BUGAJ / FISCHER
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
P.O. BOX 390
MAPLE LEAF GARDENS
308 NINTH STREET HONESDALE, PA 18431
(570) 253-3021 FAX (570) 253-9484

Ronald M. Bugaj '75 Ronnie Bugaj Fischer '03

July 25, 2017

SENT VIA EMAIL

WILLIAM J. PEARN
AMELIA PEARN
101 BEVERLY DRIVE
SHOHOLA, PA 18458

RE: Pearn - Walker Lakeshores Landowners Association vs. - Appeal

Dear Bill and Amelia:

Enclosed please find a copy of the 1925 Appellate Opinion issued by Judge Kameen in support of his decision in the above-captioned matter.

As you can see, Judge Kameen did a very thorough job in reviewing this matter and setting forth why you were successful in the case.

I will keep you posted on my progress in this matter.

Sincerely,

Ronald M. Bugaj

RMB/lm
Encl.

IN THE COURT OF COMMON PLEAS OF
PIKE COUNTY, PENNSYLVANIA
CIVIL DIVISION

WALKER LAKESHORE LANDOWNERS ASSOCIATION,	:	
Plaintiff/Appellant,	:	**No. 277-2011 CIVIL**
v.	:	
WILLIAM PEARN and AMELIA PEARN, his wife,	:	
Defendants/Appellees.	:	

OPINION SUBMITTED PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1925

AND NOW, this 13th day of July, 2017, after careful review of the record, this Court continues to stand by its decision and respectfully requests the Superior Court to uphold the April 5, 2017 entry of judgment in Plaintiff's favor pursuant to Verdict of this Court dated December 22, 2016. This Court also adds, pursuant to Pennsylvania Rule of Appellate Procedure 1925, the following:

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff Walker Lake Landowners Association ("Plaintiff") is a Pennsylvania non-profit organization, which operates as the landowners association for the Walker Lake community and is the owner of certain property, including Walker Lake ("the Lake"). The Walker Lake community is one of four communities located around the Lake. Defendants own property in Maple Park, another one of these communities, and have deeded rights to use the waters of the Lake.

The present action arises out of Plaintiff's assertion that Defendants, who are not members of Plaintiff, owe Plaintiff various fees for the maintenance of common areas near the Lake, maintenance of the Lake, and various other administrative expenses. These issues were initially litigated before Magistrate District Judge, the Honorable Alan B. Cooper. On January 14, 2011, Judge Cooper award judgment of two hundred thirty-five dollars ($235.00) in Plaintiff's favor. Plaintiff timely appealed the Judgment to this Court on February 10, 2011 and filed a Complaint in the matter on March 3, 2011. Defendants filed an Answer on March 21, 2011.

On June 20, 2014, a Praecipe for Arbitration was filed with this Court and following a hearing, the arbitration panel filed a Report and Reward, which found for Plaintiff in the amount of one thousand two hundred eighty-seven dollar and ninety-six cents ($1,287.96). Defendants appealed.

Following appeal, Plaintiff filed a Praecipe for the November 2015 Trial List. After a number of continuances, a non-jury trial was held before the Honorable Joseph F. Kameen, P.J., on November 14, 2016. On the same day this Court entered an Order granted both parties twenty (20) days to submit post-trial briefs, which both parties subsequently submitted. Following a careful review of the parties' briefs and the entire record, this Court entered a Verdict on December 22, 2016 in Plaintiff's favor in the amount of thirty dollars ($30.00). Plaintiff filed a Post-Trial Motion, which this Court denied on January 5, 2017. On April 5, 2017, Defendants filed a Praceipe for entry of the adverse judgment and final judgment was promptly entered by the Prothonotary.

Plaintiff filed a Notice of Appeal on May 5, 2017 and on May 15, 2017, this Court ordered that the Plaintiff/Appellant file a Concise Statement of Matters

Complained of on Appeal within twenty-one (21) days from the date of the Order. Appellant filed a Concise Statement of Matters Complained of on Appeal on June 5, 2017. Appellant raises four issues on appeal:

1) Whether this Court erred as matter of law and abused its discretion by relaying on incompetent and irreverent evidence at trial?
2) Whether this Court erred and abused its discretion in awarding common element assessments, or alternatively easement maintenance fees for the beach area next to the Lake, which was not owned by Plaintiff, while failing to award common element assessments, or alternatively easement maintenance fees for the Lake, which was owned by Plaintiff?
3) Whether this Court erred by failing to allow Plaintiff to amend its pleadings?
4) Whether this Court's decision in this matter was erroneous and contrary to its own precedent?

II. DISCUSSION

As an initial matter, this Court notes that Plaintiff's appeal is procedurally defective because it failed to order a transcript of the relevant proceeding, and we respectfully submit that the appeal should be dismissed on those grounds. However, this Court also addresses the substantive issues Plaintiff raises on appeal in this opinion[1].

Plaintiff's Appeal is Fatally Defective

Pursuant to Pa. R.A.P. 1911(a), an "Appellant shall request any transcript required" for determination of an appeal and "make any necessary payment" for such a

[1] Due to Plaintiff's failure, this Court's record of trial is limited to the audio recording of the notes of testimony and all of the references to what occurred at trial are drawn from that recording.

transcript. The transcript must be transmitted to the higher court, along with the rest of the appellate record, within sixty (60) days following the notice of appeal. Pa. R.A.P. 1931(a)(1). Once an appellant orders and pays the deposit for the required transcript the lower court's transcriptionist will prepare the transcript within fourteen (14) days. Pa. R.J.A. 4011(A).

In Pike County, a party wishing to obtain a transcript must request it and pay fifty percent (50%) of the estimated cost of creating the transcript. L.R.J.A. 4007(D)(1). Once this payment is made, a transcriptionist, at the direction of the Court Administrator, will generate the requested transcript. L.R.J.A. 4007(D)(2). When the transcriptionist completes this task, she shall inform the requesting party and indicate the remaining balance owed for the transcript. L.R.J.A. 4007(D)(3). The transcript will only be provided to the appellate court and the parties once the cost of the transcript is paid in full. L.R.J.A. 4007(D)(4). A failure to order a transcript or follow the proper procedure for doing so may result in appropriate action by the appellate court, up to and including dismissal of appeal. Pa. R.A.P. 1911(d).

Here, Plaintiff filed its notice of appeal of a final judgment entered pursuant to Verdict of this Court on May 5, 2017. In its Concise Statement of Matters Complained of on Appeal Plaintiff asserts that this Court made numerous errors at trial held on November 14, 2016. As of the date of this Opinion Plaintiff has neither requested nor paid for a transcript of the trial or any of the relevant portions of the testimony present on that day.

This Court respectfully submits that Plaintiff's failure to perfect its appeal or to take any steps toward perfecting the appeal within the sixty (60) days allowed for the

transmission of the lower court record warrants the dismissal of its appeal. In particular, we note that without a transcript of the relevant proceedings, it is impossible to make a fair determination of whether or not this Court erred at trial. As such, Plaintiff has essentially waived any entitlement it had to proper consideration of its appeal.

Substantive Issues Raised on Appeal

1. This Court Did Not Rely on Incompetent or Irrelevant Evidence at Trial.

Plaintiff asserts that this Court erred by relying on two particular pieces of alleged incompetent and irrelevant evidence. Specifically, Plaintiff asserts that this Court allowed the admission of an unqualified title search expert and relied on an impermissible 2013 deed. For clarity, this Court addresses each issue in turn.

Title Search Testimony

Pa. R.E. 602 states: "A witness may testify only to if evidence is sufficient to support a finding that the witness has personal knowledge of the matter." A lay witness may render an opinion if, that opinion is: "a) rationally based on the witness's perception; b) helpful to clarify understanding the witness's testimony or to determining a fact in issue; and c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Pa. R.E. 701.

Pursuant to Pa. R.A.P. 302(a), "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal."

In this matter, the Defendants presented testimony from Amelia Pearn ("Pearn"), who is a licensed real estate agent and the co-owner of the property for which lake assessments where alleged to be owed. Contrary to Plaintiff's assertion, Pearn was not erroneously admitted as an expert witness, because she was never admitted as an expert

witness, but rather testified within her personal knowledge of her chain of title. Furthermore, we note that all of the underlying deeds that Pearn testified to where admitted as exhibits, either by Plaintiff or explicitly without objection from Plaintiff. Thus, even if Pearn's alleged expert testimony was inadmissible this Court was still free to consider the underlying deeds, which spoke for themselves.

At trial, Pearn testified that she conducted a search of her chain of title, which produced several deeds admitted as exhibits at trial. She then further testified to the content of these deeds. While this Court allowed Pearn a fair amount of leeway as to her ability to testify to the content of the deeds in her chain of title, we prohibited her from testifying to any legal conclusions about the deeds.

In addition, we note that other evidence, including testimony directly produced by the Plaintiff and brought out on cross-examination of Pearn, substantively confirmed much of Pearn's testimony about the title search she conducted. In particular, Pearn testified to a 1911 deed in her chain of title, which gave Defendants the right to use the waters of the Lake. *See* Def.'s Ex. 4. Even if this testimony were inadmissible, the deed itself was admissible. There also was no dispute that Defendants had rights to use the Lake and there was sufficient evidence from both parties to establish this fact. Specifically, Art Politano ("Politano"), the president of Plaintiff, testified to Defendants right to use the Lake during Plaintif's case-in-chief.

Pearn next testified to a 1966 deed in which Grace J. Swezy, Charles D. Swezy, and Beverly A. Swezy granted a portion of the property that currently belongs to Defendants to Donald and Gladys Jarvis ("Jarvis deed"). *See* Pl.'s Ex. 2. The Jarvis deed contains thirteen (13) covenants the last of which reads as follows:

> The Purchaser agrees to pay to the grantors the sum of $10.00 per year for the maintenance of the picnic grounds and dock until such time as 90% of the lots described and laid out on the aforesaid map to be recorded have been sold and to pay said sum thereafter to an association of property owners to be formed at that time. Pl.'s Ex. 2.[2]

The Jarvis deed, along with the 1911 deed, was central to this Court's Verdict and not only was it admitted into evidence by the Plaintiff, but Plaintiff further stipulated to the fact that the deed was in Defendants' chain of title. Therefore, this Court did not need to, and in fact did not, rely on Pearn's interpretation of the meaning of the deed, but rather only needed to rely on our own understanding the deed, which we did. Thus, we reached our Verdict based on a plain reading of the Jarvis deed, which entitled Plaintiff to the payment of ten dollars ($10.00) a year for the maintenance the picnic area, known as the Swezy beach area ("Swezy beach"), and, as explained in detail below, on Plaintiff's own failure to prove Defendants owed any other fees for 2008, 2009, and 2010.

2013 Deed

Plaintiff asserts in its Concise Statement that this Court impermissibly considered a 2013 deed (admitted as Defendant's Exhibit 6 at trial) in making its decision in this case. However, Plaintiff waived any right it might have had to raise this issue on appeal because it explicitly did not object to the admission of *any* exhibits at trial and thus cannot attempt to raise the issue post hoc. Nevertheless, assuming *arguendo* that Plaintiff had not already waived the issue it should be noted that this Court explicitly did not consider the 2013 deed in rendering its Verdict in this matter.

The 2013 deed formally transferred ownership of Swezy beach to Plaintiff. If this Court had considered the 2013 deed, we would have determined that Plaintiff did not possess Swezy beach during the years 2008 to 2010 and therefore Defendants did not

[2] Pearn testified credible at trial that this is the only access point to the Lake for residents of Maple Park, who are not members of Plaintiff.

owe Plaintiff any of the fees for the maintenance of the property during that time period. Rather this Court found, without considering the 2013 deed and noting that a homeowners association was never formed for Maple Park, that the property was de-facto controlled by Plaintiff from 2008 to 2010 and therefore it was owed the $10.00 a year for the beach area's upkeep.

2. The Court Did Not Err or Abuse Its Discretion in Awarding Plaintiff Assessments for Maintenance of Swezy Beach, but Not Any Other Requested Lake Assessments.

As best this Court can tell, this issue appears to raise two basic sub-issues. First that this Court should not have granted judgment in Plaintiff's favor as to the fees associated with Swezy beach and second that we should have granted judgment in Plaintiff's favor as to all other lake assessments Plaintiff believes it was owed by Defendant.

The crux of the first sub-issue appears to assume that this Court took into consideration the 2013 deed and our ruling was contrary to this deed because Plaintiff did not own Swezy beach during the years relevant to this case. As previously noted, this Court did not consider the 2013 deed and instead found that Plaintiff were in charge of maintaining Swezy beach from 2008 to 2010 and thus we awarded the deeded assessments for this area to Plaintiff and against Defendants. We are now puzzled as to why Plaintiff is insisting such assessments are not owed to it, but we stand by our decision, as explained above.

As to the second sub-issue, this Court did not grant Plaintiff its requested lake assessments because Plaintiff failed to meet its burden of proof in the matter. While this Court, if presented with sufficient evidence might have been persuaded to grant

proportionate, non-deeded fees to Plaintiff for maintenance of the Lake, Plaintiff failed to meet its burden at trial to show that it was owed any such fees from 2008 to 2010.

Specifically at trial, Plaintiff did not present any evidence of how it calculated the dollar amount it was purportedly owed by Defendants for the relevant years. Plaintiff did provide a breakdown of the expenses allegedly owed by residents of Maple Park for the year 2013 ("P-5"). *See* Pl.'s Ex. 5. During his testimony, Politano repeatedly asserted that P-5 was "an example" of how the budget for the Lake and each homeowner's proportionate share of that budget was calculated every year. While, this Court found Politano's assertion credible, we were not persuaded that this was sufficient proof that Defendants owed Plaintiff any money for 2008, 2009, and 2010.

Plaintiff's evidence that it was owed lake assessment fees by Defendants for the relevant years was deficient in to two ways: 1) that it does not represent the amounts charged during the years at issue at trial; and 2) it is plain on the 2013 budget's face that, if Plaintiff followed the same methodology in previous years, Defendants were repeatedly overcharged. According to P-5, Defendants were charged for a portion of a "basic lake budget" as well as a portion of "overhead expenses" for 2013. *See Id.* We note that there is no explanation for what expenses are included in the basic lake budget. Although there was some testimony at trial, that the basic lake budget covered insurance for the Lake and grounds and water testing. Plaintiff presented no evidence of how much it actually spent on insurance and water testing. Moreover, much of the overhead that Defendants were charged for in 2013, included expenses for amenities that Defendants had no right to use. *See Id.* In particular, Defendants were charged for a portion of the costs of the clubhouse, security, and various other expenses associated with the operation

of Plaintiff. *See Id.* Because Defendants were not and are not members of Plaintiff this Court finds that, they could not be charged for expenses related to its operation. Finally, we note that Plaintiff based the portion of fees owed by Defendants on the number of residents who currently paid assessments and not on the number of actual residents, further unfairly inflating the fees allegedly owed by Defendants.

Given Plaintiff's failure to provide a proper explanation for the requested relief in this matter and the rampant miscalculation of the numbers for 2013, this Court refused to accept that alleged amounts owed by Defendants at face value. More to the point, we refused to wade into a guessing game as to what Defendants might have actually owed Plaintiff for 2008, 2009, and 2010. As such, we found that Plaintiff failed to meet its burden of proof at trial and thus concluded that the only fees Plaintiff was entitled to were those owed to it under the Jarvis deed.

3. The Court Did Not Err in Denying Plaintiff's Request to Amend Its Pleadings.

Generally, a plaintiff may amend its pleadings at any time, either with consent of the adverse party or by leave of court. Pa. R.C.P. 1033. Rule 1033 allows for the liberal amendment of pleadings, but prohibits amendments that "will surprise or prejudice the opposing party." *Discover Bank v. Stucka*, 33 A.3d 82, 88 (Pa. Super. 2011)(citing *Horowitz v. Universal Underwriters Ins.*, 580 A. 2d 395, 398 (Pa. Super 1990)). A lower court's denial of a motion to amend pleadings will be reversed, only if there is "a clear abuse of discretion" by the trial court. *Stempler v. Frankford Trust Co.*, 529 A.2d 521, 524 (Pa. Super. 1987).

Here, Plaintiff's Complaint requested lake assessments from Defendants for the years 2008, 2009, and 2010. At trial, Plaintiff made an oral motion to amend its

pleadings in order to reflect a request for lake assessments form 2008 to the date of trial. Defendants objected to the amendment because Plaintiff had explicitly promised and then failed to provide an accounting for the later years during a prior settlement conference and a pre-trial conference. Defendants asserted that without this information, they could not properly prepare a defense as to the years after 2010. Although, Defendants did note that that they had been provided that morning with certain accounts from a recent settlement between Plaintiff and Hinkle Estates, one of the other communities adjacent to the Lake, they still stood by their objection as this information was not directly relevant to the present case. In response to this argument, Plaintiff merely repeated its request to amend and acknowledged that the final decision on the matter rested within this Court's discretion.

Based on Defendants' assertion and Plaintiff's failure to provide any explanation for its failure to provide accounts for the later years or any reason that would justify such a failure, this Court determined that Plaintiff's requested amendment would constitute unfair prejudice and surprise to the Defendants.

4. This Court's Decision was Neither Erroneous Nor Contrary to Its Own Precedent.

Plaintiff asserts that this Court was inconsistent with itself because in at least one prior involving Plaintiff and other residents of Maple Park we previously awarded Plaintiff lake assessment fees against the defendants. On this issue, this Court notes that again Plaintiff failed to raise the issue at trial and thus pursuant to Pa. R.C.P. 302(a) it cannot raise the issue now. However, assuming *arguendo* that Plaintiff has preserved the issue, any presumed inconsistence comes from Plaintiff's own failure to prove its case before this Court. We did not grant lake assessment fees

to Plaintiff because it failed to explain why it was owed such fees or how much it was owed at trial. In asserting that this Court erred by not granting Plaintiff all the fees it requested Plaintiff conflates its own failure to meet its burden at trial with the notion that this Court was somehow inconsistent. Moreover, Plaintiff does not point to any specific ways in which this Court was inconsistent, beyond the fact that we did not grant Plaintiff all the fees it requested. Thus, we were not inconsistent, but rather we properly decided the present case on its own facts.

III. CONCLUSION

Following an extensive review of the record and Appellant's Concise Statement of Matters Complained of on Appeal, this Court continues to stand by its decisions in this case. As such, it is respectfully requested that the Superior Court uphold the April 5, 2017 entry of judgment in Plaintiff's favor pursuant to Verdict of this Court dated December 22, 2016.

BY THE COURT:

HON. JOSEPH F. KAMEEN, P.J.

cc: Eric L. Hamill, Esq., *Attorney for Plaintiff/Appellant*
Ronald M. Bugaj, Esq., *Attorney for Defendants/Appellees*

RJF
CT. ADM