

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PENN PRODUCTS CORPORATION, DAVID
J. HORICK, DOUGLAS C. HORICK,
MARILYN SNYDER BUDZYNSKI,
EXECUTRIX DBN OF THE ESTATE OF
MAYBELLE ASPER, DECEASED, DANIEL
A. KUHN, DONNA LEE GOFF, LEWIS G.
KUHN, CAROLYN WAGNER, DORIS I.
ERNST AND JEAN M. HORICK,

Appellees

v.

SANDRA L. MCCORKEL, GREGORY R.
SWOPE, MEGAN SWOPE AND JOHN D.
SWOPE,

Appellants

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 985 MDA 2012

Appeal from the Judgment Entered May 29, 2012
In the Court of Common Pleas of Cumberland County
Civil Division at No(s): 2838 Civil 2012.

BEFORE: BOWES, GANTMAN and OLSON, JJ.

MEMORANDUM BY OLSON, J.:

FILED NOVEMBER 25, 2013

Appellants, Sandra L. McCorkel, Gregory R. Swope, Megan Swope, and
John D. Swope, appeal from the judgment entered on May 29, 2012
following the entry of an order on May 15, 2012 that issued a permanent

injunction in favor of Appellees.¹ After careful review, we vacate and remand for further proceedings.

This case arises from a struggle for control over Penn Products, a closely held corporation organized under Pennsylvania law. Appellants are shareholders of Penn Products who, as of April 25, 2012, served as officers and directors of the company. Together, Appellants hold a minority share of the voting power at Penn Products. The individual Appellees include: persons who are shareholders of Penn Products, persons who hold shareholder proxies, and a representative of the estate of a deceased shareholder. The individual Appellees hold a majority of the voting power of the outstanding shares of Penn Products.

¹ Appellees include Penn Products Corporation and David J. Horick, Douglas C. Horick, Marylyn Snyder Budzinski, executrix-dbn of the estate of Maybelle Asper, deceased, Daniel A. Kuhn, Donna Lee Goff, Lewis G. Kuhn, Carolyn Wagner, Doris I. Ernst, and Jean M. Horick. Collectively, we shall refer to all appellees as "Appellees." We refer to the corporate appellee as "Penn Products" and to the individual appellees either by name or, collectively, as "individual Appellees."

Appellees have filed an application to quash this appeal. In their application, Appellees allege that the present appeal is subject to quashal because Appellants failed to file and serve the required designations or notice under Pa.R.A.P. 2154, Appellants' reproduced record fails to comply with Pa.R.A.P. 2171(a) and 2173, and Appellants' concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) was too vague and failed to include the issues raised in Appellants' brief. As these alleged procedural defects have not materially hampered our ability to conduct appellate review, we deny Appellees' application for relief.

On April 25, 2012, the annual shareholders meeting of Penn Products was convened. The Appellants, as well as the individual Appellees, were present at the meeting. Other attendees included an attorney retained by the individual Appellees and one of his employees. Corporate counsel for Penn Products was not present.

Sandra McCorkel (McCorkel), president of Penn Products, presided over the meeting. The assembly, however, descended into chaos as disputes arose concerning the validity of the proxies, the identity of shareholders of record who were entitled to vote, and the selection of the judge of elections. At various times during the meeting, several, if not all of the Appellants, including McCorkel, telephoned corporate counsel for Penn Products. Counsel suggested to McCorkel that she adjourn the meeting and reconvene when he could be present and address the disputed issues. In accordance with this advice, McCorkel adjourned the meeting and ushered the individual Appellees out of the meeting place.

The individual Appellees left the shareholders meeting, immediately reconvened amongst themselves in the parking lot, appointed a judge of elections, and elected themselves as officers and directors of Penn Products.

On May 2, 2012, corporate counsel for Penn Products notified all shareholders that the annual shareholders meeting would resume on May 10, 2012. The trial court summarized the ensuing procedural history in this case as follows:

[Thereafter, the individual Appellees, on behalf of themselves and Penn Products, filed a complaint on May 7, 2012 seeking both a preliminary or special injunction and a permanent injunction. By way of relief, the complaint requested a preliminary injunction in which the trial court would: 1) enjoin the "Resumption of Annual Meeting of Stockholders" noticed for May 10, 2012; 2) prohibit Appellants from acting on behalf of Penn Products; 3) prohibit Appellants from accessing the various financial accounts of Penn Products; 4) recognize the directors and officers who were elected on April 25, 2012; and, 5) direct Appellants to deliver to the new directors all keys to corporate property, all corporate checkbooks and financial accounts, all corporate records, and the corporate seal. The demands for permanent injunctive relief differed only slightly from the demands for preliminary injunctive relief. Paragraph five of Appellees' prayer for preliminary relief asked the trial court to order the return of corporate property to the newly elected directors. Whereas, paragraph five of Appellees' request for permanent relief asked the trial court to place the responsibility for management of Penn Products into the hands of the newly elected directors and officers.]

On May 8, 2012, [the trial c]ourt issued an order which granted the requested preliminary or special injunction and set a hearing on the matter for Friday, May 18, 2012, at 1:30 p.m. Upon realizing [that it] had erred in failing to set bond and in failing to schedule a timely hearing pursuant to Pa.R.C.P. No. 1531, [the court] entered an order on May 9, 2012, that vacated the order of May 8, 2012 and, in effect, reissued the same order with two exceptions - bond was set at \$1.00 and the hearing was scheduled for May 14, 2012, at 9:00 a.m.

On May 14, 2012, the [trial] court heard approximately six hours of testimony from nine witnesses, admitted 18 exhibits into evidence and heard argument from counsel [for the parties.] [Based upon the evidence presented at the hearing, the trial court made the following findings of fact:]

1. Proper notice was given to the [s]hareholders of the April 25, 2012 Annual Shareholders Meeting of Penn Products Corporation.
2. The largest shareholder in attendance (holding 5,195 shares or 20.78% of all outstanding shares) was Marilyn Budzynski, who was

the duly appointed personal representative of the estate of Maybelle Asper.

3. [Appellees] submitted legitimate proxies to [Appellants] prior to the meeting being convened.
4. Then [p]resident, [McCorkel], called the meeting to order in the living room because there were too many attendees to meet in the kitchen as planned.
5. McCorkel declared the first order of business to be the election of the Board of Directors and began to pass out preprinted ballots that only contained the names of [Appellants].
6. McCorkel was advised by counsel for [the individual Appellees] that there was an alternate slate of candidates consisting of David Horick, Douglas Horick, Marilyn Budzynski, Donna Goff, Sandra Kreider, Richard Magee and Daniel Kuhn all of whom were properly moved, seconded and ultimately added to the ballot.
7. After the ballots were revised, McCorkel attempted to appoint/nominate [] Greg Swope, John Swope and/or Megan Swope to serve as judges of election, but was informed by counsel for [the individual Appellees] that pursuant to the Penn Products by-laws and the statutes of Pennsylvania, a candidate may not serve as a judge of election.
8. After some additional confusion, discussion, and perhaps a few raised voices, Marilyn Budzynski nominated [an individual who was one of only three] present at the meeting who were legally eligible to serve as judge of elections.
9. There was a somewhat begrudged consensus among the [s]hareholders that [the nominee] would serve as judge of elections, and McCorkel, the officer empowered to appoint the judges of elections, stated words to the effect of "alright [sic] let's proceed."
10. Following the resolution of the question as to who would serve as judge of elections, McCorkel passed out the ballots.
11. Shortly after passing out the ballots, and following a [telephone] call with then corporate counsel, without a motion or vote to adjourn, McCorkel announced "this meeting is over" and within

minutes turned out the lights in order to usher the [individual Appellees] out of the house.

12. Amidst a flurry of objections to adjournment by the [individual Appellees], McCorkel declared "don't make me have to call the police" in order to force the [individual Appellees] off the premises.
13. [The judge of elections] attempted to collect all of the ballots prior to leaving, but [Appellants] refused to give him their ballots.
14. After [the judge of elections] collected the ballots in the house, [the individual Appellees] proceeded to meet outside in the parking lot and continued the election of officers that had commenced inside, with each candidate on the aforesaid alternate slate receiving well over 50% of the votes present, in person or by proxy (14,630 votes of a possible 23,175).
15. Following their attempt to abort the election of directors, [Appellants] met on May 1, 2012 and continued to transact business on behalf of the corporation, including the payment of approximately \$300,000[.00] in accounts payable, the declaration of a dividend in the amount of \$22.00 per share and the mailing of notices to reconvene the [a]nnual [s]hareholders [m]eeting on May 10, 2012.
16. The transactions by [Appellants] required sizeable transfers of funds between corporate accounts with Charles Schwab and ACNB leaving only \$20,000[.00] in the corporate accounts for operation of the corporation.
17. All [of the Appellants] deposited their \$62,476.00 dividend checks into their ACNB accounts on May 7, 2012, withdrew \$60,000[.00] in cash two days later and deposited the same into accounts with different institutions.
18. On May 3, 2012, the newly elected [d]irectors met at a properly called meeting to authorize the filing of th[is action for injunctive relief.]

Trial Court Opinion, 8/24/12, 1-8 (internal footnotes and citations omitted).

Based on the foregoing findings, the trial court, on May 15, 2012, entered an order which found "that the [a]nnual [s]hareholders [m]eeting

on April 25 was properly noticed and convened and that the ensuing election of [d]irectors and [o]fficers comported with both the by-laws of the corporation and the laws of this Commonwealth.” Trial Court Order, 5/15/12. Consequently, the trial court issued a permanent injunction authorizing the directors and officers elected on April 25, 2012 to undertake the management of the corporation. The court’s May 15 order also prohibited Appellants from acting on behalf of the corporation, declared Appellants’ actions following the April 25, 2012 annual meeting to be null and void unless ratified by the newly constituted board, and directed Appellants to deliver all of the corporate records of Penn Products to the new directors of the corporation. ***Id.***

On May 25, 2012, Appellants filed preliminary objections alleging that Appellees’ complaint failed to conform to law in that it was unverified. [Appellants’] Preliminary Objections to [Appellees’] Complaint, 5/25/12, at ¶ 1. Appellants also alleged that the complaint contained scurrilous matter and that no petition for a preliminary injunction had been filed. ***Id.*** at ¶¶ 2-3. Thereafter, Appellees filed a petition for preliminary injunctive relief, explaining that this submission had been inadvertently omitted from their complaint. On May 29, 2012, Appellants filed a praecipe for entry of judgment upon the trial court’s May 15 order together with a timely notice of

appeal.² On May 31, 2012, the court ordered Appellants to file a concise statement of errors complained of on appeal. Appellants timely complied on June 20, 2012. The trial court issued its opinion on August 24, 2012.

Appellant's brief raises the following questions for our consideration:

Did [the trial court] act properly and in accordance with law when, on May 8, 2012, [it] issued an *ex parte*, mandatory preliminary injunction, on the basis of an unverified complaint, with no petition for a preliminary injunction having been filed, and without requiring that a bond be posted, and scheduled a hearing for May 18, 2012[?]

Did [the trial court] act properly and in accordance with law when, on May [9], 2012, [it] vacated [its] [o]rder of May 8, and issued an *ex parte*, mandatory preliminary injunction, on the basis of an unverified complaint, with no petition for a preliminary injunction having been filed, and requiring that a bond of \$1.00 be posted and scheduled a hearing for May 14, 2012[?]

Did [the trial court] act properly and in accordance with law when, on May 14, 2012, [it] conducted a hearing on the merits of the [c]omplaint, adjudicated the issues between the parties, and issued a permanent injunction?

Appellants' Brief at 5.

Appellants' three claims challenge orders entered by the trial court on May 8, 2012 (issuing preliminary injunction), May 9, 2012 (vacating order of May 8, 2012 and issuing amended preliminary injunction), and May 15, 2012 (issuing permanent injunction). Appellees respond that Appellants waived

² Appellants' filing of a praecipe for entry of judgment on the trial court's May 15, 2010 order was unnecessary. **See** Pa.R.A.P. 311(a)(4) (permitting interlocutory appeal as of right from order granting injunctive relief).

appellate review of their claims and, alternatively, challenge the validity of Appellants' claims on appeal. We first address whether Appellants waived appellate review of their claims and, since we conclude that they did not, we then confront the merits of their appellate contentions.

Appellees cite three grounds for finding waiver. Appellees claim that Appellants filed a noncompliant concise statement under Pa.R.A.P. 1925 that was too vague to advise the trial court of the nature of the objections they sought to raise on appeal. Appellees also argue that Appellants failed to object to the issuance of a permanent injunction before the trial court and, thus, failed to preserve their claims under Pa.R.A.P. 302 ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Appellees further maintain that Appellants waived appellate consideration of their claims since they did not move for post-trial relief under Pa.R.C.P. 227.1(c).

We conclude that Appellants' concise statement was not so vague as to preclude the trial court from identifying the issues raised on appeal. Hence, we find no basis for waiver under Pa.R.A.P. 1925. We are also convinced that in light of the unusual procedural posture of this case, including the fact that the specific error raised on appeal did not occur until the trial court issued its May 15, 2012 order (after the proceedings before the trial court had concluded), Appellants did not waive their claims under Pa.R.A.P. 302. Lastly, for the reasons set forth below, we find that Pa.R.C.P.

227.1, setting forth the requirements for filing post-trial motions, does not preclude appellate review.

In this case, the trial court initially granted preliminary injunctive relief without ordering a bond or scheduling a hearing within five days, in violation of Pa.R.C.P. 1531(b). Upon realizing its error, it vacated that order and entered a new order granting relief pending the posting of a bond of \$1.00 and scheduling a hearing within the mandatory five days pursuant to Pa.R.C.P. 1531(b). A hearing on the preliminary injunction was held on May 14, 2012. One day later, on May 15, 2012, the trial court entered an order granting a permanent injunction, rather than a preliminary injunction.

Appellants filed an appeal to this Court alleging, *inter alia*, that the trial court's issuance of a permanent injunction based on the preliminary injunction hearing was a denial of procedural due process. Appellees assert that Appellants' failure to file post-trial motions pursuant to Pa.R.C.P. 227.1(c) compels us to find waiver. We disagree.

In ***Newman Development Group of Pottstown, LLC v. Genuardi's Family Markets, Inc.***, 52 A.3d 1233 (Pa. 2012), our Supreme Court unanimously reversed this Court's application of Rule 227.1 to proceedings following an appellate remand. The Court reasoned that neither the explicit language of Pa.R.C.P. 227.1, nor the official note to that rule, expressly provided for such a procedure. It focused on the language of the rule in concluding that "to warrant the heavy consequence of waiver, in a rules

schemata designed to ‘secure the just and speedy and inexpensive determination’ of disputes, the applicability of the Rule should be apparent upon its face or failing that, in clear decisional law construing the Rule.” **Id.** at 1247, *quoting* Pa.R.C.P. 126. To determine whether post-trial motions are clearly required by Rule 227.1, our Supreme Court in ***Genuardi’s*** looked to several factors, including: 1) whether the plain language of Rule 227.1 clearly required the filing of a post-trial motion under the circumstances; 2) whether interpretive case law made clear that a post-trial motion was required even though Rule 227.1 may be silent on the subject; and, 3) whether application of a post-trial motion requirement would be at odds with the reasonable expectations of practicing attorneys who read the rule and attempted to discern the scope of the post-trial motion requirement under the circumstances. ***Genuardi’s***, 52 A.3d at 1248.

Pa.R.C.P. 227.1 provides that, “[a]fter trial,” and upon a written motion for post-trial relief filed within ten days after “the filing of the decision in the case of a trial without jury,” the court may order various types of relief.³ However, the Note to the Rule further provides that a

³ Pa.R.C.P. 227.1, which addresses post-trial relief, sets forth the prerequisites to preserve an issue for appellate review. In relevant part, it states:

Rule 227.1. Post-Trial Relief

• • •
(Footnote Continued Next Page)

motion for post-trial relief is not to be filed to orders relating to proceedings which do not constitute a trial or to matters governed exclusively by the rules of petition practice. Pa.R.C.P. 227.1, Note.

Here, the trial court, on May 8, 2012, issued an order granting the requested preliminary or special injunctive relief and set a hearing on the matter for May 18, 2012. Upon realizing that this order failed to conform to Pa.R.C.P. 1531, the court amended its order on May 9, 2012 and scheduled a hearing for May 14, 2012. The May 14, 2012 hearing was an evidentiary hearing on a request for preliminary injunction and, as such, was convened to allow the trial court to receive testimony and enter evidence into the record in determining whether the previously issued temporary preliminary injunction should be dissolved, continued, or modified. Pa.R.C.P. 1531(e). The key issue at such a proceeding is whether Appellees' pleadings and evidence demonstrated that they had a reasonable likelihood of success on the merits. Thus, while it was appropriate for the court to consider the merits, it was improper to treat the proceeding as a final hearing unless the
(Footnote Continued) _____

(c) Post-trial motions shall be filed within ten days after

(1) verdict, discharge of the jury because of inability to agree, or nonsuit in the case of a jury trial; or

(2) notice of nonsuit or the filing of the decision in the case of a trial without jury.

Pa.R.C.P. 227.1.

parties stipulated to such treatment. ***Soja v. Factoryville Sportsmen's Club***, 522 A.2d 1129, 1133 (Pa. Super. 1987). There was no stipulation in this case. For this reason, we will not consider the May 14, 2012 proceeding as a trial without a jury under Rule 227.1.

We also conclude that the May 14th proceeding was not a “trial without a jury” within the meaning of Pa.R.C.P. 1038. Rule 1038 governs trials without a jury and provides that at the conclusion of such a trial, the trial judge will render a decision.⁴ The Note to Rule 1038 states that, “[a]

⁴ Rule 1038 states:

Rule 1038. Trial without Jury

(a) Except as otherwise provided in this rule, the trial of an action by a judge sitting without a jury shall be conducted as nearly as may be as a trial by jury is conducted and the parties shall have like rights and privileges, including the right to move for nonsuit.

(b) The decision of the trial judge may consist only of general findings as to all parties but shall dispose of all claims for relief. The trial judge may include as part of the decision specific findings of fact and conclusions of law with appropriate discussion.

(c) The decision may be made orally in open court at the end of the trial, and in that event shall be forthwith transcribed and filed in the office of the prothonotary, or it may be made thereafter in writing and filed forthwith. In either event the prothonotary shall notify all parties or their attorneys of the date of filing. The trial judge shall render a decision within seven days after the conclusion of the trial except in protracted cases or cases of extraordinary complexity.

(Footnote Continued Next Page)

decision includes what were formerly known as a decree nisi and an adjudication. A decision is not a final decree, also known as a judgment.” Pa.R.C.P. 1038, Note. For these reasons, Rule 1038 requires the filing of a post-trial motion under Rule 227.1 after the trial court issues a decision. Here, however, the fact that the trial court erroneously issued permanent injunctive relief that purported to finally dispose of all issues following the May 14th preliminary hearing did not convert that hearing into a trial. We look to the nature and purpose of the hearing, not the result, to characterize the proceeding.⁵ As we concluded above with respect to Rule 227.1, Rule 1038 is inapplicable under the present circumstances since there was no trial. Thus, no post-trial motion was required under Rule 1038.

Finally, we are not persuaded that Rules 1531(f)(1)-(2), governing preliminary injunctions involving freedom of expression, not at issue herein, *(Footnote Continued)* _____

Note: A decision includes what were formerly known as a decree nisi and an adjudication. A decision is not a final decree, also known as a judgment.

For post-trial relief following a trial without jury, see Rule 227.1.

Pa.R.C.P. 1038.

⁵ In ***Warehime v. Warehime***, 860 A.2d 41 (Pa. 2004), our Supreme Court reversed a decision issued by this Court in which we treated an appeal from the denial of a preliminary injunction as equivalent to a permanent injunction because the trial court conducted exhaustive hearings. The Supreme Court observed, “The mere holding of hearings . . . does not somehow morph that motion into a request for a permanent injunction.” ***Id.*** at 46.

compel the filing of a post-trial motion in this case.⁶ Rule 1531(f)(1) presupposes that a preliminary injunction has issued either with or without notice and a hearing. It then requires the court to hold a final hearing within three days after a demand by the defendant and file a final order within twenty-four hours after the close of the hearing or the injunction is deemed dissolved. Subsection (2) provides that when the defendant demands a final hearing, no further pleadings are required, and Rules 1038 and 227.1 to 227.3, relating to post-trial relief, do not apply. We will not infer from these

⁶ Rules 1531(f)(1) and (f)(2) provide an exception to the application of Rules 1038 and 227.1 where a request for injunctive relief involves the freedom of expression. In relevant part, Pa.R.C.P. 1531 provides:

(f)(1) When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three days after demand by the defendant. A final order shall be filed in the office of the prothonotary within twenty-four hours after the close of the hearing. If the final hearing is not held within the three-day period, or if the final order is not filed within twenty-four hours after the close of the hearing, the injunction shall be deemed dissolved.

Note: The three-day period is the maximum time. In particular cases a shorter period may be required. The court is “always open for the transaction of judicial business”. **See** Section 324 of the Judicial Code, 42 Pa.C.S. § 324[.]

(2) When the defendant demands such a final hearing, no further pleadings shall be required and Rule 1038(b) and (c) relating to decision in a trial without jury and Rules 227.1 to 227.3 relating to post-trial relief shall not apply.

Pa.R.C.P. 1531(f)(1)-(2).

provisions that this is the only time that Rules 1038 and 227.1 do not apply to injunctive relief. It is well-settled that an order concerning a preliminary injunction is appealable as of right pursuant to Pa.R.A.P. 311(a)(4), and post-trial motions are neither required nor permitted in that instance. **See *City of Philadelphia v. Frempong***, 865 A.2d 314 (Pa. Cmwlth. 2005) *citing ***Kennedy & Carter Constr. Co., Inc. v. Barkley****, 468 A.2d 513 (Pa. Super. 1983). When read in context, Rules 1531(f)(1) and (f)(2) appear to excuse the filing of post-trial motions following a final hearing on an injunction involving freedom of speech issues. For non-speech-related issues, a final hearing is a trial and Rules 1038 and 227.1 require the post-trial motions. In this case, however, there was no final hearing and, hence, no trial. Thus, no post-trial motion was required and we will not find that Appellants waived their claims pursuant to Pa.R.C.P. 1531.

In sum, based upon the foregoing, we do not find that the plain language of Rule 227.1 clearly required the filing of a post-trial motion under the present circumstances. We also are not convinced that our interpretive case law made clear that a post-trial motion was required even though Rule 227.1 was silent on the issue. Lastly, we conclude that application of a post-trial motion requirement under the circumstances would be at odds with the reasonable expectations of practicing attorneys who read the applicable rules in an attempt to discern the scope of the post-trial motion requirement. We therefore turn to the merits of Appellants' due process claim.

We conclude that the trial court erred in granting a permanent injunction following the May 14, 2012 hearing on Appellees' request for preliminary injunctive relief. The individual Appellees filed their complaint to obtain judicial confirmation of the election of directors and officers that occurred on April 25, 2012, and to preserve the status quo as it existed prior to certain actions by Appellants. Those actions involved Appellants' transaction of business on behalf of Penn Products after April 25, 2012, including the payment of certain accounts payable, the declaration of a dividend, and the mailing of notices to reconvene the annual shareholders meeting on May 10, 2012. To that end, the individual Appellees sought preliminary and permanent injunctive relief. Because this request required the trial court to satisfy itself that the right to relief requested by the individual Appellees was clear, the court needed to determine whether the individual Appellees had substantial evidence that shareholder proxies were properly submitted, that the judge of elections was validly selected, that shares in Penn Products were properly voted, and that proper procedures were followed in the elections of directors and officers on April 25, 2012. ***See Santoro v. Morse***, 781 A.2d 1220, 1229 (Pa. Super. 2001) (in dispute between owners of closely held corporation, request for issuance of preliminary injunction required court to consider testimony relating to merits of moving party's claim at time of preliminary injunction hearing, including

movant's ownership of shares). Thus, the trial court properly considered the merits of Appellees' claims at the preliminary injunction hearing on May 14th.

Although the trial court properly considered the likelihood that Appellees might succeed on the merits of their claims, Appellants raise a valid contention that the trial court erred in treating the May 14th hearing on the preliminary injunction as a final hearing for purposes of issuing a permanent injunction. It is well-established that a court may not treat a hearing for a preliminary injunction as a final hearing and as a basis for a permanent injunction, unless the parties so stipulate. **Santoro**, 781 A.2d at 1229 (trial court may not "convert the proceeding for a preliminary injunction into a final hearing[.]"); **Soja**, 522 A.2d at 1133; **Burrell Educ. Ass'n v. Burrell School Dist.**, 674 A.2d 348, 350 (Pa. Cmwlth. 1996) ("It is well established that a court may not treat a hearing for a preliminary injunction as a final hearing and as a basis for a permanent injunction, unless the parties stipulate to the contrary."); **Berger by & Through Berger v. West Jefferson Hill Sch. Dist.**, 669 A.2d 1084 (Pa. Cmwlth. 1995). The rationale against treating these two proceedings as one is that separate and distinct standards control a request for a preliminary injunction and a request for a permanent injunction. Moreover, the procedure is fundamentally unfair where, as here, the parties participate in what they believe is a preliminary hearing subject to one standard of proof, only to

learn afterwards that the hearing was a final hearing governed by a different standard. This Court in *Soja, supra*, succinctly articulated the problem:

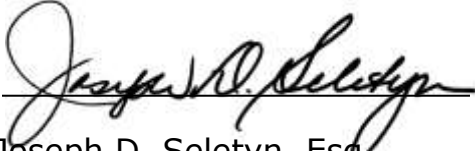
Certainly, it is unfair for a court to determine an action based upon a different legal standard than that by which the litigants believed themselves to have been governed. It is the antithesis of due process to bring someone before a court to defend himself on one basis if the court then reaches its decision on a different basis. It is also unfair to reach a final decision after a preliminary proceeding. A litigant may not prepare as completely as he would had he realized that he was not going to receive a second chance to present his case.

Id. 522 A.2d at 1133.

Hence, in light of the procedural irregularities present herein, we reverse the judgment, vacate the May 15th order granting permanent injunctive relief, direct the trial court to enter an order - consistent with its findings - that grants Appellees' request for a preliminary injunction (**see** Trial Court Opinion, 8/24/12, at 12 (concluding that "Appellees established their entitlement to relief under the standards for both preliminary and permanent injunctive relief.")), and remand for disposition of Appellees' petition for a permanent injunction.

Appellees' application for relief denied. Order and judgment vacated. Case remanded for further proceeding consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath it.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013