with the Antantises when Graham mislead them about the size of the property.

The Superior Court in *Antantis* next addressed the challenge made by Graham and Remax as to the fraud claim asserted against them by the Antantises with regards to the existence of black mold in the property.

Graham and Remax argued that any misrepresentation that the Antantises received about mold originally came from Kolarosky and was not intentionally conveyed to them by Graham, who never claimed to have personal knowledge of the property's condition.

Relying upon *Aiello v. Ed. Saxe Real Estate*, 499 A.2d 282 (Pa. 1985), the Superior Court stated that "real estate agents are responsible for misrepresentations, both willful and negligent."

Quoting *Glanski v. Ervine*, 409 A.2d 425 (Pa. Super. Ct. 1979), the Superior Court pointed out that "even when a real estate broker's false statement is innocently made, a 'material misrepresentation may be found whether the agent actually knew the truth or not, especially where, as here, it was bound to ascertain the truth before making the representation.'"

The Superior Court in *Antantis* noted that there was sufficient evidence from which the jury could conclude that the Antantises carried their burden of proving Graham's negligent misrepresentation, making Graham and Remax liable for their resulting damages.

Even if Graham did not know or explicitly claim to know whether the house had mold, the Superior Court in *Antantis* found that "she still dissuaded the Antantises from having the home inspected for that defect without making a reasonable investigation of the truth of her advice" and, in following the advice of their real estate agent to their detriment, the Antantises, in their own relative inexperience in the real estate industry, suffered damages due to the existence of black mold in their home.

The Superior Court in *Antantis* also determined whether Remax should be held liable on the fraud claim for Graham's conduct because she was an independent contract, not an agent or employee, of Remax.

In making this determination, the Superior Court in *Antantis* noted that the Pennsylvania Supreme Court rejected a similar argument under analogous circumstances in *Aiello*.

In *Aiello*, the Supreme Court concluded that, after reviewing the underlying factual circumstances, a real estate agent was not deemed an independent contractor of the real estate agency and that the agency could be liable for the real estate agent's misrepresentations.

The Superior Court in *Antantis* relied upon the following evidence submitted at trial which established the test for agency in the real estate context—Graham maintained an office at Remax's physical office location, Remax assigned Graham to the property after Kolarosky called Remax's main office line for representation in the sale of his property, and the contract entered into between Kolarosky and Remax authorized Remax to compensate its "subagents, buyer-agents and transactional licensees including the share of part of its commission."

Lessons Learned

When a real estate agent and broker represents both sides of a such a real estate transaction, some of the knowledge of the property may be imputed unto them.

Furthermore, the advice, or lack thereof, given by the real estate agent and broker to their buyer will be heavily scrutinized and critiqued.

For these reasons, the real estate agent and broker must determine whether the reward (i.e., the added commission representing the buyer) outweighs the risks associated with representing the seller and buyer in the same transaction.

Superior Court Addresses Partition Action In 'McGoldrick'

In *McGoldrick*, Megan Murphy and Joseph McGoldrick, a couple engaged to be married at the time, purchased a home together in Royersford, Pennsylvania, the opinion said.

According to the opinion, since McGoldrick had the financial wherewithal to close on the home and Murphy was more creditworthy than McGoldrick, they agreed that McGoldrick would withdraw the needed money from his retirement fund to purchase the home and Murphy would solely enter into the mortgage note.

Prior to closing, McGoldrick separately withdrew $5,000 and $47,000 from his retirement account that was applied to the home purchase, the opinion said.

As part of the mortgage loan application, Murphy's bank required McGoldrick and her to execute a gift letter to document the source of each payment he made to her and to verify that her receipt of these payments constituted a gift to be applied toward the home purchase and should not constitute a loan between them, the opinion said.

In the gift letters, McGoldrick confirmed that his relationship to Murphy as "fiancé" and that the payments should be deemed a "gift is to be applied toward the purchase of the home" and that "no repayment of the gift is expected or implied in the form of cash or by future services of the recipient," the opinion said.

After the home purchase, they began sharing all home-related expenses. Murphy ultimately ended her engagement to McGoldrick and moved out of the home but continued to pay all home-related expenses.

McGoldrick then filed an action for partition with the Common Pleas Court in order to compel a sale of the home.

Soon thereafter, the parties entered into a stipulated court order specifically providing that they "expressed their agreement to list the home for sale and further agree that the proceeds of the sale shall be placed in escrow with the title company" and "absent an agreement between the parties, the trial court shall be notified upon the sale of the home at which time chambers shall promptly schedule this matter for a one-hour hearing to address division of assets."

After the home sold, the sale proceeds were placed in escrow, the opinion said.

As the parties could not agree on the division of the sale proceeds, the trial court held the agreed-upon hearing.

After the hearing took place, the trial court entered an order dividing the sale proceeds by awarding a sum equal to half of the money Murphy paid on home-related expenses in excess of what McGoldrick did to her and a sum to McGoldrick for the remaining sale proceeds to account for the gifts he made to her when they initially purchased the home together.

Murphy appealed the trial court's ruling to the Superior Court.

Murphy first questioned whether the stipulated court order should ultimately have been interpreted as an order of partition requiring an equal distribution of the proceeds received from the sale of the home, subject to an equitable adjustment in her favor based upon her overpayment of the home-related expenses.

As noted by the Superior Court in *McGoldrick*, Rules 1551 through 1574 of the Pennsylvania Rules of Civil Procedure govern "the procedure in an action for the partition of real estate."

In Pennsylvania, the Superior Court in *McGoldrick* noted that the Pennsylvania Rules of Civil Procedure are split into two, distinct parts—Rules 1551 through 1557 (Part 1) and Rules 1558 through 1574 (Part 2).

Under Part 1, the trial court must ascertain whether the parties jointly

own the real estate in question and, if so, what fractional legal interests in the property does each party hold.

Rule 1557 dictates that "the trial court shall enter an order directing partition that shall set forth the names of all the co-tenants and the nature and extent of their interests in the property" and "no exceptions may be filed to an order directing partition."

After an order of partition under Part 1 has been issued, under Rule 1570, the trial court may "divide the partitioned property among the parties, force one or more of the parties to sell their interest in the land to one or more of the parties, or sell the land to the general public and distribute the proceeds among the parties."

Murphy contended that the stipulated court order that "memorialized the parties' agreement regarding the sale of the home and the distribution of the sale proceeds followed by the actual sale of the home abrogated the need to record a Part 1 partition order, but nevertheless served the purpose of a Part 1 partition order."

Once the sale occurred, Murphy argued that "the joint tenancy was terminated … and the proceeds turned into a tenancy in common—the same result as a recorded Part 1 order."

Murphy then stated the hearing which occurred afterward "constituted the Part 2 hearing where the parties presented 'evidence of monetary contributions as set-offs toward owelty.'"

In doing so, Murphy sought one-half of the sale proceeds plus a sum equal to the overpayment of home-related expenses that she was already awarded by the trial court.

The Superior Court in *McGoldrick* flatly rejected Murphy's argument.

In essence, the Superior Court in *McGoldrick* concluded that the parties preempted the issuance of a Part 1 order by agreeing "to sell the home and, if need be, allow the trial court to divide the sale proceeds, which the agreement was memorialized in the court order."

According to the Superior Court in *McGoldrick*, "when the home sold, Murphy and McGoldrick no longer had legal interests in the home" and "consequently, and despite Murphy's insistence to the contrary, at the time of the sale, the procedural rules, as well as the case law, that govern an action for the partition of real estate ceased to apply simply because the sale of the home extinguished the parties' legal interests

and there was no longer any real estate to partition."

"Murphy next claimed that the trial court erred when it concluded that the $52,000 McGoldrick contributed to purchase the home was a conditional gift in contemplation of marriage because the plain language of the gift letters executed by the parties constituted an express waiver of repayment that trumps case law on conditional gifting."

In Pennsylvania, gifts made in contemplation of marriage must be returned to the donor regardless of who was at fault for ending the relationship, as reiterated by another panel of the Superior Court in *Nicholson v. Johnston*, 855 A.2d 97 (Pa. Super. 2004).

Murphy nonetheless asserted that the execution of the gift letters issued by McGoldrick when Murphy applied for and obtained a mortgage loan in connection with the purchase of the home constituted a waiver by McGoldrick that his gift of $52,000 toward the purchase of the home was conditioned on marriage because the gift letters that they signed state that "no repayment is expected or implied."

The Superior Court in *McGoldrick* was unpersuaded by this assertion and instead emphasized that McGoldrick made "the $52,000 gift for the purpose of purchasing a marital residence for them to live in as husband and wife and the gift letters were necessary to achieve that purpose and did not extinguish the condition upon which the gift was given—the occurrence of marriage."

Lessons Learned

The underlying circumstances encountered by the litigants in *McGoldrick* are not too uncommon. Nowadays, many individuals who are romantically involved purchase homes together before they are married. When the relationship sours before they ever marry, they suddenly face the prospect of a real estate divorce (i.e., a partition action).

In order to avoid the outcome of the litigants in *McGoldrick*, the unmarried couple should seriously consider entering into a written agreement setting forth how monies used for their home purchase would be accounted for at the time of separation and the responsibilities of the parties for home-related expenses while they are residing at the home together.

Superior Court Takes Up Statute Of Frauds And Oral Agreements In 'Wilson'

In *Wilson v. Parker*, 2020 Pa. Super. LEXIS 42 (Jan. 24, 2020), the Pennsylvania Superior Court cautioned, however, that, even if an oral agreement to purchase real estate runs afoul of the doctrine of the statute of frauds, the attempted buyers can still recover monetary damages against the property owner under a claim for unjust enrichment.

In 2008, when Alison and David Wilson moved to Bedford County, they began leasing a trailer owned by Chad and Jessi Parker, the opinion said.

The Wilsons orally agreed to pay rent to the Parkers in the amount of $400 per month, the opinion said.

About a year later, the parties agreed that the Wilsons would not only purchase the trailer from the Parkers for $1,000, but also the land upon

which the trailer was situated for $10,000.

Thereafter, the Wilsons immediately paid the $1,000 due to the Parkers for acquisition of the trailer and continued to pay rent to them in the amount of $100 for a few months until they paid them the agreed upon $10,000 for the purchase of the land, the opinion said

The Wilsons paid no additional rent to the Parkers after making the agreed-upon payment of $10,000 for the land.

Over the next seven years, the parties had many interactions regarding the formal transfer of the property, but no deed was ever executed or recorded.

During this period of time, the Wilsons made improvements to the property that amounted to $11,228.19, the opinion said.

When Chad Parker ultimately stated his intention not to sell the property to the Wilsons, the Wilsons filed a civil complaint against the Parkers in the Bedford County Court of Common Pleas for, among other things, specific performance and unjust enrichment.

After the bench trial took place, the trial court judge not only refused to compel the transfer of the property to the Wilsons based upon the doctrine of the statute of frauds, but he also denied their claim for unjust enrichment and ordered that they relinquish their possession of the land to the Parkers.

The Wilsons appealed the trial court’s ruling to the Superior Court.

Prior to the Superior Court handing down its opinion, the Wilsons did, indeed, relinquish their possession of the land to the Parkers.

On appeal, the Wilsons only challenged whether the trial court erred in denying their claim for unjust enrichment for the purchase price and cost of repairs and improvements after their oral contract to purchase the land was deemed unenforceable.

The Superior Court ultimately agreed with the Wilsons that the trial court judge misapplied the law of unjust enrichment.

The Superior Court first addressed the trial court judge’s belief that the lack of a legally binding contract between the Wilsons and the Parkers barred the Wilsons from recovering monetary damages against the Parkers for unjust enrichment under the circumstances.

The Superior Court emphatically stated that “the absence of an enforceable contract is not, as the trial court held and as Chad Parker claims, ‘fatal to the Wilsons’ claim for unjust enrichment,’” but rather reasoned that “the absence of an enforceable contract at law is the seed from which an unjust enrichment claim in equity sprouts” in that “the quasi-contract theory of … unjust enrichment, by definition, imply that no valid and enforceable written contract exists between the parties” and “critically … the doctrine of unjust enrichment is inapplicable when the relationship between parties is founded upon a written agreement or express contract.”

The Superior Court emphasized that “the Wilsons had every right to pursue that alternative theory once the trial court denied specific performance due to the statute of frauds.”

Citing to *Meyer, Darragh, Buckler, Bebenek & Eck v. Law Firm of Malone Middleman,* 179 A.3d 1093 (Pa. 2018), the Superior Court then discussed whether the Wilsons met their burden at trial in establishing the following elements for a claim of unjust enrichment: “benefits were conferred on defendant by plaintiff; appreciation of such benefits by defendant; and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.”

In analyzing the situation, the Superior Court cautioned that, “in determining if the doctrine applies, the focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.”

The Superior Court in *Wilson* found that the payment of $10,000 made by the Wilsons to the Parkers clearly satisfied the first two elements for a claim of unjust enrichment, as articulated by the Pennsylvania Supreme Court in *Meyer*, because the payment was a benefit that the Wilsons conferred onto the Parkers and the Parkers realized that benefit when the Parkers accepted the payment.

As for the third element (whether the “acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value”), the Superior Court noted that, when a court declines to enforce an oral contract for the sale of land under doctrine of the statue of frauds, that court will generally return the parties to the position they occupy prior to the barred real estate transaction.

The Superior Court then relied upon the Restatement (Second) of Contracts

Section 375, which, according to the Superior Court, “makes clear, returning the funds to the Wilsons vindicates the statute of frauds by fully rescinding the unenforceable, oral contract to sale the land that the Parkers and Wilsons allegedly formed.”

Comment (a.) to Section 375, which is titled ‘Restitution generally available,’ provides that “parties to a contract that is unenforceable under the Statute of Frauds frequently act in reliance on it before discovering that it is unenforceable. A party may, for example … make improvements on land that is the subject of the contract. The rule stated in this section allows restitution in such cases.”

The Superior Court did not believe that the Wilsons should receive the entire amount of $10,000 back from the Parkers since they also resided on and had the exclusive use and possession of the land for seven years.

The Superior Court pointed out that “the restatement covers this exact scenario in Illustration #2 of Section 375: by providing that the would-be buyer recoups both her purchase price (minus the value of using the land—i.e., rent) and the cost of improvements made during her time in possession of the property.”

Since the Parkers rented the land to the Wilsons for a short period of time at the rate of $100 per month prior to their receipt of the payment of $10,000 from them, the Superior Court reduced the monetary damages related to the $10,000 payment by $9,000, an amount equal to the rent they would have paid for the seven years they used the land until they relinquished possession of the land after the trial court’s ruling.

The Superior Court held that the Wilsons’ claim for unjust enrichment based upon the improvements they made to the land is equally meritorious under the law.

The Superior court flatly rejected Chad Parker’s attempt to discount the $11,228.19 as having afforded him no benefit based upon his assertion that the trailer would need to be torn down.

In so doing, the Superior Court stated “that the roof and the deck were attached to the land—not the trailer—and there was no testimony that those improvements were to be demolished” and, “even if Chad Parker removes those constructions in the future, the Parkers still reaped and retained benefits from them for a time.”

Lessons Learned

The Superior Court's ruling in *Wilson* merely confirms that, when an oral agreement to transfer real estate remains uncompleted and the doctrine of the statute of frauds bars specific performance, a court will generally restore the parties to the position they would have occupied had neither party performed any part of the unenforceable oral agreement.

Dramatic Changes To Philadelphia Residential Property Taxes Likely

By the end of this year, Philadelphia City Council, with the approval of Mayor Jim Kenney, will likely pass into law dramatic changes as to how some residential properties within city limits will be taxed.

On an annual basis, all real estate located in Philadelphia is assessed

by the city of Philadelphia's Office of Property Assessment separately based upon the then-fair market value of the land, as well as the then-fair market value of the building structure, if any, situated on the land.

For purposes of this article, I will assume there is a property existing in Philadelphia with an address of 123 Main St. and that the property's fair market value for the land is $100,000 and for the building structure is $400,000, meaning that the property's combined fair market value for real estate tax purposes is $500,000.

Based upon the current tax rate, $1,400 of real estate taxes is due for every $100,000 in a property's assessed value, unless a portion of the property's assessed value is exempt from taxation.

In other words, the property owner of 123 Main St. would pay $7,000 in real estate taxes under this scenario, without taking into account any tax exemptions under the law.

Real Estate Tax Abatement Program

Since 2000, if a property owner develops vacant land in the city of Philadelphia by building a newly constructed home, the city government has offered a real estate tax abatement for a period of 10 years for the increase in the property's assessed value based upon the improvements made to the property.

Simply stated, during this 10-year period of time, the owner of the property will not pay any real estate taxes based upon the then fair market value of the building structure situated on the property.

This portion of the real estate tax abatement program is commonly known as Ordinance 1456-A and is codified under Section 19-1303(4) of the Philadelphia Code.

Under the current version of the law, based upon my example, if the building structure on 123 Main St. is newly constructed on what was formerly vacant land, the property owner would pay $1,400 for the assessed value of $100,000 for the vacant land, but would not currently be liable to pay the $5,600 in real estate taxes which would otherwise be due based upon the assessed value of $400,000 for the building structure. Assuming the fair market value (and, thus, assessed value) for the land and building structure remains the same for the 10 years of the tax abatement, under the current tax rate, the property owner would save $56,000 in real estate taxes due to the current version of this portion

of the real estate tax abatement program.

For a variety of reasons, this year, Philadelphia City Council has advanced Bill No. 190013 that would alter how much of the assessed value of a newly constructed home would be exempt from taxation during this 10-year period of time.

Under Bill No. 190013, which is expected by the end of the year to be passed by Philadelphia City Council and signed into law by Kenney, during this 10-year period of time, the assessable amount of the applicable building structure for residential properties shall be exempt from real estate taxation, as follows: 100% of the assessable amount of the building structure in the first year; 90% of the assessable amount of the building structure in the second year; 80% of the assessable amount of the building structure in the third year; 70% of the assessable amount of the building structure in the fourth year; 60% of the assessable amount of the building structure in the fifth year; 50% of the assessable amount of the building structure in the sixth year; 40% of the assessable amount of the building structure in the seventh year; 30% of the assessable amount of the building structure in the eighth year; 20% of the assessable amount of the building structure in the ninth year; and 10% of the assessable amount of the building structure in the 10th and final year.

In other words, under what is expected to be the new version of this portion of the real estate tax abatement program, the property owner will not save $56,000 in real estate taxes, as they would under the current version of the law, but rather $30,800. This reduction in real estate tax savings will be 55% as compared to the current version of this portion of the real estate tax abatement program.

Although Philadelphia City Council originally proposed for the new version of this portion of the real estate tax abatement program to take effect on July 1, 2020, through a compromise with Kenney, it has agreed to make this change in the law effective as of Jan. 1, 2021.

The extended effective date will give real estate developers and investors potentially the time necessary to complete projects which are already in the pipeline and actually may cause them next year to develop additional newly constructed homes on vacant lots as, after Jan. 1, 2021, home buyers will likely ask for price concessions to account for the lesser tax abatement under the new law.

Of particular note is that for the time being, there will not be any changes enacted to the other portions of the real estate tax abatement

program.

Under Ordinance 961 (which is codified under Section 19-303(2) of the Philadelphia Code), the city of Philadelphia will still offer a real estate tax abatement, without restrictions, on improvements made to existing residential building structures that will either be sold at the completion of the improvements or occupied by the property owner. Structures that contain one or more dwelling units are eligible for a tax abatement under Ordinance 961.

Under Ordinance 1130 (which is codified under Section 19-1303(3) of the Philadelphia Code), property owners will still be allowed, without restrictions, to obtain a real estate tax abatement for improvements due to rehabilitation of a preexisting building structure or new construction of commercial, industrial and any other business properties.

While Philadelphia City Council has elected this year not to address these other portions of the real estate tax abatement program, that does not mean further changes are not on the horizon. Next year, the composition of Philadelphia City Council will be more liberal and some of its newly elected members campaigned on reducing and possibly eliminating the real estate tax abatement program altogether.

Homestead Exemption

If you own property in Philadelphia and it is your primary residence, you are eligible for the homestead exemption on a portion of the assessed value of your property.

From the 2014 through the 2018 tax year, the homestead exemption was $30,000. This current tax year, the homestead exemption is $40,000 and for the 2020 tax year the homestead exemption will be $45,000.

Under Bill No. 190943, Philadelphia City Council has proposed for the homestead exemption for the 2021 tax year to increase to $50,000.

In other words, the real estate tax savings will be $700 that a property owner would have paid in real estate tax but for the existence of the homestead exemption.

Security At Eagles' Game Questioned In Case Involving Injured Cowboys' Fan

In a recent decision, the Pennsylvania Superior Court in *Pearson v. Philadelphia Eagles,* 2019 Pa. Super. LEXIS 1016 (Oct. 11, 2019) addressed whether a jury verdict in favor of a fan of the Dallas Cowboys, based upon injuries he suffered during an altercation with fans of the Philadelphia Eagles during a game between the teams at Lincoln Financial Field, should be overturned based upon a motion for judgment notwithstanding the verdict.

In late 2014, Patrick Pearson, a Dallas Cowboys fan, went with a friend to the Eagles-Cowboys game at Lincoln Financial Field, the opinion said.

During the game, Pearson wore a Dallas Cowboys' jersey. At halftime, Pearson and his friend went to the restroom, the opinion said. In the restroom they got into a verbal and physical altercation with some of the fans of the Philadelphia Eagles, the opinion said. Pearson was physically injured during the altercation and was immediately transported to the hospital where he underwent surgery for a broken ankle.

Despite undergoing physical therapy, Pearson continues to walk with a limp and has pain in the leg in which the ankle was broken.

Pearson subsequently commenced a personal injury action in the Philadelphia County Court of Common Pleas against the corporate entity that owns the Philadelphia Eagles as well as the corporate entity that manages Lincoln Financial Field.

In the complaint, Pearson raised allegations of negligence against them relating to the security program, or lack thereof, at the stadium. In particular, he alleged that he would not have been injured if a different program of security was provided, i.e., an extra security guard stationed inside the bathroom, the opinion said.

After a jury trial took place, the jury returned a verdict in favor of Pearson, finding that the defendants' negligence was a factual cause of his injuries and awarding him damages in the amount of $700,000, the opinion said.

Afterwards, the named defendants filed post-trial motions, including one for judgment notwithstanding the verdict. The trial court ultimately denied the motion for judgment notwithstanding the verdict.

The Philadelphia Eagles and the operator of Lincoln Financial Field then filed an appeal to the Superior Court.

On appeal, the appellants argued that "Pearson failed to prove that the appellants were negligent in implementing their security program and thus, Pearson could not demonstrate that the appellants breached a duty that caused his injury."

Quoting *Truax v. Roulhac*, 126 A.3d 991 (Pa. Super. 2015), the Superior Court pointed out that "the duty owed to a business invitee is the highest duty owed to any entrant upon land" and "the landowner is under an affirmative duty to protect a business visitor not only against known dangers but also against those which might be discovered with reasonable care."

The Superior Court then emphasized that, in determining the scope of duty property owners owe to business invitees, appellate courts in Pennsylvania have previously relied upon the Restatement (Second) of Torts Section 343, which provides "a possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, if but only if, he: knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an

unreasonable risk to such invitees, and should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and fails to exercise reasonable care to protect them against the danger."

Citing to *Campisi v. Acme Markets,* 915 A.2d 117, 119-20 (Pa. Super. 2006), the Superior Court stated that "an invitee must demonstrate that the proprietor deviated from its duty of reasonable care owed under the circumstances" and "the particular duty owed to a business invitee must be determined on a case-by-case basis."

The appellants argued that "the trial court erred in concluding that they deviated from the duty of reasonable care owed to Pearson under the circumstances by not having security personnel stationed in the stadium restrooms on the basis that it was foreseeable that altercations could take place in the bathrooms." In doing so, they relied upon the ruling handed down by the Pennsylvania Supreme Court in *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984).

In *Feld*, tenants had just returned to their assigned parking space in the parking garage of their apartment complex and were assaulted by armed individuals who held them at gunpoint. They then sued the landlord, alleging a breach of duty of protection owed by the landlord to them.

The Supreme Court in *Feld* stated that "absent therefore an agreement wherein the landlord offers or voluntarily proffers a program, it finds no general duty of a landlord to protect tenants against criminal intrusion."

However, the Supreme Court in *Feld* cautioned that, "when a landlord by agreement or voluntarily offers a program to protect the premises, he must perform the task in a reasonable manner and where a harm follows a reasonable expectation of that harm, he is liable."

In other words, the duty enunciated in *Feld* "is one of reasonable care under the circumstances and "it is not the duty of an insurer and a landlord is not liable unless his failure is the proximate cause of the harm."

The Supreme Court also cited to Comment f. to Section 344 of the Restatement (Second) of Torts that provides that a duty to protect business invitees against third-party conduct arises only if the owner has reason to anticipate such conduct.

Relying upon the Supreme Court's decision in *Feld* and Comment f. to

Section 344 of the Restatement (Second) of Torts, the Superior Court in *Pearson* concluded that the appropriate inquiry in this case is whether the named defendants had notice of prior incidents in the stadium bathrooms and, if no such notice existed, then Pearson had to demonstrate that they otherwise lacked reasonable care in conducting their security program.

The appellants in *Pearson* argued that "they had no notice that a violent attack like the one on Pearson was likely to occur" and that "the attack on Pearson was a surprise and that there is no evidence of record that supports the trial court's conclusion that they were aware of multiple prior incidents of violence in the stadium's bathrooms.

In response, Pearson pointed to the testimony of security personnel at trial that allegedly confirmed that the appellants were aware of fights occurring in the bathroom as evidence that they were on notice that the stadium restrooms were a dangerous location.

In reviewing that testimony, the Superior Court in *Pearson* stated that "the record, however, belies Pearson's assertions" and, that, while the security personnel "acknowledged in their trial testimony that in the past, fights had occurred in the restrooms, both explained that these incidents occurred with such infrequency, that the appellants chose to have their security personnel more closely monitor other areas of the stadium."

As such, the Superior Court reasoned that, "at best, Pearson can argue that the appellants should have had in place a different security program or additional security personnel available on the night of Pearson's injury," but that, "such an argument, however, is not a basis for a finding of negligence."

Rather, according to the Superior Court in *Pearson*, "in order to successfully prove a negligence claim, Pearson had to demonstrate that the appellants failed to conduct the security program offered with 'reasonable care.'"

The Superior Court in *Pearson* rejected his assertion that the appellants lacked such reasonable care because it took several minutes for security personnel to arrive at the restroom following the altercation that resulted in his injury because there was "no indication in the record or otherwise that had the security personnel been more prompt in arriving at the restroom, it would have prevented his injury."

The Superior Court also found unavailing his argument that "it was a

known danger to wear the apparel of the opposing team to Eagles' games as proof that they operated their security program in a negligent manner" because they "recognized this danger and addressed the issue by having some of their security personnel dress in the opposing team's apparel at their games, and patrol the stadium undercover to identify individuals who were harassing fans of the opposing team."

In so analyzing the situation, the Superior Court in *Pearson* held that the trial court erred in denying the motion for judgment notwithstanding the verdict, as the Philadelphia Eagles and the other named defendants were entitled to judgment as a matter of law and, in doing so, vacated the judgment entered in favor of Pearson, reversing the order denying the motion for judgment notwithstanding the verdict, and remanding the case to the trial court for entry of judgment.

Lessons Learned

The Superior Court's ruling in *Pearson* clearly sets forth a property owner's duty to protect business invitees where security to them is offered.

While a property owner is not a guarantor for such protection under the circumstances, when providing such security protection, the property owner must do so with reasonable care.

By the way, for all of you who attend Eagles games, you have been warned that the team has security personnel who patrol the stadium dressed in the apparel of the visiting team. In other words, fans beware. #flyeaglesfly.

Philadelphia Tackles Lead Paint Violations In Residential Rental Properties

Due to these newly enacted amendments to the Philadelphia Code, many residential landlords will now be obligated to substantially modify the way they do business in Philadelphia.

The most impactful change in the law is its applicability. Previously, the law only applied to residential rental properties built before 1978 in which children aged 6 years and under resided. The law now applies to all such properties, except for student housing.

Under the law, all such tenants must be given a copy of a certification prepared by a certified lead inspector demonstrating that the residential rental property is either “lead-free” or “lead-safe.”

A copy of a certificate demonstrating the residential rental property is either lead-safe or lead-free must be signed by the tenant and returned to the city of Philadelphia’s Department of Public Health.

In a change under the law, the certification now must also be “accompanied by a copy of the corresponding laboratory results of wipe tests for lead-contaminated dust.”

A residential rental property is deemed lead-safe if it is “free of a condition that causes or may cause exposure to lead from lead-contaminated dust, lead-contaminated soil, deteriorated lead-based paint, deteriorated presumed lead-based paint or other similar threat of lead exposure due to the condition of the property itself.”

To be deemed “lead-free,” the “interior and exterior surfaces of a property do not contain any lead-based paint and the property contains no lead-contaminated soil or lead-contaminated dust.”

To assist such landlords in obtaining the requisite certification, the city of Philadelphia’s Department of Public Health is now required under the law to “maintain on its website a publicly available list of certified lead inspectors and a list of persons qualified to perform lead remediation.”

Under the newly passed amendments to the law, the city extended the time period in which a certification is valid.

Now, a certification is considered valid if the inspection occurred within 48 months from the date in which a housing inspection license is issued by the city of Philadelphia’s Department of Licenses and Inspections for the residential rental property, or, if no such housing inspection license is issued, the date upon which the parties enter into a new lease arrangement.

Previously, under the law, landlords were only required to provide their tenants with the requisite certification when the parties originally entered into a lease arrangement. The law now includes a certification requirement for lease renewals as well.

Since the law now also applies to lease renewals, such tenants are obligated under the law to cooperate and provide reasonable access to the residential rental property for a certified lead inspector to test the residential rental property in an attempt to obtain the requisite certification or to have any remedial measures performed on the residential rental property if it is not deemed leas safe or lead free.

If the landlord believes that such reasonable access has not been provided, the landlord may provide notice to the city of Philadelphia’s Department of Public Health. The law does not specifically state what happens when such notice is provided. Instead, according to the law, the city of Philadelphia’s Department of Public Health may implement regulations regarding such access to the residential rental property.

Another substantial change to the law is that a landlord cannot obtain a housing inspection license from the city of Philadelphia's Department of Licenses and Inspections for such a residential rental property or renew it without providing a valid certification at the time the landlord applies for the issuance or renewal of the housing inspection license.

Furthermore, in all eviction actions regarding such a residential rental property, at the time of the filing of the complaint, a landlord is now required under the law to either submit a copy of the valid certification before the landlord can proceed with the eviction.

The law also creates a rebuttable presumption that all residential rental properties are built before March 1978 and the landlord, in other words, is required to overcome such a presumption.

Under the newly passed amendments, the city of Philadelphia's Department of Health will now be obligated to publicize a list of all certifications it receives as well as all violations issued under the law.

The city of Philadelphia's Department of Health is further empowered under the law to test a residential rental property if a child residing in the residential rental property has demonstrated elevated blood levels due to lead exposure. Under the law, a residential rental property may now be subject to testing if it receives "a credible report that a child living at the property has a blood lead level of greater than 10 micrograms per deciliter, or such lower level as shall be established by the Board of Health as cause for significant concern."

Additionally, the penalties for violations of the law have been stiffened by way of these amendments.

Under the previous version of the law, while a landlord was prohibited from collecting rent during any period of noncompliance of the law, the landlord could nonetheless recover possession of the residential rental property. That is no longer the case. If the landlord is noncompliant under the law, the landlord will be prevented from not only collecting rent from the tenant, but also from recovering possession of the residential rental property.

The law also includes a provision allowing the tenant to receive an abatement and refund of any rent paid by the tenant to the landlord for any period the tenant occupies the residential rental property without the requisite certification.

A landlord or a representative of the landlord is now also subject to

imprisonment of up to 90 days for certain violations of the law.

Finally, the law also clarifies that the penalties allowed under the law applies to “any person who fails to comply with the provisions of this chapter, and any person who knowingly participates in any such failure to comply by any other person or who has reason to know that his or her participation will materially contribute to any such failure by another person.”

The law does not immediately become effective as to such residential rental properties in which children aged 6 years and under do not reside.

Rather, according to the law, the city of Philadelphia will be divided into separate regions based upon the percentage of screened children with elevated blood lead levels, as determined by the city of Philadelphia’s Department of Health, and, depending upon what region the residential rental property falls into, the earliest the law will apply for such a residential rental property is Oct. 1, 2020 and the latest it will apply is April 1, 2022.

Superior Court Takes On Adverse

Possession In ‘Piazza Realty’

In *Piazza Realty v. Moscariello Development*, 2019 Pa. Super. Unpub. LEXIS 2945 (Aug. 6), the Pennsylvania Superior Court had the opportunity to deal with such an instance in the commercial realm.

In 1980, Piazza Realty Co. acquired the property located at 3387 Ridge Pike in Limerick Township, Montgomery County, the opinion said.

Since that time, Piazza Realty, through various corporate entities, had, in various facets, owned, operated, maintained and used the property as an automobile dealership, the opinion said.

In 2005, Moscariello Development acquired the property borderline to the one owned by Piazza Realty, the opinion said.

By that time, Piazza Realty had control and possession of a “certain ‘bump-out’ on the mutual property line, being a trapezoidal-shaped property containing 1,236 square feet or 2.8% of an acre,” the opinion said.

According to the opinion, the bump-out was used, paved and graveled by Piazza Realty and used as a turning radius for vehicles going into and out of garage bays facing Piazza Realty’s property and for parking.

In 2014, the zoning code was changed to allow Moscariello Development to develop its property into townhomes and it looked into so developing it, the opinion said.

Soon thereafter, Moscariello Development, through legal counsel, made monetary demands to Piazza Realty, threatening to close off the bump-out if Piazza Realty did not provide them with such financial concessions for the property use and access, the opinion said.

When the parties could not amicably resolve their real estate dispute,

Piazza Realty commenced a quiet title action in the Montgomery County Court of Common Pleas against Moscariello Development under the theories of adverse possession and for prescriptive easement.

After a bench trial that took place over the course of a couple of days, the trial court awarded quiet title of the bump-out to Piazza Realty by virtue of adverse possession.

The trial court concluded that Piazza Realty, by and through itself and various businesses which leased its property as an automobile dealership over the years, had been using the bump-out for parking and moving vehicles since 1984, according to the opinion.

Additionally, the trial court noted that, over the years, the bump-out had been improved by Piazza Realty.

The trial court further found that Moscariello Development observed the asphalt bump-out when it purchased its property in 2005 but did not assert an ownership interest in that portion of its property until approximately 2014, the opinion said.

According to the opinion, by 2014, the trial court calculated that Piazza Realty "had been continuously, exclusively, and actually using the asphalt bump-out for 30 years for parking cars, transporting cars and stationing a tractor-trailer for storage in a manner that was visible, notorious, distinct and hostile."

Moscariello Development ultimately appealed the trial court's ruling to the Superior Court.

On appeal, Moscariello Development argued that the trial court erred as a matter of law because Piazza Realty failed to establish their adverse possession of the bump-out.

According to the Superior Court in *Piazza Realty*, "one who claims title by adverse possession must prove actual, continuous, exclusive, visible, notorious, distinct and hostile possession of the land for 21 years" and, if one of these elements do not exist, "the possession will not confer title."

According to the Superior Court in *Piazza Realty*, the claimant of adverse possession bears the burdening of establishing adverse possession by credible, clear and definitive proof.

As for the elements of "actual" and "continuous" possession, the

Superior Court in *Piazza Realty* cited to *Johnson v. Tele-Media of McKean County*, 90 A.3d 736 (Pa. Super. Ct. 2014).

According to the Superior Court in *Piazza Realty*, "only acts signifying permanent occupation of the land and done continuously for a 21-year period will confer adverse possession."

Furthermore, the Superior Court in *Piazza Realty* noted that "a sporadic use of land, by one without title to it, will not operate to give him a title, no matter how often repeated."

Rather, the Superior Court in *Piazza Realty* stated that "residence is not necessary to make an adverse possession" and that "the possession may be adverse by enclosing and cultivating the land", for example.

Quoting *Brennan v. Manchester Crossings*, 708 A.2d 815 (Pa. Super. Ct. 1998), the Superior Court in *Piazza Realty* noted that "to establish visible and notorious possession, claimants are required to prove that their conduct was sufficient to place a reasonable person on notice that his land is being held by claimants as their own."

As for the element of "hostile," the Superior Court in *Piazza Realty*, quoting *Flannery v. Stump*, 786 A.2d 255 (Pa. Super. Ct. 2001), cautioned that, "while the word hostile has been held not to mean ill will or hostility, it does imply the intent to hold title against the record title holder."

In doing so, the Superior Court in *Piazza Realty* stated that "the element of hostility requires that the court examine not just the physical facts of possession but also the evidence, if any, probative of the intent with which the land in question was possessed," and that "possession may be hostile even if the claimant knows of no other claim and falsely believes that he owned the land in question."

After reviewing the record established at the trial court-level, the Superior Court in *Piazza Realty* concluded that "the trial court's findings are supported by the record and comprise 'sufficient competent evidence' to sustain the grant to Piazza Realty of title to the bump-out based upon adverse possession."

The Superior Court in *Piazza Realty* stated that sufficient evidence existed illustrating that the bump-out had actually, continuously, and visibly been used by automobile dealerships that had leased Piazza Realty's property since 1980.

When Moscariello Development purchased its property, the Superior Court in *Piazza Realty* calculated that "approximately 20 years and 9 months had passed since Piazza Realty began using the bump-out."

On appeal, Moscariello Development pointed out that its principal member "did not walk the property line near the bump-out because he was not yet developing that portion of his property" and he only personally became aware of the bump-out and Piazza Realty's use of it in 2014.

In upholding the trial court's ruling, the Superior Court in *Piazza Realty* stated that the alleged ignorance by Moscariello Development of the existence and use of the bump-out by Piazza Realty had no effect on the merits of Piazza Realty's claim for adverse possession.

LESSONS LEARNED

More and more sections of Philadelphia that have been neglected for well over a generation are being developed. As that occurs, real estate developers and investors are being confronted by claims of adverse possession that cannot be discovered through a search of the public records.

Prior to purchasing a property, especially in these sections of Philadelphia, a real estate developer or investor should visit the property on multiple occasions during different times of the day to determine whether there is any potential adverse possession of the property.

Superior Court Addresses Subject Matter Jurisdiction in an Eviction Action

In Philadelphia, the Philadelphia Municipal Court and the Philadelphia Court of Common Pleas have concurrent jurisdiction to handle landlord-tenant disputes. While the Municipal Court is technically Philadelphia's small claims court, for purposes of landlord-tenant disputes, it is a court of unlimited jurisdiction. In other words, the Municipal Court can handle a dispute of any monetary amount between the parties.

Given that a dispositive hearing may be scheduled for an eviction action within a month of the filing of the complaint, most landlords initiate eviction actions in the Municipal Court as compared to the Court of Common Pleas.

Furthermore, while a judgment for possession in an eviction action initiated in the Municipal Court may be appealed to the Court of Common Pleas on a *de novo* basis, if the tenant wishes to stay the execution of the judgment for possession while the appeal before the Common Pleas Court is pending, the tenant is required under court rules to escrow, without objection, the rent due under the lease arrangement with the prothonotary. As such, if the landlord is ultimately successful at the Court of Common Pleas-level, the landlord will have a proverbial "pot of gold" at the landlord's disposal to satisfy the money owed to the

landlord by the tenant in connection with the underlying eviction action.

Another reason to file an eviction action in Municipal Court is that the case management deadlines for an appeal at the Court of Common Pleas-level is more expedient and streamlined.

In contrast, if no landlord-tenant relationship exists between the parties, then the property owner must initiate an ejectment action in the Court of Common Pleas. Unlike an eviction action, there is no mandatory escrow requirement and the case management for an ejectment action is not as expedient and streamlined as an eviction action.

In *Rittenhouse 1603 v. Barbera*, 2019 Pa. Super. Unpub. LEXIS 1546 (June 24, 2019), the Pennsylvania Superior Court recently addressed whether the Municipal Court and Court of Common Pleas had subject matter jurisdiction as to the eviction action commenced by the property owner against the occupant of the residential property.

In *Barbera*, Eugene Barbera owned a condominium unit in a building situated adjacent to Rittenhouse Square in Philadelphia, the opinion said.

When Barbera defaulted upon the mortgage loan encumbering the condominium unit, he lost the condominium unit to the lender in foreclosure proceedings, the opinion said.

After that happened, Barbera and Lewis Katz, Barbera's longtime friend and business associate, created a limited liability company, Rittenhouse 1603, LLC, that purchased the condominium unit from the lender.

According to Rittenhouse 1603's operating agreement, Katz was its managing member and Katz contributed $235,000 in return for four Class A voting units and Barbera contributed $1 for one Class B nonvoting unit, the opinion said.

Subsequently, Barbera assigned his Class B nonvoting unit in Rittenhouse 1603 to Katz and, that same day, Rittenhouse 1603 entered into a separate occupancy agreement with Barbera, the opinion said.

According to the opinion, under the occupancy agreement, Barbera had the right to use and occupy the condominium unit for a term commencing on Dec. 23, 2013, and continuing until 30 days after written notice of termination from Rittenhouse 1603.

While the occupancy agreement did not require Barbera to pay rent, he was

responsible for paying all utilities, real estate taxes, special assessments, condominium assessments and insurance associated with the condominium unit.

When Katz died in a tragic airplane accident in 2014, his son, Drew Katz, replaced Katz as Rittenhouse 1603's managing member.

As of the date of Katz's death, Barbera did not make any payments due under the occupancy agreement to Rittenhouse 1603, the opinion said.

Later that year, Rittenhouse 1603 sent Barbera a written notice to vacate from the condominium unit and terminated the occupancy agreement.

After Barbera refused to willingly vacate from the condominium unit, Rittenhouse 1603 filed an action in the Philadelphia Municipal Court seeking Barbera's eviction from the condominium unit (but not monetary damages), the opinion said.

After the hearing took place, the Municipal Court entered judgment for possession in favor of Rittenhouse 1603 and against Barbera.

Barbera then appealed the court's ruling to the Common Pleas Court.

After doing so, Rittenhouse 1603 filed a complaint in the Court of Common Pleas that not only included a count for eviction based upon the alleged breaches of the terms and conditions of the occupancy agreement, but also for ejectment and unjust enrichment.

Unlike the eviction action initiated in the Municipal Court, Rittenhouse 1603 not only sought possession of the condominium unit, but also requested a monetary judgment against Barbera.

After a bench trial, the trial court judge entered a decision in favor of Rittenhouse 1603 and against Barbera on its claims of ejectment, breach of the terms and conditions of the occupancy agreement, and unjust enrichment.

In doing so, the trial court judge "awarded possession of the condominium unit to Rittenhouse 1603 as well as counsel fees of $75,000 (including condominium fees and taxes) in the amount of $16,924.33, and rent in the amount of $50,700, for a total of $142,624.38."

Barbera filed a timely appeal of the trial court judge's ruling to the Superior Court.

Of particular note, the Superior Court, *sua sponte*, addressed whether the lower courts, the Municipal Court and the Court of Common Pleas, had subject matter jurisdiction over the real estate dispute between the parties.

The Superior Court first discussed whether the Municipal Court had subject matter jurisdiction through its landlord-tenant court.

As indicated by the Superior Court in *Barbera*, 42 Pa. C.S. § 1123(a)(3), the jurisdictional statute for landlord-tenant disputes in Philadelphia, the Municipal Court has jurisdiction over "matters arising under the act of April 6, 1951, (P.L. 69, No. 20), known as The Landlord and Tenant Act of 1951 (68 P.S. Sections 250.101-250.602)."

According to Superior Court, the grounds for removal of a tenant under the Landlord and Tenant Act include: "termination of the term of the lease, breach of its conditions or the tenant's failure to pay rent."

The Superior Court then determined whether the occupancy agreement should be recognized as a lease arrangement that could be dealt with under the Landlord and Tenant Act, thus bestowing subject matter jurisdiction as to the eviction action initiated by Rittenhouse 1603 against Barbera in the Municipal Court.

Citing to the eighth edition of Black's Law Dictionary, the Superior Court in *Barbera* noted that "a lease may be defined as 'a contract by which a rightful possessor of real property conveys the right to use and occupy the property in question for exchange of consideration, usu. rent.'"

Quoting the Supreme Court in *Morrisville Shopping Center v. Sun Ray Drug,* 112 A.2d 183 (Pa. 1955), the Superior Court in *Barbera* emphasized that "while the parties need not use the term 'lease' in describing the occupancy agreement, a lease may be found where it is 'the intention of one party voluntarily to dispossess himself of the premises, for a consideration, and of the other to assume the possession for a prescribed period.'"

The Superior Court ultimately concluded that "the Municipal Court had jurisdiction over Rittenhouse 1603's complaint seeking Barbera's eviction under the Landlord and Tenant Act" because, "although the occupancy agreement did not call for Rittenhouse 1603 to pay 'rent,' it constituted a 'lease' because it was a contract that permitted Barbera to use the condominium unit in exchange for 'consideration,' namely payment of utilities, real estate taxes, special assessments, condominium

assessments and insurance."

The Superior Court in *Barbera* then dealt with whether the Court of Common Pleas possessed subject matter jurisdiction over Barbera's appeal of the Municipal Court judgment against him.

Citing to 42 Pa. C.S. Section 1123(a)(3), the Superior Court stated that "the legislature authorizes aggrieved parties to appeal a Municipal Court landlord-tenant judgment to the court of common pleas in accordance with 'local rules of court established by the administrative judge of the trial division,'" so long as those rules are not inconsistent with statewide rules of procedure established by our Supreme Court.

Unlike the complaint filed in the Municipal Court, Rittenhouse 1603's complaint filed on appeal to the Court of Common Pleas included counts not only for eviction based upon the alleged breaches committed by Barbera of the terms and conditions of the occupancy agreement, but also for ejectment and unjust enrichment.

The Superior Court stated that, "although Rittenhouse 1603 did not allege these claims in the Municipal Court, Rittenhouse 1603 had the right to allege them in the appeal to the Court of Common Pleas."

According to the Superior Court, "Philadelphia Local Rule *1001(f)(2)(ii) provides that appeals from Municipal Court landlord-tenant judgments 'shall be in accordance … with the Rules of Civil Procedure that would be applicable if the action being appealed was initially commenced in the Court of Common Pleas'" and, in turn, Rule 1020(a) of the Pennsylvania Rules of Civil Procedure provides that "'the plaintiff may state in the complaint more than one cause of action cognizable in a civil action against the same defendant.'" And that "each cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief.'"