

APPENDICES INDEX

		pp.
APPENDIX A -	Opinion Supreme Court of Pennsylvania No. 85 MM 2023, November 6, 2023 Denying Extraordinary Relief	1
APPENDIX B -	Petition for Permission to Appeal or in the Alternative, Application for Extraordinary Relief, July 7, 2023	2 - 27
APPENDIX C -	Opinion of Lackawanna County Judge Dismissing 22-CV-3622, June 15, 2023	28 - 42
APPENDIX D -	Complaint 22-CV-3622, Continuing Trespass. Minus Exhibits, September 7, 2022.	43 - 63
APPENDIX E -	Opinion Commonwealth Court of Pennsylvania Order No. 987 C. D. 2012, April 4, 2013, Ordering Equitable Relief / Denying Trespass Relief for thirteen years of occupation	64 - 86
APPENDIX F -	Complaint in Equity of March 4, 2003 Trespass & Negligence Prepared by Counsel Including Deed of May 5, 2000.	88 - 97
APPENDIX G -	Partial Transcript of Florimonte Testimony April 3, 2009	98 - 128
APPENDIX H -	Transcript of Dennis Peters Testimony Engineer for Florimonte - April 3, 2009	129 - 148
APPENDIX I -	Transcript of Robert Fisher Testimony Neighbor - April 3, 2009	149 - 160
APPENDIX J -	Disclosure Statement by Hedricks Stating No Flooding on Property - March 4, 2000	161
APPENDIX K -	Opinion of Lackawanna County Judge Dismissing 2003-EQ-60011, Dec. 28, 2011	162 - 178

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAROLYN J. FLORIMONTE,

: No. 85 MM 2023

Petitioner

v.

BOROUGH OF DALTON,

Respondent

22 CU 3622

ORDER

PER CURIAM

AND NOW, this 6th day of November, 2023, the "Notice of Petition for Permission to Appeal or in the Alternative, Application for Extraordinary Relief" is DENIED.

A True Copy Elizabeth E. Zisk
As Of 11/06/2023

Attest: *Elizabeth E. Zisk*
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA

No. _____

CAROLYN J. FLORIMONTE

Petitioner,

V.

BOROUGH OF DALTON

Respondent

**PETITION FOR PERMISSION TO APPEAL OR IN THE
ALTERNATIVE, APPLICATION FOR EXTRAORDINARY RELIEF**

APPEAL FROM THE ORDERS OF THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY ON JULY 2, 2021, AT NO. 21 EQ 918, AND
APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF
LACKAWANNA COUNTY AT NO. 22 EQ 3622

BY: CAROLYN J. FLORIMONTE, PRO SE
219 THIRD STREET
P. O. BOX 375
DALTON, PA 18414
PHONE: (570) 561-0426

DATE: July 7, 2023

Petitioner, pro se, Carolyn J. Florimonte, respectfully files this Petition for Permission to Appeal or in the Alternative Extraordinary Relief and in support thereof, states as follows:

INTRODUCTION

As we leave Independence Day, 2023, the day of freedom for the United States, Petitioner begs this Honorable Court to extend that same freedom to her by removing the constant threat of malicious, supersaturating flooding of her home and Property by local government which she has endured for twenty-three years.

In addition, this Petition addresses a two-part emergent equity appeal on discrete issues on behalf of Petitioner and all others similarly affected, in particular, pro se litigants, regarding the process for Removal to Federal Court. A further aspect of this Appeal is the active deference given to local governments when the lower courts “put a thumb” on the scales of justice in favor of government, despite sworn testimony validating local government’s involvement in illegal activity, which in Petitioner’s case has resulted in ongoing harms for the last twenty-three years.

Cognizant of reasoning by the Commonwealth Court of Pennsylvania regarding Equity Complaints, not being constrained by the Statute of Limitations, and the right to file multiple complaints when continuing trespass by flooding is involved, Petitioner files an extraordinary request to this Court, for protection long-denied during those twenty-three years.

For many of those years, Petitioner believed that the lower courts would protect her from the ravages of flooding which Respondent has artificially created. Following the most recent equity complaint dismissed on June 15, 2023, Petitioner now finds that belief was misplaced.

The lower courts have failed to protect Petitioner and her Property, 219 Third Street, Dalton, Pennsylvania, from theft and ravaging by actual occupation, trespass and flooding during the first thirteen years, caused by Respondent, the Borough Council of Dalton, a municipality

4

in Dalton, Pa. This failure to protect Petitioner has given Respondent unfettered access to the Property to flood, damage and control for the last twenty-three years. The financial gain realized by Respondent in eluding implementing of an approved stormwater management plan, is enormous. The cost of the theft of her Property for flooding has crippled Petitioner financially in every possible way, especially in the right and ability to sell her home.

Petitioner has taken this unprecedeted step to appeal directly to this Honorable Court with a prayer for protection to ensure her personal safety, as she is at such an advanced age that it is impossible to wait another twenty-three years to finally gain control and protection of her Property, denied to her for those years by Respondent's illegal occupation, continuing trespass and artificial flooding of the Property, causing her physical danger, harm and injury.

Respectfully, Petitioner prays for justice and just compensation, repeatedly denied by the lower courts' failures to uphold findings in Graybill v. Providence Township 140 Pa. Commw 505 (Pa. Cmmw. Ct.1991), Lake v. The Hankin Group, 79 A.3d 748 (Pa. Cmmw. Ct. 2013), and the Constitution of the Commonwealth of Pennsylvania **Article I Section 10**, during those years of artificial flooding which destroyed Petitioner's legal right to sell her home causing catastrophic financial loss now more than five hundred thousand dollars (\$500,000.00) and climbing.

None of the damages caused by the intermittent, unpredictable flooding claimed in this Petition was permanent or irreparable. Petitioner just wants it to end and to be assured that it will never occur again. This will enable her to repair her home and sell the Property.

This Court may exercise extraordinary jurisdiction in cases regarding dire consequences such as Petitioner's, which arise from a twenty-three-year invasion and flooding of the Property at will by Respondent, thus piercing the Constitution of the Commonwealth of Pennsylvania.

A physical injury in 2005, when a branch from a tree deadened by flooding, fell on Petitioner's head, caused a significant injury which underlines the danger from dead trees killed by flooding, in 2021, which now surround Petitioner everywhere on the Property. The continuing dangers which Petitioner faces daily from nearly ninety-five (95) now collapsing trees destroyed by repeated, willful, malicious flooding of the Property, cannot be overstated. Savings gone, Petitioner has no funds to remove such a large quantity of trees or to plant new ones.

This prayer for appeals and/or extraordinary relief addresses areas needed to make Petitioner whole, to obtain due process, just compensation and ultimately the control of her Property, so long-denied.

The first part of the appeal is based on this Court's opinion that equity complaints are not constrained by statutes of limitations. This is a prayer for reversal of an Order of July 2, 2021, Striking a judgment in equity, filed on May 7, 2021, based on the contention that Respondent's process for Removal to Federal Court, was defective as it failed to comply with the requirements in 28 U.S.C. §1446 (a) and (d).

Respectfully, Petitioner alleges that the lower court erred as a matter of law because it gave more gravity to the date of Respondent's filing in state court than to Respondent's failure to promptly and legally fulfill the law, pursuant to Removal in 28 U.S.C. §1446 (a), and (d).

Absolute clarification by this Court regarding effecting prompt service of Notice of Removal to pro se litigants is needed. This clarification would require an amending of Pa. R. C. P. 400 which this Court proposed Amending in 2022, to clarify the process for "snap removals" pertaining to 28 U.S.C. § 1441(b), so the prospect of further amending to protect pro se litigants is not untenable. The requested modification is in the public interest.

Requiring service by certified mail or sheriff for pro se litigants who are not part of the online

6

filings system, is essential to avoid the complications Petitioner experienced when Respondent failed to serve the Notice of Removal until *after* filing in state court.

In part, for these reasons, Petitioner prays that this Court will grant the Petition for Permission of an Equity Appeal as Statutes of Limitations do not pertain to Complaints in Equity, as *held* by the Commonwealth Court of Pennsylvania when quoting this Honorable Court in *Lake v. The Hankin Group, 79 A.3d at 756, 748 (Pa. Cmmw. Ct. 2013)*,

The second part respectfully disputes the June 15, 2023, dismissal of Equity Complaint, 2022 EQ 3622, filed on September 7, 2022. The lower court Judge erred in dismissing the Complaint in defiance of the findings in *Graybill v. Providence Township 140 Pa. Commw at 513, 505 (Pa. Cmmw.Ct. 1991)*, and *Lake v. The Hankin Group, 79 A.3d at 755, 748 (Pa. Cmmw. Ct. 2013)*, for damages specifically occurring from February 26, 2021, to September 7, 2022, and further denying Petitioner the right as pro se to file additional suits for as long as the malicious, artificial flooding of her Property continues.

Both *Graybill* and *Lake* uphold a private property owner's right to file a succession of complaints while the flooding trespass continues. Petitioner prays that the Court will reverse the Order of June 15, 2023, and remand to Lackawanna County Civil Court for a jury trial.

The dismissal of the Equity Complaint of 2022, despite findings in *Graybill* and *Lake* to the contrary, supports the basis for a claim of unwarranted deference by the courts given to local government when that government has engaged in illegal activities for years.

In the alternative, this is a prayer for the protection of this Court which will free Petitioner from a forced, unwilling servitude for the last twenty-three years deliberately created by Respondent's use of the Property as a conduit for storm water disposal artificially generated in a new uphill development known as Huntington Woods, Dalton, PA. Respondent's responsibility

in creating the problem was verified through sworn transcript testimony during two Injunction Hearings in 2009, by Respondent's own witness, Petitioner's witness and at Trial in 2011, by the Borough Engineer, positively stating that Respondent installed the sophisticated system of pipes.

This servitude has repeatedly harmed Petitioner. Efforts to gain control of her Property as well as remove Respondent and flooding from the Property have caused her to be vilified and blamed repeatedly, by the government and the courts which have a duty to protect her, while purposely ignoring the deceptive, illegal practices used by Respondent to steal private property.

Petitioner's health and welfare will continue to be impacted negatively and endangered unless the Pennsylvania Supreme Court ends the continuing threat of flooding by Respondent, which the Court has the exclusive power to enact.

For these foregoing reasons, Petitioner prays this Court to grant this Petition for Permission to appeal the Order of July 2, 2021, and the Order of June 15, 2022, or in the alternative provide extraordinary relief and any other relief as the Court may deem necessary, which has been denied to Petitioner for twenty-three years.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Petition for Permission to Appeal pursuant to Section 702(b) of the Judicial Code, 42 Pa. C.S. § 702(b) and Section 723 of the Judicial Code, 42 Pa. C.S. § 723. This Petition for Permission to Appeal is addressed to the Court's appellate jurisdiction, and is filed pursuant to Pa. R.A.P. 1311.

In the alternative, this Court has the discretion to exercise extraordinary jurisdiction pursuant to 42 Pa. C.S. § 726. This Application is filed pursuant to Pa. R.A.P. 3309.

Section 726 - Extraordinary jurisdiction

Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

This Application is filed pursuant to Pa. R.A.P. 3309:

(a) *General rule.*—An application for relief under 42 Pa.C.S. § 726 (extraordinary jurisdiction), or under the powers reserved by the first sentence of Section 1 of the Schedule to the Judiciary Article, shall show service upon all persons who may be affected thereby, or their representatives, and upon the clerk of any court in which the subject matter of the application may be pending. The application shall be deemed filed on the date received by the prothonotary unless it was on an earlier date deposited in the United States mail and sent by first class, express, or priority United States Postal Service mail as shown on a United States Postal Service Form 3817 Certificate of Mailing or other similar United States Postal Service form from which the date of deposit can be verified. The certificate of mailing or similar Postal Service form from which the date of deposit can be verified shall be cancelled by the Postal Service, shall show the docket number of the matter if known and shall be either enclosed with the application or separately mailed to the prothonotary. Appearances shall be governed by Rule 1112 (entry of appearance) unless no appearances have been entered below, in which case appearances shall be filed as in original action.

ORDERS IN QUESTION

A. The text of Order of July 2, 2021, from which Petitioner seeks to appeal, states in pertinent part:

We agree with the sound reasoning of Master Equipment that the state court is best suited to correct a void judgment docketed in its own record, and that the striking of a default judgment by the state court is merely a ministerial function rather than an improper exercise of jurisdiction to “proceed” further with this litigation in contravention of 28 U.S.C. §1446 (d). Therefore, Dalton’s petition to strike Florimonte’s \$5,756,340.00 judgment, which the Clerk of Judicial Records entered on May 7, 2021, without authority to do so, will be granted. Additionally, Dalton’s corresponding request for a stay of the proceedings in the Court of Common Pleas of Lackawanna County will likewise be granted. See *Filby*, 149 A.3d at 349; *Wenrick*, 361 Pa. Super. at 142, 522 A.2d at 54.

AND NOW, this 2nd day of July, 2021, upon consideration of the “Petition to Strike Judgment/Stay Proceedings” filed by defendant, Borough of Dalton, the “Opposition to Petition to Strike Judgment/Strike Proceedings” filed by plaintiff, Carolyn J. Florimonte, the supporting and opposing briefs filed by the parties, and the oral argument on June 29, 2021, and based upon the reasoning set forth above, it is hereby ORDERED and DECREED that:

1. Defendant’s “Petition to Strike Judgment/Stay Proceedings” is granted.
2. The default judgment in the amount of \$5,756,340.00 entered in favor of plaintiff and against defendant by the Clerk of Judicial Records on May 7, 2021 is stricken as void *ab initio*; and
3. Pursuant to 28 U.S.C. §1446 (d), all proceedings in the above captioned matter are stayed “unless and until the case is remanded” by the United States District Court for the Middle District of Pennsylvania.

BY THE COURT

J.

Terrence R. Nealon

See Appendix A.

Petitioner appeals Order A, striking judgment filed in equity complaint, No. 21 EQ 918, contending that despite a ninety (90) day advance notice of a new lawsuit Defendant failed to promptly serve Notice of Removal until *after filing in state court*. Defendant failed to provide

federal court with a complete filing of the equity complaint. Both filings fail to meet the requirements of 28 U.S.C. §1446 (a) and (d), therefore, the Removal to Federal Court was defective. This was not a “snap judgment.” This was not a “snap removal.” Petitioner seeks re-instatement of the legal judgment of May 7, 2021.

B. The text of the Order of June 15, 2023, which Petitioner seeks to appeal, states in pertinent part:

AND NOW, this 15th day of June, 2023, upon consideration of the Preliminary Objections and Motion to Dismiss on behalf of the Defendant, the opposition paper of the Plaintiff and the argument of the parties, IT IS HEREBY ORDERED THAT:

1. The Preliminary Objections of the Defendant are SUSTAINED.
2. Defendant’s motion pursuant to Pa. R. Civ. P. 233.1 is GRANTED.
3. The Plaintiff, Carolyn Florimonte, is hereby barred and precluded from pursuing additional *pro se* litigation against the Borough of Dalton, the Borough Council and Borough officials from raising the same or related claims without leave of Court.
4. The Complaint in this matter is hereby DISMISSED.
5. The Clerk of Judicial Records is directed to mark this case CLOSED.

BY THE COURT:

J.

James A. Gibbons

See Appendix B.

Petitioner appeals Order B, dismissing equity complaint, No. 22 EQ 3622, contending that the judge erred in failing to follow well-settled law regarding continuing trespass by flooding in GrayBill and Lake; in allowing the impossible burden to continue; in failing to protect Petitioner because of the undue deference accorded to government; and due to an institutionalized court discrimination against *pro se* litigants.

BACKGROUND

To begin, we focus on the mid 1980's, when Petitioner was a licensed Real Estate Associate in Pennsylvania, who was frequently on Third St, Dalton, PA, to show houses listed for sale. At that time the street was half paved. The unpaved dirt portion contained a wetland, now known as 224 Third Street, Dalton, PA. As a real estate agent, Petitioner wrote many sales agreements which were essential to protecting the rights of both buyers and sellers. In fact, a course in Real Estate Law was required to obtain a license in Pennsylvania. Trespass was part of that study.

Injunction testimony in 2009, and the deed of 1986, prove that previous owner of 219 Third Street, Dalton, PA, Stanley Hedrick, purchased the Property in 1986. At a point, following 1986, Respondent illegally placed two 18" diameter pipes, emitting flooding, on the Property, without any notice or approval. Hedrick complained to Respondent. His complaint was met with an extortion attempt- by Respondent - unless that portion of the Property (100' x 200') was deeded to the Borough for \$1.00 (one dollar), the pipe and uncontained flooding would remain.

Hedrick's testimony in 2009, also revealed that he was never aware of the second pipe hidden on the Property. His testimony further confirmed that 224 Third Street had been a wetland.

Hedrick was a witness for Respondent. Petitioner's witness, Robert Fisher, former fire chief of Dalton, Pa, corroborated Hedrick's testimony.

Without disclosing the hidden flooding on the Property, Hedrick sold the Property to Petitioner in May, 2000. Upon discovering a hidden pipe, Respondent was contacted. The Borough Manager visited, promising to fix the problem. (Petitioner's complaint to the Borough in 2000, legally, removed any possible claim of a prescriptive easement, which Respondent would later claim and then abandon at Trial in 2011).

The flooding was not a naturally occurring event but a carefully planned and executed system

of pipes artificially channeling storm water, sump pump and contractor effluent to the Property.

A year later, Borough Manager disclosed existence of a second hidden pipe, on the Property, then showed the buried location to Petitioner. Although, an easement was discussed, nothing was legally pursued by Respondent, despite stipulation by Petitioner for a legal document. Instead, Respondent began to treat the entire Property as if it belonged to the Borough. In 2003, an Equity Complaint was filed in Civil Court in Lackawanna County on behalf of Petitioner.

In 2001, an illegal trench, now filled in, was dug across the Property, damaging and later killing a tree which, in 2005, would dislodge a limb on Petitioner causing two compound fractures in her neck, medically unresolved until 2007. Informed of the injury in 2005, Respondent did nothing other than hiring two new attorneys. (This injury was claimed in 2009, in a separate suit and dismissed.)

At Trial in 2011, the Borough Engineer would testify that storm water from the sixteen (16) acres above Third Street was being artificially channeled to 219 Third Street. Those acres contain the new housing development known as Huntington Woods.

The 2003 Equity Complaint in Lackawanna County was dismissed on December 28, 2011. The gravity of a judge visiting the Property after an Injunction Hearing in 2009, and observing the pipes directly on the Property, then ruling that there was no trespass, cannot be exaggerated. The judge also dismissed two additional complaints by Petitioner. Those prejudiced dismissals have followed Petitioner throughout all further legal proceedings amidst efforts to end the dangerous flooding of the Property and her home - including the Equity Complaint of 2022, dismissed on June 15, 2023, in defiance of the rights accorded to litigants subjected to ongoing trespass and continuing flooding as *held in Graybill and Lake*. (The issues raised in the 2022, complaint had not been adjudicated before, as there were new damages not previously claimed,

therefore, the judge erred in dismissing the equity action of 2022.)

Pro se appeal, in 2012, to the Commonwealth Court immediately followed. In April, 2013, the Commonwealth Court Opinion concluded the Judge erred and ordered equitable relief. During Trial in 2011, Petitioner had requested monetary relief for the years of occupation and trespass flooding of the Property, but not actual ongoing damages as they were claimed in a separate suit filed in 2009, but none was forthcoming.

The Commonwealth Court then erred in holding that Respondent owed no duty to Petitioner because Respondent had not admitted to installing the sophisticated system of pipes, therefore, Petitioner was not entitled to trespass compensation for the occupation of the Property.

During Hearing in 2013, Respondent again requested an easement, to avoid removal of the pipes. No longer trusting the Borough, Petitioner denied the request. Respondent, in retaliation, immediately installed catch basins on connecting streets which never flood but willfully, maliciously excluded Third Street, which always floods during heavy rains.

Petitioner believed that removal of the pipes in 2013, would end the flooding of the Property. However, Respondent would maliciously, willfully continue the flooding through a third pipe hidden behind 224 Third Street. As Huntington Woods grew, so did the volume of flooding which overtook the Property. Although this was an intermittent event, it repeatedly deprived Petitioner of use and enjoyment of her Property and repeatedly damaged her home.

In 2018, Petitioner witnessed and photographed removal of the pipe behind 224 Third Street, continuing to bring storm water artificially from the uphill acreage. After 2018, flooding then continued from the upper part of Third Street which contained a residual portion of the original piping system removed from the Property in 2013.

Respondent has consistently exhibited a complicated, malicious pattern of illegal activities

which destroyed the private property rights of any and all owners of the Property, endangering Petitioner's life without cease as the lower courts deference to government entities has allowed a remorseless Respondent, without financial punishment for its actions, to continue illegal actions which daily endanger Petitioner's life and the lives of pedestrians and drivers on Third Street as the trees continue to collapse on the road and the Property.

As the damages from repeated continuing flooding have multiplied over the years so have the equity complaints while the Civil Court of Lackawanna County, steadfastly, refuses to protect Petitioner and stop Respondent's access to the Property by flooding.

The Order of June 15, 2023, expressly bars Petitioner, *pro se*, from filing further complaints. This is *blatant, illegal discrimination against pro se litigants* not because Petitioner is wrong but because the judge dismissing her complaint denies her the right to file for new damages, for a continuing trespass by flooding which cannot, logically, be claimed in one suit.

Becoming *pro se* in 2009, was not a choice. Petitioner had no further funds for legal representation. Those funds were drained long before 2009, by damages from the continuing trespass flooding, forcing Petitioner into excessive debt.

The judge is wrong to specifically bar *pro se* litigation involving continuing flooding trespass which, according to Graybill and Lake, allow multiple complaints for as long as the trespass continues, without restriction as to legal representation or *pro se* litigation. Barring only *pro se* litigation raises issues of institutionalized prejudice against *pro se* litigation.

The judge erred in dismissing Equity Complaint of September 7, 2022, as the dismissal defies findings in Graybill and Lake.

STATEMENT OF THE CASE

There is a starting presumption that establishes a private property owner's sacrosanct right to control his/her own property. This presumption is adopted and professed in the Constitution of the Commonwealth of Pennsylvania, *Article 10*, yet in reality, there is an unwarranted deference by the lower courts shown to local governments which has a chilling effect on plaintiffs when those very governments are engaged in exceptionally, illegal matters.

The duration of this long-standing dispute involves a series of continuing illegal actions by Respondent causing damage, injury and intense distress as well as denial of control of the Property for an unprecedented length of time coupled with serious safety and health concerns generated and imposed by Respondent's refusal to protect Petitioner from further flooding. The length of this dispute has also been extended by the lower courts' deference to Respondent, causing Petitioner to never at any time have control or enjoyment of her Property since 2000.

Deference is unwarranted, in particular, when illegal actions by government are present, and continuing, dangerous and damaging. There are few cases similar to Petitioner's as laws, already in place, prohibit governments from engaging in the illegal activities which Respondent used first to occupy the Property until 2013, then afterwards, to continue to steal the Property by flooding for the *remainder* of the twenty-three years.

Court deference has recently been admitted and addressed in Tennessee with a new judicial bias law to end favoritism extended to governments:

Tennessee courts exercise what is called judicial deference to the government agency, choosing the government's interpretation of an unclear law over the individual's even when the individual's would make more sense. That amounts to the court putting a thumb – or in some cases, an anvil – on the scale for the government.

See Pacific Legal Foundation, p. 1, April 22, 2022.

See Appendix C

This case is brought before the Court, with no other recourse available to gain control and true ownership of the Property. Aside from one of personal importance, it is also one of extreme importance to all plaintiffs, especially pro se litigants, who await service confirmation of whether or not Removal to federal court will occur. Because this case also involves deference provided to governments, it is of extreme importance to all litigants whose private property rights are denied by an overzealous and often illegally motivated local government.

This request for relief involves the two most recently dismissed equity complaints, 21 EQ 918 and 22 EQ 3622, which met the standards of continuing flooding trespass, established in Graybill and Lake.

See Appendix D and Appendix E.

The Order of July 2, 2021, was not appealed until now, as Petitioner believed that filing a new equity complaint would, at least, remedy some damages which occurred between February 26, 2021, and September 7, 2022. The Complaint of September 7, 2022, has just been dismissed by Order of June 15, 2023. Any belief that Petitioner can obtain justice or relief from this ongoing, impossible burden, in the lower courts, is gone.

The Commonwealth Court of Pennsylvania also failed Petitioner in 2013, with a mere slap on the wrist to Respondent. That failure, without monetary trespass repercussions, which is legal, for the years of physical invasion of the Property, encouraged Respondent to continue to flood at will during the intervening years.

In appealing the Order of July 2, 2021, Petitioner contends that Respondent's Removal to Federal Court was defective, therefore, it may be adjudicated by this Court according to the following statute of limitations regarding equity complaints in Lake at 756:

With respect to the Lakes' second argument, we agree that the Lakes' claims for equitable relief are not subject to statutes of limitations. The Pennsylvania Supreme Court has held that:

in the absence of fraud or concealment, it is a general rule that laches follows the statute of limitations. However, because **statutes of limitation are not controlling in equity, but only provide guidance in determining the reasonableness of any delay**, this Court has allowed suits in equity to proceed despite significant delays in bringing the action.

This Petition has been provoked by the Order of June 15, 2023, dismissal of the equity action filed on September 7, 2022, following guidelines specifically proclaimed in Graybill at 513, and Lake at 755-756.

Confident that the Commonwealth Court's findings in Lake @ 758, regarding continuing trespass confirmed the right to file multiple complaints as the flooding continues, Petitioner filed additional suits during the twenty-three (23) years of continuing trespass and flooding:

b: *Continuing trespass*: The actor's failure to remove from land in the possession of another a structure, chattel, or other thing which he has tortiously erected or placed on the land **constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land and ... confers on the possessor of the land an option to maintain a succession of actions based on the theory of continuing trespass or to treat the continuance of the thing on the land as an aggravation of the original trespass...**

Petitioner now finds that confidence was misplaced due to the unwarranted deference which the local courts extend to government entities despite the illegal activities engaged in by those same entities, which have caused disastrous consequences to Petitioner. In 1991, in Graybill, this Court recognized the inability to claim all damages in one suit when the trespass flooding is continuing and noted that decision in Lake at 755:

Considering the record evidence in the light most favorable to the Lakes, as we must, and in the context of the concerns of the "ascertainability or predictability of the injury involved" and "whether it is possible for [the Lakes] to calculate all of [their] future damages in one action," we conclude that their claim is more akin to a continuing trespass. *Graybill*, 593 A.2d at 1316. *See also Cassel-Hoffer*, 44 A.3d 80 (Pa.Super.2012). Thus, the trial court erred when it concluded that the Lakes' action is time-barred. *Lake v. Hankin Grp.*, 79 A.3d 748, 755 (Pa. Cmmw. Ct. 2013)

In *Miller v. Stroud Township*, 804 A.2d 749 (Pa.Cmwlth.2002), this Court found that

the complaint set forth a claim for continuing trespass where the complaint alleged that: the Township constructed a sanitary sewer line on, near or about [a]ppellants' property. The construction, coupled with the effects of rainfall, resulted in a continuing trespass of water and fecal matter, which caused damage to [a]ppellants' property and an unhealthy concentration of fungi, mold and bacteria. Under section 161 of the Restatement [(Second) of Torts], because the Township failed to remove the water and fecal matter resulting from the sewer installation, [a]ppellants may maintain a succession of actions against the Township based on the theory of continuing trespass, or [a]ppellants may treat the continuance of water, fecal matter, fungi, mold and bacteria on the land as an aggravation of the original trespass.

See Appendix E

The June 15, 2023, dismissal of Equity Complaint 2022 -EQ-3622, solidifies Petitioner's belief that she cannot receive relief from the Civil Court of Lackawanna County. Twenty-three (23) years is long enough to continue asking the lower courts for relief and protection from a government agency that has appropriated Petitioner's Property by flooding since the year 2000, endangered her health and safety, daily, coupled with government retaliation by refusing to provide the same protections to her which have been provided to all other owners in Dalton.

Putting a thumb on the scales of justice in favor of any government which purposely, maliciously, illegally harms even only one resident is unacceptable.

Petitioner has correctly filed additional equity lawsuits for a continuing flooding trespass – *all* have been dismissed. It is mere conjecture to claim all possible damages in one lawsuit when a flooding trespass continues to create new, dangerous damages over many following years.

Since purchase in 2000, Petitioner has never, at any time, had control of the Property. Again and again, attempts to wrest control from Respondent have failed. This is a plea and a prayer that this court will finally end the servitude which has forced upon her by Respondent since May, 2000, by allowing appeals of the Order of July 2, 2021, and the Order of June 16, 2023.

Well-settled law by this very Court, regarding Equity Complaints, which are unconstrained by Statutes of Limitations, provides the basis for a delayed appeal of the Order of July 2, 2021.

First: Regarding Order of July 2, 2021, the Removal to Federal Court, Petitioner contends, was defective, because incomplete copies of the original filings were provided to federal court to initiate the Removal in violation of 28 U.S.C. §1446 (a).

(a)GENERALLY.—

A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

Further, Notice of Removal was never served until *after* filing in state court. The excessive excessive amount of time Respondent had to ready the Removal process indicates it was neither prompt nor legal, pursuant to 28 U.S.C. §1446, (d). Respondent filed, then held all filings until after filing in state court, mailing, en masse, which Petitioner received on May 11, 2021.

(d)NOTICE TO ADVERSE PARTIES AND STATE COURT.—

Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

Respectfully, Petitioner believes that the Judge erred as a matter of law in striking the judgment of May 7, 2021, by giving more weight to the date of the filing in state court rather than the failure of Respondent to follow the directives of 28 U.S.C. § 1446 (d). Petitioner contends that Respondent had a full ninety (90) days prior to the triggering of the thirty (30) days to effect a Removal to Federal Court. Notice of an impending Complaint is required when defendant is a municipal government. Written Notice was provided to Respondent 60 days before the Equity Complaint was filed on February 25, 2021.

Service of the Complaint by Sheriff occurred on March 26, 2021. As of April 15, 2021,

Respondent had not answered. Petitioner is not part of the online filing system, so after a lapse twelve (12) *additional days*, a Ten-Day Notice was filed with the Clerk of Lackawanna County on April 27, 2021. No response was forthcoming. On the morning of May 7, 2021, judgment was filed with the Clerk's Office. On May 11, 2021, Petitioner received four separate, large date-stamped envelopes containing various filings, all with conflicting dates on documents and envelopes. Included was a copy of the federal filing of April 26, 2021, with an incomplete copy of the original complaint.

Respondent allowed forty (40) days to lapse before serving the Notice of Removal on or about May 7-8, 2021. Upon learning of the judgment, Respondent immediately filed to Strike.

During a Hearing by phone on June 29, 2021, counsel for Respondent admitted failure to timely serve the Notice of Removal, stating Covid and staffing problems caused the delay. These issues were raised in filings and during the May 29, 2021, Hearing. However, in federal court, Respondent would later falsely accuse Petitioner of knowing of the Removal, without ever explaining how.

Had a requirement to serve by registered mail or the sheriff been required to pro se litigants, this problem could have been avoided. In 2022, this Court proposed to alter the provisions of Pa. R. C. P. 400, to accommodate "snap removals" therefore, it is not untenable for the Court to consider, a provision clarifying a legal requirement of extreme importance to pro se litigants thus ending the recurring problems with service for all Plaintiffs, not just those who are pro se. Such an amendment would remove the vague wording of "promptly" which initiates appeals to clarify if service was prompt or not, as in this case, pursuant to 28 U.S.C. § 1446 (d), and whether service must occur before filing in state court, not *after* state court filing, as in this case.

Petitioner prays that this Honorable Court will permit this appeal and prays that the Court will

overturn the Order of July 2, 2021, then re-instate the judgment of May 7, 2022.

In appealing the Order of June 15, 2023, Petitioner respectfully contends the judge erred by failing to follow well-settled law in Graybill and Lake. Petitioner draws the Court's attention to Lake at 755:

Considering the record evidence in the light most favorable to the Lakes, as we must, and in the context of the concerns of the "ascertainability or predictability of the injury involved" and "whether it is possible for [the Lakes] to calculate all of [their] future damages in one action," we conclude that their claim is more akin to a continuing trespass. *Graybill*, 593 A.2d at 1316. *See also Cassel-Hess v. Hoffer*, 44 A.3d 80 (Pa.Super.2012). Thus, the trial court erred when it concluded that the Lakes' action is time-barred.

Petitioner contends the ditch, dead trees, plants, home repairs all were reversable but continued to occur again and again over the twenty-three years of unpredictable flooding as *held* in Graybill at 513:

The damages that Graybill has enumerated include the replacement of appliances such as furnace, hot water heater and washer and dryer. In a single action to recover all damages, past, present and future, it is impossible to calculate how many such replacements should be alleged. Under these facts, it is impossible to know exactly how many incidents of flooding would occur, and the severity of them. The effect of the holding in *Leggieri* is to compel a plaintiff to seek recovery in one action for future damages based on pure speculation, because of the intermittent and unpredictable nature of the injury involved.

Petitioner's equity complaint 22 EQ 3622, met all of the requirements of a continuing trespass by flooding and contends the judge failed to follow the law, due to government deference or adverse pro se prejudice, shown in Order of June 15, 2023 - issues for this Court to decide.

Petitioner prays that this Honorable Court will reverse the Order of June 15, 2023, and remand to Lackawanna County Civil Court for further proceedings and jury trial.

Further, Petitioner prays for a permanent injunction against flooding by Respondent and striking of the Order of June 15, 2023, denying Petitioner's right to file pro se complaints.

CONTROLLING QUESTIONS OF LAW

1. What would any reasonable person do to protect her/his property and home and to escape supersaturating, continuing flooding for twenty-three years while contending with unwarranted deference to local government?
2. Was the Complaint improperly removed to Federal Court pursuant to 28 U.S. C. §1446 (d) as the it clearly states that the second step is to promptly provide Notice of Removal to Plaintiff?
3. Does serving Notice of Removal *after* filing the Removal in State Court comply with the requirements pursuant to 28 U.S. C. §1446 (d), as this was not a “snap removal” or a “snap judgment,” was the action improperly removed to federal court due to failure to serve Notice of Removal until *after* entry on the docket of the Court of Common Pleas of Lackawanna County?
4. Does providing federal court with a flawed or redacted copy of the original filings comply with the requirements for removal pursuant to 28 U.S. C. §1446 (a)?
5. Should Pennsylvania Rules of Civil Procedure be amended to require service by sheriff or registered mail of the Notice of Removal to federal court to avoid possible future judgments?
6. Should Pennsylvania follow Tennessee’s lead and create law which outlaws deferential treatment for local governments?
7. Does a judge in Lackawanna County Civil Court have the right or power to deny a *pro se* litigant the legal right to file complaints for as long as local government continues to purposely, maliciously, flood that litigant’s property for twenty-three years, while the judge does nothing to protect Petitioner or restrict that government’s retaliatory access to the Property?

REASONS TO GRANT THIS PETITION FOR PERMISSION TO APPEAL

Petitioner alleges for the foregoing reasons that she has a clear right to relief and the Court should permit the appeals for the following reasons:

First, whether due to deference or an institutionalized prejudice against pro se litigants there is no adequate remedy at law for damages available in the lower courts. Petitioner will suffer irreparable harm if this Court does not allow appeals of the Orders of July 2, 2021, and June 15, 2023. Allowing the appeals will significantly advance the termination of the matter

Second, Petitioner and the public will suffer irreparable harm if this Court does not exercise jurisdiction and enjoin the lower courts from discriminating against pro se litigants as well as ending deference to local governments.

Third, amending Pa. R. C. P. 400 would benefit all litigants and the courts in determining the correct dates of service and removal of complaints to federal court, eliminating uncertainty and the need for appeals.

I. The Appeal of the Order of July 2, 2021, Should be Granted as the Removal to Federal Court was Defective.

Lake v. Hankin Grp. at 755-56, supports Petitioner's equity right to appeal the Order of July 2, 2021, despite the passage of time, as equity complaints are not constrained by Statutes of Limitations. Petitioner contends Removal to federal court was defective as there was a failure to provide complete filings for Removal, pursuant to 28 U.S. C. 1446 (a). Petitioner also contends that Notice of Removal was not served until *after* the filing in state court which does not meet the requirements of prompt service pursuant to 28 U.S.C. 1446 (d).

With ninety (90) days advance notice of a new complaint, waiting until the last minute to file for Removal to Federal Court then failing to serve Notice of Removal until *after* filing in

state court should be grounds for appeal. Counsel for Respondent admitted on June 29, 2021, to failure to serve the Notice of Removal due to Covid and staffing issues. This admission is verified in the Order of July 2, 2021.

Service was untimely as the Removal was not a “snap” removal. Nor was a “snap” judgment involved. When counsel for Respondent, is inclined to remove an action to federal court, but fails to serve Notice of Removal to a plaintiff, for a time-period of nearly forty-five (45) days it invites a Ten-Day Notice and following Judgment.

The judge erred in applying the law because the law is unclear as to what constitutes prompt service of Notice of Appeal, pursuant to 28 U. S. C. 1446 (d).

This Court may decide to allow an appeal of the Order of July 2, 2021, for purposes of clarifying the process of removal to federal court when the removing party fails through design or misadventure to serve Notice of Appeal to the Plaintiff, resulting in a filing for judgment.

Petitioner respectfully requests permission to appeal the Order of July 2, 2021. Pursuant to findings in Lake at 756, that equity complaints are not constrained by statutes of limitations. therefore, Petitioner, respectfully requests permission to appeal, in order to validate the judgment filed on May 7, 2021, and reverse the defective removal to federal court.

II. The Appeal of Order of June 15, 2023, Should be Granted There is Clear Indication Of Prejudice Against Pro Se Litigants

Petitioner has clearly experienced the effects of deference to government agencies as well as prejudice against pro se litigants, indicated in the Order of June 15, 2023. When courts protect the offender instead of the victim, because the victim is pro se, an appeal should be allowed to correct the miscarriage of justice. An appeal will permit justice and just compensation which are until now have been unattainable in the lower courts of Pennsylvania.

The Court should allow appeal of the Order of June 15, 2023, as the judge erred in dismissing the Equity Complaint of September 7, 2022, because Petitioner is pro se and failed to follow well-settled law in Graybill and Lake, regarding filing of successive complaints during continuing, flooding trespass. The Order should be reversed and remanded to the lower court for jury trial. The public will benefit from knowing that if there is a valid legal basis for claims, their complaints will not be dismissed simply because they are pro se.

**III. Amending Pa. R. C. P. 400 Would Benefit All Litigants and the Courts
Determination of Correct Dates of Service and Removal of Complaints to Federal
Court, Eliminating Uncertainty and Following Appeals.**

Amending Pa. R. C. P. 400 would benefit all litigants and the courts in determining correct dates of service and valid removal of complaints to federal court, eliminating uncertainty and the need for appeals. A simple change to valid service by registered mail or sheriff would forestall most appeals regarding removal questions relating to service. And, certainly would have provided proof in Petitioner's case that she was not served until after the filing in state court, which counsel for Defendant, admitted as stated by the judge in the Order of July 2, 2021.

Petitioner prays that the Court will eliminate vague requirements as to *service* of Removal to Federal Court. While it may be too late to help Petitioner, the amending of Pa. R. C. P. 400 will benefit the public at large and reduce the need for appeals on that issue.

**IN THE ALTERNATIVE, PETITIONER APPLIES
FOR EXTRAORDINARY RELIEF**

Petitioner in the alternative, applies for extraordinary relief in this matter, pursuant to Pa. R.A.P. 3309 and 42 Pa. C.S. § 726.

**REASONS TO GRANT THE APPLICATION
FOR EXTRAORDINARY RELIEF**

Petitioner and the public will suffer irreparable harm by this Court's failure to exercise jurisdiction and end Respondent's continuing control and harm by flooding of the Property.

In exercising its discretion, this Court is asked to consider the public importance of the issues raised as well as the immediacy of the continuing, daily harm and danger to Petitioner.

Twenty-three years is long enough to wait for relief from the impossible burden of flooding and receive justice from the lower court system in Pennsylvania, which never comes. Petitioner alleges that she has a clear right to relief, that no adequate remedy at law for damages in the lower courts is available, and that those courts have failed to uphold her private property rights and/or protect her physically, emotionally and financially from the illegal actions by Respondent.

The ever-present danger and life-threatening aspects of the continuing trespass through artificial flooding by Respondent, as well, the absolute necessity to be reassured that the flooding will cease and never occur again is essential and meets the grounds for application for extraordinary relief. Without the measures needed to prevent future flooding, i.e., catch basins, if Petitioner sells her home, she is at risk for legal action for the following two years by the buyer, should Respondent continue to flood the Property.

Finally, this Court has a duty to provide just compensation for the twenty-three year burden of illegal theft, occupation and flooding by Respondent and a duty to uphold the Constitution of the

Commonwealth of Pennsylvania, Article 10, which reads as follows:

Initiation of Criminal Proceedings; Twice in Jeopardy; Eminent Domain
Section 10.

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

CONCLUSION

Wherefore for the foregoing reasons, Petitioner prays for aid and protection by this Court from the constant danger caused by Respondent which the lower courts have failed to provide during the ongoing years of occupation and flooding. Health and welfare at risk daily resulting from Respondent's actions, Petitioner's emotional and physical health has already been impacted and impaired and will continue to be endangered.

Failure to uphold Article 10 of the Constitution of the Commonwealth of Pennsylvania for just compensation will encourage other local governments to abuse citizens under its control just as Respondent has continued to abuse Petitioner and steal her Property without cease.

Petitioner begs this Honorable Court to intercede on her behalf and provide any other relief as the Court may deem necessary.

Respectfully submitted,

Carolyn J. Flormonte, pro se
Carolyn J. Flormonte, pro se
219 Third Street
P. O. Box 375
Dalton, PA. 18414
(570) 561-0426

APPENDIX C

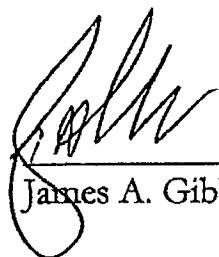
CAROLYN FLORIMONTE,	:	In the Court of Common Pleas
<i>Plaintiff,</i>	:	of Lackawanna County
vs.	:	2023 JUN 15 P 1:55
BOROUGH OF DALTON,	:	Civil Action - Lawyer of JUDICIAL
<i>Defendant.</i>	:	RECORDS CIVIL DIVISION
	:	No. 22-CV-3622

ORDER

AND NOW, this 15th day of June, 2023, upon consideration of the Preliminary Objections and Motion to Dismiss on behalf of the Defendant, the opposition papers of the Plaintiff, and the arguments of the parties, IT IS HEREBY ORDERED THAT:

1. The Preliminary Objections of the Defendant are **SUSTAINED**;
2. Defendant's motion pursuant to Pa.R.Civ.P. 233.1 is **GRANTED**;
3. The Plaintiff, Carolyn Florimonte, is hereby barred and precluded from pursuing additional *pro se* litigation against the Borough of Dalton, its Borough Council and Borough officials from raising the same or related claims without leave of Court;
4. The Complaint in this matter is hereby **DISMISSED**;
5. The Clerk of Judicial Records is directed to mark this case **CLOSED**.

BY THE COURT:



James A. Gibbons

J.

CAROLYN FLORIMONTE,	:	In the Court of Common Pleas
Plaintiff,	:	LACKAWANNA COUNTY
	:	of Lackawanna County
vs.	:	2023 JUN 15 P 1:55
BOROUGH OF DALTON,	:	Clerk of Judicial
Defendant.	:	Civil Action - Lawords Civil Division
	:	
	:	No. 22-CV-3622

Notified
6-16-23

MEMORANDUM AND ORDER

I. Introduction.

Carolyn J. Florimonte (Florimonte), proceeding *pro se*, filed what appears to be her fifteenth¹ (15th) action against the Borough of Dalton centering on flooding of her property on Third Street. The current Complaint is titled in continuing trespass. Florimonte complains against the Borough of Dalton (Dalton) "for malicious, willful misconduct; malicious, deliberate indifference; malicious, discriminatory negligence; and malicious continuing trespass." (Complaint, p.1).

The Complaint seeks to limit itself temporally. ("This action pertains only to the period of time since the filing of February 25, 2021 (21-CV-918), until the present date

¹ In the Lackawanna County Court of Common Pleas, *see Florimonte v. Borough of Dalton* (2003-CV-6611); *Florimonte v. Borough of Dalton*, (2010-CV-5981); *Florimonte v. Borough of Dalton*, (2010-CV-7822); *Florimonte v. Borough of Dalton*, (2010-CV-8001); *Florimonte v. Salva* (2011-CV-404, 2011-CV-405, 2011-CV-570, 2011-CV-571); *Florimonte v. Council of Borough of Dalton* (2011-CV-7601); *Florimonte v. Borough of Dalton*, (2016-CV-3688); *Florimonte v. Borough of Dalton* (2021-CV-918); in the United States District Court for the Middle District of Pennsylvania: *Florimonte v. Borough of Dalton*, (3:CV-14-0341); *Florimonte v. Borough of Dalton*, (3-CV-17-1063); *Florimonte v. Borough of Dalton*, (3:CV-21-756). These docket numbers represent the trial courts' only; Florimonte has made repeated trips to the Commonwealth Court of Pennsylvania, the Supreme Court of Pennsylvania, the United States Court of Appeals for the Third Circuit and the United States Supreme Court.

of this filing of September 7, 2022 . . ."). (Complaint, p.7).² Count I is entitled "Continuing Trespass," Count II is entitled "Consolidated Statutes Violated," and Count III is entitled "Violations of the Constitution of the Commonwealth of Pennsylvania." Florimonte seeks all kinds of relief in the form of compensatory damages and multiple equitable orders. Dalton filed preliminary objections and a motion to dismiss pursuant to Pa.R.Civ.P. 233.1. Dalton argues that, based on the application of *res judicata*, Florimonte's Complaint should be dismissed because the issues raised by Florimonte have been raised and disposed of previously throughout her multiple lawsuits. Additionally, Dalton argues that Florimonte's Complaint fails to state a claim upon which relief may be granted for continuing trespass, consolidated statutes violations, and violations of the Constitution of the Commonwealth of Pennsylvania. Dalton also argues several violations of the Pennsylvania Rules of Civil Procedure (one of which we have mentioned already with respect to the numbering of paragraphs), that the Complaint lacks an appropriate verification in violation of Pa.R.Civ.P. 1024, and the facts upon which Plaintiff bases her claims are not stated in a concise and summary form in violation of Pa.R.Civ.P. 1019(a). (Preliminary Objections, ¶¶42-44).

² Despite her extensive litigation history, Florimonte's Complaint fails to comply with Pa.R.Civ.P. 1022 ("Every pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation."). None of the paragraphs in Florimonte's 19-page Complaint are numbered.

II. Standard of Review.

“Preliminary objections are a device used to test the legal sufficiency of a pleading, its compliance with the Pennsylvania Rules of Civil Procedure or the court’s authority to adjudicate a controversy, prior to having to respond to the pleading on the merits.” *Sparks v. Fidelity Deposit*, No. 2014-CV-01707, 2014 WL 5789742, at *2 (Pa.Com.Pl. Lackawanna Nov. 6, 2014) (quoting *Pilosi v. Cummings*, No. 2014-CV-02879, 2014 WL 4426119 at *3 (Pa.Com.Pl. Lackawanna Sept. 4, 2014)). A preliminary objection based on a pleading’s legal insufficiency is known as a demurrer. Pa.R.Civ.P. 1028(a)(4). As stated by our appellate courts,

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

Denmark ex. rel. Hurst v. Williams, 117 A.3d 300, 305 (Pa.Super. 2015)(quoting *Durst v. Milroy General Contracting, Inc.*, 52 A.3d 257, 259-260 (Pa.Super. 2012)(citations omitted)).

“When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible

therefrom.” *Joyce v. Erie Ins. Exch.*, 74 A.3d 157, 162 (Pa. Super. 2013) (quoting *Feingold v. Hendrzak*, 15 A.3d 937, 941 (Pa. Super. 2011)). A court should sustain preliminary objections which seek the dismissal of a cause of action “only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief.” *Id.* (quoting *Feingold*, 15 A.3d at 941). “If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.” *Id.* (quoting *Feingold*, 15 A.3d at 941).

III. Discussion

Dalton’s preliminary objections find their bases in the application of the doctrine of *res judicata*. Dalton argues that the doctrine “bars the relitigation of issues that either were raised or could have been raised in the prior proceeding.” (Preliminary Objections, ¶30)(citation omitted). Essentially, Dalton argues that because there have been multiple final valid judgments upon the merits of Florimonte’s claims, she is prevented from relitigating the same cause of action. Additionally, Dalton argues that the Complaint fails to state a claim upon which relief may be granted for each of the three counts enumerated in the Complaint.

Dalton also faults the Complaint because it lacks an appropriate verification in violation of Pa.R.Civ.P. 1024; because the material facts on which Florimonte’s causes of actions are based are not stated in a concise and summary form in violation of Pa.R.Civ.P. 1019(a); and, as noted above, the Complaint violates Pa.R.Civ.P. 1022

regarding the pleader's obligation to divide and number consecutively the paragraphs in the Complaint.

In response, Florimonte offers the following:

All Preliminary Objections set forth by opposing counsel for Defendant are invalid, as they pertain to prior lawsuits. This instant complaint specifically pertains only to damage from February 26, 2021, which occurred on that date and continued until September 7, 2022, as stated in the complaint and as such, prior complaints are out-of-time, having no bearing on this matter.

(Plaintiff's Answer to Preliminary Objections, p.1). Further in her Answer to the preliminary objections, Florimonte states that “[a]ll causes of action have been different but based on a continuing trespass.” (Answer to Preliminary Objections, p.8). Florimonte seeks to distinguish the instant case in arguing that counsel for Dalton “insists on including complaints which have no bearing on this case. This instant case is a separate unit distinct from all others as it pertains only to the time from February 26, 2021 to September 7, 2022. Further, plaintiff has the right to file a complaint for every day that the flooding trespass continues.” (*Id.*, p.9). Florimonte further argues that she “did not appeal all of the dismissed complaints, therefore, this statement by opposing counsel is untrue. A petition to re-open three of the never appealed lawsuits will follow based upon denial of due process.” (*Id.*). Florimonte argues that “[p]ast lawsuits have no bearing on the validity of this instant complaint. Plaintiff has the right to file successive lawsuits for as long as it takes to end the flooding of her Property (sic)

by the Borough of Dalton.” (*Id.*, pp.11-12). Florimonte also argues that “*res judicata* is invalid in a continuing trespass.” (*Id.*, p.19).

Essentially, Florimonte relies on the Commonwealth Court’s decision in *Lake v. The Hankin Group*, 79 A.3d 748 (Pa.Cmwlth. 2013) and the decision of the United States Supreme Court in *Haines v. Kerner*, 404 U.S. 520 (1972).

In *Lake*, the Commonwealth Court succinctly set forth the issues it faced:

There are four issues for this Court’s review: (1) whether the trial court properly concluded that the relevant statutes of limitations had expired because the alleged changes to the Lakes’ property caused by flooding constituted a permanent change in the land, rather than a continuing trespass; (2) whether the Lakes’ claims for equitable relief to abate flooding are subject to statutes of limitations and, if not, whether issues of material fact remain regarding laches; (3) whether the Lakes failed to join indispensable parties; and (4) whether the Lakes’ statutory and common law claims must be dismissed against a party who allegedly caused tortious stormwater discharges, but no longer owns the property from which the stormwater continues to flow.

Lake v. The Hankin Group, 79 A.3d at 751. With respect to the last enumerated issue, the trial court found that no cause of action “could exist under the Clean Streams Law as to Hankin Group and Hankin Properties because they no longer possessed or controlled [the property in question]. The trial court determined that the Lakes’ remaining claims were time-barred.” (*Id.* at 752). The Commonwealth Court reversed the trial court *on the enumerated issues*, and remanded the case to the trial court. (*Id.* at 759)(emphasis supplied).

Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 662 (1972) held that the allegations of a *pro se* complaint would be held to “less stringent standards than formal pleadings drafted by lawyers” 404 U.S. at 520.

Florimonte argues that the Commonwealth Court’s decision in *Lake* is “the only support needed to overcome all of Defendant’s Preliminary Objections. (Answer to Preliminary Objections, p.18).

Simply put, Dalton’s argument has nothing to do with any statutes of limitations. Dalton’s argument is that Florimonte’s claims have *repeatedly* been presented and litigated, considered, and dismissed, with the exception of her initial action in 2003. That case, *Florimonte v. Borough of Dalton*, Lackawanna County No. 2003-CV-6611, resulted in an unfavorable verdict after a bench trial. Florimonte appealed and the Commonwealth Court of Pennsylvania affirmed the trial court with respect to her negligence claim, but reversed with respect to her equitable claim for trespass. *Florimonte v. Borough of Dalton*, No. 987 C.D. 2012, 2013 WL 3873727 (Pa.Cmwlth. 2013). The appellate court concluded that Florimonte had affirmatively waived any takings claim and any claim for money damages, but remanded the matter with instructions to fashion equitable relief to abate the continuing trespass occasioned by the flooding of her property. 2013 WL 3873727 at *3-*4, *11. Upon remand, the trial court directed Dalton to remove the one pipe located on Florimonte’s property and to seal and cap both pipes. Neither the borough nor Florimonte appealed the trial court’s decision on remand.

Every lawsuit since the first has had at its core the claim that Dalton has continued to channel stormwater onto her property. *See*, Plaintiff's Brief in Support of Complaint for Continuing Trespass, p.1. She has sought compensatory relief as well as equitable relief repeatedly. An excellent summarization of her multiple suits, both state and federal, is found in *Florimonte v. Borough of Dalton, a.k.a. Borough Council*, 2017 WL 7542619 (M.D.Pa. 2017). There, United States Magistrate Judge Joseph F. Saporito, Jr., catalogs Florimonte's actions from their beginning through December, 2017. Clearly, all of Florimonte's cases are based on the same claims, i.e., that Dalton has caused continuous and repeated flooding on her property.

The doctrine of *res judicata* bars relitigation of issues if four elements are present: (1) the identity of the thing sued for; (2) the identity of the cause of action; (3) the identity of the persons and parties to the action; and (4) the identity of the quality in the persons for and against whom the claim is made. *Callowhill Center Associates, LLC v. Zoning Bd. of Adjustment*, 2 A.3d 802, 809 (Pa.Cmwlth. 2010). *Res Judicata* is conclusive not only to matters decided but also to matters that *could have been, or should have been, raised and decided in a prior case*. *Id.*; *Merkle v. Workers' Compensation Appeal Board (Hofmann Industries)*, 918 A.2d 190 (Pa.Cmwlth. 2007). Additionally, *res judicata* subsumes the doctrine of collateral estoppel, which forecloses re-litigation in a subsequent action of an issue of fact or law that was originally litigated and was necessary to the original judgment. *Id.*; *see also, City of Pittsburgh v. Zoning Board of Adjustment*, 522 Pa. 44, 559 A.2d 896 (1989). Collateral estoppel is applicable where: (1) the issue decided in the prior

case is identical to one presented in a later case; (2) there was a final judgment; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment. *Id.*; (citation omitted).

“[T]he doctrine of *res judicata* precludes the relitigation of issues decided in a prior valid judgment in any future suit between the parties on the same cause of action, whereas the doctrine of collateral estoppel operates to preclude the relitigation of issues of fact or law determined in a prior proceeding.” *Mel v. Township of Springbrook*, 30 A.3d 554, 557 (Pa.Cmwlth. 2011).

Florimonte’s claims in the instant matter are barred by the doctrines of *res judicata* and collateral estoppel. Although Florimonte attempts to isolate on a temporal basis her claims in the instant matter, the facts upon which those claims are based have been adjudicated many times over.

As do the “identity of the thing sued for,” Florimonte has consistently sought compensatory and equitable relief in the form of money damages and a directive to install storm drains. As to the “identity of the case of action,” it has consistently been one of trespass.³ As to the “identity of the persons and parties to the action,”

³ In her federal action, Florimonte asserted violations of 42 U.S.C. §1983 as well, together with a claim of unlawful taking of her property. She has also included unlawful taking claims in her second federal case as well as multiple cases in this court.

Florimonte has remained constant throughout, as has the Borough of Dalton. Additionally, Florimonte has sued some of her neighbors and Borough Council. With respect to the “identity of the quality in the persons for or against whom” Florimonte’s claims have been made, as noted, they have remained constant.

We conclude that Florimonte’s present action is barred by the doctrines of *res judicata* and collateral estoppel. The statute of limitations has nothing to do with Dalton’s argument or our analysis. Florimonte’s reliance on *Lake* is wholly misplaced.

As noted, Florimonte’s Complaint contains two additional counts: Count Two “Consolidated Statutes Violated” and Count Three “Violations of the Constitution of the Commonwealth of Pennsylvania.

Regarding Count Two, the Complaint seems to suggest liability on the part of Dalton under the Pennsylvania Political Subdivision Tort Claims Act (the Act), 42 Pa.C.S. §8541, *et seq.* The Act provides limited exceptions to the general grant of governmental immunity. Florimonte quotes passages of various statutes including 42 Pa.C.S. §8542 (exceptions to governmental immunity) and §8550 (willful misconduct). Florimonte alleges in conclusory fashion that Dalton was “[w]arned prior to an injury to Plaintiff in 2005, caused by illegal digging of a trench, and warned repeatedly of ongoing danger as well as damage to Plaintiff’s home, trees and Property (sic), including the ongoing hazard on Third Street which causes water to forcibly cross Third Street and course onto the Property, Defendant has taken no action to end the continuing trespass.” (Complaint, p.17).

Regarding Count Three “Violation of the Constitution of the Commonwealth of Pennsylvania,” Florimonte lists in conclusory fashion the particular sections of the Constitution of the Commonwealth of Pennsylvania and alleges in conclusory fashion that they have been “violated by Defendant during the many years of occupation, control and continuing flooding of Plaintiff’s Property.” (Complaint, p.18). In support of this count, Plaintiff alleges a violation of Section 1 “inherent rights of mankind.”; Section 10 “initiation of criminal proceedings; twice in jeopardy; eminent domain.” and Section 26 “no discrimination by Commonwealth and its political subdivisions.” Essentially, Plaintiff argues in Count III that Dalton has installed catch basins on all adjoining streets which never flood and then “deny those same protections to Third Street which always floods.” (Complaint, ¶18). Plaintiff alleges that the borough is retaliating against her because she denied the Borough an easement over her property.

Dalton argues that the claims pressed by Florimonte in Counts II and III are not viable causes of action because of governmental immunity⁴ and the absence of any private right of action for violations of the highlighted sections of the Constitution. It is clear from the face of the Complaint that Dalton’s arguments are well taken. We can make this determination in the context of preliminary objections because “it is apparent from the face of the complaint that the plaintiff’s causes of action fail.” *Feldman v.*

⁴ Pennsylvania law provides generally that local government agencies, such as the Borough of Dalton, are immune from tortious liability. 42 Pa.C.S. §8541. While there are enumerated exceptions, *see* Pa.C.S. §8542, Florimonte has not articulated which, if any, apply; nor has she indicated that she has provided the requisite notice in this or any of her cases. *See*, 42 Pa.C.S. §5522.

45

Hoffman, 107 A.3d 821, 832 (Pa.Cmwlth. 2014); *see also, Pilchesky v. Lackawanna County*, 2023 WL 3316070 (Pa.Cmwlth. 2023); *Jones v. City of Philadelphia*, 890 A.2d 1188, 1215-16 (Pa.Cmwlth. 2006).

A. Motion to Dismiss.

Dalton has filed a motion pursuant to Pa.R.Civ.P. 233.1. Rule 233.1 provides as follows:

- (a) Upon the commencement of any action filed by a *pro se* plaintiff in the court of common pleas, a defendant may file a motion to dismiss the action on the basis that (1) the *pro se* plaintiff is alleging the same or related claims which the *pro se* plaintiff raised in a prior action against the same or related defendants and, (2) these claims have already been resolved pursuant to a written settlement agreement or court proceeding.
- (b) The court may stay the action while the motion is pending.
- (c) Upon granting the motion and dismissing the action, the court may bar the *pro se* plaintiff from pursuing additional *pro se* litigation against the same or related defendants raising the same or related claims without leave of court.
- (d) The court may *sua sponte* dismiss an action that is filed in violation of a court order entered under subdivision (c).
- (e) The provisions of this rule do not apply to actions under the rules of civil procedure governing family law actions.

“Rule 233.1 was created to address the abuse of the legal system by *pro se* litigants ‘repeatedly filing new litigation raising the same claims against the same defendant even though the claims have been previously adjudicated either through settlement or through court proceedings.’” (Comment to Rule 233.1). Rule 233.1 provides

accountability for *pro se* litigants not subject to attorney disciplinary procedures. *Bush v. Adams*, 2023 WL 2379026 (Pa.Super. 2023). “The rule operates to spare potential defendants the need to defend spurious claims first, by allowing the expeditious dismissal of duplicative *pro se* actions and, second, by empowering the trial court to ban the *pro se* litigant’s commencement of further actions against such defendants.” *Gray v. Buonopane*, 53 A.3d 829, 835 (Pa.Super. 2012).

In her Answer to the Preliminary Objections, Plaintiff notes that three of her lawsuits were not appealed. (Answer to Preliminary Objections, p.2). “Therefore, because Defendant refuses to settle and end this continuing trespass, Plaintiff will file to reopen all three Complaints.” (*Id.*). Additionally, Plaintiff evinces intent to pursue future litigation. “This matter is a continuing trespass, therefore, all of Plaintiff’s future damages cannot be claimed in one lawsuit.” (*Id.*, p.5). “Further, Plaintiff has the right to file a complaint for every day that the flooding trespass continues.” (*Id.*, p.9). “Plaintiff did not appeal all of the dismissed complaints . . . A Petition to re-open three of the never appealed lawsuits will follow based upon denial of due process.” (*Id.*). “Plaintiff has the right to file successive lawsuits for as long as it takes to end the flooding of her Property by the Borough of Dalton.” (*Id.*, p.12). “A continuing trespass gives Plaintiff the right to file a new complaint for every day that the trespass continues.” (*Id.*, pp.14, 15). These are statements in Florimonte’s pleadings indicative of her intent to engage in repetitive litigation. In light of these statements, as well as the demonstrated history of litigation in both the federal and state trial and appellate

courts, Dalton's position is well taken in this motion pursuant to Rule 233.1. We recognize that it is a stark remedy, and we do not take it lightly. But it is time for this litigation to end.

Accordingly, in addition to sustaining Defendant's preliminary objections, we will grant the motion to dismiss and order appropriate relief. An appropriate Order follows.

APPENDIX D

43
CAROLYN J. Florimonte
219 THIRD Street Plaintiff
DALTON, PA 18414

: IN THE COURT OF COMMON PLEAS
: OF LACKAWANNA COUNTY
: CIVIL ACTION

VS.

Borough of Dalton
105. West MAIN Street
DALTON, PA 18414 Defendant

: JURY TRIAL DEMANDED

2011 SEP - 7 P: 2: 04
Mauri B. Kelly
LACKAWANNA COUNTY
CLERK OF
JUDICIAL RECORDS
CIVIL DIVISION
3472

NOTICE

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed against you by the Court without you, and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

NORTHERN PA LEGAL SERVICES
507 Linden Street
Suite 300
Scranton, PA 18503
(570) 342-0184

Pennsylvania Lawyer Referral Services
Lackawanna Bar Association
338 N. Washington Avenue
Third Floor
Scranton, PA 18503
(570) 969-9161
(570) 969-9170 - Business Fax

CAROLYN J. FLORIMONTE,

EQUITY ACTION

Plaintiff

vs.

JURY TRIAL DEMANDED

BOROUGH OF DALTON,

Defendant

No.

COMPLAINT
CONTINUING TRESPASS

22 C
 2021 SEP 1 P 204
 JUNICIA CIVIL DIVISION
 BUREAU OF RECORDS
 LICK KELLY, PA. COUNTY

Now comes Carolyn J. Florimonte, Plaintiff, who resides at 219 Third Street, Dalton, PA, hereinafter known as the Property, to complain against Defendant, the Borough of Dalton, 105 West Main Street, a municipality located in Dalton, Pennsylvania, for malicious, willful misconduct; malicious, deliberate indifference; malicious, discriminatory negligence; and malicious continuing trespass in accordance with and pursuant to Commonwealth Court of Pennsylvania findings, in *Lake v. The Hankin Group*, 79 A.3d 748 PA. Comm Ct. (2013); pursuant to the Constitution of the Commonwealth of Pennsylvania; Section 1, Section 10 and Section 26; and pursuant to 42 Pa. C.S. Chapter 85 Subchapter A, Section 8501, "Local Agency" and 42 Pa. C.S. Chapter 85 Subchapter B, Section 8542, "Exceptions to Governmental Immunity" (b) (4) Trees and (b)(6) Streets, and Section 8550. Willful Misconduct, which has continued since the previous filing of February 25, 2021.

Since the illegal pipes on the Property were ordered removed in 2013, by order of the Commonwealth Court, Defendant has continued to purposely, maliciously with discrimination engage in a continuing flooding trespass which creates an undue burden for Plaintiff which no one person/constituent should be forced to bear.

Defendant knew or should have known of the anguish caused to Plaintiff when it singled out the Property, her home and her person to bear the burden of massive flooding created by its illegal, willful, malicious continuing trespass as Plaintiff has informed Defendant of the consequences of the illegal negligence by the malicious flooding and trespass, again and again.

The continuing flooding trespass is a form of malicious retaliation by Defendant to punish Plaintiff for her refusal to provide an easement in 2013, which could have been had in 2001, when initially proposed by Defendant but never solidified legally despite a promise to do so.

Plaintiff seeks monetary compensation relief in excess of fifty thousand dollars (\$50,000.00) regarding ongoing willful, malicious damages since and at all times after the previous continuing trespass complaint filing of February 25, 2021, (which addressed the malicious trespass prior to February 25, 2021), for purposeful continuing trespass and flooding, damage, financial, physical and emotional distress caused by Defendant's continuing trespass occurring since that date and Defendant's consistent willful, refusal to provide catch basins which would protect Plaintiff and her Property, thus preventing future continuing flooding and damage.

Plaintiff requests an independent, impartial panel of viewers to visit the Property to survey the ongoing destruction in order to determine the continuing, willful, malicious damage to the home and Property as well as the ongoing danger imposed on Plaintiff by Defendant's malicious, willful inaction and refusal to protect her.

Plaintiff also seeks relief in the form of an order requiring installation of catch basins on Third Street across from 219 Third Street so that overflow stormwater, which collects on the road opposite the Property, is prevented from flowing onto 219 Third Street thus eliminating the dangerous, continuing supersaturation of Plaintiff's Property or, in lieu of catch basins, an order

requiring Defendant to expend funds to cover the cost of more than two hundred fifty (250) feet of a French Drain around the house and barn to protect Plaintiff's home and property from further damage.

As mold continues to form on the interior and exterior of the home, the decaying T-111 siding must be removed as well as insulation behind the siding which is covered with mold by the excessive moisture which surrounds the house as a result of continuing flooding trespass, therefore, Plaintiff requests financial compensation by Defendant for siding and mold removal inside and outside of the home and replacement of furniture containing mold and replacement of new T-111 siding which is beginning to rot as a result of flooding.

Fissures are now visible in the garage floor and the edges of the floor are disintegrating as a result of the heaving caused by the continuing flooding trespass, therefore, Plaintiff requests relief by financial compensation by Defendant to resurface the garage apron and floor.

Further relief is requested by order requiring Defendant to remove all dead trees on the Property, killed as a result of the continuing trespass by flooding, which pose an ongoing threat to Plaintiff's health and safety and physically endanger her home. At last count – ninety+ (90+) dead trees remain on the Property. Maple, Poplar, Ash and Japanese Red Maple have all been drowned and killed by the willful, malicious super saturation of the Property by Defendant.

Further relief is requested by order requiring the provision of variances by Defendant for the legal separation and possible sale of the two additional sections of land comprising her lot which are each 100' x 200' in size and suitable for building. The Property's three lots are presently conveyed as one parcel. The ability to sell the lots separately will provide some recompence for the hundreds of thousands of dollars spent by Plaintiff (financial records- 2021-2022), during the

continuing trespass to combat the effects of recurring trespass and flooding of the Property.

Flooding, which Defendant has refused to contain, denied Plaintiff's ability and right to enjoy or sell her home thus plunging her into enormous debt. (Financial records 2021-2022.)

Plaintiff requests relief by a court order requiring Defendant to remove the dead trees in the Borough's right of way which pose an ongoing threat to Plaintiff and passersby while in vehicles or on foot. There have been no less than three instances of collapses of portions of the dead trees onto the road, killed as a direct result of the Defendant's continuing trespass, which has drowned the trees in water. New trees to be planted by Defendant after removal of dead trees.

During the Winter of 2021-2022, the supersaturation of the Property, caused more than one hundred fifty plus (150+) feet of Plaintiff's patented fencing to collapse. Plaintiff requests relief that requires Defendant to provide the funds to pay for the rebuild of the fencing.

The super saturation of the land from the Fall and Winter of 2021-2022, has caused the once level ground, which Plaintiff had previously raked and leveled, (by hand and payment to a professional contractor, Roger Miller, to level), to become bumpy and uneven. Plaintiff requests relief in the form of the cost of new re-leveling of the property and installation of new sod to be borne by Defendant.

The Winter of 2021-2022, caused sufficient heaving of the house and separated a portion of the siding, on the second level, from the house. Plaintiff requests relief in the form of the cost of repair to be provided by Defendant.

The once level stone wall, mortared and adhered to the perimeter of the house, after heaving is now a mess, uneven and pulled away from the house, allowing water to collect behind the wall, causing exterior damage to the home. Plaintiff requests relief by the provision of funds by

Defendant to tear down and reset all portions of the walls to their former level appearance.

The Winter of 2021-2022, caused severe heaving of the house which in turn caused a rupture at the top of the interior terra cotta sewer line. Plaintiff requests relief by requiring Defendant to fund the replacement of the ruptured interior sewer line.

Heaving of the home during the Winter of 2021-2022, has caused an increase in the number of nails surfacing through the second level bathroom floor. Plaintiff requests relief by requiring Defendant to fund the replacement of the bathroom flooring.

The new barn built in 2005, after the Winter of 2021-2022, is now covered in mold and dead tree limbs, while the exterior is deteriorating due to excessive moisture from repeated flooding. Plaintiff requests relief by requiring Defendant to fund the cost of barn restoration.

Landscaping timbers installed next to the garage have been moved by the excessive flooding to an area at the far end of the barn. The area with the heavy timbers and paving stones has been destroyed and must be rebuilt. Plaintiff requests relief by requiring Defendant to fund the cost to restore the area to its previous appearance. (Evidence in photos and video.)

The surface and lattice of the screened in porch is covered with green mold, caused by the repeated flooding of the Property since February 26, 2021. Plaintiff requests relief by requiring Defendant to fund the cost of cleaning and re-painting the floor and concrete base walls and lattice of the screened in porch, which show the effects of freezing water underneath the slab foundation.

The area around the large front window is rotting from the flooding, which crawls up the cinderblocks and destroys portions of the molding. Relief is requested by requiring Defendant to fund restoration of the molding and any other areas of the window damaged by continuing

flooding trespass.

There have been times over the years, that the property has been intermittently underwater for extended periods of time, most recently as in the Winter of 2021-2022. Because contractor effluent and sedimentation have been present on the Property during those times, Plaintiff requests relief by requiring Defendant to fund an independent, unaffiliated, accredited test of ground soil on the Property for contaminants to determine if the levels exceed 50-500 PPM, which would require remediation. Readings above 500 PPM EPA Standards would require immediate remediation by the offender, in this case, Defendant.

Plaintiff is elderly and no longer has the funds or energy or ability to manage the many new or ongoing problems on her Property which have been created by Defendant's willful, malicious, continuing flooding trespass. Experiencing flooding again and again each year is wrenchingly stressful and cannot be adequately described in words.

At the age of seventy-seven, (77) every time heavy rains are predicted, Plaintiff must pull sixty (60) pound sandbags in front of her garage to prevent the flooding from entering her home. Heavy rains have begun to engulf the entryway of the home causing increasing concerns that the slab home is sustaining hidden damage as visible separations are now occurring in the concrete.

Lest the Court might fail to comprehend the danger inflicted on Plaintiff by Defendant's repeated flooding of the Property, following is an example of that danger: In January, 2022, Plaintiff wore her boots to walk behind her home to discern the amount of water and ice on her land caused by flooding. As she walked behind her home, her boot went through the snow then stuck to the ice below causing Plaintiff to trip and fall on the snow and ice. Who else in Dalton is subjected to living this way by the very government that is duty bound to protect her? No one.

Until flooding by Defendant is ended, any attempts to end the danger and correct the damage is throwing good money after bad, as the continuing flooding will recreate the same problems.

Again and again, Defendant has ignored Plaintiff's suffering, knowing full well the damage and injury being caused to her and everything she owns by the repeated malicious flooding.

As the malicious, willful, intentional, retaliatory destruction of Plaintiff's life, home and property continues, Plaintiff prays this Honorable Court will provide relief from the ongoing nightmare of continuing intermittent flooding trespass by holding Defendant accountable and ordering a complete funding of the damages after an impartial panel of viewers' visit to the Property and, following an assessment of the damages since February 26, 2021, until the date of this instant filing by court order removing all danger created by Defendant's malicious flooding.

I. FACTS AND BACKGROUND

This action pertains only to the period of time since the last filing of February 25, 2021, (2021-CV-918), until the present date of this filing of September 7, 2022, as the damages have continued and escalated since the previous filing of February 25, 2021.

In the 1980's, Plaintiff was a real estate agent. She recalls that the section of Third Street where the subject Property is located, was unpaved. The upper part of the street was paved but the lower section was a dirt road. Sometime later Defendant paved the entire street, hiding the two eighteen (18) inch in circumference pipes under the road which then emerged, but hidden, on a wooded portion of 219 Third Street. This could only have been accomplished by the Borough itself, as witness testimony during Injunction Hearings proved in 2009.

Plaintiff did not know until 2011, after Trial testimony by the Borough engineer, that storm and contractor effluent from newly developing Huntington Woods was also being illegally

re-directed onto the Property.

On or about May 18, 2018, Plaintiff witnessed a third enormous pipe being removed from 222 Third Street. (Photo evidence.) That pipe was still funneling water under a stone wall and then underground to a commercial sump pump on 222 Third Street, which then forced flooding onto the street. The area, where the commercial sump pump was located, is still visible in the front yard of 222 Third Street, now covered by a concrete slab.

After the two flooding pipes on the Property were removed as well as further sealed with cement, by Order of the Commonwealth Court, in 2013, the Borough hid the fact that the third similar pipe was still delivering stormwater to 222 Third Street, causing repeated flooding of the street and still inundating 219 Third Street again and again. Only Defendant could have devised such an elaborate system in order to avoid a storm water management program for Huntington Woods. Plaintiff contends that the upper Third Street, eighteen (18) inch pipe, although removed from the Property, is still purposely delivering stormwater to the upper section of Third Street, and still causing the continuing, willful trespass and flooding of Plaintiff's entire property as it makes its way down Third Street.

When Plaintiff purchased the Property in May, 2000, she undertook a complete renovation of the home, unaware of the hidden flooding. After suing the Borough in 2003, Defendant asked "what has Plaintiff done to correct the problem?" Plaintiff then undertook a clearing of the wooded portion of the Property, which concealed the two pipes, thinking that perhaps she could resolve the problem herself. Massive amounts of uncontained water from the pipes ended that thought.

For thirteen years, Defendant refused to vacate the Property, in contempt of repeated Cease

and Desists, causing a slow destruction of Plaintiff's land and home. Despite court ordered removal of the two pipes in 2013, trespass flooding continues as Defendant refuses to protect Plaintiff by catch basin installation on Third Street, thus overtly threatening her health and safety during heavy rains.

When Plaintiff filed a Federal Complaint in 2014, Defendant dithered with doing the right thing by contemplating installing five catch basins across from 219 Third Street, even going so far as to paint and number the areas for installation, but then did nothing.

The unpredictability of heavy rains as well as the increase in volume of water during current rainstorms creates a stressful event and continuing flooding every time it rains. The severity of these rainstorms fills Plaintiff with dread and fear.

Defendant has known for many years of the problem it created when it illegally destroyed a wetland in the 1980's, then illegally seized, installed and hid pipes on a portion of the Property to accommodate the stormwater which subsequently had nowhere to go except onto the street. Instead of creating a stormwater management program for Third Street, Defendant's actions established a pattern of illegal activity which continues to this day.

Photo evidence from 2004, proves that Defendant's illegal solution was inadequate even then as the Property could not absorb the volume of water being illegally transferred through the two hidden massive pipes, thus causing water to overwhelm Third Street *and* the Property.

Further, during this time Huntington Woods was being developed, therefore, stormwater and effluent from that area was also being transferred illegally to the Property. Pieces of cut brick, algae and visible foam often flowed through the Property (after clearing of land by Plaintiff), causing contamination.

Then, as now, stormwater overwhelms the Property, flows to the back into a natural conduit which travels under Second Street into another channel, to the opposite side of Fuller Road and progresses through Borough pipes under Old Turnpike Road, then through more pipes, emptying into the Ackerly Creek watershed which flows through Dalton, PA, taking contractor effluent from Huntington Woods with it - new houses are, even now, being constructed. Contaminated water eventually makes its way to the Chesapeake Bay.

According to PA EPA, Ackerly Creek is the most "stressed" watershed in the Tunkhannock Creek drain basin involving problematic concentrations of ammonia, phosphates and nitrates.

The many violations of Commonwealth law did not and still do not concern Defendant as it continues to illegally flood the Property at will. In addition, as testified, during Hearings, when the previous owners of the Property complained to Defendant, Defendant responded that unless the owners deeded a 100 foot x 200 foot section of the Property to the Borough for one dollar (\$1.00), the Borough would not correct the problem. (Evidence - Transcript of 2009, Injunction Hearing.) Further, Defendant was unsuccessful in claiming a prescriptive easement during Trial in 2011, as the twenty-one year requirement of being open, notorious and visible was not met.

II. DAMAGES

Damages are many, ongoing and substantial since the Complaint of 2021. Effects of repeated, unpredictable flooding could easily be ended by installation of catch basins on Third Street.

During her lifetime Plaintiff has owned three other homes and never once experienced any personal injury, damage, danger and invasion of her home and land, as she has while living in the Borough of Dalton. Never in any of those homes was her land covered by ice and, therefore, dangerous. Defendant has transformed her life into a living agony. It has been devastating and

extremely costly. Being forced to share her Property with an unscrupulous, local government which has vast resources to prolong the agony which invades Plaintiff's life, is intolerable.

As water repeatedly overtakes the Property, much of it collects under Plaintiff's home which is on a slab foundation. If the weather is not conducive to eliminating the water under the home, the results are horrific. The house continues to heave every winter causing additional interior and exterior damage. Those damages could be corrected if the intentional flooding of the Property were to be ended. To correct the damage without ending the flooding will incur the same problems again and again.

In October, 2021, Plaintiff walked the portion of the Property containing many of the dead or dying trees in order to count them, immediately stepping into two (2) inches of pervasive water. To be clear, the flooding has not killed just ash trees but maple, poplar, ornamental bushes, and trees, as well. Each tree removes a ton of water per day from land but can't if it is dead.

III. CONCLUSIONS OF LAW

The issues presented in this instant equity complaint regarding continuing trespass by flooding were previously addressed and resolved by the Commonwealth Court in Lake v. The Hankin Group, 79 A.3d 748 PA. Comm Ct. (2013). Even if an offending structure is removed but the trespass by an "other thing" (in this case flooding) continues, it does not absolve the original trespasser of liability for the continuing flooding trespass.

The questions: can a storm event causing damage be reasonably predicted; is there a statute of limitations in equity; is there a permanent change to the land; are the resulting damages prospectively ascertainable? The answer to all is no.

Further questions: is there a continuing trespass; may Plaintiff continue to file additional

complaints for every day that the flooding trespass continues? The answer to both is yes.

On appeal, *Lake* maintained that ongoing safety concerns and damage caused by continuing periodic incidents of large amounts of water flowing onto their property as well as additional sediment caused repeated damage to their property and could not be predicted. *Lake* claimed that they could not calculate all of their future damages in one complaint and claimed that the statute of limitations did not apply to their suit in equity. The Commonwealth Court agreed.

In *Lake*, the Commonwealth Court also held the prior owners responsible, in part, for creating the continuing trespass, although they no longer owned the offending property. Like Plaintiff, the *Lakes* could not predict the heavy rain events and could not possibly include all damages in one suit. The continuing trespass put the *Lakes* and their property at risk with every heavy rain.

The Standard of Review for this instant equity complaint is *Lake v. The Hankin Group, 79 A.3d 748 PA. Comm Ct. (2013)*, which almost exactly mirrors Plaintiff's ongoing problems regarding the continuing trespass by Defendant. Defendant has a long history and ongoing pattern of illegal actions which Plaintiff cannot overlook as it has cost her countless funds financially as well as deep emotional distress and despair as she has watched the slow, unending deterioration of her home and property.

Previous and ongoing safety concerns and injuries, as well as continuing physical damages to Plaintiff's home and property caused by the continuing, periodic, often daily, intrusion of water onto the Property constitute a continuing trespass, as held in *Lake v. The Hankin Group*. Further, as held in *Lake, pp. 753-754*, there are no statutes of limitations nor are irreparable damages a bar for a continuing trespass claim in an Equity Complaint:

The Lakes first argue that the trial court erred by granting summary judgment based upon its determination that their claims were time-barred. Specifically,

they assert a genuine issue of fact remained as to whether the floods they have experienced, and the damages therefrom, constitute a continuing trespass, given that the floods cannot reasonably be predicted, and the resulting damages are not prospectively ascertainable. We agree.

In Lake, p. 755, the Commonwealth Court reversed the lower court's erred finding that the claims were time-barred. Although the Lakes suffered what would be considered to be permanent changes to their property, their allegations also described "ongoing potential safety concerns as well as damage caused by continuing, periodic intrusion" of water onto their property. The Commonwealth Court found the latter allegations "more akin to a continuing trespass" so the Lakes were not barred by the applicable statutes of limitations. "Statutes of Limitations are not controlling in equity." See Lake at pp.755-756.

We conclude the trial court erred in finding that the Lakes' action is in the nature of a permanent trespass because, although the subject claims do describe some permanent changes to the Property allegedly caused by the flooding, the allegations also describe characteristics of continuing trespass.

Notwithstanding that there have been sediment deposits and some physical damage to the Driveway has occurred, the Lakes also complain of the ongoing potential safety concerns as well as damage caused by continuing, periodic intrusion of the large amounts of water onto their property, along with the additional sediment deposits.

Further, in Lake p.755, the Court held:

Considering the record evidence in the light most favorable to the Lakes, as we must, and in the context of the concerns of the "ascertainability or predictability of the injury involved" and "whether it is possible for [the Lakes] to calculate all of [their] future damages in one action," we conclude that their claim is more akin to a continuing trespass. *Graybill*, 593 A.2d at 1316. See also *Cassel-Hess v. Hoffer*, 44 A.3d. 80 (Pa.Super.2012). Thus, the trial court erred when it concluded that the Lakes' action is time-barred.

In *Miller v. Stroud Township*, 804 A.2d 749 (Pa.Cmwlth.2002), this Court found that the complaint set forth a claim for continuing trespass where the complaint alleged that the Township constructed a sanitary sewer line on, near or about [a]ppellants' property. The construction, coupled with the effects of rainfall, resulted in a continuing trespass of water and fecal matter, which caused damage to [a]ppellants' property and an unhealthy concentration of fungi, mold and bacteria. Under section 161 of the Restatement [(Second) of

Torts], because the Township failed to remove the water and fecal matter resulting from the sewer installation, [a]ppellants may maintain a succession of actions against the Township based on the theory of continuing trespass, or [a]ppellants may treat the continuance of water, fecal matter, fungi, mold and bacteria on the land as an aggravation of the original trespass.

Id. at 754 (citation omitted). Similarly, in the instant action, the Lakes have alleged that the former Cairns Tract development “coupled with the effects of rainfall, resulted in a continuing trespass of water” and sediment. *Id.*

As the only exception to the Court’s findings in *Lake*, is the absence of fecal matter, which corresponds to contractor effluent, Plaintiff’s case is identical to *Lake v. The Hankin Group*.

In *Lake*, p. 758, the Court found that when a landowner is subjected to continuing trespass by any “other thing,” in this instant case, flooding, he or she may file lawsuits for every day that the trespass continues:

Hankin Group and Hankin Properties contend that they cannot be held liable under the Clean Streams Law as a “person ... in violation” because they cannot presently be in violation since they no longer have an interest in the former Cairns Tract. *Id.* The Restatement (Second) of Torts, § 161 (1965) states in relevant part, “(1) A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.” The comment to Subsection 1 of Section 161 of The Restatement (Second) of Torts provides, in pertinent part:

- b. *Continuing trespass.* The actor’s failure to remove from land in the possession of another a structure, chattel, or other thing which he has tortiously erected or placed on the land constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land and ... confers on the possessor of the land an option to maintain a succession of actions based on the theory of continuing trespass or to treat the continuance of the thing on the land as an aggravation of the original trespass

Warned by Plaintiff, again and again, of dangerous conditions on the Property, Defendant, has instead continued without regard to Plaintiff’s safety or well-being, to exacerbate the flooding which overtakes the Property causing severe distress and mental anguish to Plaintiff, thus causing a forced servitude which no reasonable person should ever have to endure.

These illegal, intrusive, willful, deliberate, malicious actions by Defendant have destroyed

any possibility of her ever selling her home and robbed her of her lifetime savings. This willful, deliberate, malicious indifference by Defendant has negatively affected every aspect of Plaintiff's life, harming her again and again.

Defendant has had the ability to end the flooding of the Property by installing catch basins on Third Street but refuses to do so even though Defendant is knowledgeable of the harm, injury and danger the flooding causes to Plaintiff.

The Courts in Pennsylvania have shown a willingness to hold municipalities accountable for their illegal, despicable actions when the outcomes of those actions cause immense hardship and distress to Plaintiffs. Injunction Testimony from 2009, indicates that Defendant did indeed install the pipes on the Property.

The removal of two of the pipes in 2013, does not relieve Defendant of the duty to end the flooding of the Property, especially since Defendant knew but did not disclose information of the third pipe which continued to flood Third Street every time it rained and, in turn, often caused violent flooding of the Property. Flooding is the "other thing" which Defendant was obligated to cease, desist, stop and quit but did not.

IV. COUNT ONE
CONTINUING TRESPASS

Upon finding the first pipe on her land in 2000, Plaintiff immediately contacted Defendant. The Borough Manager visited the Property and promised to correct the problem. In 2001, he demanded an easement which Plaintiff was willing to provide, but only upon preparation by Defendant's solicitor of a document regarding legal easement which would be signed and recorded. Defendant instead decided not to pursue an easement but continued to flood the Property at will, at all times retaining illegal control of the Property. The continuing trespass is

now in its 22nd year during which time no monetary relief has been provided. Defendant has made no effort to correct the trespass which re-occurs whenever it rains.

Allowing the raising of the levels of the properties located at 222 and 224 Third Street, in 2018, has dramatically increased the flooding which now enters Plaintiff's garage and the home entryway. Dead and dying trees are evident everywhere on the Property and pose a continuing significant threat to Plaintiff and her home. Plaintiff is fully within her rights to file multiple lawsuits to regain control of her Property as long as there is a continuing trespass by Defendant. The continuing trespass has been unabated since 2000.

As the Commonwealth Court *held in Lake v. The Hankin Group, 79 A.3d 748 PA. Comm Ct. (2013)*, the controlling actions by Defendant on and around Plaintiff's Property day after day for twenty-one (21) years, are the very definition of a continuing trespass.

V. COUNT TWO
CONSOLIDATED STATUTES VIOLATED

Following are the Pennsylvania Statutes violated by Defendant during the many years of occupation and/or continuing flooding of Plaintiff's Property:

42 Pa. C.S. Chapter 85 Subchapter A, Section 8501. Definitions. "Local Agency" "Local agency." A government unit other than the Commonwealth government. The term includes, but is not limited to, an intermediate unit; municipalities cooperating in the exercise or performance of governmental functions, powers or responsibilities under 53 Pa. C.S. Ch. 23 Subch. A (relating to intergovernmental cooperation); and councils of government and other entities created by two or more municipalities under 53 Pa.C.S. Ch. 23 Subch. A.

42 Pa. C.S. Chapter 85 Subch. C, Section 8542, "Exceptions to Governmental Immunity"

§ 8542. Exceptions to governmental immunity.

(a) **Liability imposed.**--A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and (2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

(b) **Acts which may impose liability.**—The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:

(4) **Trees, traffic controls and street lighting.**—A dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting systems under the care, custody or control of the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

(6) **Streets.**—

(i) A dangerous condition of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

42 Pa. C.S. Chapter 85 Subchapter C, Section 8550, Willful misconduct.

§ 8550. Willful misconduct.

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

Warned prior to an injury to Plaintiff in 2005, caused by illegal digging of a trench, and warned repeatedly of ongoing danger as well as damage to Plaintiff's home, trees and Property, including the ongoing hazard on Third Street which causes water to forcibly cross Third Street and course onto the Property, Defendant has taken no action to end the continuing trespass.

VI. COUNT THREE
VIOLATIONS OF THE CONSTITUTION OF THE
COMMONWEALTH OF PENNSYLVANIA

Following are the laws pursuant to the Constitution of the Commonwealth of Pennsylvania violated by Defendant during the many years of occupation, control and continuing flooding of Plaintiff's Property:

§ 1. Inherent rights of mankind.

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.

§ 10. Initiation of criminal proceedings; twice in jeopardy; eminent domain.

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

§ 26. No discrimination by Commonwealth and its political subdivisions.

Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

Defendant cannot justify the installation of catch basins on all adjoining streets which never flood and then deny those same protections to Third Street which always floods. Defendant's blatant discrimination is an illegal, malicious, ongoing retaliation directed towards Plaintiff because she denied to Defendant the coveted easement on her Property, which is her civil right.

For who would want to share any portion of their property with a government known, by its actions, to be dishonest and untrustworthy?

CONCLUSION

Defendant has had an obligation and duty to protect all persons in its care, without favor or discrimination. The flooding and continuing trespass was created by Defendant as stated during testimony in May, 2009, by Defendant's own witness, and in August, 2011, by the Borough Engineer. It continues to this day unabated. Defendant has failed to end the flooding of the Property and danger to Plaintiff. The damage and injury continue unabated.

Wherefore, for the foregoing reasons, Plaintiff respectfully requests this Honorable Court to grant all of the claims set forth in this Complaint and in particular, the granting of an impartial viewing panel to visit and assess the continuing trespass and damage to the home and Property as well as requiring Defendant to provide testing for soil contamination.

Respectfully submitted,

Carolyn J. Flotimonte, pro se
Carolyn J. Flotimonte, pro se
219 Third Street
P.O. Box 375
Dalton, PA 18414
570 563-2422

CERTIFICATE OF SERVICE

RE: Continuing Trespass

I, Carolyn J. Florimonte, hereby certify that I have caused to be served a true and correct copy of Plaintiff's Equity Complaint for Continuing Trespass of September 7, 2022, to Defendant, by service of the Lackawanna County Sheriff's Department, on the date indicated above, to the parties listed below:

Borough of Dalton
105 West Main Street
Dalton, Pennsylvania 18414

Plaintiff:

Carolyn J. Florimonte, pro-se
219 Third Street
P.O. Box 375
Dalton, Pennsylvania 18414
570-563-2422

Signature:

Carolyn J. Florimonte, pro se

Date:

September 7, 2022

APPENDIX E

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carolyn J. Florimonte, :
Appellant :
v. : No. 987 C.D. 2012
Borough of Dalton, :
:

ORDER

AND NOW, this 4th day of April, 2013, the order of the Lackawanna County Court of Common Pleas denying Carolyn J. Florimonte's claim for relief in the above-captioned matter is affirmed, in part, as Carolyn J. Florimonte has failed to offer sufficient evidence of negligence and reversed, in part, as Carolyn J. Florimonte has demonstrated a continuing trespass and is entitled to equitable relief.

The matter is remanded to the Lackawanna County Court of Common Pleas to fashion equitable relief consistent with the attached opinion that will abate the trespass created on Carolyn J. Florimonte's property situated at 219 Third Street in the Borough of Dalton, Lackawanna County, Pennsylvania, by the unlawful concentration and discharge of surface water thereon through and from the two pipes, referred to in the record as the ninety-degree and forty-five degree pipes, laid under Third Street and terminating near or upon the property.

Jurisdiction relinquished.

James Gardner Collins
JAMES GARDNER COLINS, Senior Judge

Certified from the Record

APR - 4 2013

and Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carolyn J. Florimonte,

Appellant,

v.

Borough of Dalton

: No. 987 C.D. 2012
: Submitted: October 26, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: April 4, 2013

Carolyn J. Florimonte (Appellant), *pro se*, appeals from the December 28, 2011 Lackawanna County Court of Common Pleas (Trial Court) opinion and order denying her claim for relief against the Borough of Dalton (Borough) for trespass and negligence.¹

Appellant is the owner of a parcel of land situated at 219 Third Street in the Borough of Dalton, Lackawanna County, Pennsylvania (Property). In the Borough of Dalton, Third Street runs between Fuller Road and Lake Street. The Property is flat, but located on Third Street between two significant slopes that place the Property at the bottom of a bowl. (Notes of Testimony (N.T.) at 147,

¹ Judgment was entered in favor of the Borough on April 25, 2012.

215-216, Reproduced Record (R.R.) at 302b, 370b-371b.) As a result of the surrounding topography, surface water drains naturally from the twenty-six acres above the Property to the area of Third Street where the Property is situated. (N.T. at 99, 218-219, R.R. at 254b, 373b-374b.)

Appellant purchased the Property by deed dated May 5, 2000, from Stanley and Josephine Hedrick. (N.T. at 27-28, R.R. at 182b-183b, Appellant's Trial Exhibit 4.) The Property consists of three lots, each a hundred feet wide: Lot 16 contains Appellant's residence and borders upon Third Street; Lot 17 is adjacent to Lot 16 and also borders upon Third Street; and Lot 30 is situated directly behind Lot 16. (N.T. at 57, 222, R.R. at 212b, 377b.) At the time of purchase, the Property had stood vacant for five years and Lot 17, which is at the heart of this appeal, was wooded and overgrown with brush. (N.T. at 46-19, 184-186, R.R. at 201b-204b, 339b-341b.)

Shortly after purchasing the Property, Appellant grew concerned about excess surface water and traced the source of the water to the interior of Lot 17. (N.T. at 151, R.R. at 306b.) Appellant discovered two plastic sluice pipes carrying water onto the Property. The first sluice pipe travels underground at a ninety-degree angle to Third Street and outlets on the surface about seven to nine feet from the boundary line, within the Borough's right of way. (N.T. at 151, 190-191, 219-220, 226, R.R. at 306b, 345b-346b, 374b-375b, 381b.) Appellant contacted the Borough. (N.T. at 154, R.R. at 309b.) In April 2001, Appellant discovered the second sluice pipe. (N.T. at 188, R.R. at 343b.) This second sluice pipe is partially visible on the surface of Lot 17, before it continues underground, crossing Third Street at a forty-five degree angle, and continuing toward Lake Street. (N.T. at 188, 219-220, 223, R.R. at 343b, 374b-375b, 378b.)

The side of Third Street on which the Property is located does not have culverts or a swale; however, the opposite side of Third Street has a swale running parallel to the street and the bordering properties, and most of the driveways have culverts underneath to allow surface water to travel freely through the swale. (N.T. at 59, 63, 65, R.R. at 214b, 218b, 220b.) The surface water running down the opposite side of Third Street through the swale is then conveyed underneath Third Street and onto Lot 17 via the sluice pipes. (N.T. at 130, R.R. at 285b.) Both pipes are a part of the Borough's storm water management system. (N.T. at 226, R.R. at 381b.)

Initially, Appellant gave permission for Borough representatives to enter the Property and attempt to work a solution to the flooding caused by the discharge of water on Lot 17 from the two pipes. (N.T. at 155, R.R. at 301b.) Borough representatives entered the Property, cut back brush on Lot 17, and dug a trench at the point where the discharge from the two pipes was closest, to allow the water exiting the pipes to traverse the length of Lot 17, and outlet into an existing channel located on the property behind Lot 17. (N.T. at 153, 157, 195, 222, R.R. at 208b, 250b, 312b, 377b.) The trench failed to lessen the effect of the flooding on the Property and, dissatisfied with this result, Appellant subsequently rescinded permission for the Borough to enter the Property. (N.T. at 159, 191-193, R.R. at 314b, 346b-348b, Appellant's Trial Exhibit 59.)

The flooding and standing water on Lot 17 continued, and when Lot 17 became saturated, the water traveled onto Appellant's other lots. (N.T. at 198, R.R. at 353b.) Appellant's residence, situated next to Lot 17 on Lot 16, is a former barn constructed of cinder block and the water traveled under the foundation, causing damage to the residence. (N.T. at 178-180, 198, R.R. at 333b-335b, 353b.) Over time, Appellant took steps to protect the residence, such as adding a silicone

coating to the siding, constructing a stone wall at the Property line, raising Lot 16, and putting down gravel to absorb the water, but the flooding continued to impact her residence. (N.T. at 180, 196, 198, 204, 335b, 351b, 353b, 359b.) Ultimately, Appellant's residence suffered significant water damage, Lot 17 remained saturated, and none of the steps Appellant undertook lessened the damage caused by the excess surface water discharged onto her Property.

On March 4, 2003, Appellant, represented by counsel, filed a complaint in equity alleging that the Borough is the owner of a water drainage system that is located, in part, on her property, that the Borough's placement of the water drainage system was without consent, and that the water drainage system continually deposits excessive quantities of water onto her land. (Complaint ¶¶4-8, R.R. at 12a-13a.) Appellant claimed that the excessive quantity of water deposited by the drainage system amounted to a continuing trespass, rendering a portion of her land unusable and interfering with her enjoyment of the Property. (Complaint ¶¶15-16, R.R. at 13a-14a.) Appellant further alleged that the Borough altered the natural flow of surface water by concentrating the discharge of surface water onto the Property, causing a dangerous condition, and that the Borough had negligently constructed and maintained its water drainage system. (Complaint ¶¶18-19, R.R. at 14a.) Appellant asked for both monetary damages and equitable relief.

On April 18, 2007, Appellant petitioned for preliminary and/or permanent injunctive relief, requesting that the Borough be ordered to remove the pipes discharging water onto the Property and/or abate the continuous discharge of water. Hearings were held before the Trial Court on April 3, 2009, and May 1, 2009, and the Trial Court conducted a view of the Property on May 1, 2009. On October 6, 2009, the Trial Court issued an opinion and order denying Appellant's petition for injunctive relief. The Trial Court reasoned that an injunction was

inappropriate because (1) the record failed to establish the status quo, (2) Appellant had an adequate remedy at law, and (3) it was not clear from the record that removal would not harm the public interest. (October 6, 2009, Opinion and Order (Injunction Op.), at 9-10, R.R. at 262a-263a.) The Trial Court also stated that its opinion and order was limited to Appellant's entitlement to a mandatory injunction and was not intended to address Appellant's entitlement to the relief requested in her complaint. (Injunction Op. at 9, R.R. at 262a.)

Appellant was represented by counsel up to and including the two hearings and the view conducted as a part of the Trial Court's review of Appellant's petition for injunctive relief. On May 28, 2009, Appellant's counsel filed a petition for leave to withdraw as counsel. The petition was granted on June 16, 2009, at which time Appellant elected to proceed *pro se*.

On August 10, 2011, the Trial Court held a single-day non-jury trial on Appellant's claims. Appellant testified and submitted into evidence a series of photographs of the pipes at issue, the water collecting on the Property, and the damage to her residence. Appellant, however, chose not to submit evidence concerning monetary loss. Both Appellant and the Borough presented the testimony of the Borough's engineer, John Seaman. The Borough also presented photographs, a street profile of Third Street, and a topographical map of the area surrounding the Property. The Borough did not dispute the water problems and the damage to the Property alleged by Appellant, but sought instead to demonstrate throughout the trial that the excess surface water on Appellant's Property was a result of the natural watercourse and not due to any act for which the Borough was liable.

Following the non-jury trial, the Trial Court concluded that Appellant had "failed to meet her burden," writing: "There simply is no credible evidence of

record which supports a cause of action in negligence or trespass. For this reason, Plaintiff's claim for relief is hereby denied." (December 28, 2011, Opinion and Order (Trial Court Op.) at 14, R.R. at 677a.) Appellant appealed to this Court.

Before this Court, Appellant argues a right to recover under the Storm Water Management Act² (SWMA), and contends that the Borough's actions constitute a taking in violation of the United States and Pennsylvania Constitutions. Appellant also contends that the Trial Court's denial of her recusal request was an abuse of discretion. Finally, Appellant contends that the Trial Court committed an error of law and abused its discretion in finding that she failed to meet her evidentiary burden and denying her claim for equitable relief based on negligence and trespass.³ For the reasons that follow, although we conclude that Appellant procedurally waived her takings claims and her claim under the SWMA, and we affirm the Trial Court's denial of Appellant's claim for relief based in negligence, we must reverse and remand this matter to the Trial Court, as we conclude that the Trial Court committed an error of law in denying Appellant equitable relief for her claim of trespass.

Appellant argues that the Borough violated the SWMA by diverting surface water over her land, creating a nuisance, and by failing to file a storm water management plan. Appellant is procedurally barred from recovery under the SWMA. Appellant did not allege a right to recover under the SWMA in her

² Act of October 4, 1978, P.L. 864, as amended, 32 P.S. §§ 680.1-680.17.

³ "Our appellate role in cases arising from non-jury trial verdicts is to determine whether competent evidence supports the trial court's findings or whether the court committed an error of law. The trial court's findings of fact must be given the same weight and effect on appeal as the verdict of a jury. Further, we consider the evidence in a light most favorable to the verdict winner." *James Corp. v. North Allegheny School District*, 938 A.2d 474, 483 n.6 (Pa. Cmwlth. 2007) (internal citations omitted).

complaint. Appellant's complaint contains only claims for trespass and negligence and Appellant has never amended her complaint to include other claims. Appellant contends that the SWMA has "been a part of the Pleadings since June, 2007," and cites to portions of the reproduced record that contain her counseled brief in support of a petition for preliminary injunction and her post-hearing *pro se* brief in support of a request for preliminary injunction. (Appellant Br. at 32.) Neither of the briefs cited by Appellant are proper pleadings or vehicles with which to raise a claim for relief. *See Pa. R.C.P. No. 1017(a).*⁴ Regardless of whether Appellant may have at one time had a substantive basis upon which to claim a right to recover under the SWMA, Appellant waived any such claim in these proceedings.⁵

Similar procedural deficiencies bar Appellant's takings claim. In her brief to this Court, Appellant alleges that her rights under the Fifth and Fourteenth Amendment of the United States Constitution and under Article 1, Section 10 of the Pennsylvania Constitution have been violated.⁶ As with Appellant's argument

⁴ Pennsylvania Rule of Civil Procedure No. 1017(a) states: "Except as provided by Rule 1041.1, the pleadings in an action are limited to (1) a complaint and an answer thereto, (2) a reply if the answer contains new matter, a counterclaim or a cross-claim, (3) a counter-reply if the reply to a counterclaim or cross-claim contains new matter, (4) a preliminary objection and a response thereto."

⁵ Section 15 of the SWMA, with certain exceptions, allows private individuals aggrieved by violations of the act to bring suit for damages or equitable relief. 32 P.S. § 680.15.

⁶ The Fifth Amendment to the United States Constitution provides, in relevant part, "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides, in relevant part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." *See also Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241, 17 S. Ct. 581, 586 (1897). Article 1, Section 10 of the Pennsylvania Constitution provides, in relevant part, "[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

concerning the SWMA, Appellant may well have had a substantive basis upon which to pursue a claim against the Borough for taking the Property or a portion thereof without the payment of just compensation. However, Appellant has failed to follow the proper procedural law in advancing her claim. Appellant filed a civil action in equity alleging claims of negligence and trespass. Nowhere in her complaint does Appellant raise any counts related to the Pennsylvania or United States Constitution. More importantly, Appellant did not and has never filed a petition with the common pleas court for the appointment of a board of viewers in accordance with the Eminent Domain Code.⁷ In order to advance her claims that the Property or a portion thereof was taken without just compensation, Appellant needed to file a petition for appointment of a board of viewers.⁸ *Id.* Accordingly, Appellant's state and federal constitutional claims are not properly before this Court.

Next, Appellant contends that the Trial Court Judge demonstrated a bias against her and that it was therefore an abuse of discretion to deny her motion for recusal. As a general rule, a motion for recusal is initially addressed to and ruled upon by the jurist whose impartiality is being challenged. *Commonwealth v.*

⁷ At the time Appellant filed her civil action, Section 502 of Article V, the Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. §§ 1-101 – 1-903, providing for the appointment of a board of viewers was still in effect. The Act has since been repealed and replaced with the Act of May 5, 2006, P.L. 112, § 1, 26 Pa. C.S. § 502(c).

⁸ A *de facto* taking occurs when an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his or her property. *Capece v. City of Philadelphia*, 552 A.2d 1147, 1148 (Pa. Cmwlth. 1989). In order to sustain a taking as a result of excess surface water, the water must constitute an actual, permanent invasion of the land amounting to an appropriation. *Oxford v. Commonwealth Dep't. of Transp.*, 506 A.2d 990, 994 (Pa. Cmwlth. 1986). If the condition is abatable and preventable, it is not permanent, and amounts to an injury to the property rather than an appropriation. *Colombari v. Port Authority of Allegheny County*, 951 A.2d 409, 413 (Pa. Cmwlth. 2008).

White, 589 Pa. 642, 657, 910 A.2d 648, 657 (2006). The party requesting recusal has the burden to produce evidence establishing bias, prejudice, or interest. *Reilly by Reilly v. Commonwealth*, 507 Pa. 204, 222, 489 A.2d 1291, 1300 (1985). The jurist will then make an independent, self-analysis of the ability to be impartial and decide whether continued involvement in the case “creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary.” *Commonwealth v. Druce*, 577 Pa. 581, 589, 848 A.2d 104, 108 (2004). An appellate court, such as this one, presumes judges are fair and competent and will only disturb the decision to deny a request for recusal where it is shown to be an abuse of discretion. *White*, 589 Pa. at 657, 910 A.2d at 657. Nonetheless, there is no need to find actual prejudice; the appearance of impropriety alone is sufficient justification to grant new proceedings. *In Interest of McFall*, 533 Pa. 24, 34, 617 A.2d 707, 712 (1992).

Appellant first requested that the Trial Court Judge recuse himself as one of several claims raised in a petition for a writ of mandamus that was filed at the same term and number as Appellant’s civil action. The Trial Court Judge orally denied the writ *in toto* prior to the commencement of the August 10, 2011, non-jury trial and on September 13, 2011, issued a written opinion detailing the grave procedural and substantive deficiencies in the petition that supported denial. However, at the August 10, 2011 hearing and in the December 28, 2011 opinion, the Trial Court Judge separately addressed the recusal request, placing in the record Appellant’s request and his reasons for denying the recusal request. (N.T. at 10-11, R.R. at 165b-166b); *see also* Trial Court Op. at 3 n.2, R.R. at 666a.)

Before the Trial Court, Appellant requested that the Trial Court Judge recuse himself on the basis that his denial of her request for a stenographer at the October 26, 2010 summary judgment hearing reflected a bias against her. The

Trial Court Judge stated that he had no independent recollection of denying the request for a stenographer and that his practice is to always grant such requests. (N.T. at 11, R.R. at 166b.) In addition, the Trial Court Judge stated that even if Appellant's recollection was correct, the summary judgment proceedings were for the purpose of legal argument, not fact finding, and that Appellant was not prejudiced by the lack of fact finding at the summary judgment hearing, nor was a conflict created that would prevent him from serving as a fact-finder at trial. (*Id.*)

Before this Court, Appellant argues that recusal was necessary "for the very reason that he knew of belief by Appellant of bias on his part and therefore he could not possibly render an impartial verdict." (Appellant Br. at 23.) Appellant also contends that the Trial Court Judge's impartiality is reflected in references to her lack of legal knowledge contained in the December 28, 2011 opinion. (Appellant Br. at 23-25.)

We find no abuse of discretion in the denial of Appellant's recusal motion. Appellant offered no evidence to support the request, let alone evidence that established bias, prejudice, or interest. Moreover, a jurist's knowledge that a party before him or her believes the jurist is partial is not grounds for recusal; if such knowledge alone were sufficient grounds for recusal, any party could recuse any jurist simply by making the motion.

Separately, the record in this case reveals a long journey from the clarity of the allegations pled to the opacity of what exactly was evinced at trial. The discussion in the December 28, 2011 opinion of Appellant's *pro se* status speaks to the difficulty the Trial Court Judge here faced in trying to ensure Appellant access to the courts without also providing her assistance in the prosecution of her case, thereby depriving the Borough of its right to a fair trial. The transcript of the August 10, 2011 hearing memorializes repeated instances

where Appellant's lack of legal training and confusion over what can be offered as evidence and what is a legal argument worked to the detriment of her case. (N.T. at 29-36, 83-86, 120-121, 132, 141, 144-145, 148-150, 169; R.R. at 184b-192b, 238b-241b, 275b-276b, 287b, 296b, 299b-300b, 303b-305b, 324b.) Unfortunately, such difficulty is all too common among *pro se* litigants, a fact which reflects on the enormity of their task rather than on the litigants themselves, but does not and cannot relieve a party unrepresented by counsel of the obligation to follow procedural and substantive law. The Trial Court Judge's discussion of the law concerning the role of the trial court and the obligations of *pro se* litigants in the December 28, 2011 opinion is a necessary discussion of the context within which the record on appeal was created and serves to aid our review of a record that he aptly described as "convoluted." (Trial Court Op. at 5, R.R. at 668a.)

Next, Appellant contends that the Trial Court committed an error of law and abused its discretion in finding that she failed to meet her evidentiary burden and in denying her claims for equitable relief based on negligence and trespass. The Borough argues that Appellant failed to meet her evidentiary burden on both claims.

Under Pennsylvania common law, the owner of upper land is not liable to an owner of lower land for damage from surface water that flows through the natural water course; however, there are two well-settled exceptions to this rule of loss without injury. *Shamoski v. P.G. Energy, Div. of Southern Union Co.*, 579 Pa. 652, 669, 679, 858 A.2d 589, 599, 606 (2004). First, a landowner may not alter the natural flow of surface water by concentrating it in an artificial channel and discharging it on the land of another, even though no more water is collected than would naturally have flowed upon another's land in a diffused condition. *Rau v. Wilden Acres, Inc.*, 376 Pa. 493, 494-495, 103 A.2d 422, 423-424 (1954);

Chamberlain v. Ciaffoni, 373 Pa. 430, 96 A.2d 140 (1953); *Pfeifer v. Brown*, 165 Pa. 267, 273, 30 A. 844, 845 (1895); *Kauffman v. Griesemer*, 26 Pa. 407 n.a (1856) (quoting *Martin v. Riddle*, “[N]or has the owner of the upper ground a right to make excavations or drains by which the flow of water is directed from its natural channel, and a new channel made on the lower ground; nor can he collect into one channel water usually flowing off into his neighbour’s fields by several channels, and thus increase the wash upon the lower fields.”).⁹ Second, a landowner may not unreasonably increase the quantity of water or change the quality of water discharged upon a lower landowner. *Lucas v. Ford*, 363 Pa. 153, 156, 69 A.2d 114, 116 (1949); *Tom Clark Chevrolet, Inc. v. Dept’t of Environmental Protection*, 816 A.2d 1246, 1252 (Pa. Cmwlth. 2003); *LaForm v. Bethlehem Township*, 499 A.2d 1373, 1378 (Pa. Super. 1985). These common law rules of surface waters

⁹ In *Tom Clark Chevrolet, Inc. v. Department of Environmental Protection*, 816 A.2d 1246, 1252 n.15 (Pa. Cmwlth. 2003) (internal citations omitted) we stated that “surface water means water from rain, melting snow, springs, or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake,” and that “watercourse means a stream of water of natural origin, flowing constantly or recurrently on the surface of the earth in a reasonably definite natural channel.” We also examined the difference between “natural” and “artificial” in the context of watercourses:

By “natural” watercourses are meant those watercourses whose origin is the result of the forces of nature. (But see Comment g [relating to new channels]). By artificial waterways are meant all waterways that owe their origin to acts of man, such as canals, drainage and irrigation ditches, aqueducts, flumes and the like. Many “natural” watercourses have in some respects been altered by acts of man. The phrase “natural origin” also includes a natural watercourse that has in some measure been so altered. Widening, narrowing, deepening or straightening the natural channel, or changing the course in part, are alterations that do not change its classification as a watercourse. Likewise the addition of water that, but for the act of man, would never have become part of the stream, does not destroy its character as a natural watercourse. These changes may, however, affect the legal relations of persons who perform or may be affected by those acts.

Id. (quoting Restatement (Second) of Torts § 841 comment h (1979)).

bind all landowners, including municipalities. *Rau*, 376 Pa. at 494-494, 103 A.2d at 423-424 ("Even a municipality, while not liable to a property owner for an increased flow of surface water over his land arising merely from changes in the character of the surface produced by the opening of streets and the building of houses in the ordinary and regular course of the expansion of the city, may not divert the water onto another's land through the medium of artificial channels."); *Marlowe v. Lehigh Township*, 441 A.2d 497 (Pa. Cmwlth. 1982).

While Pennsylvania municipalities are bound by the same common law rules of surface waters as other landowners, our municipalities do not have a common law duty to provide storm water management systems. *Carr v. Northern Liberties*, 35 Pa. 324 (1860); *City of Washington v. Johns*, 474 A.2d 1199, 1202 (Pa. Cmwlth. 1984); *Yulis v. Borough of Ebensburg*, 128 A.2d 118, 120 (Pa. Super. 1956). As a result, a municipality cannot be held negligent if harm befalls another due to the inadequacy of a storm water management system constructed and maintained by the municipality; but, if harm is due to negligence in the construction of the system, a municipality may face liability. *Tom Clark Chevrolet, Inc.*, 816 A.2d at 1252.

For example, in *Al Staffaroni v. City of Scranton*, 620 A.2d 676, 677, 679 (Pa. Cmwlth. 1993), the plaintiff claimed the city negligently constructed its storm water management system after the city placed a 15-inch drainage pipe underneath a road running alongside the plaintiff's property in an attempt to alleviate an icing problem on the roadway. The placement of the pipe allowed surface water that had previously traveled across the road in a diffuse manner to be collected, channeled underneath the road, and discharged in a concentrated fashion on plaintiff's land creating a gully and causing erosion. *Id.* At trial, the plaintiff demonstrated through photographs, oral testimony, and documentary evidence that

the city installed the pipe despite the foreseeable injury to the plaintiff, the concentration of water created the gully and caused the erosion on plaintiff property, and the gully and erosion constituted actual economic damage to the property. *Id.* With these proofs, the plaintiff demonstrated that the city was negligent in the construction of its storm water management system and, accordingly, the trial court ordered that the city block off the pipe and compensate the plaintiff for the damage done to the property. *Id.* at 678.

Similarly, once a municipality has constructed or taken ownership and control over a storm water management system, the municipality must take steps to maintain that system, such as replacing cracked pipes and preventing blockages, or the municipality may be liable for harm caused by the failure to do so. *Morton v. Borough of Ambridge*, 375 Pa. 630, 101 A.2d 661 (1954) (borough's failure to maintain lateral connections allowed water to seep around sewer, which weakened the fill, and caused sewer to collapse, creating a jury question as to whether resulting harm was due to borough's negligence); *Tom Clark Chevrolet, Inc.*, 816 A.2d at 1252.

In *City of Washington v. Johns*, the plaintiffs repeatedly lodged complaints with the city because a portion of the city's drainage system caused storm water to back up in the basement of the plaintiffs' private home. 474 A.2d at 1201. The city responded to the plaintiffs' complaints on only one occasion and at that time removed large quantities of dirt that had accumulated in the public sewer. *Id.* Following a heavy rainstorm, the plaintiffs' private home suffered interior water and structural damage, for which the plaintiffs brought an action against the city for negligent maintenance of its storm water management system. *Id.* This Court concluded that the plaintiffs had produced sufficient evidence to demonstrate that it was the city's failure to keep the sewer free of dirt, rather than the inability

of the system to adequately manage the amount of storm water, that caused injury to the plaintiffs' property. *Id.* at 1202-1203.

In her complaint, Appellant alleges extensive damage to the Property caused by the Borough's negligent construction and maintenance of its drainage system and requests money damages and equitable relief. (Complaint ¶¶18, 20.) To prove her negligence cause of action, Appellant had the burden to establish at trial: (1) a duty recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure of the actor to conform to that standard; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damages to the interests of another. *Fazio v. Fegley Oil Co., Inc.*, 714 A.2d 510, 512 (Pa. Cmwlth. 1998). However, unlike the plaintiff in *Al Staffaroni v. City of Scranton*, Appellant failed to offer the requisite proof to support her allegations.

Under Appellant's claim for negligent construction, the duty on the Borough was to construct or install its storm water management system without altering the natural flow of surface water by concentrating it in an artificial channel and discharging it onto the Property. Although there was no question that both of the pipes direct surface water onto the Property, there was not sufficient evidence at trial to demonstrate that the Borough installed the pipes. The only evidence concerning the initial installation or construction of the two pipes consisted of the Borough's response to Appellant's interrogatories, which states: "The original drainage system was installed at least thirty (30) years ago. The precise date of the installation is unknown. New piping was installed approximately fifteen (15) years ago, by the Sewer Author [sic]." (N.T. at 90, R.R. at 245b; Appellant's Trial Exhibit 33.) At no time during the course of this litigation did the Borough represent that it installed the pipes or that it had knowledge of who may have installed the pipes. Without proof that the Borough performed the act of

installation or construction, Appellant's negligence claim cannot be sustained; without the act, there is no duty, and without a duty, there can be no breach.

Likewise, Appellant's claim for negligent maintenance must fail due to insufficient evidence. There was no evidence at trial that showed or suggested a failure by the Borough to maintain its storm water management system, such as cracks or sags in the pipes, clogs in the culverts, erosion of the swale, or the like. Instead, it is clear from the record that the system functions just as it was intended and it is this system that causes the damage Appellant complains of, rather than a failure to maintain the system amounting to negligence.

Appellant's final argument is that the Trial Court erred in denying her claim for trespass due to insufficient evidence. Liability in trespass is created where one intentionally causes a thing to enter the land of another or causes a thing to remain on the land or fails to remove a thing from the land in violation of a duty. Restatement (Second) of Torts § 158.¹⁰ *Rawlings v. Bucks County Water and Sewer Authority*, 702 A.2d 583 (Pa. Cmwlth. 1997). In addition, liability for a continuing trespass is created by continued presence on the land of a thing "which the actor has tortiously placed there, whether or not the actor has the ability to remove it," or "which the actor's predecessor in legal interest therein has tortiously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing." Restatement (Second) of Torts § 161 (1965); *see also Miller v.*

¹⁰ The Restatement (Second) of Torts § 158 (1965) states: "One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land; or (c) fails to remove from the land a thing which he is under a duty to remove."

Stroud Township, 804 A.2d 749, 754 (Pa. Cmwlth. 2002); *Rawlings*, 702 A.2d at 586; *Graybill v. Providence Township*, 593 A.2d 1314, 1316-1318 (Pa. Cmwlth. 1991); *Marlowe*, 441 A.2d at 500-501.

Appellant contends that she established a continuing trespass by demonstrating that the Borough owns and maintains a water drainage system that is located, in part, on her property, that the system was placed without consent, and that the water drainage system continually deposits a concentration of surface water onto her land. We agree.

The Borough produced a street profile and topographical map demonstrating that the Property is located below twenty-six acres in the flat slope of a "bowl" and that surface water naturally traverses the higher land in the direction of Third Street and the Property. (N.T. at 147, 211, 217, Borough Trial Exhibit 3, 4, R.R. at 302b, 366b, 372b.) The Borough engineer testified that the topography of Third Street has not changed in the last fifteen years and that the only change to Third Street was an inch and a half of pavement added in 2009. (N.T. at 245, R.R. at 400b.) The Borough engineer admitted that the Property and the properties directly across Third Street share the same elevation or flat slope. (N.T. at 236-239, R.R. at 391b-394b.) The Borough engineer further stated that "the pipe is conveying water from the northeast side of Third Street onto your property. That's what we testified to time and time again." (N.T. at 241, R.R. at 396b.) The Borough engineer admitted that if the pipes were removed, surface water would collect on the opposite side of Third Street, and with a big enough rain fall, run over top of Third Street and onto Appellant's Property. (N.T. at 234-241, R.R. at 389b-396b.) The Borough engineer stated that "these engineering drawings, Ms. Florimonte, indicate that the waters [sic] coming your way. There's

no way to get around it. Until the good Lord reverses gravity the waters [sic] going to cross Third Street." (N.T. at 239; Trial Court Op. at 12-13.)

In denying her claim for trespass, the Trial Court stated:

[Appellant] did not present any evidence, expert or otherwise, that addressed the natural flows of water before pipe installation or the natural flow of water after installation. There was no evidence of record that addressed the amount of water discharged, the nature and relative flow rate and/or velocity of same, both before and after installation. What was clear to this Court was that the removal of the pipe would not abate [Appellant's] problem and would likely create a safety hazard on Third Street, especially in the winter months.

(Trial Court Op. at 13-14.) Had Appellant based her trespass claim on a change in the quantity or quality of surface water deposited on the Property, Appellant would have had to produce evidence akin to that delineated by the Trial Court concerning the nature and relative flow rate and/or velocity or volume of water discharged on the Property. Here, Appellant's theory is based on the collection, concentration, and diversion of surface water onto the Property via an artificial channel. As a result, to prove trespass, Appellant needed to demonstrate the natural flow of water before and after installation of the pipes. We conclude that the Trial Court committed error by applying the incorrect law to the evidence at trial.

Here, Appellant was able to prove her claim in large part due to the evidence presented by the Borough. The testimony of the Borough's engineer, credited and cited by the Trial Court, (Trial Court Op. at 11-12.), and the supporting exhibits offered into evidence by the Borough, establish that surface water traveled through the watershed to the area of Third Street where the Property is located; it did so in a diffuse condition; and that the water only flowed onto the Property in a concentrated fashion because it was collected by the culverts and

swale and diverted through an artificial channel, the sluice pipes, onto the Property. See *Marlowe*, 441 A.2d at 501 ("We disagree with this rationale to the extent that it implies, as the township vigorously argues, that the [plaintiffs] have not suffered an actionable wrong because the water now flowing over their property is the same storm runoff, albeit in a concentrated state, which was present before the township acted.").

Furthermore, the evidence clearly shows that the Borough maintains this artificial diversion of surface water onto the Property for the benefit of Third Street. The Borough argues that a central point in this case is the fact that removal of the pipes would cause water to pond on Third Street and would create freezing and icy road conditions in winter, amounting to a public hazard. However, the fact that the Borough's diversion of surface water onto the Property benefits the road is not material in an analysis of whether or not the Borough is liable for trespass, nor does a benefit to the road or the public transform a recoverable loss into a loss without injury. Moreover, if the Borough wishes the public benefit to be central to an analysis of its use of the Property, the Borough can of course make use of its powers of eminent domain.

Finally, the evidence shows that the Borough's artificial diversion of surface water onto the Property continues without consent. (N.T. 255, R.R. at 410b.) Before the Trial Court, Appellant entered into evidence the deed to the Property, which reflected an absence of formal easements. (N.T. at 28, R.R. at 183b, Appellant's Trial Exhibit 4.) The Borough's engineer testified that the two pipes discharging water onto the Property were part of the Borough's storm water management system. (N.T. at 91-92, 225-226, R.R. at 246b-247b, 380b-381b.) The Borough also abandoned its claim that a prescriptive easement had been acquired by adverse, open, notorious, continuous and uninterrupted use of Lot 17

for 21 years. (N.T. at 28, 250-251, R.R. at 183b, 405b-406b); *compare Gehres v. Falls Township*, 948 A.2d 249 (Pa. Cmwlth. 2008) (municipality acquired a public, prescriptive easement to artificially collect, concentrate, and discharge storm water runoff onto plaintiff's private property by adverse, open, notorious, continuous and uninterrupted use of plaintiff's private property for storm water drainage for 21 years). Appellant and the Borough's engineer testified that she allowed the Borough onto the Property in 2001 to remove the surface water, but subsequently rescinded permission in March 2002 when the Borough failed to do so. (N.T. at 159, 191-193, R.R. at 314b, 346b-348b, Appellant's Trial Exhibit 59; Trial Court Op. at 13.) Clearly, the Borough does not have permission to divert surface water onto the property.

Appellant has demonstrated a continuing trespass. The Borough is liable to Appellant for trespass due to surface waters it concentrates in an artificial channel and discharges onto the Property as a part of its storm water management system. Appellant is entitled to equitable relief. *St. Andrews Evangelical Lutheran Church of Audubon v. Township of Lower Providence*, 414 Pa. 40, 198 A.2d 860 (1964).

Left is the issue of damages. Appellant's complaint was filed in equity prior to our Supreme Court's December 16, 2003 order merging actions in equity with civil actions effective July 1, 2004. See Supreme Court Order, December 16, 2003, No. 402 Docket No. 5 (In re Consolidation of the Action in Equity with the Civil Action). In her complaint, Appellant requested both money damages and equitable relief compelling the Borough "to remove that portion of its drainage system which is located on [the Property] in such a manner that an excessive amount of water is no longer deposited on [the Property]," along with any other relief the court deemed necessary under the circumstances. (Complaint

¶¶16, 20, R.R. at 14a-15a.) The Borough did not challenge Appellant's right to claim equitable and legal relief in the same action. (N.T. at 38, R.R. at 193b.) Prior to trial, neither Appellant nor the Borough requested that the Trial Court bifurcate the presentation of evidence. (N.T. at 120, R.R. at 275b; *See also* Docket Entries 2003-EQ-2011.) Yet, at trial, Appellant abandoned her claim for money damages, specifically objected to the inclusion of damages, and stated that she would only continue with her equitable claim. (N.T. at 36-38, 120, R.R. at 191b-193b, 275b.) Accordingly, Appellant has affirmatively waived her right to recover money damages.

We affirm in part, reverse the Trial Court's denial of Appellant's claim for relief in trespass, and remand to the Trial Court to fashion an equitable remedy that will abate the trespass created on Appellant's Property by the unlawful concentration and discharge of surface water thereon through and from the two pipes, referred to in the record as the ninety-degree and forty-five degree pipes, laid under Third Street and terminating near or upon the Property.¹¹ We also note

¹¹ Our opinion in this matter is consistent with a prior unpublished opinion addressing equitable relief for a continuing trespass by a local government's artificial diversion of surface water in a concentrated form onto the property of another, *Medallis v. Northeast Land Development, LLC, et al.*, (Pa. Cmwlth. No. 1479 C.D. 2009, Filed July 23, 2010), where we affirmed on the basis of the trial court's opinion, *Grace Medallis and Robert A. Medallis v. Northeast Land Development, LLC, CJS DEV, Inc., Tripp CIDC, Inc., CDC-1, LLC and City of Scranton*, 8 Pa. D. & C. 5th 411 (Dkt. No. 2003 EQ 60063, Filed December 4, 2008 and June 26, 2009) (C.P. Lackawanna). As we have here, the trial court stated in its opinion in *Medallis* the principle that a landowner who diverts surface water in violation of the applicable common law rules is liable, even if the landowner is not guilty of negligence. *Id.* at 416. Also relevant to the matter before us, the trial court in *Medallis* addressed the inapplicability of the governmental immunity provisions of the Judicial Code, 42 Pa. C.S. §§ 8541-842, which extend to liability for *damages*, to certain types of *injunctive* relief. *Medallis*, 8 Pa. D. & C. 5th at 425; *see also* *Rawlings*, 702 A.2d at 587; *E-Z Parks Inc. v. Larson*, 498 A.2d 1364, 1370 (Pa. Cmwlth. 1985), *affirmed*, 509 Pa. 496, 503 A.2d 931 (1986) ("Since governmental immunity under Section 8541 of the Judicial Code extends only to liability for *damages*, Petitioner must be permitted to pursue his claim against the Authority for injunctive relief.")

that nothing in this opinion should be construed to affect the right of the Borough to exercise its power of eminent domain.

James Gardner Collins
JAMES GARDNER COLINS, Senior Judge

APPENDIX F

SCAN 88

Oliver, Price & Rhodes
Karoline Mehalchick, Esquire
Attorney I.D. No. 87641
1212 South Abington Road
P.O. Box 240
Clarks Summit, PA 18411
Telephone (570) 585-1200
Fax (570) 585-5100

LACKAWANNA COUNTY
CLERK OF JUDICIAL RECORDS
2003 MAR -4 A 9:21

P

CAROLYN J. FLORIMONTE,

Plaintiff

vs.

BOROUGH OF DALTON,

Defendant

IN THE COURT OF COMMON PLEAS
LACKAWANNA COUNTY

CIVIL ACTION - IN EQUITY

No. 03-60011

NOTICE TO DEFEND

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICES SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

NORTHERN PENNSYLVANIA
LEGAL SERVICES
507 Linden Street, Suite 300
Scranton, PA 18503-1631
Telephone: 570-342-0184

OR LAWYER REFERRAL SERVICE
Lackawanna Bar Association
338 North Washington Avenue, 3rd Floor
Scranton, PA 18503
Telephone: 570-969-9600

OLIVER, PRICE & RHODES

Karoline Mehalchick
Karoline Mehalchick
Attorney I.D. No. 87641
1212 South Abington Road
P.O. Box 240
Clarks Summit, PA 18411
(570) 585-1200
fax (570)585-5100

Oliver, Price & Rhodes
Karoline Mehalchick, Esquire
Attorney I.D. No. 87641
1212 South Abington Road
P.O. Box 240
Clarks Summit, PA 18411
Telephone (570) 585-1200
Fax (570) 585-5100

CAROLYN J. FLORIMONTE,

Plaintiff

vs.

BOROUGH OF DALTON,

Defendant

IN THE COURT OF COMMON PLEAS
LACKAWANNA COUNTY

CIVIL ACTION - IN EQUITY

No.

COMPLAINT

AND NOW COMES the Plaintiff, Carolyn J. Florimonte, by her counsel, Oliver, Price & Rhodes, and file the following Complaint in Equity against the Borough of Dalton:

1. Plaintiff, Carolyn J. Florimonte, is an adult, competent individual residing at 219 Third Street, Dalton, Pennsylvania, Lackawanna County.
2. Defendant, the Borough of Dalton, is a municipal corporation operating and existing under the laws of the Commonwealth of Pennsylvania.
3. Plaintiff is the owner of the parcel of real estate situated at 219 Third Street, and surrounding lands, Dalton, Pennsylvania, by virtue of a Deed from Stanley Hedrick and Josephine Ann Hedrick to the Plaintiffs dated May 5, 2000, and recorded in Lackawanna County Record Book 250 at Pages 449 et seq., a copy of which is attached hereto as Exhibit "A".
4. Defendant is the owner and operator of a water drainage system,

a portion of which is located on Plaintiff's property.

5. At no time did Plaintiff or the previous owners of the property ever consent to the placement of the drainage system on the property.
6. The drainage system exists and continues to exist on Plaintiff's property without her consent.
7. The drainage system regularly deposits excessive quantities of water onto Plaintiff's land without her consent.
8. The excessive quantities of water render a large portion of Plaintiff's land unuseable, have destroyed many trees which were attached to the land, and substantially interferes with her use and enjoyment of the land.
9. Defendant further damaged Plaintiff's property when Defendant dug a trench on Plaintiff's property without Plaintiff's permission.
10. Plaintiff has repeatedly requested that the Defendant move, remove or redirect that portion of its drainage system which is located on Plaintiff's property such that excessive amounts of water are no longer deposited on her land.
11. Defendant has refused and continues to refuse to comply with Plaintiff's requests.
12. Plaintiff has repeatedly, and in good faith, notified Defendant of the problem; however, Defendant has refused to remedy the problem.
13. The operation of the drainage system as it presently exists is not necessary for the safe and efficient drainage of water by the Defendant.

COUNT ONE - TRESPASS

14. Plaintiff, Carolyn J. Florimonte, incorporates by reference the allegations contained in the foregoing paragraphs as if the same were more fully set forth herein.
15. Despite repeated notice by Plaintiff to Defendant, Defendant still

refuses to move, remove or redirect the drainage system such that excessive amounts of water are not deposited on her land.

16. The drainage system has resulted in a large portion of Plaintiff's land being rendered unuseable, has destroyed many trees which were attached to the land, and substantially interferes with her use and enjoyment of the land.

WHEREFORE, for all the foregoing reasons, Plaintiffs respectfully ask this Honorable Court to grant relief as follows:

- a. Enter an Order compelling Defendant to remove that portion of its drainage system which is located on Plaintiff's property in such a manner that an excessive amount of water is no longer deposited on her land;
- b. Award money damages to the Plaintiffs due to Defendant's unjust detention of Plaintiffs' lands; and
- c. Award any other relief as this Honorable Court deems necessary under the circumstances.

COUNT TWO - NEGLIGENCE

17. Plaintiff, Carolyn J. Florimonte, incorporates by reference the allegations contained in the foregoing paragraphs as if the same were more fully set forth herein.
18. The negligent construction and maintenance of the drainage system has caused and will continue to cause extensive damage to the Plaintiff's land.
19. Defendant has altered the natural flow of surface water by concentrating the discharge of it onto Plaintiff's property, causing a dangerous condition to occur upon Plaintiff's property.
20. Defendant is aware of the continued damage to Plaintiff's land, and yet still has not remedied the problem.

WHEREFORE, for all the foregoing reasons, Plaintiffs respectfully ask this Honorable Court to grant relief as follows:

- a. Enter an Order compelling Defendant to remove that

portion of its drainage system which is located on Plaintiff's property in such a manner that an excessive amount of water is no longer deposited on her land;

- b. Award money damages to the Plaintiffs due to Defendant's negligent construction and maintenance of the drainage system; and
- c. Award any other relief as this Honorable Court deems necessary under the circumstances.

Respectfully submitted,

OLIVER, PRICE & RHODES

Karoline Mehalchick

Karoline Mehalchick
Attorney I.D. No. 87641
1212 South Abington Road
P.O. Box 240
Clarks Summit, PA 18411
(570) 585-1200
fax (570)585-5100

THIS DEED

Made the 5th day of May in the year Two Thousand (2000).

Between **STANLEY HEDRICK** and **JOSEPHINE ANN HEDRICK**, his wife, of the Borough of Dalton, County of Lackawanna and State of Pennsylvania, hereinafter referred to as the Grantors

A
N
D

CAROLYN J. FLORIMONTE, of the Township of Newton, County of Lackawanna and State of Pennsylvania, hereinafter referred to as the Grantee.

WITNESSETH, That in consideration of the sum of **NINETY-FIVE THOUSAND (\$95,000.00) DOLLAR(S)**, in hand paid, the receipt whereof is hereby acknowledged, the Grantors do hereby grant and convey to the said Grantee, her Heirs and Assigns,

ALL that following described lot or parcel of land situate, lying and being in the Borough of Dalton, County of Lackawanna and State of Pennsylvania, described as follows:

BEGINNING at a point on Second Street on a line between Lots Nos. Twenty-nine (29) and Thirty (30) on the Plot of "Adelaide and Mary Gardner's Map of Addition to the Village of Dalton recorded in Deed Book 69, Page 52"; thence North Forty-eight degrees Fifty minutes East (N. 48° 50' E.), along the division line of Lots Nos. Twenty-nine (29) and Thirty (30) and Fifteen (15) and Sixteen (16) on the aforementioned plot, a distance of Four Hundred (400) feet to Third Street; thence South Forty-one degrees Ten minutes East (S. 41° 10' E.), along Third Street, Two Hundred (200) feet to a corner in the Division line of Lots Nos. Seventeen (17) and Eighteen (18) on the said plot; thence south Forty-eight degrees Fifty minutes West (S. 48° 50' W.), a distance of Two Hundred (200) feet to a corner common to Lots Nos. Seventeen (17), Eighteen (18), Thirty-one (31), and Thirty-two (32) on the aforesaid plot; thence North Forty-one degrees Ten minutes West (N. 41° 10' W.), along the division line of Lots Nos. Seventeen (17) and Thirty-one (31), a distance of One Hundred (100) feet to a corner common to Lots Nos. Sixteen (16), Seventeen (17), Thirty (30) and Thirty-one (31) on the aforesaid plot; thence South Forty-eight degrees Fifty minutes West (S. 48° 50' W.), a distance of Two Hundred (200) feet to a corner on Second Street; thence along Second Street North Forty-one degrees Ten minutes West (N. 41° 10' W.), One Hundred (100) feet to the place of beginning. Being Lots Nos. Sixteen (16), Seventeen (17) and Thirty (30) in Block "D" on the Plot of Adelaide and Mary Gardner's Map of Addition to the Village of Dalton recorded in Deed Book 69, Page 52.

94

SUBJECT to the same exceptions, restrictions, reservations, and conditions as are contained in former deeds in the chain of title.

Lots Nos. Sixteen (16) and Thirty (30) are part of the same premises conveyed by Libbie Smith, widow, to Otto V. Schmidt and Lois Schmidt, his wife, by Deed dated March 31, 1933 and recorded in the Recorder's Office of Lackawanna County in Deed Book 394, Page 139.

Lot No. Seventeen (17) is the same premises conveyed by James H. Bunnell and Elizabeth S. Bunnell, his wife, to Otto V. Schmidt and Lois E. Schmidt, his wife, by Deed dated August 3, 1957 and recorded in the Recorder's Office of Lackawanna County in Deed Book 548, at Page 401.

ALSO BEING the same premises conveyed to the Grantors herein by Deed of Otto V. Schmidt, widower, dated October 14, 1982 and recorded October 15, 1982 in the Office of the Recorder of Deeds in and for Lackawanna County in Deed Book 1063, Pages 707-710, inclusive.

IN WITNESS WHEREOF, said Grantors have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered
in the Presence of:




STANLEY HEDRICK


JOSEPHINE ANN HEDRICK

Commonwealth of Pennsylvania }
 County of Lackawanna } ss.

On this, the 5th of May, 2000, before me, the undersigned officer, personally appeared, known to me or satisfactorily proven to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes herein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

NOTARIAL SEAL

STEPHEN A. HOFFMAN, Notary Public

Soroton, Lackawanna County, PA

My Commission Expires Dec. 22, 2002

Notary Public

I hereby certify that the precise address of the Grantees herein is

219 Third Street, Dalton PA 18414

Mr. Head
 ATTORNEY FOR GRANTEES

BOOK 250P 448

ISBN 978-9356910053

፭፻፲፭

Lackawanna County Recorder of Deeds Instrument File

88TOTO

LYNN KURTZ MICHENER
Recorder of Deeds

*Evelyn Ratcliffe McNulty
Recorder of Deed:*



1 hereby CERTIFY that this document is
recorded in the Recorder of Deeds Office
of Lackawanna County, Pennsylvania.

96

VERIFICATION

I, Carolyn Florimonte, verify that the statements made in this COMPLAINT are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904, relating to the unsworn falsification to authorities.

Carolyn J. Florimonte
Carolyn Florimonte

APPENDIX G

4	CAROLYN J. FLORIMONTE,	X
5	Plaintiff,	X
6	-vs-	X No. 03 CV 60011
7	BOROUGH OF DALTON,	X
8	Defendant.	X

TRANSCRIPT OF PROCEEDINGS

13 BEFORE: HONORABLE ROBERT MAZZONI

DATE: April 3, 2009

16 PLACE: Lackawanna County Courthouse
Scranton, Pennsylvania 18503

APPEARANCES

20 For the Plaintiff: ROBERT J. MURPHY, ESQUIRE

22 For the Defendant: FRANK J. BOLOCK, ESQUIRE
MARK SHERIDAN, ESQUIRE
KEVIN HAYES, ESQUIRE

Tara B. Jones, RMR
Official Court Reporter

1
2 I N D E X
34 PLAINTIFF'S WITNESSES DIRECT CROSS RD RC
5

6 Carolyn Florimonte 10 42 55

7 Dennis Peters (Qual.) 57
8 63 74

9 Robert Fisher 78 85, 87

10 PLAINTIFF'S EXHIBITS MARKED ADMITTED11 1 - 17 10 56
12 18-20 56
13 22 78 7814 DEFENDANT'S WITNESSES DIRECT CROSS RD RC15 John Seamans (Qual.) 92 106
16 94

17 By The Court 111

18 DEFENDANT'S EXHIBITS MARKED ADMITTED

19 1 - 3 115

1 helpful for the fact finder to get a copy of
2 those exhibits. A lot of times -- and I was
3 guilty of this myself in private practice --
4 giving the witness copies and the defense
5 counsel, plaintiff's counsel copies, didn't
6 give the Judge a copy.

7 MR. MURPHY: Your Honor, admittedly
8 I was handed a number of documents, some of
9 which have been exchanged I know in
10 discovery prior to my involvement, including
11 the deed; and also I had some drawings that
12 I went over with my client had made, which I
13 did review with Attorney Bolock in advance
14 and he didn't have a problem. Let me show.

15 MR. SHERIDAN: I think we'll be able
16 to stipulate to ownership issues and things
17 like that.

18 (WHEREUPON, a discussion was held off
19 the record.)

20 (Plaintiff's Exhibit Nos. 1-17 were
21 marked for identification.)

22 DIRECT EXAMINATION

23 BY MR. MURPHY:

24 Q. Can you state your full name, please?

25 A. Carolyn J. Florimonte.

1 Q. What is your current address?

2 A. 219 Third Street, Dalton, PA.

3 Q. How old are you?

4 A. I am 64.

5 Q. With whom do you reside?

6 A. I reside by myself.

7 Q. The Dalton address on 219 Third Street, do
8 you own that?

9 A. I do.

10 Q. When did you purchase it?

11 A. I purchased it in 2000, May of 2000.

12 Q. Prior to purchasing it was there a time that
13 you came on the property or negotiated a price for that
14 property?

15 A. Yes.

16 Q. I have what's been premarked as Plaintiff's
17 Exhibit 1. What does Plaintiff's Exhibit 1 represent?

18 A. This represents the disclosure statement
19 signed by the seller on January 7th of 2000 and
20 countersigned by me on March 8th of 2000.

21 Q. And subsequent to that, at the time you
22 entered that and when you first looked at the property,
23 were you aware of any water damage problems that
24 existed?

25 A. Not in the beginning, no.

1 Q. And at some point in time after the sales
2 agreement you actually purchased the property?

3 A. Yes, I did.

4 Q. And I have --

5 THE COURT: What's the address of
6 this property again, Ms. Florimonte?

7 THE WITNESS: 219 Third Street in
8 Dalton.

9 BY MR. MURPHY:

10 Q. Can you identify Plaintiff's Exhibit 2?

11 A. This is the deed between Otto Schmidt and
12 Stanley and Josephine Hedrick dated October 14, 1982.

13 Q. What was the consideration when you
14 purchased the property?

15 A. \$95,000.

16 Q. And how many lots are there?

17 A. There are three lots there.

18 Q. Can you describe them in terms of at the
19 time you purchased the property, if you're looking at
20 the front the property, which lots have the house and
21 what lots are empty?

22 A. If you're standing in the street looking at
23 the property, the right lot contains my home which is
24 sideways. The second lot right next to it on the left
25 was heavily wooded right out to the road. Behind the

1 lot on the right and down below it is a third lot and
2 that is vacant at this time.

3 Q. Now, the lot on the left as you're looking
4 at the front of the property, at the time you purchased
5 it, can you describe that?

6 A. It was headily wooded, lots of brush. You
7 couldn't see into it at all. There were vines all over
8 the trees, lots of heavy growth, and it was right out
9 to the road.

10 Q. And is that changed compared to how it is
11 now?

12 A. It has. When I kept getting stuck in my
13 tractor in the mud in my backyard, I went looking for
14 the source of the water which is when I discovered the
15 pipe out in the front.

16 Q. And first off let me ask you Plaintiff's
17 Exhibit No. 3 I believe is the assessment map?

18 A. This was provided to me by my surveyor and I
19 believe it came from courthouse records.

20 Q. Now, you indicated that you found a pipe.
21 Where was the pipe?

22 A. The pipe was located on the left lot about
23 15 feet in.

24 Q. What -- in relation to the border of your
25 property, where is that pipe?

1 A. That pipe would be on lot 17. I own 16, 17
2 and 30.

3 Q. Do you know where that pipe originates from?

4 A. It actually comes under the road from across
5 the street and there are three smaller pipes that feed
6 into it that bring water from other areas of Third
7 Street.

8 Q. These other pipes, are they located on Third
9 Street or in the right of way?

10 A. They're located on the right of way.

11 Q. And is that pipe the only pipe that's on
12 your property?

13 A. No.

14 Q. Where is the other pipe?

15 A. The other pipe is located -- if you look at
16 one of the plans that I actually measured. The second
17 pipe is 23 feet in from the edge of the right of way,
18 from where the borough's right of way ends. It's
19 23 feet in and then another pipe, the pipe extends
20 fully visible onto my land for another 20 and a half
21 feet. So essentially 43 and a half feet my land has
22 been appropriated by the borough.

23 Q. Now, you're talking in terms of where the
24 pipes actually extend?

25 A. Right.

1 Q. What are the pipes doing?

2 A. The pipes are delivering -- it is my
3 understanding that the 22 acres above Third Street
4 drains onto my land. All of the houses on Third Street
5 drain onto my land. And the sump pump, which I can
6 verify myself, water from these houses drains onto my
7 land.

8 Q. And can you explain to the Court in terms of
9 what effect it has had on your property since you
10 purchased it?

11 A. Since I've purchased it, the front of my
12 house, the siding is rotting off. There is a photo
13 which shows standing water in front of my home in the
14 winter time. That water has traveled to the cinder
15 block -- my home is completely cinder block -- has
16 traveled up it, has stripped the paint off my upstairs
17 windows. It's destroyed my siding, first in the front
18 and now it's starting in the back. My whole house has
19 a heave. First it heaved in the front for a couple of
20 years, now then last year it heaved in both the front
21 and the back.

22 My nails in my upstairs bathroom are coming
23 up through the tile from the heaving. My roof has moss
24 all over it, as does my siding. I had a locust tree
25 taken down to provide more sunshine to the front of my

1 property, hasn't helped at all because the water
2 continues to flow onto my land not only from the pipes
3 but from across the street. My neighbors' properties
4 which the borough has said that my --

5 Q. All right. Let's not lose sight. I want to
6 show you what we'll refer to Plaintiff's 18.

7 THE COURT: Looking at Exhibit
8 No. 3, are you able to identify your lots on
9 here?

10 THE WITNESS: Right there.

11 THE COURT: Which ones, ma'am?

12 THE WITNESS: These three right
13 there.

14 THE COURT: The ones that you've
15 marked are --

16 THE WITNESS: The surveyor.

17 THE COURT: -- this is 17 here.

18 THE WITNESS: 16, 17 and 30 I think.

19 THE COURT: I just highlighted in
20 yellow. That's it?

21 THE WITNESS: Yes.

22 THE COURT: Do you see it, Frank?

23 MR. BOLOCK: Can I see that, Judge?
24 Just on this Exhibit No. 3 it's No. Lot 16,
25 17 and 30?

1 THE WITNESS: Yes.

2 BY MR. MURPHY;

3 Q. Now, I'd like to show you what's been
4 referred to as Plaintiff's Exhibit 18 and it's a series
5 of pictures that we've taken the opportunity to show to
6 Attorney Bolock and can you tell the Court what these,
7 first, side A, what does that depict?

8 A. This is from March of 2002. This side
9 depicts the property similar to what it was when I
10 first bought it. By this time I had discovered the
11 pipe in front coming in from Third Street and I had
12 cleared the land back to that pipe. This is the other
13 areas of the property that were not cleared.

14 Q. Okay. And what does the other side show
15 which is identified as May of '02?

16 THE COURT: May of 2002?

17 MR. MURPHY: Yes.

18 A. May of 2002 if you look -- are looking down
19 from the inside of my home, you can see the actual
20 standing water where I have mowed with my mower which
21 is probably 10, 15, maybe 20 feet from my house and I
22 have a number of photos that show it. Then at the
23 bottom are three photos which show the lower part of my
24 property, that would be lot 30 which was also affected
25 by the flooding, and you can see the end of my house

1 here. So essentially when the property was flooded, it
2 took over all three sections of my land.

3 Q. Now I'd like to show you --

4 THE COURT: Let me see those, Bob.

5 BY MR. MURPHY:

6 Q. I'd like to show you what's been premarked
7 as Plaintiff's Exhibit 19 and this is, Attorney Bolock,
8 one of the drawings that we reviewed prior to the
9 hearing. What does this show? First off, who prepared
10 that?

11 A. I did.

12 Q. Admittedly that is not drawn to scale?

13 A. No.

14 Q. What does it depict?

15 A. It depicts the proposed solution by the
16 borough with the projectory they wanted to take --

17 MR. BOLOCK: Your Honor, I'm going
18 to object to any testimony regarding Exhibit
19 No. 19. I don't think that's particularly
20 relevant to this injunctive proceeding.

21 THE COURT: I'm inclined to agree to
22 that because these are, what you're looking
23 at now are proposals for --

24 MR. MURPHY: The other ones -- I
25 didn't realize that that was -- that this

1 was the one that -- I thought I left that
2 out.

3 THE COURT: If this was a proposal
4 for -- that you guys had discussed in
5 settlement and try to resolve it --

6 MR. MURPHY: And attempt to resolve
7 it.

8 THE COURT: -- that's now all off
9 the board and we're here talking about the
10 merits of it now.

11 MR. MURPHY: That's correct.

12 BY MR. MURPHY:

13 Q. The question was what does this depict?

14 A. Depicts my three properties, Bob Fisher's
15 property, Nick and Jackie who live in between our
16 properties.

17 Q. Do you know Nick and Jackie's last name?

18 A. No, I don't, but Bob probably does.

19 Q. I'd like to show you Plaintiff's Exhibit 20
20 and again represent that this is a drawing and can you
21 identify who made that drawing?

22 A. I did.

23 Q. And can we agree that that drawing was not
24 made to scale?

25 A. Correct.

1 Q. What does that drawing depict?

2 A. This shows my property in 2000. It shows
3 the wooded area, lot I believe 17, my home which is 16,
4 my third property which I believe is lot 30. It shows
5 the home next to it and Bob Fisher's property.

6 Q. And the markings on that particular drawing,
7 what does it depict?

8 A. Well, some of them that are in black depict
9 all the wooded area and the brush and the vines. The
10 red lines depict the flooding that occurred to my home
11 in 2000.

12 Q. And is the property currently in this
13 condition as it was?

14 A. No, it is not.

15 Q. Now, when you turn that over, what does this
16 side depict? Is this also something you drew?

17 A. This is something I drew, yes.

18 Q. And can we also agree that this was not done
19 to scale?

20 A. Yes.

21 Q. What does this depict?

22 A. This depicts the wetlands in 1980s on Third
23 Street. The wetlands would be considered a swamp which
24 are protected by a 1971 act by Pennsylvania.

25 Q. Is your property on this?

1 A. Yes. It would be this and this, 219 Third
2 Street..

3 Q. What you were referring to as a swampy area,
4 is that across the street?

5 A. Yes, it is.

6 Q. Are there currently houses there?

7 A. Yes, there are.

8 Q. Now, the houses in your neighborhood, did
9 they predate yours or did they come in afterwards?

10 A. No, they came in afterwards. My house was
11 originally a barn converted to a house in the 1950s.

12 Q. And at the time you purchased in 2000,
13 across the street was what?

14 A. There were newer homes across the street.

15 Q. Now, have these homes -- are there homes on
16 Third Street that came in after you took residence?

17 A. There was one prefab home built across the
18 street up maybe five, six houses, and that was built
19 new.

20 Q. If you look across Third Street, what is
21 beyond the houses that front on Third Street across
22 from yours?

23 A. There is an open area of field up above
24 Third Street behind the houses across the street.

25 Q. All right. Is there any development up on

1 that higher ground?

2 A. There are some homes but they're scattered.

3 Q. Do you know what part of the city that is or
4 what street it is?

5 A. That would be Fuller Road, the properties on
6 Fuller Road as far as I know.

7 Q. Now, did you contact anyone when you
8 determined that these pipes were discharging water?

9 A. Yes, I did. I called the borough and spoke
10 to the borough manager.

11 Q. All right. And at some point in time did
12 the borough come in and do something?

13 A. Yes. We had a discussion in front of my
14 home with Ned Graham present in 2000 --

15 Q. The question --

16 A. -- right after I discovered it and then we
17 had another discussion.

18 Q. The question was: Did the Borough of Dalton
19 do something to your property?

20 A. Yes. They came in and dug a ditch.

21 Q. Okay. Now, can you explain to the Court in
22 looking at No. 20 where the ditch went? I'm going to
23 take this one out.

24 A. The ditch goes from the pipe that's on Third
25 Street and angles back on my property into the channel

1 that is there already.

2 Q. Now, can you mark that with a blue pen to
3 show where the Borough of Dalton put in a ditch?

4 A. Okay.

5 Q. All right. Now, you indicated there was a
6 second pipe?

7 A. Yes.

8 Q. Can you mark with that same blue pen where
9 that enters your property?

10 A. It enters my property up here and flows back
11 to the same channel, but water goes all over the place.

12 THE COURT: That's the second pipe?

13 THE WITNESS: Mm-hmm.

14 THE COURT: Hold it right there.

15 Let me take a look at that exhibit. When we
16 get to look at this at some other time it's
17 going -- can I mark this as the second pipe?

18 This is what you're talking about the second
19 pipe where you made this circle? Second
20 pipe. And then this, these two lines that
21 I'm showing here that's going left to right,
22 this is the ditch that you claim that the
23 borough had dug?

24 THE WITNESS: Yes.

25 THE COURT: So I'm just going to

1 mark it ditch here, so okay. Go ahead.

2 BY MR. MURPHY:

3 Q. Now, I have Plaintiff's Exhibit 12. Can you
4 tell me does Plaintiff's Exhibit 12 show either of the
5 markings you just made on No. 20?

6 A. Yes, it does.

7 Q. Which one does it show?

8 A. That shows the water coming through the pipe
9 that's located on Third Street.

10 Q. That was the first one that you indicated on
11 this drawing?

12 A. Yes, it is.

13 Q. And I'd like to show you Plaintiff's
14 Exhibit 16. Does that show the area in which the other
15 pipe is?

16 A. No. This shows the properties across the
17 street from my home that were wetlands.

18 Q. Flip the page to the next number. Can you
19 show the front of your property and just tell us what
20 picture number you're looking at?

21 A. None of these show the other pipe. I do
22 have photos with me but -- these are all just the
23 flooding.

24 Q. The action taken by Dalton Borough, did it
25 resolve the water problems on your property?

1 A. No, it did not.

2 Q. Did they come on your property to do that
3 work?

4 A. Yes, they did.

5 Q. And they had your permission to do so?

6 A. No.

7 Q. When you say no, you indicated you
8 previously talked to them about resolving this?

9 A. Yes, I did.

10 Q. Did you know that they were coming on to do
11 work?

12 A. The understanding was that they would come
13 on with the backhoe and connect the pipes, dig and
14 connect the pipes and bury them and run them to the
15 back of the property.

16 Q. Now, that was your understanding of a
17 decision on the part of the Borough of Dalton to
18 resolve this?

19 A. This came from the borough manager.

20 Q. What was his name?

21 A. The only name I know is Doc Stacknick,
22 whatever it is. I'm not sure.

23 THE COURT: So what you're saying so
24 I understand your testimony is that they did
25 have permission to come on to dig a trench

1 with the backhoe to put pipe in?

2 THE WITNESS: Yes, but not the
3 trench that they actually dug.

4 THE COURT: All right.

5 BY MR. MURPHY:

6 Q. Has the trench that was put in, has that
7 ever been maintained by the Borough of Dalton?

8 A. No.

9 Q. Has it kept its shape? In other words, is
10 it still conveying the water to the back of the
11 property?

12 A. Actually it does but the water overflows it
13 all the time and goes just everywhere. It hasn't
14 contained it.

15 Q. Has the Borough of Dalton ever addressed the
16 pipe at the front of your property?

17 A. You mean the one on Third Street?

18 Q. On Third Street.

19 A. No, not other than the conversations that I
20 had with their borough manager.

21 Q. Have you requested that they do anything?

22 A. Repeatedly.

23 Q. Admittedly you're not being -- you're not
24 being offered to testify as an expert, but can you tell
25 what is your understanding as to where these pipes

1 A. Only from what the Hedricks told me.

2 THE COURT: Who are the Hedricks?

3 MR. BOLOCK: They were the prior
4 owners of the property, Judge, Stanley
5 Hedrick and his wife were the prior owners
6 of the property.

7 THE COURT: Okay.

8 BY MR. BOLOCK:

9 Q. And Mrs. Florimonte, the briars and vines
10 and bushes that were on lot 17 when you looked at it
11 for the first time in March and April of 2000 and
12 ultimately when you purchased it, you removed those,
13 some of those items, when?

14 A. I removed them after I discovered the pipe.

15 Q. And when was that?

16 A. That would have been -- I only removed back
17 to the pipe so it was only a few feet, 15 feet -- but
18 that would have been probably part of the summer of
19 2000 and part of the summer of 2001.

20 Q. So in your Exhibit 18, you show some
21 pictures of lot 17 in March of 2002 and in May of 2002,
22 but none of those pictures show the lot as it appeared
23 when you purchased it in 2000; right?

24 A. No, but I do have photos if you need them.

25 Q. Now, would you agree with me that lot 17 is

1 actually lower than your lot 16 where your house is
2 situated?

3 A. A little bit, yes.

4 Q. And that also that lot 17 is lower than the
5 properties that are on the other side of Third Street
6 or the northerly side?

7 A. They are now but they weren't originally.

8 The low spot on Third Street was the properties across
9 the street from me which were wetlands.

10 Q. Are you suggesting that sometime after you
11 purchased the property the lands across the street
12 lowered in elevation?

13 A. No.

14 Q. Or raised in elevation?

15 A. No. I am saying that when I purchased it,
16 evidently from what the borough did across the street,
17 now my property lot 17 is lower but it wasn't
18 originally.

19 Q. Okay. Lot 17, when you purchased it May of
20 2005, was lower than the properties across the street?

21 A. Yes.

22 Q. If you go up Third Street in, again, if you
23 were to come out of your driveway and go to the right,
24 come out of lot 16, take a right, go across the front
25 of lot 17 and up Third Street in that direction, would

1 you agree with me that those properties up there are
2 all higher than lot 17?

3 A. Correct.

4 Q. And his Honor was asking you some questions
5 earlier and we were referencing the assessment map
6 which is Exhibit No. 3 pointed to an area that was up
7 above the northerly side of Third Street, the
8 properties that are across the street from you and you
9 talked about some scattered housing up in there. Up
10 above that, am I correct, that that's where the
11 railroad line is?

12 A. The railroad line actually runs at the end
13 of Fuller Road which is perpendicular to Third Street.

14 Q. Right.

15 A. If you go back out Fuller Road, you see the
16 train tracks back there.

17 Q. And the train tracks are higher than the
18 land that comes down into Third Street; correct?

19 A. No. It's down in a gully. I would like to
20 add that if you were to look at my property lot 17
21 physically, all the trees are up on little mounds and
22 the reason for that is because of the flooding. My
23 topsoil has been carried away and it's very visible.
24 You can't miss the fact that these trees, they've got
25 roots coming out trying to find exposure to get away

1 A. No. I would be over here so that's in front
2 of the lots across the street.

3 Q. But I mean if you were looking out from
4 lot 16 you're looking at the water so the water is in
5 front of 16?

6 A. Yes.

7 THE COURT: That's on the other side
8 of Third Street from your house?

9 THE WITNESS: Yes.

10 BY MR. BOLOCK:

11 Q. The northerly side. And Mrs. Florimonte,
12 Exhibit No. 17, what does that show?

13 A. This shows the front of the yard that Keith
14 and Judy Miller own. That's where the small pipes that
15 feed across. You can see where the street was dug up
16 to put the pipe in. That's where --

17 Q. But that pool of water that's shown on
18 Exhibit No. 17, that's actually on the other side of
19 Third Street from where you live?

20 A. It is and that's the water that feeds
21 through the pipe.

22 Q. It's also up the road from lot 17; correct?

23 A. No. Actually it's right where the pipe on
24 Third Street enters the end of my lot 17 all the way --
25 a hundred feet from the other side of my lot.

1 Q. Just so we're clear, you're testifying that
2 there are two pipes --

3 A. Yes.

4 Q. -- that enter your property. Is this the
5 property that comes directly across Third Street into
6 lot 17?

7 A. This would be the one that comes across and
8 into the pipe that is on Third Street located on the
9 borough's right of way.

10 THE COURT: This pipe?

11 THE WITNESS: Yes.

12 THE COURT: As opposed to this pipe?

13 THE WITNESS: Yes.

14 THE COURT: That clears it up?

15 MR. BOLOCK: Yes.

16 BY MR. BOLOCK:

17 Q. And Exhibit No. 16 shows water on Third
18 Street in front of lot 16?

19 A. No. This again is across the street,
20 Lucretia Tallman's property and the Miller's property.

21 Q. And that's Exhibit No. 16.

22 THE COURT: Is there a photograph in
23 any of those photographs there that depicts
24 the second pipe?

25 THE WITNESS: Not there. I do have

1 some with me but they haven't been entered
2 into evidence.

3 BY MR. BOLOCK:

4 Q. And Mrs. Florimonte, when you initially
5 instituted your lawsuit against the borough you were
6 suing for monetary damages; correct?

7 A. It was my understanding that I was suing to
8 have the problem corrected as well as any damages to my
9 property.

10 Q. And you signed that complaint and reviewed
11 it and signed it?

12 A. I did.

13 Q. The various photographs that you've
14 testified to, did you take those photographs yourself?

15 A. I did.

16 Q. And they were taken at the times that are
17 indicated on those photographs --

18 A. Yes.

19 Q. -- by you.

20 A. Yes, they were.

21 THE COURT: Did you say these
22 photographs have times on them, Frank?

23 MR. BOLOCK: I thought I saw some
24 dates on the corners.

25 MR. MURPHY: Some do and some do

1 not.

2 THE COURT: Some do and some don't.

3 THE WITNESS: It depends on the
4 file, where I took them from on the
5 computer.

6 BY MR. BOLOCK:

7 Q. Mrs. Florimonte, when you testified that the
8 borough people were on your property at some point in
9 time with your permission, when was that?

10 A. That would have been in 2000 when I first
11 discussed it and then in 2001 just prior to the ditch
12 being dug.

13 Q. Okay. When the ditch was dug in 2001, how
14 long were the borough people on your property?

15 A. I believe they were there when I left in the
16 morning to go to work and they were just leaving when I
17 got home that evening.

18 Q. So eight hours, seven hours, five hours?

19 A. I don't know what their work day was.

20 Q. What was your work day?

21 A. It varied. I was an on-the-road salesperson
22 so I would come home and work on my laptop. It
23 probably was around three or 4 o'clock because I did
24 call the borough and leave a message regarding the fact
25 that they had dug the ditch and it was not something we

1 discussed.

2 Q. And you towards the end of your direct
3 testimony talked about a -- your thoughts about how
4 this water situation could be resolved by piping the
5 property along your side of your land and the
6 depositing it into a ditch down below. Do you believe
7 that would resolve the water issue?

8 A. It would but rather than just pipe it to the
9 back to the channel, if the borough would extend the
10 pipe down to where the channel curves down the Second
11 Street, it would carry it away. It would protect my
12 property, Bob Fisher's, and the people next door.

13 Q. The properties down below, down below
14 Mr. Fisher, that's Second Street; correct?

15 A. Correct.

16 Q. Would you agree with me that that is
17 considerably lower in height than your property, your
18 property sits up higher?

19 A. Yes.

20 Q. And basically we're talking about this
21 almost a hill, Third higher than Second higher than
22 First --

23 A. Correct.

24 Q. -- down to the turnpike. And the issues on
25 your property, the heaving and the cracks that you've

1 testified about in the fireplace and other areas, those
2 are all cracks and issues that could be fixed with the
3 appropriate contractors or labor and materials;
4 correct?

5 A. Yes. I would have to have someone come in
6 and give me estimates too and everything would have to
7 be taken up again and redone.

8 MR. BOLOCK: Judge, these are all
9 the questions I have.

10 MR. MURPHY: Attempting to locate
11 the other pipe. I thought I had it.

12 THE COURT: Well, you don't have any
13 problem, Frank, if he finds the photograph
14 to just introduce it as an exhibit?

15 MR. BOLOCK: None, Judge.

16 THE WITNESS: May I add something,
17 your Honor?

18 THE COURT: I don't think you can,
19 ma'am, because it has to be a question and
20 answer type of deal. Is it an explanation
21 to what you said here before?

22 THE WITNESS: It clarifies the
23 borough's promise to me to fix the property.

24 THE COURT: I can't let you testify
25 without a question being submitted.

1 REDIRECT EXAMINATION
2 BY MR. MURPHY:

3 Q. Is it your understanding, at the end of
4 cross-examination you were discussing the what you
5 believe is a remedy to the water problem, was it your
6 understanding back in '01 and '02 that that was what
7 was going to be implemented as a long-term solution by
8 the borough?

9 A. Yes. And I was so reliant on Stacknick's
10 agreement to do it that way that I actually prepared a
11 letter for my neighbors after I had the survey done
12 asking them to remove anything that was on the boundary
13 line from there because the borough was going to be
14 putting a pipe along there with a backhoe.

15 Q. And again, the current water system that you
16 testified to, that was put in by the Borough of Dalton?

17 A. Yes.

18 Q. The ditch?

19 A. Yes.

20 MR. MURPHY: That's all I have.

21 THE COURT: Frank?

22 MR. BOLOCK: No, nothing.

23 THE COURT: Now you want to move for
24 your --

25 MR. MURPHY: Yes. We move for 1

1 through 20 with the exception of 19 which we
2 removed.

3 THE COURT: Any objections, Frank?

4 MR. BOLOCK: No objection, Judge.

5 THE COURT: They stand admitted.

6 Thank you very much. Okay. Your next
7 witness.

8 MR. MURPHY: Dennis Peters.

9 THE COURT: Let me take a look at I
10 thought I had -- I thought there was a deed
11 as an exhibit.

12 MR. BOLOCK: There was, Judge.

13 Exhibit No. 2, it was the deed from
14 Mr. Schmidt to Mr. Hedrick.

15 THE COURT: Okay. That was a deed
16 that was a predecessor deed to the deed in
17 this issue, right? So Mr. Hedrick, I have
18 1982.

19 MR. BOLOCK: That's when Mr. Schmidt
20 conveyed to the Hedricks.

21 THE COURT: And then Hedricks
22 conveyed to the plaintiff in this case
23 sometime May of 2000, right?

24 MR. BOLOCK: Yes.

25 MR. MURPHY: Correct.

APPENDIX H

1 D E N N I S R. P E T E R S, having been called as a
2 witness and being duly sworn testifies as follows:

3 MR. BOLOCK: Your Honor, I wonder if
4 we could have an offer of proof with regard
5 to this witness, please.

6 MR. MURPHY: Your Honor, he's going
7 to testify as to his examination of the
8 property, his design of a remedial water
9 problem consistent with the borough's prior
10 promise to the plaintiff that she's already
11 testified to, and as to what he believes is
12 a violation of the existing storm water
13 management act by allowing development of
14 properties above -- which the plaintiff has
15 already alluded to -- development of
16 properties above Third Street without
17 ensuring that such could be done without
18 affecting the existing water runoffs to the
19 existing properties such as the plaintiffs.

20 THE COURT: Okay. Go ahead.

21 DIRECT EXAMINATION ON QUALIFICATIONS

22 BY MR. MURPHY:

23 Q. Sir, what is your professional address?

24 A. My professional address is Peters

25 Consultants Incorporated, 100 Robbins Avenue, Berwick,

1 Pennsylvania 18603.

2 THE COURT: Where in Pennsylvania?

3 THE WITNESS: Berwick.

4 BY MR. MURPHY:

5 Q. Sir, how long have you been working in the
6 field of engineering?

7 A. I've been working in the field of
8 engineering since 1972.

9 Q. Did you graduate from high school, sir?

10 A. Yes, I did.

11 Q. What high school?

12 A. Berwick Area High School.

13 Q. When was that?

14 A. 1970.

15 Q. Did you attend college?

16 A. Yes, I did.

17 Q. What college did you attend?

18 A. I attended Pennsylvania State University and
19 also Drexel Institute.

20 Q. Did you receive any degrees from Penn State?

21 A. Yes, I did.

22 Q. What was that?

23 A. Received a degree, bachelor of science in
24 civil engineering in 1974.

25 Q. And did you receive a degree from Drexel?

1 A. No, I did not.

2 Q. How many years did you attend Drexel?

3 A. Attended Drexel two years, three nights a
4 week while I worked in Doylestown, Pennsylvania.

5 Q. And how about have you had any other
6 education or other courses since Penn State and Drexel?

7 A. I received my registered surveyor's license
8 in 1976. I received my professional engineer's
9 license, both by examination, in 1978. I've attended
10 dozens and dozens of courses since then in the
11 different fields of engineering. Department of
12 environmental protection, environmental protection
13 agency courses and seminars.

14 Q. And how about in terms of your employment,
15 since you received your degrees in engineering where
16 have you worked?

17 A. Initially after I received my bachelors
18 degree from Penn State I worked for a firm for two
19 years in Doylestown, Pennsylvania, Boucher,
20 B-O-U-C-H-E-R, and James. Prior to that while I was in
21 college I worked for state college borough in the
22 engineering department under Lee Lowry(phnetic), the
23 borough engineer, for three years and then Boucher and
24 James. After Boucher and James I came back to my
25 hometown and started my own business in 1977.

1 Q. And have you been continuously employed in
2 the field of engineering since then?

3 A. Yes, I have.

4 Q. And you are currently a registered or
5 certified engineer?

6 A. Yes, I am.

7 Q. As part of the practice in your field of
8 practice in engineering, are there times when you're
9 consulted to examine either hydrology or surface water
10 drainage problems?

11 A. Yes. Frequently.

12 Q. And during the course of your employment as
13 an engineer, were you contacted by the plaintiff
14 Carolyn Florimonte to examine her property?

15 A. Yes, I was.

16 MR. MURPHY: At this time I'd move
17 for his admission as an expert in the field
18 of engineering.

19 THE COURT: Cross?

20 MR. BOLOCK: Your Honor, I have no
21 requests on qualifications.

22 THE COURT: So admitted.

23 MR. BOLOCK: Your Honor, I would at
24 this point though interject an objection
25 really stemming from the offer of proof with

1 regard to Mr. Peters' testimony. I think
2 Attorney Murphy indicated that it was
3 anticipated that Mr. Peters would talk about
4 how the development up above in the
5 northerly area above Third Street had
6 violated the storm water management act.
7 And just looking at the petition I would say
8 that that testimony certainly beyond the
9 scope of the petition seeking injunctive
10 relief.

11 There is some reference in the
12 petition seeking injunctive relief that
13 suggests that it's in some way the
14 positioning of the drainage apparatus, the
15 pipe, by the borough violated the storm
16 water management act; but there's no
17 pleading in the petition or the earlier
18 pleading dealing with the complaint for
19 damages that talks about other development
20 in the borough as in some way being
21 violative of the storm water management act.
22 So my objection is that that portion of the
23 offer --

24 THE COURT: Is there any --

25 MR. BOLOCK: -- beyond the scope.

1 THE COURT: -- is there any
2 relationship between the alleged violation
3 somewhere else in this development to what
4 we're talking about here? Is that what your
5 issue is? Other than the pleading, I know
6 you talked about the pleading.

7 MR. MURPHY: Your Honor, I believe
8 it is pertinent. As noted in the brief
9 filed at the time of the request for
10 mandatory preliminary injunction, the courts
11 of this Commonwealth have repeatedly held
12 that statutory violations are per se
13 irreparable harm and I think in this case we
14 have made a request for mandatory
15 injunction. We have cited both in the brief
16 and in the petition, storm water management
17 act. I believe he can address that issue.
18 It is within his competency. Obviously we
19 understand the Borough of Dalton may not
20 agree with that and they have evidence they
21 wish to present to the contrary, but I
22 believe he can address it.

1 motion is overruled. The objection is
2 overruled.

3 DIRECT EXAMINATION

4 BY MR. MURPHY:

5 Q. Mr. Peters, can you tell the Court when you
6 first were contacted by Ms. Florimonte?

7 A. I believe it was in April of 2007.

8 Q. And what did you do after she contacted you?

9 A. I set up an appointment to view the property
10 and I viewed the property on May 7, 2007.

11 Q. What did you find at that time?

12 A. The, well, I observed the -- her home. I
13 observed the driveway. What I noticed about the
14 driveway was there was a lot of gravel that was washed
15 out of the driveway and into the lawn area. I observed
16 the two pipes that -- the one pipe that crosses from
17 the north side of Third Street to the south and drains
18 onto her property, I believe it's lot 17, and I also
19 observed the pipe which I believe is called the second
20 pipe which comes from the -- it would come from the
21 west or upstream down Third Street and cuts diagonally
22 across and into her property on would be on the west
23 side of lot 17.

24 I also walked Third Street up to the top of
25 the watershed and I observed a number of pipes that

1 came out of the houses. They looked like pipes from
2 sump pumps and then a series of other pipes that came
3 from areas in the watershed, I'm not sure where, but
4 they all pretty much discharged into the Third Street
5 pipe -- discharged into a tributary that would come
6 down to the what is called second pipe. I also
7 observed number of issues with her dwelling heaving,
8 the floors were heaved up. I observed a lot of T-111
9 siding that was rotted at the bottom. I observed
10 problems with the garage floor heaved up.

11 Q. Now, how about the land, what we referred to
12 as lot 17, which is you're looking at the front of the
13 house would be to the left, were you able to examine
14 that area?

15 A. Yes. It was pretty much -- the whole house
16 pretty much wet. I observed a channel that had been
17 carved down through the property which would be going
18 to the south down to an existing ditch, which is at the
19 south, southwest, near the southwest corner of lot 17.
20 A lot of the trees on the lot were dead. I did observe
21 that the trees, the actual trunk was a lot higher than
22 the surrounding ground. On most of the trees the roots
23 were sticking out.

24 Q. And what is that indicative of?

25 A. Well, it's pretty much looked like just a

1 wet -- just totally wet saturated lot. And also in the
2 yard, the lawn area between that lot 17 and
3 Mrs. Florimonte's house, that all the lawn area was
4 saturated in that area also.

5 Q. Subsequent to your site view were you able
6 to look at the change of title for Carolyn Florimonte's
7 property?

8 A. Yes, I did.

9 Q. Did you find any easements for the water
10 pipes that you found on your physical examination?

11 A. No, I did not, other than the right of way
12 for Third Street.

13 Q. Does the pipe coming across, does that
14 extend beyond the right of way?

15 A. No, I don't believe so.

16 Q. The pipes that you saw on the property that
17 you described, what do they do?

18 A. The pipe that's on lot 17 that crosses
19 perpendicular to Third Street conveys water from the
20 north side of Third Street to the south side of Third
21 Street. After it ponds, it ponds somewhat on the north
22 side of Third Street and then it enters the pipe and
23 it's conveyed to the south onto Mrs. Florimonte's
24 property. The other pipe, which is called the second
25 pipe, that pretty much conveys storm water from the

1 watershed to the would be the west -- or I'm sorry --
2 the east of the property, up to the top of the hill.
3 And it conveys water from not only the watershed, but
4 both sides of Third Street.

5 Q. And again, there's no existing easements
6 beyond the right of ways that allow the discharge of
7 water?

8 A. No.

9 Q. In both looking at the title and speaking
10 with Carolyn Florimonte, do you know of any agreements
11 that she had entered into allowing discharge of water
12 onto her property?

13 A. No, I don't know of any.

14 Q. Were you able to ascertain whether since
15 2000 there's been additional development in Dalton?

16 A. I don't have any information regarding
17 development, no.

18 Q. In looking at the -- what are watershed
19 plans?

20 A. A watershed plan is a plan of how to take
21 care of the watershed in the event of a situation where
22 development of the watershed occurs and the goal is to
23 try to retain the storm water runoff from the watershed
24 in the watershed and not allow discharge in excess of
25 predeveloped condition.

1 Q. And the adding roads or buildings or such or
2 taking out woodlands, are they going to increase the
3 surface water?

4 A. Yes, they do. Buildings would, of course,
5 are impervious for the most part. There is some
6 evaporation from a roof during a rain fall event. But
7 it's pretty much considered about 90 percent of the
8 water is direct runoff that falls on a roof. And of
9 course if have you an open meadow situation, that
10 situation would usually be about a 25 percent runoff
11 rate versus a 90 percent roof rate.

12 So as you can see, there would be a lot more
13 runoff from a roof or a home that's developed on a lot.
14 Then woodland, again, woodland, most of the storm water
15 is retained on the trees, on the leaves, or on the, you
16 know, the leaf matter on the ground. And if that's
17 opened up into a lawn area, there's a higher runoff.
18 If it's opened up and there's buildings on the lot,
19 it's a much higher runoff rate.

20 Q. Who do municipalities, if they prepare any
21 hydrological studies or water plans for a watershed,
22 where would that be filed?

23 A. It would depend on the extent of the
24 development. It could either be reviewed, well,
25 usually it would be reviewed at the conservation

1 district. It would be reviewed by a municipal
2 engineer. And if it's large enough development where
3 there's a lot of disturbed area, it would either be
4 referred to an engineer at conservation district that
5 has the authority to review it as an NPDES submission,
6 or if he's not qualified to do that, he would refer it
7 on to the department of environmental protection for
8 review. And possibly if it involves wetlands and other
9 issues, jurisdictional issues, it would be referred on
10 to the U.S. Army Corps of Engineers.

11 Q. Do you know if, again, in researching this
12 particular property and the watershed above and below
13 the Florimonte property, do you know if there's any
14 existing declared wetlands?

15 A. I don't know for sure, no. I don't know if
16 any studies have been done.

17 Q. That was my next. In researching for your
18 testimony today, did you find any watershed studies or
19 hydrology studies performed since 2000 on this
20 particular area in Dalton?

21 A. No, I did not.

22 THE COURT: Did you search for
23 those?

24 THE WITNESS: Yes. I'd like to
25 clarify that. The only study that I'm aware

1 of is the work that we've done with John
2 Seamans, the borough engineer, in preparing
3 exhibits for potential resolution. Other
4 than that, I don't know of any work that's
5 been done.

6 BY MR. MURPHY:

7 Q. The storm water management act that -- what
8 does that require a township or municipality to do in
9 terms of from its inception in terms of future
10 development in that municipality?

11 A. Well, there's a lot of sections of the storm
12 water management act and the clean stream law, but
13 basically what the requirement is is to require a
14 municipality to ensure that runoff does not exceed
15 predevelopment runoff, that runoff does not affect
16 downstream properties from the tributary, that the
17 runoff is pollution free, and it also creates a
18 mechanism for a municipality to set up a storm water
19 ordinance. And, you know, the criteria that's supposed
20 to be in that ordinance, it sets up a method for
21 computing different storm events, different ground
22 cover situations, and sets up a method for retention
23 and detention of storm water, conveyance of storm
24 water.

25 Q. Were you able to ascertain when the pipes

1 were first put in that you refer to as pipe one and
2 pipe two that discharge on the plaintiff's property?

3 A. No. I don't know for sure.

4 Q. There was at the time you examined the
5 property Dalton Borough had, according to plaintiff's
6 testimony, put in a ditch to convey the water. Were
7 you able to examine that ditch?

8 A. Yes, I was.

9 Q. Is that currently adequate for containing
10 the volume of water that is discharged on the property?

11 A. No, it's not. The ditch pretty much was I
12 would describe it as a jagged ditch that went around
13 trees and it was -- what I recall, I haven't been there
14 for about a year and a half now -- but it was maybe
15 six inches deep and a foot or two wide, just kind of
16 carved out between the trees in an attempt to direct
17 the water down the southeast corner where the existing
18 ditch goes off of the property.

19 Q. On your examination some of things you
20 testified to earlier in terms of the situation with the
21 trees and the grass and such, did that give indication
22 that this ditch is not controlling the water?

23 A. Well, what I observed is there was water not
24 only in the ditch but there was water over the entire
25 lot as well as over into the grass area along

1 Mrs. Florimonte's house, which would be to the right of
2 the lot if you're looking from Third Street.

3 Q. What would need to be done in order to
4 prevent the existing discharge of water onto the
5 plaintiff's property?

6 A. I prepared an opinion and what my opinion
7 was was that there should be an inlet put in at the
8 driveway to take care of the water that crosses Third
9 Street directly into the driveway and then the water
10 should be piped. It would be to the -- up Third Street
11 picking up the pipe, I guess we're calling it pipe
12 No. 1, the one that crosses perpendicular to Third
13 Street, and then take the pipe to the corner of the
14 property and then direct the pipe towards the south
15 along the property line, picking up the pipe we're
16 calling I believe pipe No. 2 in a junction box, and
17 then pipe the flow to the rear property corner back
18 where the ditch is and then also put riprap in there to
19 control the erosion and slow the water down.

20 Q. Were you in court when the plaintiff
21 testified?

22 A. Today?

23 Q. Yes.

24 A. Yes.

25 Q. She had described a water plan that was her

1 understanding the Borough of Dalton was going to
2 install; did you hear that testimony?

3 A. Yes, I did.

4 Q. Is that somewhat consistent with what you've
5 just described as your plan?

6 A. I think there's two changes. I believe what
7 Mrs. Florimonte testified to was she wanted the pipe
8 that crosses Third Street, the perpendicular pipe, to
9 be diagonal, kind of up Third Street a little more. I
10 don't think that really matters as long as it's picked
11 up in an inlet. And what I added was an inlet in the
12 driveway and I really base that on what I observe on
13 the site. It did appear to me there is a considerable
14 flow across Third Street right into her driveway and,
15 you know, the stones were washed into the lawn area so
16 I had that in my recommendation, which I believe was in
17 excess of what she talked to Dalton Borough about.

18 Q. Is the water discharge from these pipes onto
19 the plaintiff's property continuous? In other words,
20 does it occur when it rains?

21 A. It appears that it does to me. I haven't
22 been there every month out of the year so I don't know
23 if it ever dries up but it looks like the watershed
24 pretty much looks like a real wet watershed and it
25 looks like there's a pretty much continuous flow of

1 water through the property.

2 Q. The plaintiff had testified that there's
3 some development what she called up on the hill above
4 her property. Did you find any watershed studies that
5 were prepared in conjunction with any development in
6 Dalton since 2000?

7 A. No.

8 Q. To your knowledge has there ever been a
9 hydrology study in this area to determine where all the
10 water is coming from?

11 A. To the best of my knowledge, no.

12 Q. Do you believe a surface water management
13 plan should be developed for this area?

14 A. I believe it would be a good idea to develop
15 one. You know, I don't see issues in the entire
16 watershed but I see, well, I see issues past
17 Mrs. Florimonte's property, also all the way down to
18 Second Street on down the slope.

19 Q. The plan that you refer to, the piping plan,
20 do you believe that that would effectively remove the
21 discharge of water from the plaintiff's property?

22 A. Yes, I do.

23 Q. Would it allow the property to dry out?

24 A. I believe so.

25 Q. Do you think that would control the flow of

1 surface or storm water?

2 A. Through the property?

3 Q. Yes.

4 A. Yes.

5 Q. Do you believe that if the riprap is
6 installed at the end of the piping that it would be
7 able to continue to convey water into the property
8 behind the plaintiffs?

9 A. There's an existing ditch there. I believe
10 it would, yes.

11 MR. MURPHY: That's all I have.

12 Thank you.

13 CROSS-EXAMINATION

14 BY MR. BOLOCK:

15 Q. Mr. Peters, from your review of the deeds in
16 the chain of title regarding Mrs. Florimonte, did you
17 have occasion to determine when this development along
18 Third Street was first filed of record and approved?

19 A. No. I only reviewed the deed prior to
20 Mrs. Florimonte.

21 Q. So you only looked at the Hedrick deed?

22 A. Yes.

23 Q. Whether there were other deeds, easements,
24 in the chain of title you didn't examine those?

25 A. I'm not aware of anything previous to the

1 Hedrick deed.

2 Q. If I told you that this development was
3 plotted and filed in 1890, would you agree, disagree?

4 A. I don't have any knowledge one way or the
5 other.

6 Q. You've testified about the storm water
7 management act. Do you know when that was adopted in
8 the Commonwealth of Pennsylvania?

9 A. There's two adoptions, 1972, 1978. There's
10 been a lot of revisions since then.

11 Q. Okay. You testified about pipe two and
12 perpendicular pipe across Third Street. Both of those
13 exit into lot 17; correct?

14 A. Yes.

15 Q. None of the water from the perpendicular
16 pipe or pipe No. 2 enter onto lot 17 based upon your
17 observation; correct? I'm sorry, lot 16 where the home
18 is situated.

19 A. I don't believe so, no.

20 Q. Any water on lot 16 in the Florimonte
21 driveway or on that portion of her property would come
22 from other sources other than the two pipes that you're
23 referencing; correct?

24 A. Yes, it would. That flow would come across
25 Third Street from the north side of Third towards the

1 south.

2 Q. And you were on site and observed the
3 contour of the land?

4 A. Yes.

5 Q. Would you agree with me that lot 17
6 particularly is the low point in that whole drainage
7 area?

8 A. To the back of the --

9 Q. To the northerly side of Third Street and
10 above.

11 A. At, yes, I would. I would agree to that.

12 Q. Mr. Peters, from your knowledge in the field
13 of engineering would you agree with me that increased
14 vegetation on lot 17 would slow the effect of water
15 across lot 17?

16 A. Yes, it would.

17 Q. And similarly the removal of shrubs, vines,
18 trees would cause the velocity of the water to increase
19 in flow?

20 A. Yes, it would.

21 MR. BOLOCK: Nothing further, Judge.

22 MR. MURPHY: Nothing further, your
23 Honor.

24 THE COURT: Okay. Thank you very
25 much. How many more witnesses do you have?

APPENDIX I

1 MR. MURPHY: Your Honor, before we
2 call our next witness, we were able to find
3 a picture of the elusive pipe two which was
4 premarked as Plaintiff's Exhibit 22. And I
5 believe, Frank, you don't have a problem?

6 MR. BOLOCK: No objection, Judge.

7 MR. MURPHY: Your Honor, we would
8 provide you with a copy of pipe two and
9 Plaintiff's No. 22 and I'll move for that
10 admission.

11 MR. BOLOCK: No objection.

12 THE COURT: Okay.

13 R O B E R T A L A N F I S H E R, having been called
14 as a witness and being duly sworn testifies as follows:

DIRECT EXAMINATION

16 BY MR. MURPHY:

17 Q. Mr. Fisher, what is your current address?

18 A. 204 Second Street, Dalton.

19 Q. Do you know the plaintiff Carolyn
20 Florimonte?

21 A. Yes, I do.

22 Q. How do you know her?

23 A. My neighbor.

24 Q. In relation to your property where is hers?

25 A. Right up the back of my property, adjoins

1 mine.

2 Q. Are you familiar -- how long have you lived
3 at Second Street?

4 A. Seventy-five years, except for two years in
5 the army in the Korean War.

6 Q. Have you been in the same house for that
7 time?

8 A. Between the two houses, one of my dad's, one
9 of my grandma's. I switched back and forth.

10 Q. What's the address of the other?

11 A. I think it's 206 I believe.

12 Q. Do you still own 206 as well?

13 A. No.

14 THE COURT: What's your address,
15 Mr. Fisher?

16 THE WITNESS: 204 Second Street.

17 THE COURT: All right.

18 BY MR. MURPHY:

19 Q. I'd like you to look at Plaintiff's
20 Exhibit 20; is your house depicted on this?

21 A. Probably somewhere.

22 Q. Sir, I will represent to you that this has
23 been testified to be a drawing by Carolyn Florimonte,
24 not to scale, and it depicts Third Street here on the
25 left edge and I would ask if you can point out your --

1 A. I take it this is my home.

2 Q. Okay, and that would be 204?

3 A. Yes, 204.

4 Q. And where would 206 be?

5 A. Right here I imagine.

6 Q. Who owns 206 now, do you know?

7 A. I just know him by his first name, Nick.

8 Q. So you're rather familiar with the
9 development in this area?

10 A. Yes, I am.

11 Q. Where's Fuller Street from your house?

12 A. It's Fuller Road.

13 Q. Fuller Road.

14 A. Over to my left, across the field there.

15 Q. Has there been development since 2000 on
16 Fuller Road?

17 A. Yes, there has. Up on the top, above the
18 old Miller farm.

19 Q. Do you currently receive any water discharge
20 onto your property --

21 A. Yes, I do.

22 Q. -- from the Florimonte property?

23 A. Yes.

24 Q. Okay. And have you taken any remedial
25 measures on your property to try to alleviate the water

1 problem?

2 A. No, I have not. Nothing I can do.

3 Q. Do you have an existing water channel?

4 A. Across the back of my property. It goes
5 over into the Boyd's property and the ditch goes down
6 alongside his house.

7 Q. Okay. That starts, does it start on your
8 property?

9 A. Yes, it does.

10 Q. But it goes off your property to whom?

11 A. To the Boyd's residence, Mr. and Mrs. Boyd.

12 Q. Now, did the two of you jointly put that in?

13 A. I forget. It's been so long.

14 Q. How long has that channel been there?

15 A. That I couldn't tell you. Can't even guess.

16 Q. Would you like to see the water discharge on
17 the Florimonte property stop?

18 A. Like to see it discharged?

19 Q. Would you like to see the water that
20 discharges onto her property, would you like to see
21 that taken care of?

22 A. Yes, I would.

23 Q. Why?

24 A. Why? Because her ground gets saturated, it
25 come down and boils out on my back lawn there. Can't

1 even walk up there. You can't even push a push
2 lawnmower up there in the spring it's so wet.

3 Q. And that comes down off of the Florimonte
4 property?

5 A. Yes, it does.

6 Q. Do you know when those pipes were put in?

7 A. Had to be back in the eighties sometime when
8 Hedricks lived there.

9 Q. To your knowledge were they changed or made
10 larger or smaller since the eighties?

11 A. No idea.

12 Q. Were you here when Mr. Peters, engineer,
13 testified?

14 A. Yes, I was.

15 Q. He made reference to a possible resolution
16 which is at least somewhat consistent with what the
17 plaintiff testified Borough of Dalton originally said
18 they would do and that's to put water into piping. Did
19 you hear that testimony?

20 A. Yes, I did.

21 Q. What is your thought on that particular
22 plan?

23 A. Well, they want to pull a swale there which
24 I think will block up after a while and be more
25 problems. If they bring the pipe down, a few more

1 He'd be to my left of my residence.

2 THE COURT: Okay.

3 MR. BOLOCK: It shows on this.

4 Well, I think this comes down the Second
5 Street so that would be Mr. Fishers's
6 property.

7 THE WITNESS: He's to the left of
8 me.

9 MR. BOLOCK: He's this way, if
10 that's Second Street --

11 THE WITNESS: Right.

12 MR. MURPHY: Mr. Boyd's over here?

13 THE WITNESS: Right, that's correct.

14 MR. BOLOCK: Now we're all confused.

15 THE COURT: You're all right. There
16 it is, Frank, like that. And where's
17 Mr. Boyd, where are you saying?

18 THE WITNESS: Over my left here.

19 THE COURT: I've got this oriented
20 now the way this is. This is Third Street,
21 that's Second Street, 17 is the empty lot,
22 Mr. Fisher should be right in --

23 THE WITNESS: Right below. My
24 property abuts right to it.

25 THE COURT: Your property is just

1 dollars more for pipe, put a 90 degree on it, go over
2 about another 30 feet and another 90 degree into the
3 main ditch, it should take care of it. It's not
4 that -- pipe's not that expensive.

5 Q. So you believe piping it into the existing
6 ditch --

7 A. The main ditch.

8 Q. -- that you and Mr. Boyd have?

9 A. Right.

10 Q. You think that would work?

11 A. Yes, it would. But you have to get his
12 approval.

13 THE COURT: Where's Mr. Boyd's
14 property?

15 THE WITNESS: He would be over --
16 let me see how this is set up here.

17 THE COURT: Your property is right
18 there, Mr. Fisher, see it?

19 THE WITNESS: He'd be over here
20 somewhere.

21 THE COURT: There's the channel.

22 THE WITNESS: This is Third Street.

23 THE COURT: That's you right there,
24 Mr. Fisher. This is the channel.

25 THE WITNESS: That's going to down.

1 below lot 17.

2 THE WITNESS: That's correct.

3 THE COURT: And to the left, is

4 Mr. Boyd on the corner of Second and --

5 MR. BOLOCK: -- Garney.

6 THE COURT: -- and Garney?

7 THE WITNESS: Just about, yeah.

8 Garney Street runs right into the driveway.

9 THE COURT: I got it. Any further
10 questions, Bob?

11 MR. MURPHY: Just the water that
12 comes onto your property, that saturates
13 your property, does that happen routinely
14 when it rains?

15 THE WITNESS: All the time. Except
16 like July or August, then it dries up.

17 MR. MURPHY: That's all I have.

18 Thank you.

19 CROSS-EXAMINATION

20 BY MR. BOLOCK:

21 Q. Mr. Fisher, the water coming onto your
22 property from lot 17, the Florimonte, that's not
23 something new since 2000; right?

24 A. No, not new. It saturates up there and then
25 comes out on my back lawn there and you can't even walk

1 up there in the spring time.

2 Q. And that condition has existed --

3 A. -- quite a while.

4 Q. When you say quite a while, you've been
5 since the thirties or forties?

6 A. 1933 I've been there.

7 Q. And the water's --

8 A. I was too young then.

9 Q. Well, the point when you could recall it in
10 the forties, fifties, it's wet back in there?

11 A. Yes.

12 Q. And when Mr. Hedrick lived in the Florimonte
13 property, do you recall working with Mr. Florimonte and
14 his boys in improving the channel and ditch as it came
15 from the --

16 A. I wasn't aware of what they were doing. I
17 didn't work with them.

18 Q. Did you ever see them out there?

19 A. No.

20 Q. Did you ever see the borough --

21 A. No.

22 Q. -- on lot 17, okay.

23 A. I was working during the day, didn't see
24 them.

25 Q. You think the pipes under Third Street were

1 there at least back into the eighties?

2 A. That's when Hedricks lived there they were
3 put in.

4 Q. Might have been there before or you're not
5 sure?

6 A. I'm not sure. I know it was back in the
7 eighties because they just moved up there I believe.

8 ~~I'm not sure when they bought the property, but I know~~
9 ~~they come home one day and the pipe was in. They were~~
10 ~~quite mad.~~

11 MR. BOLOCK: Nothing else for
12 Mr. Fisher, Judge.

13 MR. SHERIDAN: Your Honor, do you
14 mind if I ask one question?

15 CROSS-EXAMINATION

16 BY MR. SHERIDAN:

17 Q. Mr. Fisher, the channel that you've been
18 describing that carries water down alongside the
19 property, is that where it goes?

20 A. It goes down to Second Street.

21 Q. Okay.

22 A. Underneath Second Street, goes down to the
23 ditch and then on to Fuller Road.

24 Q. Yes, sir. And that channel, does it run
25 just down the side of your property?

1 A. It's on --

2 Q. Or does some part of it run off the back --

3 A. It's not on my property. It's on Mr. Boyd's
4 property.

5 Q. Okay, the entire channel --

6 A. The entire channel all the way down is on
7 Mr. Boyd's.

8 Q. So none of that channel is on your property?

9 A. No.

10 Q. Okay. Do you know when that channel was
11 built?

12 A. No idea.

13 Q. Did you have any hand in helping to build
14 it?

15 A. No.

16 Q. Could you describe for us its dimensions,
17 how deep it is and how wide it is?

18 A. Some places probably three and a half, four
19 feet deep where it's been washing out. Up in the
20 corner where it comes across, it's washing the dirt
21 away from a big maple tree is going to come down one of
22 these days and I hope my barn doesn't get hit.

23 Q. But that channel's been there as long as you
24 can remember?

25 A. Yes, it has.

1 Q. And as long as you can remember it's always
2 been a series issue for water flow?

3 A. Yes. Sometimes in the spring I can't even
4 sleep at night because the water is so noisy in the
5 ditch going down.

6 Q. Is that because the topography of the land
7 behind your house that comes all the way down? Is that
8 a yes?

9 A. Yes.

10 MR. SHERIDAN: All right. Thank
11 you.

12 MR. MURPHY: Nothing further, your
13 Honor.

14 THE COURT: Okay. Thank you,
15 Mr. Fisher.

16 MR. MURPHY: Your Honor, having
17 moved for admission of Exhibits 1 through 22
18 with the exception of 19, plaintiffs rest.

19 MR. BOLOCK: Your Honor, I'd move
20 for the dismissal of the plaintiff's
21 petition for preliminary injunction on the
22 basis, in addition to the jurisdictional
23 issue that was raised at the outset of these
24 proceedings, on the basis that the plaintiff
25 has not established the necessary elements

APPENDIX J

11. ELECTRICAL SYSTEM Are you aware of any problems or repairs needed in the electrical system? Yes No

If "yes," explain: House needs to be reviewed to see if circuitry

12. OTHER EQUIPMENT AND APPLIANCES INCLUDED IN SALE (Complete only if applicable)

Equipment and appliances ultimately included in the sale will be determined by negotiation and according to the terms of the Agreement of Sale.

(a) Electric Garage Door Opener No. of Transmitters _____

(b) Smoke Detectors How many? _____ Location _____

(c) Security Alarm System Owned Leased Lease Information _____

(d) Lawn Sprinkler No. _____ Automatic Timer

(e) Swimming Pool Pool Heater Spa/Hot Tub

Pool/Spa Equipment (list):

(f) Refrigerator Range Microwave Oven Dishwasher Trash Compactor Garbage Disposal

(g) Washer Dryer

(h) Intercom

(i) Ceiling fans No. / Location BACK PORCH

(j) Other: _____

Are any items in this section in need of repair or replacement? Yes No Unknown

If "yes," explain: APPLIANCES ARE AS IS

13. LAND (SOILS, DRAINAGE, AND BOUNDARIES)

(a) Are you aware of any fill or expansive soil on the property? Yes No

(b) Are you aware of any sliding, settling, earth movement, upheaval, subsidence, or earth stability problems that have occurred on or affect the property? Yes No

Note to Buyer: The property may be subject to mine subsidence damage. Maps of the counties and mines where mine subsidence damage may occur and mine subsidence insurance are available through: Department of Environmental Protection, Mine Subsidence Insurance Fund, 3913 Washington Road, McMurray, PA 15317 (800) 922-1678 (within Pennsylvania) or (724) 941-7100 (outside Pennsylvania).

(c) Are you aware of any existing or proposed mining, strip-mining, or any other excavations that might affect this property? Yes No

(d) To your knowledge, is this property, or part of it, located in a flood zone or wetlands area? Yes No

(e) Do you know of any past or present drainage or flooding problems affecting the property? Yes No

(f) Do you know of any encroachments, boundary line disputes, or easements? Yes No

Note to Buyer: Most properties have easements running across them for utility services and other reasons. In many cases, the easements do not restrict the ordinary use of the property, and Seller may not be readily aware of them. Buyers may wish to determine the existence of easements and restrictions by examining the property and ordering an Abstract of Title or searching the records in the Office of the Recorder of Deeds for the county before entering into an Agreement of Sale.

(g) Are you aware of any shared or common areas (e.g., driveways, bridges, docks, walls, etc.) or maintenance agreements? Yes No

Explain any "yes" answers that you give in this section: _____

14. HAZARDOUS SUBSTANCES

(a) Are you aware of any underground tanks (other than fuel tanks) or hazardous substances present on the property (structure or soil), such as, but not limited to, asbestos, Polychlorinated biphenyls (PCBs), Ureaformaldehyde Foam Insulation (UFFI), etc.? Yes No

(b) To your knowledge, has the property been tested for any hazardous substances? Yes No

(c) Do you know of any other environmental concerns that might impact upon the property? Yes No

Explain any "yes" answers that you give in this section: _____

(d) Do you know of any tests for radon gas that have been performed in any buildings on the property? Yes No
If "yes," list date, type, and results of all tests below:

DATE	TYPE OF TEST	RESULTS (picocuries/liter or working levels)	NAME OF TESTING SERVICE
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

(e) Are you aware of any radon removal system on the property? Yes No

If "yes," list date installed and type of system, and whether it is in working order below:

DATE INSTALLED	TYPE OF SYSTEM	PROVIDER	WORKING ORDER
_____	_____	_____	<input type="checkbox"/> Yes <input type="checkbox"/> No 172
_____	_____	_____	<input type="checkbox"/> Yes <input type="checkbox"/> No 173
_____	_____	_____	<input type="checkbox"/> Yes <input type="checkbox"/> No 174

APPENDIX K

ORDER IN QUESTION

ORDER

AND NOW this 28th day of December, 2011, for reasons articulated in the preceding Non-Jury Opinion, it is HEREBY ORDERED AND DECREED that the Plaintiff Carolyn J. Florimonte has failed to meet her burden and accordingly, her claim for relief is DENIED.

A verdict is hereby entered in favor of Defendant Borough of Dalton.

BY THE COURT,

J.

JUDGE ROBERT A. MAZZONI

163

CAROLYN J. FLORIMONTE, Plaintiff
v. BOROUGH OF DALTON, Defendant

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

CIVIL ACTION - LAW

2003 CIV 60011

NON-JURY OPINION PURSUANT TO Pa.R.Civ.P. 1038

MARY F. RINALDI
CLERK OF
JUDICIAL RECORDS
2001 DEC 28 A: 9:46

MAZZONI, J.

I. RELEVANT PROCEDURAL HISTORY

On March 4, 2003, Plaintiff Carolyn Florimonte (Florimonte), by and through Counsel, filed a "Civil Action - in Equity" against the Defendant Borough of Dalton (Borough). Notwithstanding the equity characterization of this lawsuit, the Plaintiff Florimonte, in her Complaint, advances actions at law, more specifically, **a count in trespass and a count in negligence.**

Some of the foundational facts of this case are not in dispute. Plaintiff Florimonte is the owner of a parcel of land situated at 219 Third Street in the Borough of Dalton, Pennsylvania. On or about May 5, 2000, Plaintiff Florimonte purchased the subject property from Stanley and Josephine Hendrick who had previously owned and occupied the subject premises since 1982. (See Exhibit A attached to Plaintiff's

Complaint). The subject property consists of three lots, Lot 16, Lot 17, and Lot 30 in Block D on the plot of land of Adelaide and Mary Gardner in the Borough of Dalton. Lots 16 and 17 are contiguous and both of which border Third Street. Lot 30 is directly behind Lot 16 and borders Second Street. Plaintiff Florimonte's home appears to be situated on Lot 16. Lot 17 is an empty lot.

Plaintiff Florimonte claims that Defendant Borough is and has been wrongfully depositing excess quantities of water over and through her premises. Plaintiff Florimonte maintains that the Borough, without her consent or consent of the predecessors in title, developed and/or created a "drainage system" (trench) which is designed to channel water over and through her property, more particularly Lot 17. Plaintiff Florimonte claims that by reason of the above described diversion, the water has damaged trees as well as her residence, and has rendered a portion of her property unusable. Plaintiff Florimonte maintains that the aforementioned damages have interfered "with her use and enjoyment of the land." (See Paras. 7 and 8 of Plaintiff's Complaint).

In her Complaint, Plaintiff has requested the following relief:

- A. the entry of an "order compelling Defendants to remove that portion of its drainage system, which is located on Plaintiff's property in such a manner that an excess of water is no longer deposited on her land";
- B. "**award money damages** to Plaintiff due to Defendant's negligent construction and maintenance of the drainage system";
- C. "award any other relief that this Honorable Court deems necessary under the circumstances."

(See Pages 3 – 4 of Plaintiff's Complaint).

In its respective pleading, the Borough has denied Plaintiff's relevant and controlling allegations and has also advanced affirmative defenses in the form of "new matter" which has been correspondingly contested as well¹.

On August 10, 2011, this Court conducted a Non Jury Proceeding on the merits of this case. Prior to trial, the Plaintiff had filed a variety of Pre-Trial requests for relief, including a Motion for Summary Judgment and a Request for a Preliminary Injunction, both of which were denied. Less than a month before trial, the Plaintiff, Pro Se, had filed a Petition for Writ of Mandamus which this Court denied summarily on the day of trial, placing the reasons for the denial on the record². (N.T. Page 13). Prior to the Court's decision of the matter on the merits, Plaintiff, on September 8, 2011, filed an appeal to the Pennsylvania Commonwealth Court on the Court's denial of the Writ of Mandamus. This Court correspondingly issued a 1925(a) Opinion dated September 13, 2011, specifically articulating the Court's reasons for the denial of the Plaintiff's Petition for Writ of Mandamus. Pa.R.App.P. 1925(a). By Order dated October 26, 2011, the Pennsylvania Commonwealth Court quashed Plaintiff's appeal as being an appeal from a "non-final interlocutory order." Pa.R.App.P. 341.

¹ There was a great deal of attention at trial which focused on the existence or lack thereof of a prescriptive easement. Defendant Borough did not advance such a claim or if any was previously raised, it was withdrawn.

² In the Plaintiff's Writ, the Plaintiff had requested the recusal of this Judge, because this Judge had allegedly refused to provide her with a stenographer at the time of argument with regard to her Motion for Summary Relief. As noted on the record of August 10, 2011, this Court does not specifically recall denying the Plaintiff's request for a stenographer, but did indicate that it is its policy to grant such a request when advanced. (N.T. Page 10 - 11).

II. DISCUSSION

At the time of trial, and for some time prior thereto, the Plaintiff proceeded unrepresented. Prior to the commencement of trial, the Court related to the Plaintiff that It is guided by the allegations in the Complaint and the causes of action that are raised therein. Notwithstanding same, Plaintiff Florimonte, in her opening and closing statements, proceeded to "frame up" her case in the form of an eminent domain proceeding. In her post trial submission, the Plaintiff made lengthy references to the United States and Pennsylvania Constitutions, implying that one's property cannot be taken without just compensation. Because of potential and grave procedural, statutory, and substantive violations, this Court related to the Plaintiff that It was not and cannot transform this case into a *de facto* taking. (N.T. Pages 12, 252 – 254).

The fact that a litigant decides to be his/her own lawyer does not excuse him/her from failing to following the Rules of Civil Procedure. Green v. Harmony House North 15th Street Housing Ass'n, Inc. 684 A.2d 1112 (Pa. Cmwlth. 1996). "The right of self-representation is not a license...not to comply with relevant rules of procedure and substantive law." Id., citing Faretta v. California, 422 U.S. 806, 834, n. 46 (1975). Our Courts have ruled that a *pro se* litigant "must to some extent assume the risk that his[/her] lack of legal training will prove his[her] undoing." Peters Creek Sanitary Authority v. Welch, 681 A.2d 167, 170 (Pa. 1996), n.5; Vann v. Unemployment Compensation Board of Review, 494 A.2d 1081 (Pa. 1985). A *pro se* litigant is "subject to the same rules of procedure as is a counseled defendant, and has no greater right to be heard than he[/she] would have if he[/she] were represented by an attorney."

Com. v. Abu-Jamal, 555 A.2d 846 (Pa. 1989); Jones v. Rudenstein, 585 A.2d 520 (Pa. Super. 1991); Kovalev v. Sowell, 839 A.2d 359 (Pa. Super. 2003), N.7; Rich v. Acrivos, 815 A.2d 1106, 1008 (Pa. Super. 2003); Mueller v. Com. Pennsylvania State Police Headquarters, 532 A.2d 900 (Pa. Cmwlth. 1987).

This Court cannot tutor the Plaintiff and inform her on the elements of liability that are necessary to establish her claims for relief. This Court cannot guide the Plaintiff in developing her case. This Court cannot provide the Plaintiff with a legal primer on how to establish the necessary elements in a negligence/trespass case. Correspondingly, the Court cannot afford her assistance on evidentiary issues which may confront her along her journey for relief.

Needless to say, the Plaintiff focused a great deal on the result of the water diversion and not on culpability and legal responsibility. What could have arguably been a case of potential merit fell victim to a record which is convoluted and not fully developed. This Court is required to decide this case based upon the record before it as developed by the Parties. The record as developed by the Plaintiff is nothing short of convoluted, fragmented and lacking in factual foundation to afford a remedy.

Through the submission of valid and competent evidence, the plaintiff has the burden of establishing those elements which would entitle her to relief. The Pennsylvania Supreme Court has held that the requirement of a meritorious cause of action "is satisfied if the claim *as pleaded and proved at trial* would entitle [plaintiff] to relief." Simmons v. Luallen, 763 A.2d 810, 813 (Pa. 2000). In a negligence action, a plaintiff must establish the breach of a legally recognized duty or obligation that is causally connected to the damages suffered by the complainant. Bilt-Rite Contractors,

Inc. v. The Architectural Studio, 866 A.2d 270 (Pa. 2005); Sharpe v. St. Luke's Hospital, 821 A.2d 1215, 1218 (Pa. 2003). The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff. Althaus ex rel. Althaus v. Cohen, 756 A.2d 1166, 1168 (Pa. 2000). The determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution. Althaus, *supra*, at 1169. Negligence is established by proving the following four elements: (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages." Estate of Swift by Swift v. Northeastern Hosp., 690 A.2d 719, 722 (Pa. Super. 1997). Moreover, in any negligence action, "establishing a breach of a legal duty is a condition precedent to a finding of negligence." Grossman v. Barke, 868 A.2d 561 (Pa. Super. 2005).

Liability for the common law tort of trespass arises from the intentional entry upon the land of another without privilege to do so. Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716 (W.D.Pa. 1994). The definition of "trespass" in Restatement (Second) of Torts, §158 conforms to the conception of trespass at common law. Under this definition, one who intentionally and without consensual or other privilege enters land in possession of another or causes anything or a third person to do so is liable as a trespasser irrespective of whether harm is thereby caused to any legally protected interest. Glass v. Dean Coal Co., 7 Pa. D. & C.2d 657 (C.P. 1957). Similarly, one is

subject to liability to another for trespass, irrespective of whether one thereby causes harm to any legally protected interest of another, if one intentionally enters land in the possession of another or causes a thing or a third person to do so, remains on the land, or fails to remove a thing that one is under a duty to remove. Restatement (Second), §158. An owner of realty has a cause of action in trespass against any person who has committed a trespass upon her or his lands, and it is not necessary for the landowner to allege any actual injury or damage as an element of the cause of action. There is no need to allege harm in an action for trespass because the harm is not to the physical well-being of the land, but to the landowner's right to peaceably enjoy full, exclusive use of her or his property. Jones v. Wagner, 624 A.2d 166 (Pa. Super. 1993). (See Also Pennsylvania Jurisprudence, Section 23:1; 2 Summ. Pa. Jur. 2d Torts, §23:1).

The diversion of water by a municipality has been addressed by the Commonwealth Court of Pennsylvania in Marlowe v. Lehigh Twp., 441 A.2d 497 (Pa. Cmwlth. 1982). In Marlowe, the plaintiff sued the Township for damages arising from the Township's alleged acts of negligence, trespass, and breach of contract regarding a storm drainage system constructed by the Township. In reversing the trial court's findings, the Commonwealth Court held:

We disagree with this rationale to the extent that it implies, as the township vigorously argues, that the Marlowes have not suffered an actionable wrong because the water now flowing over their property is the same storm runoff, albeit in a concentrated state, which was present before the township acted. The law in this Commonwealth is that one may not alter the natural flow of surface water by concentrating it in an artificial channel and discharging it with injurious consequences upon the land of another even though no more water is thereby collected than would naturally have flowed upon the other's land in a diffuse condition. Rau v. Wilden Acres, Inc., 103 A.2d 422 (Pa. 1954); Hays v. Hinkleman, 68 Pa. 324 (1871); Elliot v. H.B. Alexander & Son, Inc., 399 A.2d 1130 (Pa. 1979)...

Even a municipality, while not liable to a property owner for an increased flow of surface water over his land arising merely from changes in the character of the surface produced by the opening of streets and the building of houses in the ordinary and regular course of the expansion of the city, may not divert the water onto another's land through the medium of artificial channels.

This principle does no more than recognize the practical reality that damage may be caused by the discharge of surface water even when its volume remains unchanged if it is collected and discharged with augmented force.

Marlowe, *supra*, at 501.

A municipal entity may not be held liable for an inadequate storm water management system. Liability does attach however, if the plaintiff **can prove** that the damages resulting from negligence and maintenance of the system. Rooney v. City of Phila, 623 F.Supp. 2nd 644 (E.D. 2009); McCarthy v. City of Bethlehem, 962 A.2d 1276 (Pa. Cmwlth. 2008).

During the Non-Jury Proceeding, and in the Plaintiff's Post Hearing Submission, the Plaintiff makes references to various types of recovery which are not contained in her pleadings. Plaintiff claims that the "Borough Manager promised to correct the flooding" and failed to do so. (See Page 4 of Plaintiff's Post Trial Brief). This is the basis of Plaintiff's Breach of Contract claim which was not previously raised nor cited in her pleadings.

Secondly, the Plaintiff claims that the diversion of water constitutes a seizure for which no compensation was exchanged. Once again, this is not an eminent domain proceeding, and such a claim was not raised in the pleadings.

Thirdly, the Plaintiff extensively cites violations of the Pennsylvania Storm Water Management Act (SWMA), 32 P.S. §680.1, et seq., which was not pled and

177

which also lacks an evidentiary foundation on the record. Section 680.15 of the SWMA permits an aggrieved person to institute a suit to prevent or abate a violation of the Act. Section 680.13 of the Act, which appears to be the gravamen of Plaintiff's alleged violations, reads as follows:

680.13. Duty of persons engaged in the development of land

Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include such actions as are required:

- (1) To assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or
- (2) To manage the quantity, velocity, and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury.

32 P.S. §680.13.

Ignoring the fact that the Plaintiff has not pled a right of recovery based on SWMA, the case of Bahor v. City of Pittsburgh, 631 A.2d 731 (Pa. Cmwlth. 1993) is most controlling. In Bahor, the Commonwealth Court upheld the trial court's j.n.o.v. for plaintiff's failure to produce at trial any evidence of an applicable storm water management plan. In the case at bar, the Plaintiff has failed to produce any evidence of an applicable storm water management plan, and failed to cite any violations of same by the Borough. The Plaintiff, in her Brief, took the liberty to attach a water shed map, a Department of Environmental Protection Fact Sheet, and an index to designated water sheds. None of these documents were introduced of record as exhibits or otherwise. For reasons articulated herein, and both from a procedural and substantive standpoint, the

alleged SWMA violation cannot be construed as a valid and legitimate claim for relief in this case.

Plaintiff was permitted to introduce over seventy (70) exhibits, most of which were photographs taken of her property at diverse times. Acknowledging her lack of legal training, this Court was patient with the Plaintiff and permitted her to present her case. The transcript does support this assessment. A review of the transcript will also reveal that the Plaintiff's presentation of evidence was convoluted at best.

After calling the Defendant Borough's Engineer, John Seamans, to the stand in her case in chief, she frequently interjected her own testimony in the process of eliciting answers to questions. (N.T. Pages 44, 47, 49 – 51, 103, 111, 126 – 128). Furthermore, Plaintiff also inappropriately read excerpts of transcripts of previous proceedings without proposing a question to the witness, and more importantly, without establishing a legal foundation to do so. (N.T. Pages 45, 57, 78 – 80).

The record makes a reference that the subject pipes were replaced some thirty years ago. The record also makes reference that the subject pipes were replaced fifteen years ago by the "sewer authority." (N.T. Page 91, 163). Except for this limited reference on the approximate date of the installation, there is no evidence of record at trial as to who installed the original piping thirty years ago.

At the time Plaintiff purchased the subject property, Plaintiff claims that Lot 17 was overgrown with brush and vegetation. Shortly after the purchase, more specifically in late May or June of 2000, Plaintiff first discovered the pipe underneath Third Street. (N.T. Page 151 – 152, 173). In the year 2000, Plaintiff contacted Borough Officials about her water problems, and she claims that she was assured that the Borough would

resolve the problem. She met with Borough officials in April, 2001 and she permitted the Borough to enter her property to dig a trench to collect and direct the water. (N.T. Page 155 – 158). This work did not meet her expectations, and in March, 2002, she “removed permission for the Borough to be on [her] property.” (N.T. Page 159)³.

The Defense called John Seamans, Borough Engineer, as its sole witness. This Court finds John Seamans’ testimony most credible. Mr. Seamans has a Bachelor of Science Degree in Civil Engineering from Penn State University. He is a Registered Professional Surveyor in the state of Pennsylvania since 1978 and a Registered Surveyor in the state of Pennsylvania since 1972. He was hired by the Borough as the Borough’s Engineer in 2000. Mr. Seamans has little or no information about the drainage facility in issue because they were installed many years before his hire. (N.T. Pages 221, 223).

Through the use of a detailed street profile and a detailed topographic chart (Defendant’s Exhibits 3 and 4), Mr. Seamans testified that the Plaintiff’s property sits in a “bowl” and is the lowest point along Third Street. (N.T. Page 212). Mr. Seamans indicated that there is a forty-four foot drop from where Third Street intersects with Lake Street, proceeding down to the Plaintiff’s property. From Plaintiff’s property in the opposite direction, Third Street goes uphill a height of thirty-four feet, where Third Street intersects with Fuller Street. (N.T. Pages 215 – 216). Through the use of the

³ It is interesting to note that prior to the closing on the subject property, the Hendricks, in their disclosure statement, failed to disclose to the Plaintiff of any water problems. Furthermore, the realtor, if privy to such information, also failed to disclose same. Plaintiff claims that she did not pursue legal action against the Hendricks and/or the realtor because she relied upon the Borough’s assurance that it would resolve the problem. (N.T. Page 169 – 171; Plaintiff’s Exhibit Number 2).

topographic exhibit, it is apparent that the entire 26 acre collection area feeds into the Plaintiff's property which is the lowest point in the area. (N.T. Pages 217 - 219).

Mr. Seamans indicated that there is no storm water management plan in Lackawanna County that pertains to the subject area. (N.T. Page 227). When asked what would happen if the pipes were removed, Mr. Seamans stated:

Q: And can you tell us or give us what your opinion would be within a reasonable degree of civil engineering in terms of what would happen to this entire area; what would happen to Third Street if both of those pipes were removed?

A: Eventually Third Street would flood and during a big enough storm the water would run across the top of Third Street and onto the Florimonte property some where and in the winter time you would have one difficult situation with ice.

Q: Due to thawing and refreezing?

A: Yes, or just freezing over.

Q: Just freezing over?

A. And building up.

(N.T. Page 226).

Mr. Seamans clearly opines that the water is going to traverse Lot 17 no matter what. On cross examination, he stated:

Q: But the normal collection point is across the street?

A: And if it is, it is still going to come onto your property.

Q: Doesn't matter. The normal collection point is across the street?

A: It matters a lot.

Q: No it does not. Not - all right.

A: These engineering drawings, Ms. Florimonte, indicate that the

waters [sic] coming your way. There's no way to get around it. Until the good Lord reverses gravity the waters [sic] going to cross Third Street.

(N.T. Page 239).

Plaintiff claims at that hearing that because her action is one filed in equity, she is not entitled to assert and prove a claim for damages. This premise contradicts her claim for monetary damages in her complaint and in her post trial submission. What is noted herein, the claims advanced by the Plaintiff are claims at law and damages are in fact a necessary element for monetary recovery. Notwithstanding her advancement in negligence and in trespass claims, there is no evidence of record to reflect a damage award.

As reflected herein, the entry upon Plaintiff's land in 2000 and the digging of a trench by Borough officials was done with the Plaintiff's permission. That permission was revoked in March, 2002. Accordingly, there is no basis for an action in trespass based on that entry.

Secondly, the alleged diversion of water onto her property through the installation of drainage pipes was accomplished by someone who is not identified in the record, but was at all times assumed to be the Borough of Dalton. Assuming that the Borough of Dalton installed the pipes approximately thirty years ago, there is nothing of record that this action constituted a trespass or constituted a negligent act. Plaintiff did not present any evidence, expert or otherwise, that addressed the natural flows of water before pipe installation or the natural flow of water after installation. There was no evidence of record that addressed the amount of water discharged, the nature and relative flow rate and/or velocity of same, both before and after the installation. What

was clear to this Court was that the removal of the pipe would not abate Plaintiff's problem and would likely create a safety hazard on Third Street, especially in the winter months.

In an effort to attain a recovery, the Plaintiff has introduced into this case causes of action which are not pled, recitation of allegations that are not borne out in the record, and references to testimony in previous proceedings which did not find their way into the trial record. In short, and based on the credible evidence of record, the Plaintiff has failed to meet her burden. There simply is no credible evidence of record which supports a cause of action in negligence or in trespass. For this reason, Plaintiff's claim for relief is hereby DENIED.

177

Ym
L 2.25-11
(2)

MARY E. RINALDI
LACKAWANNA COUNTY

2011 DEC 28 A 9:46

CLERK OF
JUDICIAL RECORDS

CAROLYN J. FLORIMONTE,	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff	:	
	:	
V.	:	CIVIL ACTION - LAW
	:	
BOROUGH OF DALTON,	:	
	:	
Defendant	:	2003 CIV 60011

ORDER

AND NOW this 28th day of December, 2011, for reasons articulated in the preceding Non-Jury Opinion, it is HEREBY ORDERED AND DECREED that the Plaintiff Carolyn J. Florimonte has failed to meet her burden and accordingly, her claim for relief is **DENIED**.

A verdict is hereby entered in favor of the Defendant Borough of Dalton.

BY THE COURT,

JUDGE ROBERT A. MAZZONI

cc: Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa.R.Civ.P. 236 (a)(2) by mailing time-stamped copies to:

Ms. Carolyn J. Florimonte, Pro Se
219 Third Street
Dalton, Pennsylvania 18414

Mark T. Sheridan, Esquire
Margolis Edelstein
200 Penn Avenue, Suite 305
Scranton, Pennsylvania, 18503

AND

James Doherty, III, Esquire
Suite 1000 Bank Towers
321 Spruce Street
Scranton, Pennsylvania 18503
Attorneys for Defendant

Frank J. Bolock, Esquire
101 West Grove Street
Clarks Summit, Pennsylvania 18411
Solicitor for Defendant