

Adams County **Legal Journal**

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COMMONWEALTH VS. MUSE

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SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 09-S-1210 issuing out of Court of Common Pleas Adams County, and to me directed, will be exposed to Public Sale on Friday, the 27th day of May, 2011, at 10:00 o'clock in the forenoon at the Sheriff's Office located in the Courthouse, Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

SHORT DESCRIPTION

By virtue of Writ of Execution No. 09-S-1210

FARMERS AND MERCHANTS TRUST vs.

RONALD C. ZEMSKY &
KATHLEEN R. ZEMSKY
385C CHURCH ROAD
ORRTANNA, PA 17353
FRANKLIN TOWNSHIP

Parcel No.: 12 – B09-0121---000

IMPROVEMENTS THEREON:
RESIDENTIAL DWELLING

JUDGMENT AMOUNT: \$52,226.86

Attorneys for Plaintiff

JAMES SMITH DIETTERICK &
CONNELLY, LLP
717-533-3280

SEIZED and taken into execution as the property of **Ronald C. Zemsky & Kathleen R. Zemsky** and to be sold by me.

James W. Muller-Sheriff
Sheriff's Office, Gettysburg, PA

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on June 17, 2011, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 20 days after the filing thereof. Purchaser must settle for property on or before filing date.

ALL claims to property must be filed with Sheriff before sale date.

As soon as the property is declared sold to the highest bidder, 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

5/6, 13 & 20

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 11-S-0083 issuing out of Court of Common Pleas Adams County, and to me directed, will be exposed to Public Sale on Friday, the 27th day of May, 2011, at 10:00 o'clock in the forenoon at the Sheriff's Office located in the Courthouse, Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

SHORT DESCRIPTION

By virtue of Writ of Execution No. 11-S-0083

NATIONSTAR MORTGAGE LLC vs.

LARRY N. WEAVER, JR.
26 BURNSIDE DRIVE a/k/a
24-26 BURNSIDE DRIVE
EAST BERLIN, PA 17316-9217
LATIMORE TOWNSHIP

Parcel No.: 23103-0034---000

IMPROVEMENTS THEREON:
RESIDENTIAL DWELLING

JUDGMENT AMOUNT: \$202,826.06

Attorneys for Plaintiff

PHELAN, HALLINAN & SCHMIEG, LLP
215-563-7000

SEIZED and taken into execution as the property of **Larry N. Weaver, Jr.** and to be sold by me.

James W. Muller-Sheriff
Sheriff's Office, Gettysburg, PA

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on June 17, 2011, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 20 days after the filing thereof. Purchaser must settle for property on or before filing date.

ALL claims to property must be filed with Sheriff before sale date.

As soon as the property is declared sold to the highest bidder, 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

5/6, 13 & 20

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 09-NO-1123 issuing out of Court of Common Pleas Adams County, and to me directed, will be exposed to Public Sale on Friday, the 27th day of May, 2011, at 10:00 o'clock in the forenoon at the Sheriff's Office located in the Courthouse, Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

SHORT DESCRIPTION

By virtue of Writ of Execution No. 09-NO-1123

LITTLESTOWN BOROUGH vs.

ROBERT J. VIA t/d/b/a HUNTER'S INN
36 SOUTH QUEEN ST.
LITTLESTOWN, PA 17340
BOROUGH OF LITTLESTOWN

Parcel No.: 008-0302---000

IMPROVEMENTS THEREON:
RESIDENTIAL DWELLING

JUDGMENT AMOUNT: \$12,480.30

Attorneys for Plaintiff

JOHN WHITE, ESQ.
717-334-9278

SEIZED and taken into execution as the property of **Robert J. Via t/d/b/a Hunters's Inn** and to be sold by me.

James W. Muller-Sheriff
Sheriff's Office, Gettysburg, PA

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on June 17, 2011, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 20 days after the filing thereof. Purchaser must settle for property on or before filing date.

ALL claims to property must be filed with Sheriff before sale date.

As soon as the property is declared sold to the highest bidder, 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

5/6, 13 & 20

COMMONWEALTH VS. MUSE

1. Where two prosecutions arise out of a single search and/or seizure, a decision by the suppression judge during the first prosecution can, upon motion of the previous prevailing party, become part of the second prosecution. The party against whom this decision is being offered may offer any new evidence which was previously unavailable. However, absent such new evidence, the suppression judge in the second prosecution must adopt the findings and conclusions of the first judge and incorporate them into the record.

2. The Superior Court ruled that *Commonwealth vs. Lagana* did not prohibit the Commonwealth from calling additional witnesses at a subsequent hearing following prior grant of the suppression of evidence where the evidence falls outside the ambit of the original suppression order.

3. As jeopardy does not attach until the jury is sworn or, in a bench trial, the trial court begins to hear evidence, the Commonwealth acted entirely within its rights by re-filing charges against the Appellant following dismissal of the same for failure to establish a prima facie case.

In the Court of Common Pleas of Adams County, Pennsylvania,
Criminal, No. CP-01-CR-22-2010, COMMONWEALTH OF
PENNSYLVANIA VS. KENNETH MARCEL MUSE.

Brian R. Sinnett, Esq., Assistant District Attorney, for Commonwealth
Robert J. Chester, Esq., for Defendant

George, J., December 9, 2010

OPINION PURSUANT TO PA. R.A.P. 1925(A)

Kenneth Marcel Muse (“Appellant”) appeals his convictions and sentences for possession with intent to deliver a controlled substance¹ and criminal conspiracy.² The sole issue raised on appeal is whether the trial court erred in denying Appellant’s Motion to Dismiss under the collateral estoppel rule enunciated in *Commonwealth v. Lagana*, 509 A.2d 863 (Pa. 1986). As Appellant misapplies *Lagana* instantly, it is requested that Appellant’s convictions and sentences be affirmed.

Appellant was originally charged with possession with intent to deliver cocaine, criminal conspiracy to deliver cocaine, possession of a controlled substance,³ and misrepresenting a controlled substance⁴

¹ 35 P.S. § 780-113(a)(30).

² 18 Pa. C.S. § 903(a)(1).

³ 35 P.S. § 780-113(a)(16).

⁴ 35 P.S. § 780-113(a)(1) (relating to possession of a controlled substance in a mislabeled container).

by criminal complaint filed on May 1, 2009.⁵ The charges stem from an incident occurring on May 1, 2009 when Littlestown Borough Police units responded to a Sheetz convenience store in Littlestown Borough, Adams County, for a loud music complaint. Upon arrival at the location, officers observed the Appellant in the rear of his vehicle and a female asleep in the front passenger's seat. Upon making contact with Appellant, and while Appellant was retrieving his identification, a pill bottle fell from the front driver's seat area onto the parking lot. Upon taking custody of the pill bottle, the officers observed pills believed to be a controlled substance. Appellant indicated that the pill bottle belonged to a friend who was not present. The officers obtained consent from the Appellant to search the vehicle which yielded negative results. The female passenger also gave consent to search her purse. Inside the purse were approximately 20 separate baggies of crack cocaine. When the Appellant was placed under arrest, a large amount of cash was found on his person.

Following a preliminary hearing during which all charges were held to court, Appellant filed an Omnibus Pre-Trial Motion wherein he sought to suppress the pill bottle and controlled substances contained therein, the cocaine found in the passenger's purse, and the cash. Additionally, Appellant filed for a writ of habeas corpus challenging whether a prima facie case had existed on the charges of possession with intent to deliver cocaine and criminal conspiracy.

On July 24, 2009, an evidentiary hearing was held before Senior Judge Oscar Spicer.⁶ At hearing, the Commonwealth presented the testimony of the Littlestown Borough police officers. At the conclusion of the hearing, the parties were given the opportunity to brief the issues. Thereafter, on September 22, 2009, Senior Judge Spicer entered an Order granting suppression of the money and the contents of the seized pill bottle, however, denying suppression of the cocaine found in the passenger's purse. Senior Judge Spicer reasoned that the passenger had consented to the search of her purse. Senior Judge Spicer also granted the Motion for Writ of Habeas Corpus concluding that the evidence was insufficient, as applied to the Appellant, to establish either actual or constructive possession of the cocaine

⁵ The record in this matter is found at *Commonwealth v. Kenneth Marcel Muse*, CP-01-CR-492-2009 (Adams C. P.).

⁶ Senior Judge Spicer has subsequently retired.

found in the passenger's purse. Accordingly, all charges against the Appellant were dismissed.

On November 10, 2009, Littlestown Borough Police filed a second criminal complaint for the incident occurring on May 1, 2009.⁷ The second criminal complaint included only the charges related to the cocaine found in the passenger's purse. Once again, the charges were bound through preliminary hearing. Thereafter, Appellant filed an Omnibus Pre-Trial Motion seeking suppression of the evidence on the basis of Senior Judge Spicer's Opinion in CP-01-CR-492-2009. Appellant's motion cited *Commonwealth v. Lagana*, 509 A.2d 863 (Pa. 1986) for authority in support of his motion. In his motion, Appellant acknowledged that *Lagana* permitted the Commonwealth to produce additional evidence in support of the legality of the seizure, however, argued that *Lagana* permitted the introduction of additional evidence only if that evidence was unavailable to the Commonwealth at the time of the previous suppression hearing. Presumably, this argument was intended to preempt the Commonwealth's use of the passenger's testimony at the subsequent suppression hearing as the passenger was cooperating with the Commonwealth.

Prior to the omnibus hearing, Appellant was specifically requested to identify his issue. Appellant confirmed that the Commonwealth should be precluded from presenting the passenger's testimony at the suppression hearing due to her being previously available, but not called, at the prior suppression hearing. Appellant concludes that absent the new evidence, Senior Judge Spicer's ruling at the prior suppression hearing is controlling.

In order to understand Appellant's misapplication of the law currently, it is necessary to understand the Supreme Court's decision in *Lagana*. In *Lagana*, the defendant was arrested for a firearm violation. By separate criminal complaint, he was also charged with burglary based upon two items which were found in close proximity to him at the time of his arrest on the firearm violation. Since the charges were filed separately, defense counsel filed separate motions to suppress. Following the suppression hearing related to the burglary charge, the trial judge suppressed the evidence. Thereafter, a suppression hearing was held on the firearm matter. No evidence

⁷ This complaint is current captioned case listed at CP-01-CR-22-2010 (Adams C.P.).

was taken at the subsequent hearing. Rather, after receiving memorandum and hearing argument, the suppression judge ruled that by operation of collateral estoppel, the previous findings of fact and conclusions of law from the burglary suppression hearing were binding upon him. Consequently, the evidence related to the firearm violation was suppressed.

The Commonwealth did not appeal the suppression ruling on the burglary charge, however, appealed the grant of suppression of the firearm at the subsequent hearing. On appeal, the Superior Court affirmed the trial court's rulings, once again, on the basis of collateral estoppel. The Supreme Court granted allocatur.

The Supreme Court identified the issue as whether collateral estoppel should apply to pre-trial suppression rulings where separate prosecutions arise from a single arrest. The court concluded that where two prosecutions arise out of a single search and/or seizure, a decision by the suppression judge during the first prosecution can, upon motion of the previous prevailing party, become part of a second prosecution. The court further explained that the party against whom this decision is being offered may offer any new evidence which was previously unavailable. However, absent such new evidence, the suppression judge in the second prosecution must adopt the findings and conclusions of the first judge and incorporate them into the record. *Commonwealth v. Lagana*, 509 A.2d at 866.

While *Lagana* is controlling as it relates to Senior Judge Spicer's prior suppression of the pill bottle and cash, it has no application to the cocaine seized from the passenger's purse. Appellant's efforts to apply *Lagana* to the cocaine are frivolous due to one critical omission in Appellant's argument: Senior Judge Spicer did not previously suppress the cocaine and, in fact, found that seizure of the same was lawful. Thus, application of the collateral source rule instantly would require a finding of the cocaine's admissibility as, after hearing, Senior Judge Spicer reached that conclusion.⁸

⁸ Appellate cases applying the collateral source rule generally do so in the context of a defendant seeking to preclude re-prosecution and/or the suppression of Commonwealth evidence following an initial favorable ruling. As this writer has failed to find any application of the rule against the defendant, in the exercise of caution, the Court conducted a second hearing on the seizure of the cocaine from the passenger's purse. At the subsequent hearing, the passenger testified that she freely consented to search of her purse. Accordingly, this Court independently admitted the evidence consistent with Senior Judge Spicer's consideration of the same issue.

Appellant expends tremendous effort in arguing that the passenger should not have been permitted to testify against Appellant as she was available at the time of the initial suppression hearing, however, not called by the Commonwealth. The Commonwealth notes that although the passenger had given a statement prior to the initial suppression hearing, at the time of the hearing, she was represented by counsel on identical criminal charges pending against her and had not, at that time, consented to testifying against the Appellant. Resolution of this factual issue, however, is not necessary as even if Appellant's factual history is accepted as true, there is no legal prohibition to permitting the passenger's testimony at the second suppression hearing. *Lagana* does not stand for that proposition nor has this Court found any authority supporting such an argument. To the contrary, in *Commonwealth v. Garcia*, 746 A.2d 632 (Pa. Super. 2000), the Superior Court ruled that *Lagana* did not prohibit the Commonwealth from calling additional witnesses at a subsequent hearing following prior grant of the suppression of evidence where the evidence falls outside the ambit of the original suppression order. Much like the current issue, the *Garcia* Court found that *Lagana* did not apply to prohibit the Commonwealth from presenting additional evidence of defendant's guilt, where the evidence was not previously suppressed, at a trial conducted following an earlier dismissal of the charges against the defendant.

Although inartfully stated, Appellant appears to be raising a double jeopardy issue based upon initial dismissal of the charges for failure to present a prima facie case and the subsequent re-filing of charges by the Commonwealth. Unfortunately for Appellant, such a claim is meritless as this issue has conclusively been determined by our appellate courts in a manner contrary to Appellant's position. As jeopardy does not attach until the jury is sworn or, in a bench trial, the trial court begins to hear evidence, the Commonwealth acted entirely within its rights by re-filing charges against the Appellant following dismissal of the same for failure to establish a prima facie case. See *Commonwealth v. Jones*, 676 A.2d 251 (Pa. Super. 1996). See also *Commonwealth v. Garcia*, 746 A.2d 632 (Pa. Super. 2000).

For the foregoing reasons, it is respectfully requested that the trial court be affirmed.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION**ESTATE OF DOROTHY S. BREAM, DEC'D**

Late of the Borough of Arendtsville, Adams County, Pennsylvania

Co-Executors: John L. Stevens and Jean E. McCauslin, c/o Sharon E. Myers, Esq., CGA Law Firm, PC, 135 North George Street, York, PA 17401

Attorney: Sharon E. Myers, Esq., CGA Law Firm, PC, 135 North George Street, York, PA 17401

ESTATE OF IRA H. HERRING, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Personal Representative: Roger Heyser, 1560 Old Harrisburg Road, Gettysburg, PA 17325

Attorney: Wendy Weikal-Beauchat, Esq., 63 West High St., Gettysburg, PA 17325

ESTATE OF LEO J. KOLARIK a/k/a LEO J. KOLARIK, SR., DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executor: Leo J. Kolarik, Jr., 1T2 Mitchell Court, Hanover, PA 17331

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle St., Hanover, PA 17331

ESTATE OF CAROLINE M. MURREN, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania

Executrix: Debra M. Miller, 3037 Centennial Rd., Hanover, PA 17331

Attorney: Keith R. Nonemaker, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York St., Hanover, PA 17331

ESTATE OF DORMAN L. RICHSTINE, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania

Executrices: Nancy R. Brown, 75 Oak Hill Drive, Hanover, PA 17331; Susan Y.R. Avaritt, 4436 York Road, New Oxford, PA 17350

Attorney: Robert E. Campbell, Campbell & White, P.C., 112 Baltimore St., Suite 1, Gettysburg, PA 17325

ESTATE OF KENNETH J. ROHRBAUGH, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Donna Thelma McCleaf, 305 Table Rock Rd., Gettysburg, PA 17325

Attorney: Phillips & Phillips, 101 West Middle St., Gettysburg, PA 17325

SECOND PUBLICATION**ESTATE OF THELMA M. GALLOWAY, DEC'D**

Late of Franklin Township, Adams County, Pennsylvania

Executrix: Linda A. Mannion, 7907 Orchard Parkway, Bowie, MD 20715

Attorney: John R. White, Esq., Campbell & White, P.C., 112 Baltimore Street, Gettysburg, PA 17325

ESTATE OF REBA V. HALTER, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania

Executrices: Patricia O. Glass, 313 West King Street, Littlestown, PA 17340; Tracy A. Dunlap, 30 West King Street, Littlestown, PA 17340

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle St., Hanover, PA 17331

ESTATE OF ALICE H. LOOKINGBILL, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Robert E. Lookingbill, 105 Dogwood Avenue, Thurmont, MD 21788

ESTATE OF CARL MILTON MOREHEAD a/k/a CARL M. MOREHEAD, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania

Executrix: Peggy Ann Morehead Weems, 34215 Woodcrest Road, Millsboro, DE 19966

Attorney: Stonesifer and Kelley, 209 Broadway, Hanover, PA 17331

ESTATE OF GLORIA E. MYERS, DEC'D

Late of the Borough of Biglerville, Adams County, Pennsylvania

Executors: Edward L. Myers, David L. Myers and Michael E. Myers, c/o Hamilton C. Davis, Esq., Zullinger-Davis, P.C., P.O. Box 40, Shippensburg, PA 17257

Attorney: Hamilton C. Davis, Esq., Zullinger-Davis, P.C., P.O. Box 40, Shippensburg, PA 17257

ESTATE OF PEARL A. REBERT, DEC'D

Late of the Borough of Abbottstown, Adams County, Pennsylvania

Executrix: Kimberly H. Fenstermacher, 7244 Valley Road, Thomasville, PA 17364

Attorney: Bernard A. Yannetti, Jr., Esq., Hartman & Yannetti, 126 Baltimore St., Gettysburg, PA 17325

ESTATE OF PHYLLIS F. SCHEINBERG, DEC'D

Late of Menallen Township, Adams County, Pennsylvania

Executor: David L. Turner, 35 Scarlet Way, Biglerville, PA 17307

Attorney: John R. White, Esq., Campbell & White, P.C., 112 Baltimore Street, Gettysburg, PA 17325

THIRD PUBLICATION**ESTATE OF GARY L. STULTZ, DEC'D**

Late of Germany Township, Adams County, Pennsylvania

Brad E. Emerson, 35 Black Lane, Hanover, PA 17331

Attorney: David K. James, III, Esq., 234 Baltimore Street, Gettysburg, PA 17325

ESTATE OF JEAN E. TOWNSEND, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Matthew B. Townsend, c/o R. Thomas Murphy, Esq., R. Thomas Murphy & Associates, P.C., 2005 East Main Street, Waynesboro, PA 17268

Attorney: R. Thomas Murphy, Esq., R. Thomas Murphy & Associates, P.C., 2005 East Main Street, Waynesboro, PA 17268

NONPROFIT ARTICLES OF
INCORPORATION

NOTICE IS HEREBY GIVEN that Nonprofit Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on May 4, 2011, for the purpose of obtaining a Certificate of Incorporation under the provisions of the Nonprofit Corporation Law of 1988. The name of the proposed nonprofit corporation is THE VILLAS AT THE RETREAT HOMEOWNERS ASSOCIATION.

The purpose for which it will be organized is: To be a unit owners' association which provides for the management, maintenance and care of the residential community project located in Mount Joy Township, Adams County, Pennsylvania, known as The Villas At The Retreat At The Links At Gettysburg, A Planned Community.

McNees Wallace & Nurick LLC
100 Pine Street
Harrisburg, PA 17101

5/20

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on the 11th day of April, 2011, for the purpose of obtaining a Certificate of Incorporation of a business corporation organized under the Business Corporation Law of 1988, Act of December 21, 1988, P.L. 1444.

The name of the corporation is:
LINCOLN DINER, INC.

The purposes for which it is organized are: To operate as a restaurant and to do all things lawful for which corporations may be incorporated under Pennsylvania law.

William C. Kollas, Esq.
Kollas and Kennedy
1104 Fernwood Avenue
Camp Hill, PA 17011

5/20

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that on April 21, 2011, Articles of Incorporation for MERIX, INC. were filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, under the Pennsylvania Corporation Law of 1988.

Griffith, Strickler, Lerman,
Solymos & Calkins,
Solicitor

5/20