H

Superior Court of Pennsylvania.
BARNES FOUNDATION
v.
KEELY, Receiver of Taxes, et al.

Jan. 25, 1933.

Appeal from Court of Common Pleas No. 1, Philadelphia County; Harry S. McDevitt, President Judge.

Proceeding by the Barnes Foundation against Harry W. Keely, Receiver of Taxes for the City of Philadelphia, and others. From the order restraining the collection of certain taxes, respondents appeal.

Affirmed.

West Headnotes

[1] Trusts 390 ⚿43(2)

390 Trusts
390I Creation, Existence, and Validity
390I(A) Express Trusts
390k40 Evidence to Establish Trust
390k43 Parol Evidence
390k43(2) k. Contradicting, Varying, or Adding to Instrument Creating Trust. Most Cited Cases

Rights of educational trust foundation under trust deed could not be altered by what trustor said or thought, regarding his retaining control of property.

[2] Taxation 371 ⚿2338

371 Taxation
371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2337 Charitable or Benevolent Institutions, and Property Used for Charitable Purposes in General
371k2338 k. In General. Most Cited Cases
(Formerly 371k241.1(1), 371k241(1))

Land grant need not be in perpetuity to make it purely public charity within tax exemption laws. 72 P.S. § 4701; P.S. Const. art. 9, § 1, amended in 1923.

[3] Taxation 371 ⚿2338

371 Taxation
371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2337 Charitable or Benevolent Institutions, and Property Used for Charitable Purposes in General
371k2338 k. In General. Most Cited Cases
(Formerly 371k241.1(1), 371k241(1))

Reasonable regulations for admission of public do not prevent trust foundation from being public charity within tax exemption laws. 72 P.S. § 4701; P.S. Const. art. 9, § 1, amended in 1923.

[4] Taxation 371 ⚿2346

371 Taxation
371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2345 Schools, Colleges and Universities, and Property Used for Educational Purposes
371k2346 k. In General. Most Cited Cases
(Formerly 371k242(1))

Art gallery is not "educational institution" within tax exemption statute. 72 P.S. § 4701; P.S. Const. art. 9, § 1, amended in 1923.

[5] Taxation 371 ⚿2354

371 Taxation

371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2354 k. Libraries, Museums, and Collections for Purposes of Science or Art. Most Cited Cases
(Formerly 371k243)

Building of public charity foundation, to promote education and appreciation of fine arts, used for miscellaneous purposes incidental to business of foundation, *held* "charitable educational institution" within tax exemption statute, notwithstanding no classes were held therein and that books written by foundation's staff were edited and stored therein and sold. 72 P.S. § 4701; P.S. Const. art. 9, § 1, amended in 1923.

|6| Taxation 371 ⚿2354

371 Taxation
371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2354 k. Libraries, Museums, and Collections for Purposes of Science or Art. Most Cited Cases
(Formerly 371k243)

Trust foundation to promote education and appreciation of fine arts, not confined to privileged individuals, *held* "institution of purely public charity" within constitutional provision authorizing exemptions of such institutions from taxation. 72 P.S. § 4701; P.S. Const. art. 9, § 1, amended in 1923.

****118 *204** Mayne R. Longstreth, David J. Smyth, and Theodore F. Jenkins, all of Philadelphia, for appellants.

***205** Philip C. Pendleton, Robert T. McCracken, and Montgomery & McCracken, all of Philadelphia, for appellee.

Argued before TREXLER, P. J., and KELLER, GAWTHROP, CUNNINGHAM, BALDRIGE, STADTFELD, and PARKER, JJ.

BALDRIGE, J.

This appeal is from an order of the court below sitting in equity, restraining the appellants from collecting city, school, and county tax due, or to be hereafter assessed, against premises known as 4525 Spruce street, Philadelphia, owned in fee simple by the Barnes Foundation, hereafter known as the Foundation.

The Foundation is a corporation of the first class under the laws of the commonwealth of Pennsylvania, not organized for profit, having its principal place of business in the township of Lower Merion, county of Montgomery, Pa. The purpose for which the corporation was formed is to promote the advancement of education and the appreciation of the fine arts.

The learned chancellor found on the testimony of Prof. John Dewey, the eminent philosopher and educator, and other qualified witnesses, the following facts, to wit: The Foundation is a recognized educational institution, holding regular classes for the instruction of students of art. It is not confined to privileged individuals, but students are admitted without regard to race, color, or sex, and no applicant for instruction is barred, except for drunkenness, incompetency, or necessary limitation in the number that may be accommodated. No tuition is charged, but, to the contrary, financial aid is given to worthy students. ***206** The Foundation represents an investment in pictures of upwards of five million dollars, and has an endowment of approximately ten millions. To carry out its aims, it acquired a tract of land in Lower Merion township, upon which is erected, at great cost, a suitable building, used as an art gallery, in which is housed a unique collection of modern works of art. The grounds are laid out as an elaborate arboretum, wherein trees and shrubs are cultivated and grown for the study and encouragement of arboriculture and forestry. A new building was essential to carrying on the work, and, in order not to disturb the planting in Montgomery county and its artistic effect, the Spruce street property was purchased, and is used for ad-

ministrative, literary, and miscellaneous purposes necessary for the efficient discharge of the corporate functions.

Two questions present themselves in this appeal: (1) Is the Foundation a purely public charity; and (2) is the Spruce street property necessary to the enjoyment of the main purposes of its charter rights, or is this property used, as appellants contend, for commercial purposes?

1. Article 9, § 1, of the Constitution of Pennsylvania, as amended November 6, 1923, reads: "All taxes shall be uniform; * * * but the General Assembly may, by general ****119** laws, exempt from taxation public property used for public purposes, * * * institutions of purely public charity." The Legislature, in pursuance of the powers conferred upon it, passed an act, approved April 30, 1925, P. L. 388, § 1 (72 PS § 4701), providing that "all hospitals, universities, colleges, seminaries, academies, associations, and institutions of learning, benevolence, or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by the public or private charity: * * * Be, and the same are ***207** hereby, exempted from all and every county, city, borough, township, bounty, road, school, and poor tax: Provided, That all property, real or personal, other than that which is in actual use and occupation for the purpose aforesaid, and from which any income or revenue is derived, shall be subject to taxation."

The question as to what constitutes a purely public charity, as used by the Legislature, has been frequently passed upon by our appellate courts. The difficulty that continues to arise is whether the given facts come within the accepted tests. It has been held that "whatever is gratuitously done or given in relief of the public burdens or for the advancement of the public good is a public charity. In every such case as the public is the beneficiary, the charity is a public charity. As no private or pecuniary return is reserved to the giver or any particular person, but all the benefit resulting from the gift or act goes to the public, it is a 'purely public charity,' the word 'purely' being equivalent to the word 'wholly.' The education of youth and the support of schools are for the advancement of public good." Episcopal Academy v. Philadelphia, 150 Pa. 565, 573, 25 A. 55. Mr. Chief Justice Frazer, speaking for the court in the case of Taylor v. Hoag et al., 273 Pa. 194, 196, 116 A. 826, 21 A. L. R. 946, said: "The word 'charitable' in a legal sense includes every gift for a general public use, to be applied consistent with existing laws, for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical, or social standpoint. In its broadest meaning it is understood 'to refer to something done or given for the benefit of our fellows or of the public.' Knight's Est., 159 Pa. 500, 502, 28 A. 303." It was said in Donohugh's Appeal, 86 Pa. 306, 313: "So there is no charity conceivable which will not, in its practical operation, exclude a large part of mankind, and there are few which do not do so in express terms, or by the restrictive ***208** force of the description of the persons for whose benefit they are intended. Thus, Girard College excludes, by a single word, half the public, by requiring that only male children shall be received; the great Pennsylvania Hospital closes its gates to all but recent injuries, yet no one questions that they are public charities in the widest and most exacting sense." In Vidal et al. v. Girard's Ex'rs, 2 How. 127, 11 L. Ed. 205, it was held that the provisions in the will of Stephen Girard, excluding a minister from holding office in Girard College, or visiting same, did not destroy the charitable nature of the college. See, also, Mercersburg College v. Mercersburg Borough, 53 Pa. Super. Ct. 388; County of Lancaster v. Y. W. C. A. of Lancaster, 92 Pa. Super. Ct. 514; Northampton County v. Lafayette College, 128 Pa. 132, 18 A. 516; House of Refuge v. Smith et al., 140 Pa. 387, 21 A. 353; City of Philadelphia v. Pennsylvania Hospital for Insane, 154 Pa. 9, 25 A. 1076; Contributors to Pennsylvania Hospital v. County of Delaware et al., 169 Pa. 305, 32 A. 456.

[1][2] The appellants contend that this case

does not come within the principle enunciated in the foregoing decisions, as Dr. Barnes, in his testimony, indicated that the gift was with qualifications, and that he intended to retain control of the property to such an extent that the privileges of the Foundation were confined to certain persons, not an indefinite public, and its continuance was "subject to his wishes." It is true that Dr. Barnes, in answer to a question as to the financial extent of the investment, said: "Yes, but don't forget that there is a string on that. If the people do not behave around here I pull that string back and it all drops in my lap. I don't expect to pull it unless they hit me too hard." That, doubtless, was an inconsiderate statement, and, at most, was but an expression of his opinion, not warranted by the deed of trust, as, under its provisions, he does not have control of the ***209** disposition of the assets. The rights, duties, and privileges are subject to the charter and the trust agreement, and they cannot be altered by what Dr. Barnes may say or think. Paragraph 32 of the deed of trust reads as follows: "The conveyance of the said real estate, together with the arboretum thereupon situate, the buildings, fixtures and appurtenances thereon or thereunto belonging and appertaining, by Donor to Donee shall be irrevocable. * * * If, at any period during the lifetime of the donor, the Board of Trustees decide that the experiment is a failure, they may, by appropriate resolution, dispose of the paintings (italics ours), by gift or otherwise, to any individual, institution, museum, school or college, specified by the Board of Trustees." It is unnecessary to determine whether the deed of trust irrevocably subjects the paintings at all times to its provisions if they are transferred to another individual or institution, should the Foundation cease to exist. The exemption from taxation now claimed is not on the paintings, but on the real estate, which undoubtedly is ****120** irrevocably vested in the Foundation. In addition, a grant of land is not required to be in perpetuity to make it a purely public charity. If it ceases so to be, equity will grant relief. White v. Smith, 189 Pa. 222, 232, 42 A. 125, 43 L. R. A. 498.

[3][4] Nor do reasonable regulations for admission of the public destroy the charitable nature of this gift. Undoubtedly, the Foundation may impose certain limitations respecting qualifications, or the time or times at which the public may have the opportunity to visit the gallery. Unless certain rules and regulations are enforced, it might defeat the very purpose of the gift by interfering with, if not entirely preventing, intelligent study of the works of art and the proper educational development of the students. In Delaware County Institute of Science v. Delaware County, 94 Pa. 163, the court held that a library and museum, open ***210** to the public under certain conditions, were not exempt. We all recognize that an art gallery has its cultural value, but it is not an educational institution within the contemplation of the law. Nor do we think the decision in City of Philadelphia v. Masonic Home of Pennsylvania, 160 Pa. 572, 28 A. 954, is controlling, as Masons only are eligible to be admitted to that home. We may add, however, that the court there recognized that a charity may impose certain restrictions, if not too exclusive, and still be public.

[5] 2. The appellants contend further that, if it be determined that the Foundation is a purely public charity, the Spruce street property is not exempt from taxation, as it is used for commercial purposes only; and no classes for the instruction of art, or any other subject, are held there. The chancellor found, on sufficient evidence, that this building is used exclusively for the transaction of literary, clerical, and miscellaneous matters necessary to carrying on the work of the Foundation. The basement is used for storing and packing the educational books written by members of the staff and sold to various schools, colleges, universities, and art galleries throughout America. The rest of the building is used for purposes incidental to the business of the Foundation, and by the president and two of the teachers in the performance of their work, which includes writing and editing books, etc. The publication is an important part of the educational program. True, the books are sold, but the uncontradicted evidence is that this is not a commercial un-

dertaking, as the publication and sale always entail a financial loss. We conclude that the purpose is not to make money, but to discuss and give expression to certain views, etc., relative to art and its allied subjects. Whatever income there may be, in such circumstances, does not destroy the character of a charitable educational institution. Nor do we think that ***211** teaching must be done in that particular building to make it educational. There are many buildings on every campus, as a rule, where classes do not convene, but which are indispensable to the wise administration of the affairs of the institution. Such buildings are as much a part of the plant as those containing classrooms, provided, of course, they are reasonably, rather than absolutely, necessary to the purposes of the purely public charity. County of Lancaster v. Y. W. C. A. of Lancaster, supra. The chancellor found that the Spruce street premises are used exclusively for the purposes of the Foundation and are necessary for the efficient discharge of its functions. We have no reason for disagreeing with that conclusion.

[6] Our attention has been called by the appellants to the decision recently handed down by the Supreme Court in the case of City of Harrisburg v. Trustees of Harrisburg Academy, 308 Pa. 585, 162 A. 815, opinion filed June 30, 1932. There is a clear distinction between that case and the one at bar, as tuition ranging from $650 to $1,060 per year was charged for boarding students, and from $320 to $440 per year for day students. The academy is not open to all who apply within the capacity of the school, but is restricted to those whom the headmaster, in his discretion, sees fit to admit, and, in addition, it is not required to employ the annual profits to the improvement of the school, but they may, under the charter rights, be distributed to the members of the corporation.

After a careful consideration of the arguments of able counsel and a review of the record, we find ourselves in entire accord with the conclusion of the chancellor and the learned court below.

Decree affirmed, at the cost of appellants.

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171 A. 267
314 Pa. 112, 171 A. 267
(Cite as: 314 Pa. 112, 171 A. 267)

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Supreme Court of Pennsylvania.
BARNES FOUNDATION
v.
KEELY, Receiver of Taxes, et al.

Jan. 30, 1934.

Appeal No. 268, January term, 1933, from judgment of Superior Court, October term, 1932, No. 66, affirming decree of Court of Common Pleas No. 1, Philadelphia County, December term, 1931, No. 6369; Harry S. McDevitt, President Judge.

Suit in equity by the Barnes Foundation against Harry W. Keely, Receiver of Taxes for the City of Philadelphia, and others, to restrain the collection of taxes. An order restraining the collection of certain taxes was affirmed (108 Pa. Super. Ct. 203, 164 A. 117), and defendants appeal.

Affirmed.

SIMPSON and SCHAFFER, JJ., dissenting.

West Headnotes

|1| Appeal and Error 30 ⚿1009(2)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1009 Effect in Equitable Actions
30k1009(2) k. Sufficiency of evidence in support. Most Cited Cases
Chancellor's fact findings will be given force of verdict and will not be disturbed if there is evidence to support them.

|2| Taxation 371 ⚿2352

371 Taxation
371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2345 Schools, Colleges and Universities, and Property Used for Educational Purposes
371k2352 k. Public or charitable character of institution. Most Cited Cases
(Formerly 371k242(7))
Reasonable regulations for admission of public do not destroy charitable nature of educational institution within tax exemption statute. 72 P.S. § 4701.

|3| Taxation 371 ⚿2341

371 Taxation
371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2337 Charitable or Benevolent Institutions, and Property Used for Charitable Purposes in General
371k2341 k. Occupation and use of property. Most Cited Cases
(Formerly 371k241.1(4), 371k241(1))
As regards tax exemption, property to be "necessary for efficient discharge" of business of charity does not have to be absolutely necessary, but only reasonably necessary. 72 P.S. § 4701.

|4| Taxation 371 ⚿2339

371 Taxation
371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2337 Charitable or Benevolent Institutions, and Property Used for Charitable Purposes in General
371k2339 k. Character, purpose, and activities of institutions; incidence of benefits. Most Cited Cases
(Formerly 371k241.1(2), 371k241(1))
As regards tax exemption, charge made to cov-

er all or part of expense of agencies used in carrying out purpose of public charity does not destroy purely charitable nature of organization, where there is no intent to profit and no actual profit made. 72 P.S. § 4701.

|5| Taxation 371 ⚿2352

371 Taxation
371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2345 Schools, Colleges and Universities, and Property Used for Educational Purposes
371k2352 k. Public or charitable character of institution. Most Cited Cases
(Formerly 371k242(7))

Property of educational charitable institution organized to promote advancement of education and appreciation of fine arts *held* tax exempt, though separated from main plant, statutory words "with the grounds thereto annexed" meaning "in connection with," and not being confined to purely geographical location. 72 P.S. § 4701.

|6| Statutes 361 ⚿223.2(.5)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.2 Statutes Relating to the Same Subject Matter in General
361k223.2(.5) k. In general. Most Cited Cases
(Formerly 361k223.2, 361k225)

Where identical words are used in several statutes respecting same purpose and concerning same subject-matter, judicial construction given language of one should not be changed or altered in construction of that language in subsequent statute.

|7| Statutes 361 ⚿223.5(4)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.5 Re-Enactment of or Reference to Statute and Adoption of Provisions Previously Construed in General
361k223.5(4) k. Judicial construction of civil statutes in general. Most Cited Cases
(Formerly 361k223.5, 361k2253/4)

Legislature is presumed cognizant of court's interpretation of statute, and, when it uses identical terminology in subsequent statute, it obviously intends meaning which courts have placed thereon, and, in case of tax exemption, statute gave to that interpretation force of rule of property. 72 P.S. § 4701.

|8| Corporations and Business Organizations 101 ⚿2291

101 Corporations and Business Organizations
101IX Corporate Powers and Liabilities
101IX(A) Extent and Exercise of Powers in General
101k2288 Regulation and Supervision
101k2291 k. Judicial supervision. Most Cited Cases
(Formerly 101k393)

General rule is that management of corporate affairs is within discretion of proper officers of corporation, and this discretion, when not abused, will not be interfered with by court, where corporation is invested with public character.

|8| Corporations and Business Organizations 101 ⚿1841

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1841 k. In general. Most Cited

Cases
(Formerly 101k310(1))
General rule is that management of corporate affairs is within discretion of proper officers of corporation.

113** ****267** Argued before FRAZER, C. J., and SIMPSON, KEPHART, SCHAFFER, MAXEY, DREW, and LINN, JJ.114** Mayne R. Longstreth, Asst. City Sol., Theodore F. Jenkins and David J. Smyth, City Sol., all of Philadelphia, for appellants.

****268** Robert T. McCracken (of Montgomery & McCracken) and Philip C. Pendleton, both of Philadelphia, for appellee.

***115** KEPHART, Justice.

Albert C. Barnes created a corporation known as the Barnes Foundation. Its principal office and place of business is in Montgomery county. It was not organized for profit; but the purpose of the corporation was to promote the advancement of education and the appreciation***116** of the fine arts, and to this end to erect, found, and maintain an art gallery for the exhibition of ancient and modern art, and to maintain an arboretum for the encouragement of arboriculture and forestry. Buildings were erected on land purchased by Dr. Barnes, and in October, 1929, a dwelling house in Philadelphia was purchased for $50,000. City and school taxes were levied on this latter property. The board of revision of taxes refused to allow an exemption, and this proceeding was instituted to restrain their collection. The court below granted an injunction, and the Superior Court sustained this action. From that order this appeal was allowed. Argument has been twice heard by this court.

[1] As the questions of fact must come under our well-settled rule that the findings of fact made by a chancellor will be given the force and effect of a verdict by a jury and will not be disturbed on appeal if there is evidence to support them (Glenn v. Trees, 276 Pa. 165, 120 A. 109), we may confine our efforts to an examination of the record to ascertain if the findings are supported by evidence. We agree with the conclusion of the Superior Court, which also went over the record, that the facts as found by the chancellor are sustained by the evidence in the record. We have carefully examined the record and find that there was evidence to support the findings that appellee, an educational institution, was a purely public charity. The foundation had its origin in a charitable impulse of its founder. It was the result of the generosity of Dr. Albert C. Barnes; all its real and personal property, including its endowment, was donated by him. Its purpose was to promote the education and cultural development of young men and women, and the fact that they were to be educated in the field of art, instead of law or medicine, can make no difference, if the intent and purposes of the corporation are purely charitable, as the court below has found them to be.

No applicant for instruction is barred from the foundation except for drunkenness, incompetency, or because ***117** of the necessary limitation of the number that may be taken care of by the institution, having due regard to the best educational results obtainable. A careful review of the cases shows that Judge Baldrige, who spoke for the Superior Court, has correctly concluded that the chancellor did not err in holding appellee to be a purely public charity.

[2] Its property located in Montgomery county is open to the public which is admitted thereto in accordance with the provisions of the by-laws, rules, and regulations of the foundation. The limitation that the general public may not use the gallery at will is in accord with the practices of leading colleges and universities, which are tax free. As stated by the President Judge of the court below: 'It must be borne in mind that the gallery is used not as an art gallery as that term is ordinarily understood, but that it is an integral part of a new educational experiment, and the unrestricted admission of the public would be as detrimental to the work of the Barnes Foundation as it would be to the work carried on in the laboratories and clinics of the Uni-

versity of Pennsylvania. A clear conception of this fundamental destination will aid in understanding the educational work of the Barnes Foundation.' Reasonable regulations for admission of the public do not destroy the charitable nature of a gift where it is otherwise found to be so.

The rights, duties, and privileges of this foundation are contained in its charter and trust indenture, and nothing that Dr. Barnes may say or think can alter that instrument; and, as we read the documents, the control that Dr. Barnes might think he has of the foundation, and what it really amounts to, are entirely different things. The relevant portions of the deed of trust, incorporated in the by-laws, preclude any such thought. The lands would seem to be irrevocably vested in the foundation. There is nothing in the deed of trust which suggests or permits the trustees at any time or in any way to reconvey the paintings to Dr. Barnes, and, if the ***118** time comes when the foundation fails, their transfer or sale would be subject to the control of the courts, as well as the disposition of the purchase price to objects similar to those contemplated by the foundation. Indeed, Dr. Barnes would want this to be so, for, after he has passed on, in years to come, he certainly would not want to put power into the hands of his trustees to uproot this foundation and cause the fruits of his labor to be turned over to private hands for private use. The provisions**269** of this deed of trust do not in any way affect the purely public, charitable character of the foundation. We need not pursue this thought further.

[3] With regard to the land at Spruce street, two questions are presented for our determination: Is this property necessary for the efficient discharge of the business of the charity? and, Is the fact that these premises are not contiguous to the main property in Montgomery county sufficient to exclude it from the tax exemption generally afforded the assets of charitable corporations by statute? The court below found the premises were necessary, within the meaning of the law, for the efficient discharge of the corporation's business, and that court and the Superior Court have described the uses to which the building is put. Such uses are clearly within the scope of the charitable endowments of the foundation. 'Necessary for the efficient discharge' does not mean an absolute necessity, but a reasonable necessity, embracing the ideas of convenience and usefulness for the purposes intended.

[4] As found by the Superior Court, the property on Spruce street did not produce any income. A charge made to cover all or part of the actual expense of certain agencies used in carrying out the purposes of a public charity, where there is no intent to profit and no actual profit is made, does not destroy the purely charitable nature of an organization. We all know that tax exempt educational institutions defray much of the cost of salaries, building maintenance, and plant upkeep, as well ***119** as of the publication of the results of research and investigation promoted under their auspices, by tuition charges, laboratory fees, and other charges.

[5] It is strongly urged that the grounds, though used for the corporate purposes of the charitable institution, are not annexed thereto because separated from the main plant, and therefore are not entitled to tax exemption under the Act of April 30, 1925, P. L. 388 § 1 (72 PS § 4701). Appellants place great stress on the words of the act 'with the grounds thereto annexed,' as indicating that all land which is to have the benefit of tax exemption must be contiguous, adjoining property only. We are not impressed with the attempt to confine the interpretation of these words to their purely geographical or locative connotation. Rather, they convey to our minds, in view of the policy of this commonwealth toward public charities, the meaning of 'in connection with' the particular institution, or 'as part of the means' of the charity for accomplishing its public purposes. An historical examination of the tax exempting legislation applicable to charitable institutions convinces us that this interpretation is justified. We find the language of the act of 1925, supra, so far as it affects the case at bar, is not different from that in the earliest act and those that

follow.

The Act of April 16, 1838, P. L. 525, § 29, provided that 'all churches, meeting houses or other regular places of stated religious worship, with the grounds thereto annexed for the occupancy and better enjoyment of the same, all burial grounds * * *, all universities, colleges, academies, and school houses belonging to any county, * * * with the grounds thereto annexed, * * * are hereby exempted from all and every * * * tax and * * * taxes. * * *' This act was amended by the Act of July 2, 1839, P. L. 576, § 3. These acts did not contain the words 'necessary for the occupancy and enjoyment' of the named charities. The Legislature passed the Act of April 14, 1851, P. L. 625, § 13, which provided: 'That all property, real or personal,***120** * * * which is now by law exempt from taxation, other than that which is in * * * actual use and occupation * * * and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation.'

The Act of April 8, 1873, P. L. 64 (72 PS § 4681), was an act 'to repeal all laws exempting real estate from taxation.' It was held in Northampton County v. Lehigh Coal & Navigation Co., 75 Pa. 461, 463, that this act repealed all special laws on the subject of tax exemption. Justice Sharswood there said: 'We think it very apparent, as well from the title as the whole scope of the enacting words of the act [of 1873, supra] * * * that its object was not to change the course of judicial decisions upon the construction of the general tax laws, but to repeal the large number of special acts upon the statute book exempting particular properties. These special laws had become a great evil.'

The following year the Constitution of 1874 was adopted, the ninth article of which declared:

'Section 1. All taxes shall be uniform, upon the same class of subjects; * * * but the General Assembly may, by general laws, exempt from taxation * * * institutions of purely public charity. * * *

'Sec. 2. All laws exempting property from taxation, other than the property above enumerated shall be void.'

****270** The Act of May 14, 1874, P. L. 158, enacted pursuant to the constitutional provisions, stated: 'All * * * hospitals, * * * colleges, * * * and institutions of learning, * * * with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, found, endowed and maintained by public or private charity; * * * be and the same are hereby exempted from all and every * * * tax.'

The law stood thus until the Act of July 17, 1919, P. L. 1021, § 1, together with the amendatory Act of April 9, 1921, P. L. 120, § 1, which contained exactly the same language, excepting***121** that the act of 1921 adds a proviso here immaterial. These acts declared tax exempt '* * * all churches, meeting-houses * * * with the ground thereto annexed necessary for the occupancy and enjoyment of the same, * * * all hospitals, * * * colleges, * * * and institutions of learning, * * * or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same. * * *'

No change so far as the present controversy is concerned was made in the Act of March 17, 1925, P. L. 39, § 1, as amended by the Act of April 30, 1925, P. L. 388, § 1 (72 PS § 4701).

It should be noted that in none of these acts is there a provision that the school buildings and dormitories of universities, colleges, academies, and institutions of learning, wiht the grounds thereto annexed, shall be exempt. On the contrary, it is stated that the universities, colleges, academies, and institutions of learning themselves, with the grounds thereto annexed, are exempted. Nowhere is there a provision that all of the grounds upon which all of the buildings are erected must be immediately contiguous. When the act of 1925, supra, was enacted, the courts of this commonwealth had construed language which is identical with that in the act of 1925 as not requiring grounds

to be adjoining or contiguous to the main plant of the charity in order to be tax exempt.

In Pennsylvania Hospital v. Delaware County, 169 Pa. 305, 32 A. 456, 457, this court had before it the act of 1873, supra, the Constitution of 1874, article 9, supra, and the act of 1874, supra.[FN1] We specifically passed upon the question now discussed, and Justice Mitchell, speaking for the court, stated: 'The two departments, though separated by a county line and some miles of distance, will nevertheless***122** constitute one whole. * * * Together, they will constitute the actual plant used, * * * organized, and looked at from the property point of view,' quoting from House of Refuge v. Smith, 140 Pa. 387, 21 A. 353. While the Contributors to the Pennsylvania Hospital was incorporated by an act of General Assembly of the province of Pennsylvania on May 11, 1751, and was confirmed by the King in council on May 10, 1753, 5 Statutes at Large, Pennsylvania, 129, the corporation was governed by all of these statutes.

> FN1. The Pennsylvania Hospital was originally exempted from taxation by the special Act of April 18, 1853, P. L. (1854) 835. For repeal of this act see the Act of April 8, 1873, P. L. 64 (72 PS § 4681); Const. of 1874, art. 9. Also Northampton County v. Lehigh Coal & Navigation Co., 75 Pa. 461; Phila. v. Penna. Hospital, 134 Pa. 171, 19 A. 490.

Similarly, Judge Lyon, in Dickinson College v. Cumberland County Commissioners, 12 Pa. Co. Ct. R. 582, held that the president's house was exempt from taxation, though it was not situated on the same piece of ground as the college.

The Superior Court had before it the same question in National Farm School v. Commissioners of Bucks County, 87 Pa. Super. Ct. 231. It was there said: 'The rule deducible from these cases [the cases above cited] is that an institution may have buildings and grounds separated from each other, but, when taken together they constitute one whole plant the operation of which is devoted to the purposes contemplated by the statute, the different tracts are exempted from taxation.'

[6] Where identical words are used in several statutes relating to the same purpose and concerning the same subject-matter, the judicial construction given to the language of one will not be changed or altered in the construction of that language in subsequent statutes.

In Northampton County v. Lehigh Coal & Navigation Co., supra, we held that, when the same words are used in taxing statutes (Acts of 1834 and 1873), and this court has interpreted the words in the first statute, prior to the enactment of the second, unless the latter act elsewhere contains words that would broaden, explain, or differentiate the prior interpretation, there is no reason in construing the second statute to give its words an enlarged or broader meaning.

123** [7] It must be presumed that the Legislature was cognizant of the interpretation which the courts had placed upon the language it had employed in acts prior to that of 1925. Hence, when it used the identical terminology, it obviously intended the meaning which the courts had theretofore placed thereon,*271** on, and gave to that interpretation the force of a rule of property. Ray v. Natural Gas Co., 138 Pa. 576, 590, 20 A. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; Struthers v. Dunkirk, etc., Rwy. Co., 87 Pa. 282; Buffington v. Summit Branch R. R. Co., 74 Pa. 162, 165; McDowell v. Oyer, 21 Pa. 417, 423; Gauthreaux v. Theriot, 121 La. 871, 46 So. 892, 126 Am. St. Rep. 328; Boston Safe Dep. & T. Co. v. Collier, 222 Mass. 390, 111 N. E. 163, Ann. Cas. 1918C, 962.

[8] Appellants insist that a building for the purposes to which the Spruce street premises have been put could be placed on the main tract in Montgomery county. Considerable testimony as to the propriety of erecting a new structure on the premises was taken in a supplementary proceeding has since the first argument before this court. It is a

general rule that the management of corporate affairs is within the discretion of the proper officers of the corporation, and this discretion, when not abused, is not to be interfered with by the courts where the corporation is invested with a public character. See Pittsburgh, Ft. W. & C. Rwy. Co. v. Peet, 152 Pa. 488, 25 A. 612, 19 L. R. A. 467; Phila. v. Ward, 174 Pa. 45, 34 A. 458; Lancaster County v. Y. W. C. A. of Lancaster, 92 Pa. Super. Ct. 514. An examination of the evidence indicates that there was no abuse of discretion by the trustees of the foundation in selecting the premises in controversy for the purposes of the charity instead of constructing a building on the main tract, for the reason that all of the latter property is required, as testified to by reputable witnesses experienced in such matters, for future development in accordance with prudent and reasonable planning.

We therefore hold that a charitable institution may have buildings and grounds geographically separated from each other, but united in their common usefulness and purpose into one plant, the operation of which is devoted***124** to the ends contemplated by the statute; and all are tax exempt.

The decree of the Superior Court is affirmed.

SIMPSON, Justice.

I dissent from the opinion and order of the court in this case. The charter of the corporation plaintiff provides that its 'purpose [is] to erect, found and maintain, in the Township of Lower Merion, County of Montgomery and State of Pennsylvania, an art gallery and other necessary buildings for the exhibition of works of ancident and modern art, and the maintenance in connection therewith of an arboretum, wherein shall be cultivated and maintained trees and shrubs for the study and for the encouragement of arboriculture and forestry, together with a laboratory of arboriculture if the same shall be found necessary.' This provision in the charter is entirely separate and distinct from the provision, statutorily required, of the statement where the business of the corporation is to be transacted, which also appears in the charter. It is clear, therefore, that, under the charter, the 'art gallery and other necessary building' of the corporation must be in the township of Lower Merion, county of Montgomery and state of Pennsylvania, and not elsewhere.

The only question involved in this appeal is whether or not a property, No. 4525 Spruce street, in the city and county of Philadelphia, later bought by the corporation, should be decreed to be exempt from taxes which are payable to the city of Philadelphia, and to the school district of the city of Philadelphia, because used for the purposes of the incorporation. If, as the majority opinion states, this building in Philadelphia is, with the property in Montgomery county, 'united in their common usefulness and purpose into one plant,' then plaintiff is endeavoring to have part of its plant in Montgomery county and part in Philadelphia county, the two being***125** miles apart, with hundreds, if not thousands, of otherwise owned properties between, though, under its charter, it was required to be located in the former county only. I would therefore hold, entirely aside from the question hereinafter to be considered, that plaintiff cannot have exemption from taxation of one of its properties, located at a place where it was not legally permitted to carry on any part of its authorized business. If the majority are correct in holding that this was a matter in the discretion of plaintiff's directors, then it may have, if they choose, another part of its plant in Erie, still another in Uniontown, still another in Scranton, and so on all over the commonwealth, despite the limitations of the charter. Surely this is not so, and the cases cited in the majority opinion do not even refer to, much less approve of, such a contention. None of them relate to the right to take and use property for corporate purposes at any other place than that designated in the charter of the particular corporation. The question is not one regarding an 'abuse of discretion * * * in selecting the premises in question for the purposes of the charity,' but one regarding its power to ****272** take and hold, exempt from taxation, any property located at a place outside of that which the charter authorizes.

Admittedly the only statute under which plaintiff can claim that any of its property is exempt from taxation, no matter where it may be located, is the Act of April 30, 1925, P. L. 388, § 1 (72 PS § 4701). It provides: 'That all * * * hospitals, universities, colleges, seminaries, academies, associations, and institutions of learning, benevolence, or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by the public or private charity * * * be, and the same are hereby, exempted from all and every county, city, borough, township, bounty, road, school, and poor tax.' For present purposes it may be conceded that plaintiff is an institution of charity, within the meaning of those words in the statute, and it is, of course, true that ***126** the exemption sought is from a city and school tax. But what property is exempted? Only the institution itself and the grounds thereto annexed. The Spruce street property is clearly not within the meaning of those words. The institution which is to be exempted must necessarily have 'a local habitation and a name,' and that 'local habitation' has for more than a decade been in Lower Merion township, Montgomery county, exactly as prescribed by the charter.

It would be so manifestly ridiculous to claim that the Spruce street property, miles away from the location of the institution itself, and in no way connected with it, is grounds annexed to it, that the majority are forced to take another position, viz., that we had given to the words 'the grounds annexed thereto' a judicial construction, when construing earlier taxing acts, and hence, when they were embodied in this later taxing statute, it must be presumed that the Legislature intended that therein they should have the same meaning as we had expressly given to them in the earlier statutes. I have no quarrel with that legal principle, but it has no relevancy here. We have never given to the words 'the grounds annexed thereto' any other than their plain everyday meaning. To reach the conclusion for which the majority contends, it would have to so appear, beyond the peradventure of a doubt, for the principle is that all exempting statutes must be strictly construed against the claim for their allowance. Phila. v. Barber, 160 Pa. 123, 126, 28 A. 644 .

Turning, then, to the cases relied on, we find that none of those in this court sustain the view of the majority. In Northampton County v. Lehigh Coal & Navigation Co., 75 Pa. 461, the single point decided was that the only effect of the Act of April 8, 1873, P. L. 64 (72 PS § 4681), was 'to repeal the large number of special acts upon the statute book exempting particular properties' from taxation. Not only were none of the general acts on the subject construed therein, but they were not even referred to. In House of Refuge v. G. W. Smith et al., 140 Pa. 387, 21 A. 353, we ***127** did not consider any of the general exempting statutes, nor refer to any statute containing the words 'the grounds annexed thereto,' nor anywhere name or consider those or kindred words, and this for the obvious reason that by the incorporating Act of March 23, 1826, P. L. 133, § 8 (11 PS § 462), it is provided 'that the lot of ground [in the City of Philadelphia], and the buildings which may be erected thereon, for the use and objects of the said association, shall be free of tax,' and by the Act of May 13, 1889, P. L. 209, 210, §§ 1, 5 (11 PS §§ 691, 695), it is provided: 'Section 1. That wherever, by virtue of its charter, any house of refuge * * * is now, or may hereafter be, located in a city, it shall and may be lawful for the managers thereof, whenever in their discretion it may be desirable, to purchase real estate and locate such institution, or any department thereof, in a rural district in the same or in any county other than that in which it has theretofore been located. * * * Section 5. All charters, laws or parts of laws, relating to houses of refuge * * * shall be equally applicable to them or any department of them, whether located in the county originally designated by their charter, or removed to another county in pursuance of section one of this act.' Thus necessarily it was held that the land and buildings of the department removed to Delaware county 'shall be free from taxation' as it was distinctly so provided in those statutes.

Contributors to the Pennsylvania Hospital v. County of Delaware, 169 Pa. 305, 32 A. 456, is likewise inapplicable. There, also, no reference is made to any general exempting act, nor to the language under consideration, or anything akin to it. On the contrary, by section 7 of the Act of April 18, 1853, P. L. (1854) 834, 835, § 7, it is provided: 'That the estates and property real and personal, belonging to the contributors of the Pennsylvania Hospital, shall be and remain free from the payment of taxes of any kind whatsoever, as long as the income from said estates and property is used for the relief of ****273** the sick and insane poor, any law to the contrary notwithstanding.'

***128** The cases of National Farm School v. Commissioners of Bucks County, 87 Pa. Super. Ct. 231, and County of Lancaster v. Y. W. C. A. of Lancaster, 92 Pa. Super. Ct. 514, do agree with the majority, but for two reasons they do not affect the question we are now considering. In the first place, they make the same mistake as the majority, in that they erroneously presume that the question at issue was decided by our two cases above, where, as has been pointed out, the general exempting statutes were not even referred to, but the exemption was allowed by virtue of the special acts above quoted. Thus, in the first of those cases, it is said (87 Pa. Super. Ct. 231, 234): 'So it was held, under the act of 1874 [which is not even referred to in the cases cited], that buildings and grounds devoted absolutely to the purposes of a purely public charity, as part of the plant on or by means of which its work is carried on, were exempted from taxation (House of Refuge v. Smith, 140 Pa. 387 [21 A. 353]). To the same effect is Penna. Hospital v. Delaware County, 169 Pa. 305 [32 A. 456]. The rule deducible from these cases is that an institution may have buildings and grounds separated from each other, but, when taken together they constitute one whole plant the operation of which is devoted to the purposes contemplated by the statute, the different tracts are exempted from taxation.' As I have already shown, from our two cases there relied on, no such rule is deducible quoad the general taxing acts, for they are not referred to in either, nor is the language under consideration in this case even hinted at. County of Lancaster v. Y. W. C. A. of Lancaster, supra, falls into the same error. After reviewing our two cases as above, it says (92 Pa. Super. Ct. 519): 'Penna. Hospital v. Delaware County, supra, rules this case, and requires a reversal of the judgment;' which, as has been shown, it does not, since we did not therein construe or even consider the language 'with the grounds thereto annexed.'

The other reason why the Superior Court cases have no bearing on the presumption that the repetition of the ***129** words of an earlier act requires the same construction if those words are repeated in a later cognate statute is that that reasoning only applies where the construction has been of a court of last resort, which the Superior Court is not. 59 C. J. 1064; 25 R. C. L. pp. 1074, 1075, § 295; Rea v. Keller, 215 Ala. 672, 112 So. 211.

It is suggested, however, that, as the report of the Penna. Hospital Case does not refer to the special statute by virtue of which the decision was made, the members of the Legislature and the Governor may have thought we were construing the General Exempting Act when we decided that case. But who shall say they so thought, when they did not say so, and why should they have so thought when that case was directly based upon and followed the House of Refuge Case, where the special statute, under which the exemption was there allowed, is expressly noted. If anything is to be assumed, then the more logical view is that the Legislature and Governor as fully considered the matter as I have herein done, and, finding the General Exempting Act had not been construed by us, and believing, as every reasonable per son must, that the words 'grounds thereto annexed,' as used in the existing Act of April 30, 1925, P. L. 388, § 1 (72 PS § 4701), now under consideration, had a meaning too plain to be misunderstood, simply repeated the language of the earlier statutes. Surely it is neither safe nor judicially wise to distort the natural meaning of the language used by the Legislature because of an

unexpressed conclusion that it intended such an impossible meaning.

It is certainly not clear beyond peradventure that the Legislature intended by 'the grounds thereto annexed' to mean grounds miles away, and, this being so, no exemption can properly be allowed, and the decree below should be reversed.

SCHAFFER, J., concurs in this dissent.

Pa. 1934
Barnes Foundation v. Keely
314 Pa. 112, 171 A. 267

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97 A.2d 81
374 Pa. 149, 97 A.2d 81
(Cite as: 374 Pa. 149, 97 A.2d 81)

Supreme Court of Pennsylvania.
WIEGAND
v.
BARNES FOUNDATION et al.

June 1, 1953.

Action brought by plaintiff individually, as a citizen, and as editorial writer for a newspaper to compel officers of charitable institution to alter administrative rules allegedly limiting access of public to institution's art gallery in such manner as to defeat purposes for which institution was founded. The Common Pleas Court of Montgomery County, February term, 1952, No. 2, in Equity, Harold G. Knight, P. J., sustained preliminary objections to the bill, and the plaintiff appealed. The Supreme Court, Chidsey, J., No. 159, January term, 1953, held that mere consent of attorney general would be insufficient to authorize maintenance of suit, since plaintiff did not seek application of the cy pres doctrine because of alleged failure of trust but merely complained of manner in which institution was being administered as being violative of its corporate purposes.

Affirmed.

Bell and Musmanno, JJ., dissented.

West Headnotes

[1] Injunction 212 ⚿114(2)

212 Injunction
212III Actions for Injunctions
212k114 Parties
212k114(2) k. Complainants. Most Cited Cases

No person whose interest is only that held in common with other members of public can compel performance of duty owed by corporation to public, only a member of corporation itself, or someone having a special interest therein, or the commonwealth, acting through the Attorney General, being qualified to bring action of such nature.

[2] Attorney General 46 ⚿7

46 Attorney General
46k5 Powers and Duties
46k7 k. Bringing and Prosecution of Actions. Most Cited Cases

Protection of public generally against failure of corporation to perform duties required by its charter is concern of sovereign, and any action undertaken for such purpose must be by Attorney General on its behalf; and in absence of statutory authority, Attorney General may not delegate conduct or control of suit.

[3] Charities 75 ⚿50

75 Charities
75II Construction, Administration, and Enforcement
75k50 k. Actions for Administration or Enforcement. Most Cited Cases

Mere consent of Attorney General, to action brought by plaintiff individually, as a citizen and as editorial writer for a newspaper, would be insufficient to authorize maintenance of suit to compel officers of charitable institution to alter administrative rules allegedly limiting access of public to institution's art gallery in such manner as to defeat purposes for which institution was founded, since plaintiff did not seek application of the cy pres doctrine because of alleged failure of trust but merely complained of manner in which institution was being administered as being violative of its corporate purposes. 20 P.S. § 301.10.

***150 **81** Harold E. Kohn, Philadelphia, Elmer L. Menges, Ambler, C. Leo Sutton and Dilworth, Paxson, Kalish & Green, Philadelphia, for appellant.

Victor J. Roberts and High, Swartz, Childs & Roberts, Norristown, for appellee.

Before STEARNE, JONES, BELL, CHIDSEY, MUSMANNO and ARNOLD, JJ.

***151** CHIDSEY, Justice.

The plaintiff, Harold J. Wiegand, individually as a citizen of the County of Montgomery, Commonwealth of Pennsylvania, and as editorial writer for The Philadelphia Inquirer Division of Triangle Publications, Inc., with the consent of the Attorney General, filed a bill in equity against The Barnes Foundation and the individual defendants who comprise its officers and trustees, averring that the latter were not carrying out the purposes for which the Foundation was incorporated as a corporation of the first class. The defendants filed an answer raising a number of preliminary objections to the bill, two of which the lower court, composed of four ****82** judges sitting en banc, sustained, and entered a final decree dismissing the bill. From this decree the plaintiff has appealed.

Dr. Albert C. **Barnes**, now deceased, was the progenitor of The **Barnes Foundation**, and following the grant of its charter on December 4, 1922, by indenture and agreement dated December 6, 1922, conveyed to the **Foundation** certain real estate on which was erected a large art gallery and other buildings, and transferred and delivered to the **Foundation** his valuable and outstanding collection of works of art consisting, inter alia, of hundreds of paintings, drawings, etchings and lithographs. In addition, he gave to the **Foundation** large sums of money and securities. The indenture and agreement contained conditions and stipulations under which the donation was made and received by the corporation, and as provided therein, was made a part of the by-laws of the corporation. The primary purpose of the incorporation, as set forth in the Foundation's charter, was 'to promote the advancement of education and the appreciation of the fine arts.'.

The gravamen of plaintiff's complaint is that the Barnes Foundation is a charitable institution exempt ***152** from taxation and that the manner in which it is administered by the officers and board of trustees (all of the officers are members of the board) so drastically limits access to the art gallery by the public as to defeat the purposes for which the corporation was founded.[FN1]

> FN1. The **Foundation's** charter and the provisions for its administration under the by-laws (which incorporated the indenture and agreement) were before this Court in **Barnes Foundation** v. Keely, 314 Pa. 112, 171 A. 267, 268, wherein a bill in equity was filed by the **Foundation** to restrain the collection of real estate taxes on a property owned by it in Philadelphia. The taxing authorities resisted the exemption, contending that the **Foundation** was not a purely public charity because, inter alia, 'The property of the **Barnes Foundation** is not open to the public.' In commenting on this contention, Mr. Justice Kephart quoted the opinion of the president judge of the trial court as follows: "It must be borne in mind that the gallery is used not as an art gallery as that term is ordinarily understood, but that it is an integral part of a new educational experiment, and the unrestricted admission of the public would be as detrimental to the work of the **Barnes Foundation** as it would be to the work carried on in the laboratories and clinics of the University of Pennsylvania. A clear conception of this fundamental destination [distinction] will aid in understanding the educational work of the **Barnes Foundation**." It was held that the **Foundation** was entitled to tax exemption as a purely public charity.

The preliminary objections sustained by the court below challenged the bill on the ground that the deed of gift and the bylaws of the corporation confer discretionary powers upon the trustees in the management of the corporation and its assets, and in the exercise of these discretionary powers the court may not interfere unless the trustees are guilty of bad faith.

While we are in accord with the conclusion reached by the court below on the merits of the bill, we are of opinion that the bill should have been dismissed for want of a proper party plaintiff by sustaining defendants' preliminary objection that '* * * The person named ***153** as plaintiff in said Amended Bill, to wit, Harold J. Wiegand, either individually or as editorial writer for The Philadelphia Inquirer Division of Triangle Publications, Inc., is not alleged to be a member of the defendant corporation, to wit, The Barnes Foundation, nor to have any right or interest therein other than such right or interest, if any, which he may hold in common with other members of the general public. * * *'.

[1] In the absence of statutory authority, no person whose interest is only that held in common with other members of the public, can compel the performance of a duty owed by the corporation to the public. Only a member of the corporation itself or someone having a special interest therein or the Commonwealth, acting through the Attorney General, is qualified to bring an action of such nature. In the early case of Buck Mountain Coal Company v. Lehigh Coal & Navigation Company, 50 Pa. 91, at page 99, this Court, speaking through Mr. Justice Thompson ****83** said: 'There are many authorities in England and in this country which deny the right of private parties in their own names-in the absence of special laws-when their interests are only in common with the public, to compel the performance of a duty to the public. The reason is, that if one individual may interpose, any other may, and as the decision in one individual case would be no bar to any other, there would be no end to litigation and strife. The general laws of order so necessary to good government forbid anything like this.' As a matter of public policy we see no reason for departing from this sound concept. No cases have been cited by appellant in this or any other jurisdiction of contrary import.

In Healy v. Loomis Institute, 1925, 102 Conn. 410, 128 A. 774 at page 778, the Supreme Court of Errors of Connecticut said: 'So that if the trustees do not pursue the objects ***154** of the charity, or abuse the charity by violating its franchises, its charter or act of incorporation, or the conditions attached to it or by the perversion of its funds, the court of chancery will intervene and compel the trustees to establish or execute the trust in accordance with their power under the charter or act of incorporation and in accordance with the law of the land. The Attorney General is the proper person to have brought this action, and the bill in equity a proper remedy. * * *'

In State ex rel. Heddens v. Rusk, 1911, 236 Mo. 201, 139 S.W. 199 at page 203 the Supreme Court of Missouri said: '* * * At such time as his [the chancellor's] power is invoked to construe the trust instrument or to restrain an abuse of power on the part of such trustees, or correct a negligent performance of duty whereby the estate is put in peril or diverted, or to remove or suspend an unfaithful trustee, or to protect and conserve the corpus of the trust estate from being dissipated or lost, he may move only at the instance of the Attorney General who moves on behalf of the people, or at the instance of some other proper party, whereby he grants relief on due process of law on giving parties their day in court. The proceedings compliained of in the instant case are not of that sort.'

In MacKenzie v. Trustees of Presbytery of Jersey City, 1905, 67 N.J.Eq. 652, 61 A. 1027 at page 1041, 3 L.R.A.,N.S., 227, the following language appears: 'In the case in hand the persons interested in the estate or fund, being an indefinite or fluctuating body, are properly represented only by the Attorney General; and only he or the Presbytery of Jersey City, by and through the body charged with the duties of trusteeship, or some member of that body, can acquire or have a standing to invoke the action of the courts touching the due administration of the trusts. * * *'

***155** Section 391 of the Restatement of Trusts, p. 1183, states: 'A suit can be maintained for the enforcement of a charitable trust by the Attorney

General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives of next of kin.'. Commented reads: 'A suit for the enforcement of a charitable trust cannot be maintained by persons who have no special interest in the enforcement of the trust. The mere fact that as members of the public they benefit from the enforcement of the trust is not a sufficient ground to entitle them to sue, since a suit on their behalf can be maintained by the Attorney General.'.

[2] The appellant relies upon the consent of the Attorney General to the filing of the bill. The protection of the public generally against the failure of a corporation to perform the duties required by its charter is the concern of the sovereign, and any action undertaken for such purpose must be by the Attorney General on its behalf. In the absence of statutory authority, the Attorney General may not delegate the conduct or control of the suit.

[3] Appellant claims that there is statutory authority for his instituting the bill with the consent of the Attorney General****84** and points to the Estates Act of 1947, P.L. 100, § 10, 20 P.S. § 301.10, which, according to the Joint State Government Commission's comment, is intended to supplant the provisions of § 10 of the Act of April 26, 1855, P.L. 328, as amended by the Act of May 23, 1895, P.L. 114, § 1, 10 P.S. § 13. The provisions referred to in all of the Acts mentioned have to do with the application of the cy pres doctrine. Under the Act of 1855, as amended by the Act of 1895, it was required that proceedings be instituted 'by leave of the attorney***156** general'. Section 10 of the Act of 1947 provides: 'Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impractical of fulfilment, or if it shall not have been carried out for want of a trustee or because of the failure of a trustee to designate such purpose, the court may, on application of the trustee or of any interested person or of the Attorney General of the Commonwealth, after proof of notice to the Attorney General of the Commonwealth when he is not the petitioner, order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether his charitable intent be general or specific.'

It is extremely doubtful that plaintiff is an 'interested person' within the intendment of the Act, but assuming that he is, it is clear that the charitable purpose of The Barnes Foundation is not and has not become 'indefinite or impossible or impractical of fulfilment' and the other contingencies provided for in the Act are not here present. The trust has not failed. Its objects and the administrative provisions for their accomplishment were before this Court when it was approved as a charitable institution in Barnes Foundation v. Keely, 314 Pa. 112, 171 A. 267, Footnote 1, supra. Appellant's bill does not seek application of the cy pres doctrine because of alleged failure of the trust, but complains of the manner in which the Foundation is being administered as being violative of its corporate purposes. The prayer of the bill is that the court require the trustees to adopt different administrative rules and regulations. Even if there were substance to appellant's complaint, suit by the Attorney General would be required and his mere consent to action by the appellant clearly insufficient.

***157** Cases cited by appellant do not support his contention that he had a standing to institute the proceeding because of the consent of the Attorney General nor are they in conflict with our conclusion. The litigation in In re Williams' Estate, 353 Pa. 638, 46 A.2d 237, arose following the audit of the account of an executrix and involved the invocation of the cy pres doctrine. In Spring Garden Institute v. Wanamaker Institute, 56 Pa.Dist. & Co. 406, the plaintiff invoked the cy pres doctrine alleging forfeiture of the trust through abandonment by defendant of its charitable purposes. In Abel, Trustees v. Girard Trust Company, Trustee, 365 Pa.

34, 73 A.2d 682, the proceeding was a bill in equity to quiet title and the plaintiffs who were trustees had a direct special interest in the matter.

The dismissal of the bill is affirmed at appellant's cost.

BELL and MUSMANNO, JJ., dissent.

MUSMANNO, Justice (dissenting).

Section 10 of the Estates Act of 1947, P.L. 100, 20 P.S. 301.10, provides:

'Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impractical of fulfilment, or if it shall not have been carried out for want of a trustee or because of the failure of a trustee to designate such purpose, the court may, on application of the trustee or of any interested person or of the Attorney General of the Commonwealth, after proof of notice to the Attorney General of the Commonwealth when he is not the petitioner, order an administration or ****85** distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention***158** of the conveyor, whether his charitable intent be general or specific. 1947, April 24, P.L. 100, § 10.'

While this section deals with cases where the doctrine of cy pres applies, it does show that public policy approves of the enforcement of trusts through the institution of suit by 'any interested person' after proof of notice to the Attorney General of the Commonwealth. The beneficiaries of the Barnes Foundation are the members of the public, of whom the plaintiff is one. He is, therefore, an 'interested person,' and, having properly notified the Attorney General of his action and obtained his express written consent thereto, which was made a part of the Bill, the suit was properly instituted by him.

In fact, the Attorney General is directly involved in the proceedings. Exhibit 'A' of the Amended Bill of Complaint reads as follows:

'In The Court of Common Pleas of Montgomery County February Term, 1952, No. 2 In Equity.

Harold J. Wiegand, Individually and as Editorial Writer for The Philadelphia Inquirer Division of Triangle Publications, Inc., 115 Old Lancaster Road, Cynwyd, Pennsylvania, Plaintiff

v.

The **Barnes Foundation**, a Pennsylvania Corporation, Laura L. **Barnes**, Nelle E. Mullen, Mary Mullen, Violette de-Mazia and Albert Nulty, Officers and Trustees of The **Barnes Foundation**, Lower Merion Township, Montgomery County, Pa., Defendants.

Consent

Robert E. Woodside, Attorney General of the Commonwealth of Pennsylvania, hereby consents to the filing of the foregoing Amended Bill of Complaint in Equity.

/s/ Robert E. Woodside

Robert E. Woodside'

***159** By this written participation in the very Bill of Complaint, the Attorney General has made the plaintiff's action *his* action and he has become a party to the record as if expressly named in the caption. By this participation in the lawsuit the Attorney General would be estopped from authorizing other similar actions so that the danger of further like suits being instituted is conclusively fore- stalled.

No objection was made by the defendant to the plaintiff's declaration in his brief:

'No statement of the amount in controversy is necessary by reason of the fact that *the action*[FN1] *was authorized by the Attorney General of the Commonwealth of Pennsylvania*, whose express consent was attached to the Amended Complaint in Equity filed. Act of 1895, P.L. 212, para. 7, Sec. 3,

as amended by Act of 1899, P.L. 248, Para. 1, and Act of 1923, P.L. 3, No. 2, Sec. 1 (17 P.S. 184).'

FN1. Italics throughout, mine.

The opinion of the Court below sustained the first and second preliminary objections in the defendant's answer, but made no reference to disqualification on the part of the plaintiff.

The Barnes Foundation has been adjudicated to be a 'purely public charity.' C.P. No. 1, Dec. Term, 1929, No. 6369; Barnes Foundation v. Keely, 108 Pa.Super. 203, 164 A. 117, Id., 314 Pa. 112, 171 A. 267.

There can be no doubt about the public character of this institution. The charter which brought the Foundation into being specified its purpose, inter alia, as follows:

'The purpose for which the corporation is formed is to promote the advancement of education and the appreciation of the fine arts; and for this purpose to erect, found and maintain, in the Township of lower Merion, County of Montgomery and State of Pennsylvania, an art gallery and other necessary buildings***160** for the ****86** exhibition of works of ancient and modern art. * * *'

An arboretum and a laboratory of arboriculture were also provided for.

Paragraph 29 of the Indenture specifies that the Art Gallery shall be open to the public:

'During the life of Donor and his said wife the art gallery of Donee shall only be open *to the public* on not more than two days in each week, except during July, August and September of each year, and only upon cards of admission issued by or under the direction of the Board of Trustees of Donee.'

Paragraph 30 emphasizes the public nature attaching to the Art Gallery:

'* * * It shall be incumbent upon the Board of Trustees to make such regulations as will ensure that it is the plain people, that is, men and women who gain their livelihood by daily toil in shops, factories, schools, stores and similar places, who shall have free access to the art gallery upon those days when the gallery is to be *open to the public*.'

Paragraph 33 reiterates the public character and the democratic nature of the grant:

'The purpose of this gift is democratic and educational in the true meaning of those words, and special privileges are forbidden.' [This paragraph then prohibits the holding of 'tea parties, dinners, banquets, dances, musicales or similar affairs,' in the Foundation buildings.] 'It is further stipulated that *any citizen of the Commonwealth of Pennsylvania* who shall present to the courts a petition for injunction based upon what reputable legal counsel consider is sufficient evidence that the above-mentioned stipulation has been violated, shall have his total expense paid by The Barnes Foundation.'

In considering the dismissal of the Bill of Complaint we are required to accept as true the averments therein. That Bill categorically declares that the purpose***161** of the Charter is being subverted by the defendant Board of Trustees, that the specific intentions of the Donor are being flouted and that certain by-laws controvert both the Charter and provisions of the Indenture, whereby the grant came into being. In defiance of the Charter and the Indenture, the Board of Trustees has sealed off the Art Gallery from the public. Those who ask to see the paintings, sculpture, drawings, etchings and lithographs housed in the Gallery receive a card which coldly announces:

'The Barnes Foundation
is not a public gallery. It is an educational institution with a program for systematic work, organized into classes which are held every day, and conducted by a staff of experienced teachers. Admission to the gallery is restricted to students enrolled

in the classes.'

It would seem that Dr. Barnes in his lifetime, not unlike other geniuses, leavened the force of a powerful personality with the yeast of whim and idiosyncracy. The Board of Trustees apparently are seeking to perpetuate an idiosyncratic trend in the administration of the trust fund, but it has no right to go beyond the clearly worded intention of the Charter and the Indenture. The Board is not privileged to guess as to what Dr. Barnes might have wanted. It must follow his explicit instructions that 'it shall be incumbent upon the Board of Trustees to make such regulations as will ensure that it is the plain people, that is, men and women who gain their livelihood by daily toil in shops, factories, stores and similar places, who *shall have free access to the art gallery upon those days when the gallery is to be open to the public.*' Building a well of haughtiness around the gallery, through which no one may pass except the chosen few picked by the Board of Trustees is certainly not conducive to helping the 'plain people.'

***162** Every one has the right to dispose of his money, property and other possessions as he chooses, but once he stamps them with a public interest to the extent that ****87** they are exempt from public taxation he divests himself of the arbitrary control which was once his. And what *he* cannot do, *his representatives* may not do.

If we accept as fact the averments in the Bill of Complaint we must conclude that the arbitrary action taken by the Board of Trustees in their administration of this trust estate is defeating the very purpose of the charter which created it. The Foundation enjoys immunity from local, state and federal taxation. It is asserted in the Bill of Complaint that this tax exemption has saved the Foundation 'many hundreds of thousands of dollars since its incorporation.' The taxpaying public has a direct interest in this institution and that interest cannot be ignored by the Board of Trustees, especially in the face of the oft-repeated conditions announced by the donor. If a court of equity does not step in to compel the Board of Trustees to enforce the dictates of the charter and the indenture, the Barnes Foundation will become a *private tax-exempt collection* of $25,000,000 worth of rare art, plus other property.

There can be no doubt about the right of a Court of Chancery to hear testimony to determine whether the serious charges made in the Bill of Complaint against the Board of Trustees are substantiated in fact or not. In the case of Hamilton v. John C. Mercer Home, 228 Pa. 410, 77 A. 630, 634, this Court approved of the statement made by the celebrated Judge Sulzberger, President Judge of the Common Pleas Court of Philadelphia County:

'Fortunately the powers of a court of equity are ample for the purpose. Whenever it is shown that trustees are derelict in the administration of their trust, ***163** the chancellor interferes to save the trust. This ancient remedy under the inherent jurisdiction of the court has been formally ratified by statute. Act June 16, 1836, § 13 (P.L. 785, 789), confers upon us the jurisdiction and powers of a court of chancery so far as relates to '(4) the control, removal and discharge of trustees, and the appointment of trustees, and the settlement of their accounts.' And, as regards the case in hand, we have the additional power conferred in the same section, subhead '(5) the supervision and control of all corporations other than those of a municipal character. * * *' If the plaintiffs have a standing here, it would be easy to shape a bill and its prayers so that any inefficiency in management tending to destroy or to impair the trust may be corrected.' It could be that the Bill of Complaint cannot be supported in fact, that the charges therein are exaggerations of chance incidents and happenings, but how can that be determined without a hearing? The plaintiff makes the flat statement that the Art Gallery has been closed to the public. Under no semblance of logic can that statement be reconciled with the positive mandate that the public shall have access to the art gallery no more than two days a week. 'Not more than' necessarily means more than nothing. If, on condition of tax exemption of a

building housing a rare library, the owner or trustee announced to the public that it would have access to the library not more than 200 days a year, the only interpretation possible would be that on a certain number of days ranging from some substantial minimum number up to 200 the public could examine the volumes in question. But if the owner or trustee barred the doors completely to the public throughout the entire year, it cannot be questioned that his recalcitrance would be a matter for review by a Court of Chancery, whose jurisdiction was invoked***164** by a member of the public. How does that differ from the situation at bar?

No matter what powers the Board of Trustees may have, it cannot transcend the borders of the charter's intention. Any by-laws and regulations which it may promulgate in violation of that intention may be modified, altered or outrightly invalidated by the Court of Equity upon application by an aggrieved party. In the case of Lutz v. Webster, 249 Pa. 226, 94 A. 834, 835, a by-law of the involved corporation provided that four-fifths of the capital stock had to be represented ****88** for a quorum at a stockholders' meeting. Upon suitable application to a court of equity, it was held that this was an unreasonable by-law and that a meeting could be held, even though four-fifths of the stockholders were not represented in person or by proxy. This Court affirmed the lower court's decision:

'The jurisdiction of the court to grant the relief prayed for is challenged, but we agree with the views of the learned chancellor and approved by the court in banc that, under the exceptional facts of this case, the court had power to determine whether the by-law was inconsistent with the law of the state, and, if found to be so, to decree that an election be held at which a majority of the stock shall constitute a quorum. The appellant Webster has prevented the holding of an annual election for two years by refusing to attend a meeting called for this purpose, and certainly it is within the spirit and reason of our own cases for the court to order an election to be held in an orderly and lawful manner under such circumstances.'

Of course, interfering with the functions of any managing body of a corporation is a serious matter and can never be justified on some slight undertaking, but the issue in this case has to do with the very heart and soul of the charitable project: giving the public ***165** a chance to see the reputedly fabulous works of art which otherwise might never come within the orbit of its enjoyment. Justice Kephart, in Barnes Foundation v. Keely, supra, [314 Pa. 112, 171 A. 271] said:

'It is a general rule that the management of corporate affairs is within the discretion of the proper officers of the corporation, and this discretion, *when not abused*, is not to be interfered with.'

The plaintiff protests, however, in his Complaint that the discretion vested in the Board of Trustees is being abused.

Justice Kephart said further in that same decision:

'Reasonable regulations for admission of the public do not destroy the charitable nature of a gift where it is otherwise found to be so.'

But the Bill of Complaint avers that the regulations imposed by the Board of Trustees are *unreasonable*. And if the facts alleged by the plaintiff are true, and we are required, in considering this action, to accept them as true, the lower Court was not, in my opinion, justified in dismissing the Bill.

Pa. 1953
Wiegand v. Barnes Foundation
374 Pa. 149, 97 A.2d 81

END OF DOCUMENT

159 A.2d 500
398 Pa. 458, 159 A.2d 500
(Cite as: 398 Pa. 458, 159 A.2d 500)

H

Supreme Court of Pennsylvania.
COMMONWEALTH of Pennsylvania, Appellant,
v.
BARNES FOUNDATION, a Corporation, and Laura L. Barnes, Nelle E. Mullen, Joe W. Langran (Substituted for Mary Mullen, Resigned), Violette deMazia and Sidney W. Frick (Substituted for Albert Nulty, Deceased), Trustees of The **Barnes Foundation**.

March 22, 1960.

Petition by the attorney general calling upon a charitable foundation and its trustees to show cause why they should not open an art gallery to the public in accordance with the terms of the agreement entered into between the donor and the foundation, wherein respondents filed preliminary objections. From an order of the Orphans' Court of Montgomery County at No. 58,788, Alfred L. Taxis, Jr., President Judge, the Commonwealth appeals. The Supreme Court, No. 21, January Term, 1960, Musmanno, J., held that the petition of the attorney general stated a cause of action.

Order reversed and petition reinstated with directions.

West Headnotes

[1] Charities 75 ⚿49

75 Charities
75II Construction, Administration, and Enforcement
75k49 k. Persons Entitled to Enforce Charitable Trust. Most Cited Cases
The attorney general is authorized to inquire into the status, activities and functioning of public charities.

[2] Charities 75 ⚿49

75 Charities
75II Construction, Administration, and Enforcement
75k49 k. Persons Entitled to Enforce Charitable Trust. Most Cited Cases
Where charitable foundation possessing an extremely valuable art collection and enjoying tax exemption denied access of the public to the gallery housing the works of art, attorney general was entitled to file a petition calling upon the foundation to show cause why they should not open the gallery in accordance with the terms of the agreement entered into between the donor and the foundation.

[3] Charities 75 ⚿50

75 Charities
75II Construction, Administration, and Enforcement
75k50 k. Actions for Administration or Enforcement. Most Cited Cases
Where charitable foundation possessed an extremely valuable art collection and, enjoying exemption from taxation, denied public access to the gallery housing the collection, petition of the attorney general alleging that in violation of the indenture between the donor and the foundation, trustees failed to operate and maintain an art gallery for exhibition or works of art and that access to buildings of the foundation housing the collection was denied to the public sufficiently stated a cause of action.

[4] Pleading 302 ⚿214(1)

302 Pleading
302V Demurrer or Exception
302k214 Admissions by Demurrer
302k214(1) k. In General. Most Cited
Respondents by demurrer conceded truth of averments in the petition.

[5] Charities 75 ⚿48(1)

75 Charities

75II Construction, Administration, and Enforcement

75k48 Administration and Disposition of Property or Funds

75k48(1) k. In General. Most Cited Cases

Where charitable foundation possessed an extremely valuable art collection and was exempted from taxation and denied the public access to the gallery housing the collection, allegedly in violation of indenture between the donor and foundation that the art collection be open to the public, while the trustees might impose some limitations in the public's frequenting of the gallery, they could not successfully claim that the public could be shut out, since the gallery could not be considered public if the public were admitted only upon the caprice, whim, and arbitrary will of the trustees.

***459** ****501** Lois G. Forer, Deputy Atty. Gen., Anne X. Alpern, Atty. Gen., for appellant.

Victor J. Roberts, High, Swartz, Childs & Roberts, Norristown, Benjamin O. Frick, Philadelphia, for appellees.

Before CHARLES ALVIN JONES, C. J., and BELL, MUSMANNO, BENJAMIN R. JONES, COHEN, BOK and EAGEN, JJ.

***460** MUSMANNO, Justice.

The Barnes Foundation in Montgomery County owns and possesses one of the extremely valuable art collections in the country. The paintings, numbering more than a thousand, include works by Renoir, Cezanne, Manet, Degas, Seurat, Rousseau, Picasso, Matisse, Soutine, Modigliani, Pascin, Demuth, Glackens, Rouault and Afro. Among the old masters are works by Giorgione, Titian, Tintoretto, Paolo Veronese, El Greco, Claude le Lorrain Chardin, Daumier, Delacroix, Courbert and Corot. The pecuniary value of this treasure ranges reputedly from twenty-five to one hundred million dollars.

Although the Barnes Foundation has been judicially recognized as an institution of public charity and, therefore, enjoys exemption from taxation, the public as such has been denied access to the gallery housing the canvases and other works of art. Because of that fact, the Attorney General of Pennsylvania filed on April 17, 1958, in the Court of Common Pleas of Montgomery County, a petition for citation calling upon the Barnes Foundation and its trustees to show cause why they should not unsheathe the canvases to the public in accordance with the terms of the indenture and agreement entered into between Albert C. Barnes, the donor, and the Barnes Foundation, the donee. The respondents made preliminary objections averring that the Petition failed to state a 'cognizable cause of action,' and that it did not specify 'in what manner or to what extent or by what improper acts of the respondents any members of the public have been denied access.'

The then Attorney General Thomas D. McBride filed a motion for discovery explaining that he did not include the information adverted to by the defendants because that information was in the exclusive possession***461** of the defendants and he accordingly requested the Court to direct the defendants to produce the books and records of the Foundation with the data needed to pursue the Commonwealth-initiated proceedings. On June 23, 1958, Judge Taxis of the Court of Common Pleas of Montgomery County signed an order allowing ****502** discovery by inspection. The defendants followed with a motion to vacate the order. The Court allowed this motion but, on January 21, 1959, overruled the preliminary objections and required the respondents to file responsive answer in twenty days. The respondents petitioned for a reargument which was allowed and then, finally, on May 7, 1959, the Court entered its definitive order rescinding its opinion of January 21, 1959, and sustaining the demurrer of the respondents. The Commonwealth, through now Attorney General Anne X. Alpern, who had succeeded Thomas D. McBride, appealed.

It is necessary here, with a few rapid strokes, to depict the background of this litigation. In 1922, Dr. Albert C. Barnes, a physician who had amassed a considerable fortune as the result of his compounding a chemical formula (argerol) which he kept secret and exploited by commercial manufacture and sale to the public, decided to offer to mankind a good portion of his riches, specifically his unique art collection and an arboretum as an--

'experiment to determine how much practical good to the public of all classes and stations of life, may be accomplished by means of the plans and principles learned by the Donor from a life-long study of the science of psychology as applied to education and aesthetics.'

It was his expressed desire that, after the death of himself and his wife--

'the plain people, that is, men and women who gain their livelihood by daily toil in shops, factories, schools, stores and similar places, shall have free access to the art gallery and the arboretum upon ***462** those days when the gallery and arboretum are to be open to the public * * *'

A corporation was duly organized under the laws of Pennsylvania to receive and administer the estate, works and property to be conveyed to it by Dr. Barnes. This corporation became known as the Barnes Foundation. On December 6, 1922, Dr. Barnes, by deed of trust, transferred to the Barnes Foundation (hereinafter to be referred to as the Foundation) his art collection, house, property and the grounds known as the Lapsley Arboretum in Montgomery County together with certain sums of money represented in 900 shares of the common capital stock of A. C. Barnes Company, a corporation of Pennsylvania. By medium of an indenture, which eventually embraced 39 paragraphs, a code of procedure was formulated for the maintenance and operation of the Barnes trust.

In October, 1929, the Foundation purchased for $50,000 a property in Philadelphia. When city and school taxes were levied on this property, the Foundation claimed exemption on the basis that the entire Foundation was a public charity. The resulting litigation reached this Court which, through Justice Kephart, declared:

'We have carefully examined the record and find that there was evidence to support the findings that appellee, [the Foundation] an educational institution, was a purely public charity. The foundation had its origin in a charitable impulse of its founder. It was the result of the generosity of Dr. Albert C. Barnes: all its real and personal property, including its endowment, was donated by him.' Barnes Foundation v. Keely, 314 Pa. 112, 116, 171 A. 267, 268.

Although the Foundation thus assumed indisputable status as tax-exempt public charity, its officers and trustees have consistently refused to the public admission to its art gallery. A painting has no value except the pleasure it imparts to the person who views it. A ***463** work of art entombed beyond every conceivable hope of exhumation would be as valueless as one completely consumed by fire. Thus, if the paintings here involved may not be seen, they may as well as exist. The respondents argue that the paintings may be seen, but only privately. However, that is not what Dr. Barnes contemplated and it certainly***503** is not what the tax authorities intended. If the Barnes art gallery is to be open only to a selected restricted few, it is not a public institution, and if it is not a public institution, the Foundation is not entitled to tax exemption as a public charity. This proposition is incontestable.

In the case of Delaware County Institute of Science v. Delaware County, 94 Pa. 163, the Institute sought exemption from taxation on the basis that its object was to--

'promote the diffusion of general and scientific knowledge among its members and the community at large; and the establishment and maintenance of a library, an historical record and museum.'

The evidence revealed that the community at large was not allowed to use the library or to make use of its facilities, these facilities being restricted to the Institute's members. The Court of Common Pleas of Delaware County held:

'The test of all public charities is their extensiveness. If the general benefits of a charity are subject to private preferences or conditions by which a large proportion of the general public will probably be excluded, it is a private charity, and therefore, not within the protection of the Act of Assembly [on tax exemption].

This Court affirmed the denial of tax exemption, declaring per curiam:

'The plaintiff in error, so far from being a purely public charity, is not a public charity at all. It is a private corporation for the benefit of its members, as much so as any other beneficial or literary society. It might permit others than members to use the library, but nobody could call it to account for refusing such permission.'

This Court also approved***464** of the statement in the case that:

'An essential element of a public charity is the right of public visitation for the correction of abuses and the enforcement of the founder's will * * *'

In the case at bar, the Attorney General, as *parens patriae*, seeks to ascertain why the Foundation as a public charity has closed the doors of its art gallery to the public. The respondents argue that the Foundation never intended its art gallery to be a public gallery, that the principal intendment of the trust indenture was to establish an educational institution, and that the art gallery is merely incidental to teaching. The Court of Montgomery County stated that--

'a careful reading of the indenture compels the conclusion that the Settlor was primarily concerned with establishing an educational institution.'

But there is nothing in the indenture which rivet-proofs that assertion. Dr. Barnes was, of course, concerned with education. Even enjoying the contents of an art gallery is a matter of education,[FN1] but Dr. Barnes did not declare his trust estate to be exclusive a school.

> FN1. The University of Pennsylvania which, of course, is strictly an educational institution, maintains a museum in connection with its educational courses, but the museum is open to the public every day from Tuesday through Saturday from 10 a. m. to 5 p. m., and on Sundays from 1 to 5 p. m.

In Paragraph 34 of the indenture, Dr. Barnes specifically stated that--

'The Barnes Foundation is to be maintained perpetually for education in the appreciation of the fine arts and not as a school for instruction in painting, drawing, sculptoring or any other branch of art or craftsmanship.'

Although the Foundation has been in Court at least three times,[FN2] it is not yet too ****504** clear just what constitutes the curriculum of the educational courses in the Foundation.***465** At the oral argument, counsel for the Foundation did not know or would not say how many pupils were enrolled at the Foundation. He contended himself with saying merely that the school was 'full.' The Attorney General of this Commonwealth not only has the authority but the duty to ascertain what are the facts surrounding the school in the Foundation to determine if it should be insulated from the shock of taxation which hits all other citizens and enterprises in the land. Every dollar a public institution saves in tax levy becomes an extra stone in the heavy sack the Commonwealth piles on every taxpayer's back.

> FN2. Barnes Foundation v. Keely, 314 Pa. 112, 171 A. 267; Wiegand v. Barnes Foundation, 374 Pa. 149, 97 A.2d 81, and the present litigation.

The indenture states that the Foundation has for its corporate purpose the 'promotion of the advancement of learning and the appreciation of the fine arts.' If, as the respondents contend, the Foundation was dedicated to education alone, the corporate purpose would probably have been expressed as 'the promotion of the advancement of learning *in* the appreciation of the fine arts.' However, the connection between the two phrases is a conjunction and not a preposition. Thus, the donor intended as the corporate purpose of the Foundation two objectives: education *and* appreciation of fine arts.

A reading of the indenture will disclose that it contains many references to art gallery and works of art without mentioning education or school. For instance, we find--

In Paragraph 7: 'During the life of Donor he shall be director of the Art Gallery and in charge of pictures, but without salary.'

In Paragraph 12: 'Donor is now making plans and executing contracts for the construction of a gallery and adjacent buildings * * *'

In Paragraph 13: 'No part or portion of the art gallery nor of the administration buildings adjacent thereto to be occupied by Donor * * * shall be occupied as for a residence * * *'

In Paragraph 23: 'In connection with the Art Gallery *and* the art educational***466** work of Donee * * *' (Emphasis supplied.)

It will be noted here that the educational work is regarded as something additional to the duties exacted of the art director.

In paragraph 30, referring to the hours in the weekdays when the gallery is to be open to the public, we find:

'This restriction shall apply to the gallery and building connected therewith only, and not to the Arboretum.'

It is true that this is a provision applying to the use of the gallery after the death of the donor and his wife, but it demonstrates that, in the entire trust administration, the art gallery is to be a thing apart.

The respondents argue that they are not required to give the public any access to the art gallery. This statement is flatly made in their brief, as follows:

'It is the appellee's position that by the terms of the trust indenture the trustees of the Barnes Foundation are given express authority (paragraph 29 of the indenture, R 26a-27a) to deny to the public access to the art gallery.'

The brief states further that the students of the Foundation should have the art gallery at their disposal, 'unhampered by interference from the public.' This is an anomalous observation to make concerning a public institution exempt from public taxation.

The first sentence of Paragraph 5 of the indenture states specifically:

'During the life of Donor and his said wife the art gallery of Donee shall only be open to the public on not more than two days in each week, except during July, August and September of ****505** each year, and only upon cards of admission issued by or under the direction of the Board of Trustees of Donee.'

There is nothing in this sentence or in the sentences which follow in Paragraph 29 which empower the Board of Trustees to exclude the public entirely. The mandate is that the gallery shall be open to the public on ***467** not more than two days of each week. Conceivably, under this provision, the visiting, for an explained and justifiable reason, could be limited to but one day or only part of a day a week, but the public cannot be forced to face sealed doors all the time. To deny the people any opportunity to look into the gallery is to make a mockery of the entire indenture with its emphasis

on democratic principles and its absolute prohibition of special privilage.

Paragraph 33 specifically declares:

'The purpose of this gift is democratic and educational in the true meaning of those words, and *special privileges are forbidden.*' Emphasis supplied.)

[1][2] And now we come to the crux of the litigation. It cannot be questioned that Attorney General Alpern, by virtue of the powers of her office, is authorized to inquire into the status, activities and functioning of public charities. This authority was recognized at common law:

'It is the duty of the King as *parens patriae* to protect property devoted to charitable uses; and that duty is executed by the officer who represents the Crown for all forensic purposes. On this foundation rests the right of the Attorney General in such cases to obtain by information the interposition of the court of equity.' Attorney General v. Brown, 1 Swanst. 291.

This Court has affirmed the common law in holding that where litigation involves charitable trusts, the Attorney General is obliged to participate as a necessary party.

In re Garrison's Estate, 391 Pa. 234, 137 A.2d 321. It would be an inadequate form of government which would allow organizations to declare themselves charitable trusts without requiring them to submit to supervision and inspection. Without such supervision and control, trustees of alleged public charities could engage in business for profit. It is because of the temptation which such lack of supervision would offer, that a Congressional committee observed:

'Foundations should ***468** not only operate in a goldfish bowl, they should operate with glass pockets.' H.R. Report 2514, 82d Congress.

[3][4][5] Thus, in carrying out the prescribed duties of the Attorney General's office, the petition for citation came into being and directly charged that:

'In violation of the Indenture referred to in paragraph 2 hereof the defendants have failed to operate and maintain an art gallery for the exhibition of the works of art and access to the buildings of The Barnes Foundation housing the art collection is denied to the public.'

The lower Court held that the petition did not allege a cause of action. But what more formidable cause of action could exist than the assertion that the trustees of a charitable trust are failing to carry out the mandates of the indenture under which they operate? The respondents, by demurrer, concede the truth of the averments in the petition. By this admission they admit a violation of the indenture because no matter how the indenture is interpreted, it is indisputably apparent that in some form or another, and at some time or another, the public is to be admitted to the art gallery. The petition unequivocally declares that access to the gallery by the public is denied. This statement is absolute and carries no limitations: The defendants have sealed off the art gallery to the public. In doing this, they indifferently or arbitrarily choose to close their eyes to the ****506** edict of Paragraph 29. They may argue that there must be limitations in the public's frequenting of the gallery, but they cannot successfully argue that the public can be shut out as if it were a contagion.

In Barnes Foundation v. Keely, 314 Pa. 112, 117, 171 A. 267, 268, this Court specifically said:

'Its [Foundation's] property located in Montgomery county is open to the public which is admitted thereto in accordance with the provisions of the by-laws, rules, and regulations of the foundation.'

The lower Court seeks to use the Keely ***469** case in supporting its decision dismissing the Commonwealth's petition by quoting from that decision as follows:

'* * * the unrestricted admission of the public

would be as detrimental to the works of the Barnes Foundation as it would be to the work carried on in the laboratories and clinics of the University of Pennsylvania.'

But this limitation does not and cannot wipe out this Court's statement that the Foundation's property 'is open to the public.' Naturally, the general public cannot use the gallery at will. The general public cannot even use a public library at will. Orderliness requires that there be hours of opening and closing of libraries, that hours or days be set aside for rest of personnel, for taking inventory, for cleaning and repairing the property and facilities. But no library would be considered public if the public could be admitted only upon the caprice, whim, and arbitrary will of its administrators.

Similarly the trustees of the Barnes Foundation may not exclude the public from the art gallery without offering explanation as to why it ignores the expressed intention of Dr. Barnes that the gallery shall, within certain restrictions, be open to the public. The defendants will be required to answer the petition for citation and suitable discovery shall be allowed the Attorney General to the end that the rights of the public in the indenture, and in accordance with public policy, may be protected and assured.

The order of the Court below is reversed and the petition is reinstated with directions that the defendants file an answer within 20 days; the costs to abide the event.

Pa. 1960
Com. v. Barnes Foundation
398 Pa. 458, 159 A.2d 500

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672 A.2d 1364
449 Pa.Super. 81, 672 A.2d 1364, 108 Ed. Law Rep. 294
(Cite as: 449 Pa.Super. 81, 672 A.2d 1364)

H

Superior Court of Pennsylvania.
In re the **BARNES FOUNDATION**, a Corporation.
Appeal of **BARNES FOUNDATION** and its Trustees ("**Foundation**").

Argued May 16, 1995.
Filed March 15, 1996.

Trustees of foundation created by trust sought to extend off-site exhibition of selected artworks following court approval of one-time exhibition, despite trust agreement provision prohibiting loans of artworks. The Court of Common Pleas, Montgomery County, Orphans Division, No. 58, 788,Ott, J., denied permission to extend exhibition. Appeal was taken. The Superior Court issued per curiam opinion authorizing exhibition. Therefore, the Superior Court, No. 1641 Philadelphia 1995, Tamilia, J., held that: (1) foundation students lacked standing on appeal, and (2) trial court abused its discretion and violated law of the case by concluding that extension of tour was impermissible.

Per curiam order reaffirmed.

West Headnotes

[1] Action 13 ⚿13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons Entitled to Sue. Most Cited Cases

Students who opposed off-site exhibition of foundation's artworks lacked standing in litigation involving expansion of court-approved, one-time tour of foundation's artworks, where only person who had represented students in related litigation had been expelled and students' appointment to board of trustees ad litem was purely for limited purpose of providing trial court with facts about educational process and curriculum of foundation's art department from perspective of present and future students, and did not extend to issues on appeal.

[2] Action 13 ⚿13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons Entitled to Sue. Most Cited Cases

Matter of standing is jurisdictional and may not be waived by court in refusing to decide case on technical basis, but electing to proceed on merits.

[3] Appeal and Error 30 ⚿174

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k174 k. Capacity or Right to Sue or Defend. Most Cited Cases

Appellate court was required to dispose of issue of students' standing to challenge foundation trustees' off-site exhibition of foundation's artworks, even though trial court refused to decide case on that basis, given trustees' objection to trial court's disposition, which preserved issue on the record.

[4] Charities 75 ⚿37(1)

75 Charities
75II Construction, Administration, and Enforcement
75k37 Application of Doctrine of Cy Pres
75k37(1) k. Nature and Requisites in General. Most Cited Cases

When two purposes of trust become conflicted and dominant intent of trust to preserve institution created by trust becomes imperiled, some provisions of trust must give way to dominant purpose if this can be done reasonably.

[5] Charities 75 ⚿37(1)

75 Charities
75II Construction, Administration, and Enforcement
75k37 Application of Doctrine of Cy Pres
75k37(1) k. Nature and Requisites in General. Most Cited Cases

Role of court, when two purposes of trust become conflicted and dominant intent of trust becomes imperiled, is to look back to mind of settlor of trust to determine what he would have done when faced with conditions that were unanticipated at time of trust's creation and nearly as possible to fulfill intention of settlor.

|6| Charities 75 ⚖37(8)

75 Charities
75II Construction, Administration, and Enforcement
75k37 Application of Doctrine of Cy Pres
75k37(8) k. Manner of Application. Most Cited Cases

Courts 106 ⚖99(6)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(6) k. Other Particular Matters, Rulings Relating To. Most Cited Cases

Extension of court-approved, one-time tour of artworks owned by foundation created by trust to include additional venue, which would generate approximately $2.5 million and would occur during period that foundation's renovations would preclude display of artworks at its facility, was warranted, given prior decrees authorizing tour during renovations, based on need to generate revenue for renovations, in reconciling conflict in trust agreement that mandated that foundation's buildings be maintained but prohibited loans of foundation's artworks; trial court abused its discretion and violated law of case by denying extension based on determination that costs of renovation had been met, particularly when prior decrees provided that excess funds generated by tour could be retained in special account for future restoration costs. 20 Pa.C.S.A. § 6110(a).

****1365 *83** Bruce W. Kauffman,Sheryl L. Auerbach, and Lynn R. Rauch, Philadelphia, for appellant.

Arthur L. Jenkins, Jr., Norristown, for Students of the Barnes Foundation, participating party.

Lawrence Barth, Deputy Attorney General, Philadelphia, for the Commonwealth, participating party.

J. Brooke Aker, Norristown, for Friends of the Barnes Foundation, participating party.

Carol S. Buechner, Philadelphia, for Alfred A. Knopf, Inc., participating party.

Before ROWLEY, President Judge FN*, TAMILIA and SAYLOR, JJ.

FN* Former President Judge Rowley participated in the oral argument held in this matter and joined in the Judgment Order entered on May 17, 1995; however, due to his subsequent retirement from the court he did not participate in this opinion.

TAMILIA, Judge.

This Opinion follows our Judgment Order Per Curiam of May 17, 1995, which authorized the Barnes Foundation Trustees to permit off-site exhibition of selected works of art owned by the Barnes Foundation. Allocatur to the Supreme Court was requested following our May 17th Order and was denied on May 26, 1995. *In re Barnes Foundation*, 541 Pa. 649, 664 A.2d 539 (1995).

***84** [1][2][3] While the *Barnes Foundation* appeal at No. 00794 Philadelphia, 1994, was held to

be moot in this Court's Order of March 8, 1995, [FN1] and in *In re The Barnes Foundation,* 443 Pa.Super. 369, 661 A.2d 889 (1995) (*Barnes I*), the emergency appeal and hearing at No. 01641 Philadelphia, 1995, was timely and brings us to a basic consideration of the issues posed by Friends of Barnes (hereinafter Friends) and of Barnes Students (hereinafter Students). Considering the issue raised by the Trustees as to the role of the Students in this appeal, as stated in *Barnes I* at No. 02605 Philadelphia, 1994, the ****1366** students have no standing. This is so for either of two reasons. At the time of *Barnes I,* the Students, represented solely by Nicholas Tinari, had no standing as Tinari was not a student at the time, having been expelled. This Court also held in *Barnes I* at No. 02085 Philadelphia, 1993, that mandamus did not lie for Tinari's reinstatement, and as a matter of contract, no breach of contract was alleged or proven for termination of the student status. The grounds for termination were found to be on-going, vexatious and substantial and neither the trial court nor this Court would intervene in a decision by the trustees to suspend under those facts. Even though reinstatement might have occurred prior to the instant appeal, the Students have no standing on the issues of this case because their appointment to the Board of Trustees ad litem by Judge Stefan was purely for the limited purpose to provide the court with facts about the educational process and curriculum of the Foundation's Art Department from the perspective of current and future students. Unfortunately, the Students have used this wedge to engage in what must be described as frivolous and harassing conduct which has done nothing but run up attorneys' fees for the Foundation. (Slip Op., Stefan, J., 8/9/91.) Based upon the ruling of Judge Stefan and this Court on appeal, the trial court erred in refusing to grant preliminary objection as to "student" participation. The matter of standing is jurisdictional and may not be waived by the court refusing to decide the case on a technical basis (Judge Ott, ***85** T.T., 5/10/95, p. 6), but electing to proceed on the merits. The Trustees objected to that disposition, preserving the issue on the record (T.T. at 8), thereby requiring our disposition of that issue on appeal.

> FN1. Although the Opinion in *In re The Barnes Foundation,* 443 Pa.Super. 369, 661 A.2d 889 (1995), indicates the Order was filed on March 8, 1995, the Order as filed by the prothonotary is dated March 10, 1995.

As to the standing of the Friends of Barnes Foundation, the Foundation likewise raised an issue as to their standing which was also ignored by the court in its dismissal of all preliminary objections. This issue was likewise preserved for appeal by the Foundation. Prior to ruling on that issue, the case was considered on the merits by the panel of this Court as it appeared to be the propitious means of expediting an emergency appeal when the record was not available to determine the standing issue as to the "Friends." This Opinion will focus on the merits which required resolution by the trial court as part of a continuum of the preceding cases and the several petitions to permit loans and touring of the art considered by Judge Stefan. The trial court proceeded to hear the request of the trustees to extend the venue, permitting the Students and Friends to contest this action. Nothing in the record subsequently forwarded to this Court established that the Friends have standing. Having issued our Per Curiam Order on the assumption that they did have standing, we will proceed to support that Order on the merits, as though they did have standing. Only in the Procedural Background Statement of the Adjudication and Decree of February 1, 1994 is there a reference to Friends of Barnes in conjunction with the Violette de Mazia Trust as co-protagonists requesting denial of the petition by the trustee. It would appear the de Mazia Trust has standing and as a "Friend of Barnes" it permits this matter to go forward on the merits. Treating these cases as a continuum, there is a basis for according standing to the Friends of Barnes, as including the de Mazia Trust, Violette de Mazia was the long-time assistant, co-author and traveling companion of Dr. Barnes, who was given special status in the Barnes

indenture. Her trust, following her decease, was designed to continue the support and interest in the Foundation she manifested during her life and pursuant to the Foundation indenture.

***86** As to Friends of Barnes, we have held in the previously entered Per Curiam Order of May 17, 1995, following the emergency argument conducted by conference call before a panel of this Court, that the reasoning of Judge Stefan, as applied to new facts, controls in this case with the same opportunities (gain without harm) central to Judge Stefan's decision. Judge Ott, who assumed jurisdiction upon the death of Judge Stefan, deviated from Judge Stefan's analysis, which is the law of the case, and withdrew to a technical application of the trust agreement which would have unnecessarily denied the Foundation the ability to enlarge its endowment and ****1367** protect what could be an inevitable defeasance of the trust based upon a corpus which fails to earn sufficient income to fulfill the dominant intent of the trust to preserve the art works intact and to teach students.

[4][5] The 1922 trust agreement provided for no loans of the art and preservation of the art in the building created for that purpose and to educate students. When two purposes of a trust become conflicted and the dominant intent of the trust to preserve the institution created by the trust becomes imperiled, some provisions of the trust, such as a no-loan policy, must give way to the dominant purpose if this can be done reasonably. *In re Mears Estate*, 299 Pa. 217, 149 A. 157 (1930) (Equity will prevent failure of definite charity by employing other means, where necessary, to carry out substantial intention of donor). The role of the Court is to look back to the mind of the settlor of the trust, to determine what he would have done when faced with conditions which were unanticipated at the time of the creation of the trust and nearly as possible to fulfill the intention of the conveyor. *In re Bodine's Trust*, 429 Pa. 260, 239 A.2d 315 (1968). Blind adherence to the terms of the trust agreement could result in the trust losing its public non-tax status and financially defaulting to the point the art works sought to be preserved in the Barnes Foundation would be sold off or assigned to some other institution which would not respect the wishes of Dr. Barnes and might in fact be the very institutions he had strongly opposed during his lifetime. The Friends of Barnes ***87** and the Students espouse a principle of blind adherence to the trust agreement despite clearly inevitable destruction of the Foundation and total denial of an inherent public interest in preserving the trust and its tax exempt status. The Barnes Foundation is no stranger to litigation and early on it was threatened with oblivion for failure of the settlor to accommodate the public interest which was essential to tax exempt status. Through intervention by the Commonwealth of Pennsylvania, this crisis was resolved. *See Barnes Foundation v. Keely*, 314 Pa. 112, 171 A. 267 (1934). The administrative scheme adopted by the settlor was approved at that time, but it did not acquire a mantel of impenetrable insulation incapable of being adjusted to a change of cultural, social and economic factors.

The administrative scheme provided two conditions which became the source of internal tension because of changing conditions, inflationary pressures, unanticipated additional expenses and the passage of time. The original trustees, pursuant to the trust indenture and because of close identity with Dr. Barnes and his philosophy, were extremely conservative and due to limitations on investments, were unable to expand the endowment in relation to the increased costs and needs of the Foundation over the many years of their administration.

[6] Judge Ott, in disregarding the approach taken by Judge Stefan who recognized the need to bring the settlor's intent into equilibrium and thereby assure the continuity of the Foundation, applied the technical wording of the agreement to the detriment of the settlor's intent to perpetuate the art collected by the Barnes Foundation for the distant future generations of students and the public. This was an abuse of discretion and violated the law of

the case established by the two decrees entered by Judge Stefan which were sustained on appeal.

A careful review of the history of this case, involving prior litigation leading to the loan of paintings to various venues, establishes the following, pursuant to the petition of the ***88** Trustees to exhibit art at an additional premises, a European Museum:

1. On July 21, 1992, [the Court of Common Pleas, Orphans' Court Division,] issued an Adjudication and Decree permitting a one-time exhibition tour of selected works of art "between April, 1993 and September, 1995, at the National Gallery of Art in Washington, D.C., and at appropriate International and National Art Institutions, in accordance with the testimony produced at time of hearings".

2. On February 21, 1994, [the Court of Common Pleas, Orphans' Court Division,] issued an Adjudication and Decree Sur Petition of Richard H. Glanton, Esquire, et al., for Approval of Exhibition of Works of Art at the Kimbell Art Museum and the Art Gallery of Ontario.

****1368** 3. While the exhibition which [was] underway at the Philadelphia Museum of Art [and] scheduled to close on April 23, 1995, renovations at the [Barnes] Foundation [was not to be completed when originally anticipated]. The reinstallation of the collection [which was anticipated to begin in April, was put off until] October 1995 and [was to] be completed, with the planned official reopening scheduled for October 14, 1995.

4. Pursuant to their fiduciary obligations, the Trustees [petitioned the Court alleging] that the Foundation [was] presented with an opportunity to receive substantial additional funds for exhibition of works of art at an additional premier art museum in Europe.

5. Exhibition at [that] museum, which would take place on or about June 1, 1995 through September 30, 1995, would not delay completion of the renovations or reopening of the Founda- tion.

6. [That] museum is a premier facility with personnel qualified to safely handle, exhibit and secure the Foundation's art in a suitable environment.

7. Exhibition of works of art at [that] facility, ... would be supervised and regularly checked by curators and security guards, [thereby] safeguard[ing] the works and pro[moting] ***89** education and the appreciation of the fine arts, while the renovations at the Foundation are being completed.

Pursuant to the petition to extend the tour, Judge Ott took testimony from relevant individuals concerning the tour, its conduct, protection benefit, and detriment to the Barnes Foundation on May 10, 1995.

At the outset, Judge Ott stated he would deal with a motion to quash within the framework of the procedure established by Judge Stefan (T.T., 5/10/95, p. 9). By implication, Judge Ott adopted the procedural if not substantive scheme established by Judge Stefan. Despite considerable antagonism and heated personal interchange between counsel and witnesses, the essential facts were elicited which permit a clear application of law to an appropriate disposition.

Our careful review of the record supports the findings of fact by the trial court as detailed below.

An all day hearing convened on May 10, 1995. At the outset, the Court announced it was dismissing all the preliminary objections. Thereafter, testimony was produced in support of the petition.

In addition to the findings of facts set forth in the Court's Adjudications of July 21, 1992 and February 1, 1994, the Court makes the following:

FINDINGS OF FACT

1. The Trustees seek approval to add an additional venue, viz., the Haus der Kunst in Munich, Germany.

2. The Haus der Kunst is a premier art facility qualified to handle, exhibit and secure the Foundation's art in a suitable environment.

3. The proposed exhibit would include between eighty and eighty-three of the paintings included in the previous venues but would not include *The Models* by Georges Seurat or *La Danse* by Henri Matisse.

4. Negotiations surrounding the proposed exhibition began in February of 1995.

***90** 5. Although a written draft of an agreement containing all pertinent terms has passed between the Trustees and the Haus der Kunst, no contract has been executed.

6. The proposed addition venue would produce $2,250,000 in revenue for the Foundation and would provide insurance coverage for the exhibited works of art.

7. The Haus der Kunst would be responsible for expenses attendant to the exhibition.

8. The Foundation proposes that the exhibition at the Haus der Kunst will take place from June 15, 1995, through October 15, 1995, with the exhibited paintings being returned to the Foundation by the end of October 1995.

9. Ideally, the Haus der Kunst would require six months advance notice of the exhibit's availability in order to make all appropriate arrangements; in all events, a ****1369** decision as to the proposed exhibition must be made immediately.

10. The exhibition paintings are presently stored in the administration building of the Foundation.

11. The renovations to the Foundation are seventy percent (70%) completed and are expected to be finished by the end of August.

12. Reinstallation of the Foundation's art is expected to commence in late August or early September 1995.

13. The anticipated final cost of the renovations has increased to $11,100,000.

14. Exhibitions of the selected paintings at the six completed tour venues has generated revenues for the Foundation of approximately $14,600,000.

15. The Office of the Attorney General as *parens patriae* for charities approves the idea of the tour to Germany, subject to certain conditions relating to the paintings' suitability for travel and the use of the tour's proceeds.

16. The Foundation has not engaged in significant development efforts beyond those related to the one-time tour authorized by this Court.

We take exception to the finding by the trial court that the Students have standing for the reasons given above, and the ***91** court's dismissal of the Trustees' preliminary objections as to the Students appears to be unsupported.

Additionally, the court ignored perhaps the most significant fact established of record, that the paintings would not be shown to the public nor available to the Students until late October, 1995, because they would remain in storage until that time, whereas, with approval of the Haus de-Kunst showing, they would be earning 2.5 million dollars (T.T., Glanton, pp. 84-85). The September opening would be limited to classes probably in the administration building rather than the galleries, until the pictures were hung (T.T. at 85).

Judge Ott, in his adjudication and decree, recognized the efficacy of Judge Stefan's reasoning in his two adjudications, the first in 1992 authorizing

"a single tour" limited to the period of any renovations in order to raise revenues to cover repairs. Judge Stefan had found an internal and irreconcilable conflict in the trust indenture between paragraphs 16 and 30. Paragraph 16 provides:

> 16. All of the buildings and improvements of Donee shall at all times be kept in first class order and repair.

Paragraph 30 provides

> 30. It shall be incumbent upon the Board of Trustees of Donee to make such rules and regulations that will protect the works of art in the gallery and the trees, shrubs and plants constituting the said arborater.

Judge Stefan, in Finding of Fact # 55, stated:

> 55. Without the tour, the Foundation, which is operating at a deficit, lacks the financial resources to pay for the renovations necessary to maintain the Foundation facilities and collection. [N.T. 5/21/, pp. 21, 51, 111, 126, 132, 133, 254, 258; N.T. 6/9; Ex. B-8]

Judge Stefan, in Discussion of the Decree dated July 21, 1992, stated:

> It is difficult to believe that a man of Dr. Barnes' erudition would not have anticipated that the day would come when the structure he had created to house his collection would require such fundamental structural repairs and renovations***92** as would make impossible the uninterrupted display of the collection as mandated by the Indenture. If such were his thought and desire, then history should tell us that an inevitable conflict with reality eventually would occur. The testimony is overwhelming that, after the passage of many decades, a basic overhaul of the Foundation buildings and systems is required if the very reason for their existence-housing and protection of the collection-is not to be frustrated by the ravages of an unfriendly environment.

Following this observation, Judge Stefan went on to find:

> A serendipitous circumstance has presented itself to the Foundation: a singular opportunity to restore, protect, and display a portion of the collection, while procuring ****1370** a substantial sum of moneys to be applied to the required renovation project. The testimony is clear that this opportunity is indeed unique; and, if lost, might not come again. The limitation on investments imposed by Dr. Barnes has not well-served the Foundation; rather, and ironically, this is a factor which now militates in favor of seizing the opportunity at hand.
>
> Decree at p. 14.

In so finding, the Court held there was no need to amend the Indenture and that approval of a *single* tour *limited to the period of renovations* can and should be accomplished by court Order pursuant to 20 Pa.C.S. § 6110(a), Administration of charitable interests,[FN2] upon the express conditions that following***93** the completion of the renovations, the paintings be returned to their places on the walls as directed by Dr. Barnes, and the provisions of the Indenture reinstated in full. (Adjudication and Decree, 7/21/92, pp. 14-15.)

FN2. Section 6110(a) provides as follows:

> **(a) General rule.**-Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed outright or in a testamentary or inter vivos trust shall be or become indefinite or impossible or impractical of fulfillment, or if it shall not have been carried out for want of a trustee or because of the failure of a trustee to designate such purpose, the court may, on application of the trustee or of any interested person or of the Attorney General, after proof of notice to the Attorney General when he is not the petitioner, order an administration or distribution of the interest for a charitable purpose in a

> manner as nearly as possible to fulfill the intention of the conveyor, whether his charitable intent be general or specific.

This is the heart of the authorization for permitting paintings of the Barnes Foundation to be placed on tour. When the Trustees again petitioned the court (Stefan, J.) to extend the tour, the court found it expedient to do so because the cost of renovation had escalated, the amount to cover those costs could be recovered by extending the tour to additional venues, the original parameters would still be operative, that is a *single tour during the period of restoration,* and the need to cover the restoration expenses. Thus in the Adjudication and Decree of February 1, 1994, the trial court simply extended an established policy to cover new and fortuitous circumstances to achieve the already approved result. In addition, the likelihood of harm to the paintings would be de minimus as the best professional safeguards were employed to insure their safety and the number of paintings exhibited was limited to 83 out of the total collection in excess of 2,000.

This brings us to the petition in the present case. What is different about the facts of this case is that the money to be obtained from extending the tour and venue to Germany would be in excess of the amount that was needed for present restoration. However, the major operative fact is that the tour would take place during the period when restoration was still in process, and the mandate of the 1992 decree to have the paintings permanently returned to their places at the Barnes Foundation by completion of restoration of the buildings would still be met. The Order by Judge Stefan that the proceeds of the tours, and any excess over the amount needed for restoration, be retained in a special account for purposes of restoration present *and future,* and not to be used for operating expenses, is crucial and remains intact. While we are bound by Judge Ott's findings of fact absent gross abuse of discretion, we are not bound by his conclusions of law. We find he was in error in concluding that extension of the tour was impermissible because cost of restoration had been met, ***94** when an equally significant finding by Judge Stefan, which continues to be binding in this case, is that the tour may be conducted throughout the period of restoration when the paintings could not be displayed at the Barnes Foundation. To deny the additional venue in Germany, and the possibility of obtaining $2,500,000 additional funds for future restoration, while permitting the paintings to remain in storage, would be unconscionable. Seventy years elapsed from the time of the Indenture and the establishment of the endowment for maintenance of the buildings and art work of the Foundation, during which there has been serious deterioration of the buildings and art work and greatly diminished value of the endowment. We cannot predict the future and a reserve of two or ****1371** three million dollars in the restoration account is small protection against future, probably escalating, costs of maintenance and restoration required by the trust indenture.

For the above reasons and because of the approval by the Attorney General of Pennsylvania, which represents the people of Pennsylvania, the Per Curiam Order by this Court entered May 17, 1995 is hereby reaffirmed.

Pa.Super.,1996.
In re Barnes Foundation
449 Pa.Super. 81, 672 A.2d 1364, 108 Ed. Law Rep. 294

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Superior Court of Pennsylvania.
In re the **BARNES FOUNDATION**, a corporation.
Appeal of **BARNES FOUNDATION** AND ITS TRUSTEES ("**FOUNDATION**"), Appellants.

Argued March 13, 1996.
Filed Sept. 12, 1996.

Charitable foundation that housed art collection petitioned to amend charitable trust to permit on-site fundraising functions, to permit increased public access, and to increase admission fees. The Court of Common Pleas, Montgomery County, No. 58-788,Stanley R. Ott, J., modified trust to enlarge number of days that art gallery was open and authorized increase in admission price. Appeal was taken. The Superior Court, No. 3231 Philadelphia 1995, Kelly, J., held that: (1) trust restrictions on social activities did not preclude on-site fundraising functions, and (2) foundation's undisputed testimony about its financial condition and approval of proposed changes by Attorney General did not establish changed circumstances required to deviate from trust restrictions on public access and admission fees.

Affirmed in part and reversed in part.

West Headnotes

[1] Charities 75 ⚿48(1)

75 Charities
75II Construction, Administration, and Enforcement
75k48 Administration and Disposition of Property or Funds
75k48(1) k. In General. Most Cited Cases

Charitable trust restriction, prohibiting charitable foundation from holding "any society functions commonly designated as receptions, tea parties, dinners, banquets, dances, musicales or similar affairs," in buildings where art collection was housed did not prohibit on-site fundraising activities; restriction prohibited private affairs for purpose of participants' enjoyment whereas purpose of fundraising functions is preservation and enrichment of assets which foundation protects.

[2] Appeal and Error 30 ⚿842(8)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(8) k. Review Where Evidence Consists of Documents. Most Cited Cases

Interpretation of words of trust or will is a question of law and scope of appellate review of that interpretation is not confined by decision of trial court.

[3] Trusts 390 ⚿112

390 Trusts
390II Construction and Operation
390II(A) In General
390k112 k. Application of General Rules of Construction. Most Cited Cases

When words of general meaning in trust are preceded by and connected with words of narrower impact, interpretation of words of general meaning is confined to species of things more specifically described.

[4] Charities 75 ⚿37(1)

75 Charities
75II Construction, Administration, and Enforcement
75k37 Application of Doctrine of Cy Pres
75k37(1) k. Nature and Requisites in General. Most Cited Cases

Probate court may direct or permit trustee of charitable trust to deviate only from administrative

provisions of trust. Restatement (Second) of Trusts § 381.

[5] Charities 75 ⚿37(1)

75 Charities
75II Construction, Administration, and Enforcement
75k37 Application of Doctrine of Cy Pres
75k37(1) k. Nature and Requisites in General. Most Cited Cases

Deviation from administrative provisions of charitable trust is generally permitted only upon showing of unforeseen and unforeseeable change in circumstances, and frustration of settlor's main objectives if strict obedience to settlor's directions were required. Restatement (Second) of Trusts § 381.

[6] Charities 75 ⚿37(1)

75 Charities
75II Construction, Administration, and Enforcement
75k37 Application of Doctrine of Cy Pres
75k37(1) k. Nature and Requisites in General. Most Cited Cases

Deviation from administrative provisions of charitable trust is permitted only when compliance with terms of trust would defeat or substantially impair accomplishment of trust purposes. Restatement (Second) of Trusts § 381.

[7] Charities 75 ⚿37(1)

75 Charities
75II Construction, Administration, and Enforcement
75k37 Application of Doctrine of Cy Pres
75k37(1) k. Nature and Requisites in General. Most Cited Cases

When deviation from administrative provisions of charitable trust is appropriate, court may direct or permit trustee to accomplish acts that are unauthorized or even forbidden by terms of trust. Restatement (Second) of Trusts § 381.

[8] Charities 75 ⚿50

75 Charities
75II Construction, Administration, and Enforcement
75k50 k. Actions for Administration or Enforcement. Most Cited Cases

Burden of proof is always on party seeking deviation from administrative provisions of charitable trust. Restatement (Second) of Trusts § 381.

[9] Charities 75 ⚿28

75 Charities
75I Creation, Existence and Validity
75k28 k. Modification or Revocation. Most Cited Cases

Fact that evidence presented by foundation that operated buildings where art collection was housed was unrefuted and that Attorney General did not object to proposed modifications did not demonstrate unforeseen change in circumstances that frustrated settlor's main objectives, precluding modification of charitable trust's administrative provisions to permit increased public access or ten-fold increase in admission fee. Restatement (Second) of Trusts § 381.

****895 *245** Bruce W. Kauffman, Philadelphia, for appellants.

Jeffrey A. Lutsky, Philadelphia, for De Mazia Trust, participating party.

***246** Before CAVANAUGH, KELLY and OLSZEWSKI, JJ.

KELLY, Judge:

This appeal is brought from an order of the Court of Common Pleas of Montgomery County granting in part and denying in part ****896** appellant's [FN1] petition to "amend and clarify" the Trust Indenture and Agreement of the late Albert C. Barnes. We affirm in part and reverse in part.

FN1. For ease of discussion, we consider The Barnes Foundation to be the appellant. We recognize, however, that the initiating petition was actually filed by the members of the Board of Trustees of the Barnes Foundation acting in their official capacity.

This case is the latest in a long line of cases related to the famous "Barnes Collection" of art work and to the institution which houses that collection. [FN2] Appellant initiated this proceeding by filing a petition in the Court of Common Pleas seeking modification or relief from the terms of the original indenture, and the judicial gloss that has been applied to it. [FN3] Appellant subsequently amended its petition and it was upon the second amended petition that the Court of Common Pleas took testimony and entered the order in question. In its "second amended petition," appellant sought relief from, or clarification of, the following terms of the indenture.

FN2. *See Commonwealth v. Barnes Foundation,* 398 Pa. 458, 159 A.2d 500 (1960); *Wiegand v. Barnes Foundation,* 374 Pa. 149, 97 A.2d 81 (1953); *Barnes Foundation v. Keely,* 314 Pa. 112, 171 A. 267 (1934); *In re Barnes Foundation; Estate of Violette De Mazia,* 453 Pa.Super. 436, 684A.2d 123 (No. 2620 and 2621 Philadelphia 1995; filed Sept./ 9/1996); *In re Barnes Foundation,* 449 Pa.Super. 81, 672 A.2d 1364 (1996); *In re Barnes Foundation, Appeal of Tinari,* 443 Pa.Super. 369, 661 A.2d 889 (1995).

FN3. In 1960, the Court of Common Pleas of Montgomery County approved a limited access program of two days per week. In 1963, the Court of Common Pleas authorized a public admission fee of $1.00. Finally in 1967, the Court of Common Pleas authorized an additional half day of public access. Thus, at the time of this hearing, the public access to the Barnes gallery was limited to two and one-half days per week and an admission charge of $1.00.

During Donor's lifetime moneys available for investment or reinvestment, whether principal or income, may be invested in any good securities whether legal investments for Trustees or not; but after Donor's death, such moneys may only be invested by Donee in such obligations of the United ***247** States of America, obligations of the several States of the United States and obligations of municipal corporation and districts in the several States of the United States which are legal investments for saving banks under the laws of the State of New York.

Paragraph 27 as amended January 29, 1941.

It is therefore stipulated by the Donor that at no time after the death of said Donor, shall there be held in any building or buildings any society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicales or similar affairs, whether such functions be given by officials, Trustees or employees of The Barnes Foundation or any other person or persons whatsoever, or whether such function be private or public. It is further stipulated that any citizen of the Commonwealth of Pennsylvania who shall present to the courts a petition for injunction based upon what reputable legal counsel consider is sufficient evidence that the above-mentioned stipulation has been violated, shall have his total legal expense paid by The Barnes Foundation.

Paragraph 33.

On Saturday of each week, except during the months of July and August of every year, the gallery and the arboretum shall be open to the public between the hours of 10:00 a.m. and 4:00 p.m. under such rules and regulations as the Board of Trustees of Donor may make.

Paragraph 30, as amended April 30, 1946.

The relief requested by appellants can be summarized as follows:

1. As to the investment restriction appellant sought permission to expand its investment option and invest funds pursuant to the Pennsylvania Probate and Fiduciaries Code. 20 Pa.C.S. § 7302 *et seq.*

2. As to the restriction on society functions appellant sought a clarification from the Court to the effect that functions which have as their purpose the raising of funds for the exclusive benefit of The Barnes Foundation not be ***248** considered "society functions," and consequently should be permitted.

****897** 3. As to the times or fees for public admission appellant sought permission to set these terms within its unfettered discretion.

See Second Amended Petition of The Barnes Foundation.

On September 13th and 14th of 1995, a hearing was held before the Honorable Stanley R. Ott of the Court of Common Pleas of Montgomery County. Appellant was permitted to put on evidence in support of its claims for relief. At the hearing, the representative of the Violette de Mazia Trust [FN4] appeared to object to the requested relief. Also, a representative of the Office of the Attorney General was approved as a representative in *parens patriae* of the citizens of the Commonwealth; the Attorney General did not object to the requested relief.

> FN4. The de Mazia Trust was accorded standing by virtue of its status as a "support organization" for the Barnes Foundation. In this appeal, appellant seeks to challenge that ruling by arguing in its reply brief that the de Mazia Trust lacks standing. We need not address this issue because neither Judge Ott's decree, nor the requirement of judicial approval for a deviation, depends upon the standing of the de Mazia Trust.

After the hearing, Judge Ott issued the following decree.

AND NOW, this 21st day of September, 1995, after hearing, it is hereby ORDERED, ADJUDGED and DECREED that Paragraph 27 of the trust and indenture executed by and between Dr. Alfred C. Barnes and the Barnes Foundation under date of December 6, 1922, as amended, is amended to read as follows:

27. During Donor's lifetime moneys available for investment or reinvestment, whether principal or income, may be invested in any good securities whether legal investments for Trustees or not; but after Donor's death, such moneys must be invested by Donee in accordance with the investment powers and privileges of fiduciaries under Chapter 73 of the PEF Code.

***249** Paragraph 10 of the Decree of this Court dated March 29, 1963, is hereby amended to read as follows:

10. The Board of Trustees shall be authorized to charge an admission fee not in excess of five dollars per person to all members of the general public (excepting students formally enrolled in the Foundation's classes and their instructors), who shall be admitted to the Art Gallery under the visiting program prescribed in the consent decree dated December 12, 1960, the decree dated February 24, 1967, and the decree dated September 18, 1995.

It is further DECREED that the Barnes Foundation's present program of admission of the public to its art gallery, pursuant to the consent decree of this Court entered December 12, 1960, and amended by Decree dated February 24, 1967, is modified and enlarged to authorize and direct the Trustees of the Barnes Foundation to open the art gallery one additional full day per week.

In all other aspects, the provisions of the trust indenture (including the prohibition against society functions at the Foundation) and of the previous decrees of this court shall remain unchanged and of full effect.

This is a final Decree not subject to the filing of exceptions.

Appellant now brings this appeal.

Appellant in its brief poses four issues; [FN5] however, these issues can be rephrased as **898 two: *i.e.*, whether the trial court *250 erred in refusing to grant the requested relief where the evidence of changed circumstances was uncontradicted and the relief requested was approved by the Attorney General; and whether the trial court erred in refusing to interpret the indenture language related to "society functions" in a manner which would permit functions for the raising of funds for the exclusive benefit of the Foundation.

FN5. Appellant's questions raised on appeal were phrased in the following manner:

1. Whether the Orphans' Court should have permitted proposed deviation from a 1922 Indenture to enable a charitable trust to fulfill its donor's dominant purpose where *uncontradicted* evidence of changed circumstances not anticipated by the donor confirmed the need to do so?

2. Whether the Orphans' Court committed errors of law, abused its discretion and capriciously disregarded *uncontradicted* evidence by refusing to grant relief, sought by the trustees and approved by the Attorney General as *parens patriae,* critically necessary to ensure the survival of a public charitable foundation?

3. After recognizing that deviation was necessary, did the Orphans' Court abuse its discretion by substituting its preferences for proposals by trustees of a public charitable foundation, approved by the Attorney General as *parens patriae,* where the only objections came from parties without standing who offered *no* testimony to support their opposition?

4. Did the Orphans' Court commit errors of law and abuse its discretion when it needlessly interpreted archaic language in a 1922 Indenture relating to "society" functions in the most restrictive manner possible and refused to clarify or change that language where *uncontradicted* evidence established the need to do so in order for a public charity to engage in significant fund raising efforts necessary for its day-to-day operations?

Appellant's Brief at 3.

[1] We will address the second issue first. By terms of the indenture, the following activities were prohibited: the holding of "any society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicales *or similar affairs.* " (Emphasis added). Appellant sought a judicial interpretation of this paragraph prior to proceeding with any on-site fund raising activities. As noted above, Judge Ott interpreted this paragraph as prohibiting such activities. We are compelled to disagree.

[2] Prior to examining this paragraph, we note that the interpretation of the words of a trust or will is a question of law and thus our scope of review is not confined by the decision of the trial court. *Dudash v. Dudash,* 313 Pa.Super. 547, 553, 460 A.2d 323, 326 (1983). Turning to the language itself, it is apparent that there is *no* explicit prohibition against on-site fund raising functions. Thus, Judge Ott's decision was necessarily based on a determination that fund raising functions fall within the category of "similar affairs."

[3] In interpreting the language of the paragraph, we are aided in our work by the construction principle known as "ejusdem generis," which provides that when words of general **251 meaning are preceded by, and connected with, words of narrower impact, the interpretation of the words of

general meaning will be confined to the species of things more specifically described. *See In re Beisgen's Estate*, 387 Pa. 425, 434, 128 A.2d 52, 56 (1956).[FN6]

> FN6. Though normally the principle is applied to statutory construction, 1 Pa.C.S.A. § 1903(b), it is applicable to the interpretation of wills and trusts as well. *See In re Beisgen's Estate*, 387 Pa. 425, 128 A.2d 52 (1956); *In re Donaldson's Estate*, 362 Pa. 357, 67 A.2d 88 (1949); *McCollum v. Braddock Trust Co.*, 330 Pa. 293, 198 A. 803 (1938).

Here, the language of Dr. Barnes' indenture described "receptions, tea parties, dinners, banquets, dances [and] musicales" as the specifically prohibited activities. Each of these activities is by its nature a private affair having as its purpose nothing more than the enjoyment of its participants. It is obvious that the late Dr. Barnes did not wish to have his school and gallery trivialized by the use of it as a mere rental hall for socialites. However, nothing in appellant's application or in the testimony in support of that application suggest that the Foundation seeks to violate that intention.

There is a decided difference between fund raising functions which have as their purpose the preservation and enrichment of the assets which the Foundation is charged with protecting, and a social affair which has as its purpose the inclusion of some and the exclusion of many. Thus, we are compelled to disagree with Judge Ott's interpretation of this paragraph to extend its proscription to fund raising activities. We wish to emphasize, however, that it is our interpretation that nothing in the paragraph prohibits fund raising functions which have as their sole purpose the raising of funds for the institution, and there is no need for a deviation or modification of the terms of this paragraph; and the paragraph will continue to include the safeguard from abuse which Dr. Barnes intended: *i.e.* that "any citizen of the Commonwealth [may] present to the court a petition for injunction based upon what reputable legal counsel consider is sufficient evidence that the above-mentioned stipulation has ****899** been violated." *See* Barnes Indenture, para. 30.

***252** [4] Turning to the second issue, in order for appellant to succeed in its request for relief, it was necessary to show that a deviation from the terms of the indenture was necessary.[FN7] The doctrine of deviation has been summarized in the Restatement (Second) of Trusts:

> FN7. It was pursuant to the principle of deviation that the Court of Common Pleas of Philadelphia rendered its approval of modifications to the famous Will of Stephen Girard. *See Girard Estate*, 27 Fiduc. 545 (1977). *See also Girard Will Case*, 386 Pa. 548, 127 A.2d 287 (1956), *reversed Pennsylvania v. Board of Trusts*, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957); *Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958); *Girard Clarification Petition*, 423 Pa. 297, 224 A.2d 761 (1966).

> [A] court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.
>
> Restatement (Second) of Trusts § 381 (1959). Those terms subject to deviation are limited to administrative provisions of the trust, *i.e.*, "the details of administration which the settlor has prescribed in order to secure the more important result of obtaining for the beneficiaries the advantages which the settlor stated he wished them to have." Bogert, The Law of Trust and Trustees § 561, at 27.

[5][6][7] In order to permit deviation from the administrative provisions of a trust, courts generally require the presence of two elements: "(1) unforeseen and unforeseeable change in circum-

stances, and (2) a frustration of the settlor's main objectives by this change, if strict obedience to the settlor directions were required." Bogert, *id.* at 230. It must be emphasized that the relief afforded by deviation is not based on mere convenience, but on the necessity of effecting a change in a situation where compliances with the terms of the trust "would defeat or substantially impair the accomplishment of the purposes of the trust." *Colin McK. Grant Home v. Medlock,* 292 S.C. 466, 473, 349 S.E.2d 655, 659 (1986). Under these circumstances, a Court may direct or permit a ***253** trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust. *See South Carolina National Bank v. Bonds,* 260 S.C. 327, 341, 195 S.E.2d 835, 842 (1973) (citing Restatement (Second) of Trusts § 381(d)).[FN8]

> FN8. The application of this doctrine to a variety of different factual situations has been discussed at length in the companion appeal to this case and we need not reproduce it here. *See In re Barnes Foundation; Estate of Violette de Mazia, supra.*

[8][9] The burden of proof is always on the party seeking the deviation because in the case of "an express trust, favorable presumptions arise, and the burden of proof is on the party disputing its validity or terms." 89 C.J.S. Trusts § 66, at 845. *See DiLucia v. Clemens,* 373 Pa.Super. 466, 472, 541 A.2d 765, 768 (1988). Appellant argues that it should have prevailed below because the evidence offered was "uncontradicted," and the proposed charges were "approved" by the Attorney General. Such an argument has no foundation in law. The mere fact that evidence is uncontradicted does not automatically imbue that evidence with sufficient weight to sustain one's burden of proof. *See In re Archer's Estate,* 363 Pa. 534, 536, 70 A.2d 857, 859 (1950); *Carl v. Kurtz,* 255 Pa.Super. 198, 205, 386 A.2d 577, 580 (1978). Additionally, although the law requires the participation of the Attorney General's Office in any proceeding to modify the terms of a charitable trust, *Little's Estate,* 403 Pa. 534, 170 A.2d 106 (1961), appellant cites no support for the proposition that the Court is bound by the position espoused by the Office of the Attorney General, and a reviewing judge must exercise his or her independent power of review. *See* 20 Pa.C.S.A. § 3323.

In this case, appellant fell woefully short of satisfying its burden in demonstrating the *necessity* for access of six days per week, or the tenfold increase in the admission fee.[FN9] At the hearing before Judge Ott, appellant ****900** failed to produce any reliable evidence concerning the true financial picture of the foundation: appellant did not produce any recognizable financial statements, bank statements, tax returns, budgets or ***254** audited reports. Instead, it offered one unsubscribed exhibit containing alleged expenses which, though received without objection, was nonetheless hearsay and of questionable weight. Appellant also introduced oral representations by its President which were very general in nature, and were not indicative of a true financial picture of the Foundation.[FN10]

> FN9. These specifics were not contained within the original petition but were testified to by the Foundation President.
>
> FN10. For instance, the President of the Foundation could not testify with assurance regarding the size of the Foundation's annual operating budget. The following exchange is indicative of the lack of specificity of the Foundation President's testimony:
>
> [COUNSEL FOR FRIENDS OF THE BARNES FOUNDATION]:
>
> Q. Mr. Glanton, did I understand you to say yesterday in your testimony that operating costs at the Barnes had run to 1.2 million dollars in 1993-excuse me, they had at some point in time reached 1.2 million dollars? Maybe I misunderstood the testimony.

[FOUNDATION PRESIDENT:]

A. I don't know if you did or not. Yes, I think it's-I'm just trying to-

Q. Is that what you anticipated or is that what has happened in the past?

A. We're looking at a budget of about one point-I would say 1.4, five million dollars.

THE COURT: This year or next year?

THE WITNESS: This year, I would have to really get the budget and-

THE COURT: When you say that, you are talking about a number for this year or is that what you believe the number is for-

THE WITNESS: Number for this year probably is 1.3, I would think. I'm not sure. But I need the budget.

THE COURT: You're on a fiscal calendar?

THE WITNESS: Fiscal.

THE COURT: So when you say 1.3 for this, are you talking July 1, '95, through June 30-

THE WITNESS: I'm sorry. We're on a calendar-year budget. It's 1.3 million dollars. That's rough.

THE COURT: For this year?

THE WITNESS: Yes, approximately. I mean, I got the budget, I believe, in my briefcase, which I can get and tell you what it is.

THE COURT: Okay.

THE WITNESS: I just don't want Mr. Aker to come back and say, oh, he said this and-

BY [COUNSEL FOR FRIENDS]:

Q. I'm trying to remember what you said yesterday. I thought you said 1.2 million yesterday.

A. I said 1.1, 1.2 or 1.3 million, yes.

Q. The record will show what it shows.

A. Right.

N.T. September 14, 1995, at 59-61. Subsequently, when the Foundation President was asked by the Court about the Foundation's operating budget, he gave the following response:

THE WITNESS: Basically, we have a budget, but the budget doesn't mean anything because we have all this litigation, we have all these contingencies. We can't have any kind of certainty about our life. And so what we do and what we have done this past-we thought, for example, we would get the litigation settled with the de Mazia Trust. There are asterisks and footnotes and everything.

At any rate, what we did is pass a continuing resolution, which in effect becomes our budget. There is a budget. That budget is presented. It's discussed. And the authority pursuant to which the Foundation spends its money is on a continuing resolution by the board.

N.T. September 14, 1995 at 109-10. As noted above, neither the budget, nor a record of the continuing resolutions, was produced.

***255** This lack of specificity was an obvious

source of frustration for Judge Ott and during the second day of the two-day hearing, he was compelled to remark:

I've got to tell you, this summary of what you say it is and then a rambling response which is absolutely inspecific, doesn't tell me a thing. I mean, it's not the way you do examination of a witness.

Day and a half, and I have about as many specifics as I could have gotten in twenty minutes of concise, succinct questioning. That's how much I've got out of a day and a half.

N.T. September 14, 1995 at 88-89. However, despite this remark, appellant failed to offer more detailed information regarding the financial situation of the Foundation. On the record it appears to this Court that Judge Ott was correct in his grant of relief; and his decision on fees and access should not be overturned.

Finally, we are compelled to remark that as a result of a variety of occurrences, the following sources of income are now available to the Barnes Foundation which were not available previously.

1. By virtue of the decision of Judge Ott in this case the Trustees of the Barnes Foundation have been freed of the investment restrictions contained in the indenture****901** and now expect a greater return on the endowment investments.

2. By virtue of our decision in the companion case to this appeal, the Foundation will receive 2.75 million dollars over ***256** the next several years from the Trust of Violette de Mazia. *See In re Barnes Foundation; Estate of Violette de Mazia, supra.*

3. By virtue of this Court's grant of interim relief, the Barnes Gallery was permitted to remain open for the months of July and August in order to participate in the international exhibit of the works of Paul Cezanne presented by the Philadelphia Museum of Art.

4. By virtue of our present decision permitting fund raising events on the premises, the Foundation will be permitted to expand their fund raising activities.

Additionally, we note that at the time of the hearing, the Foundation had a pending petition before the Court of Common Pleas of Montgomery County seeking relief from the restrictions which Judge Stefan had placed on the proceeds which the Foundation had received from the world tour of the Barnes Collection. These proceeds approximated 5.5 million dollars. N.T. September 13, 1995, at 104. Depending on the relief granted, the Foundation may obtain additional operating funds dedicated to day to day maintenance and expenses. [FN11]

> FN11. The Foundation also stands to benefit from the proceeds of a pending C.D.-ROM disc and a book produced by Alfred E. Knopf, Inc. *See* N.T. September 13, 1995, at 98.

Thus, the Barnes Foundation may lie in a position to be able to maintain funds to carry out its mandate of education and public accommodation without any further increase in public access or increased fees. However, nothing in this opinion should be construed as prohibiting a future application to the Court of Common Pleas based on some subsequent events which would demonstrate a necessity for a further deviation from the terms of the indenture.

Accordingly, the decree of the Court of Common Pleas is affirmed in part and reversed in part. Jurisdiction relinquished.

Pa.Super.,1996.
In re Barnes Foundation
453 Pa.Super. 243, 683 A.2d 894

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Motions, Pleadings and Filings
Judges and Attorneys

United States District Court,
E.D. Pennsylvania.
CITY OF ROME, et al., Plaintiffs,
v.
Richard A. GLANTON, et al., Defendants
v.
Francesco RUTELLI, et al., Third-Party Defendants.

Civil Action No. 96-5284.
April 15, 1997.

Italian city and officials brought action against art foundation and foundation president after failing to obtain sponsorship of international art exhibit, asserting, inter alia, breach of contract, misrepresentation, and civil conspiracy. Defendants asserted counterclaims and cross-claims for breach of good faith negotiation, misrepresentation, libel and slander, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, and contribution. On cross-motions for summary judgment, the District Court, Katz, J., held that: (1) no contract existed, as meeting of minds on when $3 million fee would be paid did not occur; (2) defendants were not liable on promissory estoppel, misrepresentation, or fraudulent concealment claims; (3) officials were not liable for fraudulent misrepresentation; and (4) official's expression of unfavorable personal opinions about president in Pennsylvania newspaper was not actionable defamation.

Motions granted.

West Headnotes

[1] KeyCite Citing References for this Headnote

13 Action
13II Nature and Form
13k17 k. What law governs. Most Cited Cases

Under Pennsylvania's choice of law rules, federal court sitting in diversity must first determine whether false conflict or true conflict exists; false conflict exists if only one jurisdiction's interests are impaired by application of other jurisdiction's law, or if there is basically no difference between laws of jurisdictions, and if true conflict exists, court must use Pennsylvania's choice of law analysis and apply law of jurisdiction with greatest interest in application of its laws.

[2] KeyCite Citing References for this Headnote

95 Contracts
95VI Actions for Breach
95k325 k. What law governs. Most Cited Cases

205H Implied and Constructive Contracts KeyCite Citing References for this Headnote
205HI Nature and Grounds of Obligation
205HI(A) In General

205Hk2 Constructive or Quasi Contracts
205Hk2.1 k. In general. Most Cited Cases

Pennsylvania law applied to contract and quasi-contract claims, in action that Italian city and officials brought against Pennsylvania art foundation and foundation president after city failed to obtain sponsorship of international art exhibit, even though number of relevant contacts occurred or would occur in city, where central to parties' discussions and negotiations was the understanding that agreement had to be approved by Pennsylvania court.

[3] KeyCite Citing References for this Headnote

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k1.6 k. What law governs. Most Cited Cases
(Formerly 237k1)

Pennsylvania law applied to libel and slander counterclaims asserted by Pennsylvania art foundation's president, in action that Italian city and officials brought against foundation and president after city failed to obtain sponsorship of international art exhibit; president was Pennsylvania domiciliary, and despite international nature of negotiations and lawsuit, any harm to president's professional and personal reputation that resulted from allegedly defamatory statements occurred within Pennsylvania.

[4] KeyCite Citing References for this Headnote

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k15 k. Necessity of assent. Most Cited Cases

Under Pennsylvania law, no contract existed between art foundation and Italian city for sponsorship of art exhibit, as meeting of minds on when $3 million fee would be paid did not occur; foundation president requested that city mayor sign letter which included statement that fee was payable in advance, but mayor signed and returned letter that did not include "in advance" provision contained in president's proposition.

[5] KeyCite Citing References for this Headnote

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k29 k. Questions for jury. Most Cited Cases

If there was genuine dispute about whether letter from mayor of Italian city to president of art foundation was acceptance of foundation's offer to supply art exhibition to city or a counteroffer, question was for jury.

[6] KeyCite Citing References for this Headnote

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k22 Acceptance of Offer and Communication Thereof
95k22(1) k. In general. Most Cited Cases

Under Pennsylvania law, if letter from mayor of Italian city to president of art foundation could be characterized as counteroffer on sponsorship of art exhibit, counteroffer was not accepted by president's silence or president's untruthfulness about asking for court approval to send exhibit to another European city.

[7] KeyCite Citing References for this Headnote

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future events; promissory estoppel. Most Cited Cases

Under Pennsylvania law, promise will be enforced under theory of promissory estoppel, if there is a promise to promisee which promisor should reasonably expect will induce action by promisee, promise induces such action, and promise should be enforced to prevent injustice to promisee.

[8] KeyCite Citing References for this Headnote

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future events; promissory estoppel. Most Cited Cases

Under Pennsylvania law, Italian city and officials could not have reasonably relied on statements by art foundation president pertaining to city's sponsorship of art exhibit, so as to support promissory estoppel claim asserted after sponsorship went to German city, given the level of uncertainty about terms of payment for exhibition in Italian city.

[9] KeyCite Citing References for this Headnote

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future events; promissory estoppel. Most Cited Cases

Under Pennsylvania law, Italian city and officials could not have reasonably relied on copy of art foundation's court petition seeking additional venue for art exhibit in Europe, which petition was sent in response to official's inquiry about published report of exhibit going to German city rather than Italian city, so as to support promissory estoppel claim asserted after sponsorship went to German city; terms described in petition differed from those set forth in prior letter from Italian city mayor to president providing for fee to be paid at unspecified time rather than in advance as proposed by president.

[10] KeyCite Citing References for this Headnote

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms implied as part of contract. Most Cited Cases

Under Pennsylvania law, every contract imposes upon parties a duty of good faith and fair dealing in performance and enforcement of contract. Restatement (Second) of Contracts § 205.

[11] KeyCite Citing References for this Headnote

95 Contracts
95V Performance or Breach
95k275 k. Obligation to perform in general. Most Cited Cases

Under Pennsylvania law, the obligation to act in good faith in performance of contractual duties varies somewhat with context and is impossible to define completely, but it is possible to recognize certain strains of bad faith which include evasion of spirit of bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in other party's performance.

[12] KeyCite Citing References for this Headnote

379 Torts
379V Other Miscellaneous Torts
379k431 Bad Faith
379k432 k. In general. Most Cited Cases
(Formerly 379k6)

Under Pennsylvania law, absent a contract, there is no breach of duty of good faith and fair dealing.

[13] KeyCite Citing References for this Headnote

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k2 Elements of Actual Fraud
184k3 k. In general. Most Cited Cases

184 Fraud KeyCite Citing References for this Headnote
184II Actions
184II(D) Evidence
184k58 Weight and Sufficiency
184k58(1) k. In general. Most Cited Cases

Under Pennsylvania law, party asserting fraudulent misrepresentation claim must establish, by clear and convincing evidence: misrepresentation, fraudulent utterance thereof, intention by maker that recipient will thereby be induced to act, justifiable reliance by recipient upon misrepresentation, and damage to recipient as proximate result.

[14] KeyCite Citing References for this Headnote

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k19 Reliance on Representations and Inducement to Act
184k20 k. In general. Most Cited Cases

Under Pennsylvania law, Italian city and officials could not have justifiably relied on art foundation president's misrepresentations and alleged misrepresentations pertaining to city's sponsorship of art exhibit, so as to support fraudulent misrepresentation claim asserted after sponsorship went to German city, given absence of sponsorship agreement between Italian city and foundation on material terms.

[15] KeyCite Citing References for this Headnote

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k15 Fraudulent Concealment
184k17 k. Duty to disclose facts. Most Cited Cases

Under Pennsylvania law, there can be no liability for fraudulent concealment absent some duty to speak, which arises when one party is in fiduciary or confidential relationship to the other.

[16] KeyCite Citing References for this Headnote

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k15 Fraudulent Concealment
184k17 k. Duty to disclose facts. Most Cited Cases

Under Pennsylvania law on fraudulent concealment, confidential relationship arises, so as to create duty to speak, when relative position of parties results in situation in which one party has power and means to take advantage of or exercise undue influence over the other.

[17] KeyCite Citing References for this Headnote

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k15 Fraudulent Concealment
184k17 k. Duty to disclose facts. Most Cited Cases

Under Pennsylvania law on fraudulent concealment, duty to speak may arise as consequence of agreement between parties, or as result of one party's reliance on other's representations, if one party is only source of information to other party, or the problems are not discoverable by other reasonable means; duty to speak may also occur when disclosure is necessary to prevent ambiguous or partial statement from being misleading, where subsequently acquired knowledge makes previous representation false, or where undisclosed fact is basic to the transaction. Restatement (Second) of Torts § 551.

[18] KeyCite Citing References for this Headnote

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k15 Fraudulent Concealment
184k17 k. Duty to disclose facts. Most Cited Cases

Under Pennsylvania law on fraudulent concealment, duty to speak does not arise when both plaintiff and defendant are sophisticated business entities, entrusted with equal knowledge of the facts and equal access to legal representation.

[19] KeyCite Citing References for this Headnote

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k15 Fraudulent Concealment
184k16 k. In general. Most Cited Cases

Under Pennsylvania law, art foundation president was not liable to Italian city and officials on fraudulent concealment claim asserted after art exhibit went to German city rather than Italian city, on basis that president did not disclose negotiations with German city; parties were of roughly equal business sophistication with access to legal representation, city and officials did not demonstrate that president exercised some form of undue influence over them or had heightened duty toward them, parties had equal knowledge of facts about whether contract existed between foundation and Italian city, and president's silence about subsequent events was not a proximate cause of city's professed injury.

[20] KeyCite Citing References for this Headnote

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k8 Fraudulent Representations
184k13 Falsity and Knowledge Thereof
184k13(3) k. Statements recklessly made; negligent misrepresentation. Most Cited Cases

Under Pennsylvania law, liability for negligent misrepresentation arises if misrepresentation is of material fact, if representor knew of misrepresentation, made misrepresentation without knowledge as to its truth or falsity, or made representation under circumstances in which he ought to have known of its falsity, if representor intended representation to induce another to act on it, and if injury resulted to party acting in justifiable reliance on misrepresentation.

[21] KeyCite Citing References for this Headnote

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2547 Hearing and Determination
170Ak2553 k. Time for consideration of motion. Most Cited Cases

Defendants that opposed plaintiffs' summary judgment motion were not entitled to continuance for discovery, despite claims that defendants' diligence was frustrated by plaintiffs' resistance to production of discoverable information and that further discovery was needed; defendants had more than adequate time for discovery, large record was produced on plaintiffs' and defendants' claims, and court mediated discovery disputes and attempted to accommodate defendants' and plaintiffs' discovery requests. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

[22] KeyCite Citing References for this Headnote

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k25 k. Agreement to make contract in future. Most Cited Cases

Under Pennsylvania law, breach of good faith negotiation claim can result from enforceable agreement to negotiate in good faith.

[23] KeyCite Citing References for this Headnote

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor

184k28 k. Fraud in particular transactions or for particular purposes. Most Cited Cases

Under Pennsylvania law, Italian official was not liable to art foundation and foundation president for any fraudulent misrepresentations in connection with negotiations for sponsorship of art exhibit in Italian city, given amorphous status of deal with city.

[24] KeyCite Citing References for this Headnote

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k48 Criticism and Comment on Public Matters; Public Figures
237k48(1) k. In general. Most Cited Cases

President of art foundation was public figure for purposes of defamation claim asserted against Italian officials, where president was in charge of foundation at time of well-known and widely celebrated tour of international art exhibit.

[25] KeyCite Citing References for this Headnote

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k31 Injury from Defamation
237k33 k. Presumption as to damage; special damages. Most Cited Cases

Under Pennsylvania law, party may succeed in defamation claim absent proof of special harm where spoken words constitute slander per se; such words include words imputing criminal offense, loathsome disease, business misconduct, or serious sexual misconduct. 42 Pa.C.S.A. § 8343(a).

[26] KeyCite Citing References for this Headnote

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k6 Actionable Words in General
237k6(1) k. In general. Most Cited Cases

Under Pennsylvania law, statement is defamatory if it tends so to harm reputation of another as to lower him in the estimation of community or to deter third parties from associating or dealing with him. 42 Pa.C.S.A. § 8343(a).

[27] KeyCite Citing References for this Headnote

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k19 k. Construction of language used. Most Cited Cases

Under Pennsylvania law, court must interpret statement within its context to determine whether it has defamatory meaning. 42 Pa.C.S.A. § 8343(a).

[28] KeyCite Citing References for this Headnote

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k19 k. Construction of language used. Most Cited Cases

Under Pennsylvania law, test for evaluating allegedly defamatory statement is effect the utterance

is fairly calculated to produce and impression it would naturally engender in minds of average persons among whom it is intended to circulate; words must be given by judges and juries the same signification that other people are likely to attribute to them. 42 Pa.C.S.A. § 8343(a).

[29] KeyCite Citing References for this Headnote

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k7 Words Imputing Crime and Immorality
237k7(2) k. Nature of crime and punishment. Most Cited Cases

Under Pennsylvania law, term "con man," which Italian official used in referring to Pennsylvania art foundation president in Italian newspaper, was capable of a defamatory meaning; effect that statement would have had on newspaper's readership, and any subsequent audience in Pennsylvania, could be to defame president as a criminal. 42 Pa.C.S.A. § 8343(a).

[30] KeyCite Citing References for this Headnote

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k9 Words Tending to Injure in Profession or Business
237k9(1) k. In general. Most Cited Cases

Under Pennsylvania law, Italian official's expression of unfavorable personal opinions about Pennsylvania art foundation president in Pennsylvania newspaper was not actionable defamation. 42 Pa.C.S.A. § 8343(a).

[31] KeyCite Citing References for this Headnote

237 Libel and Slander
237IV Actions
237IV(C) Evidence
237k112 Weight and Sufficiency
237k112(2) k. Intent, malice, or good faith. Most Cited Cases

Art foundation president who asserted defamation claims against Italian officials failed to establish actual malice on part of officials; president did not establish that officials were aware that their sentiments were unfounded when made.

[32] KeyCite Citing References for this Headnote

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k35 Absolute Privilege
237k38 Judicial Proceedings
237k38(1) k. In general. Most Cited Cases

Under Pennsylvania law, statements made during course of judicial proceeding are absolutely privileged from libel and slander suit.

[33] KeyCite Citing References for this Headnote

237 Libel and Slander
237II Privileged Communications, and Malice Therein

237k40 Qualified Privilege
237k41 k. In general. Most Cited Cases

Under Pennsylvania law, media statements disseminated by attorneys are extrajudicial communications protected by qualified immunity from libel and slander suit, even in their reiteration of contents of privileged judicial documents.

[34] KeyCite Citing References for this Headnote

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(A) In General
319Hk24 Pattern of Activity
319Hk28 k. Continuity or relatedness; ongoing activity. Most Cited Cases

Art foundation and foundation president failed to establish existence of pattern of racketeering activity or requisite causation for Racketeer Influenced and Corrupt Organizations Act (RICO) action against Italian official arising from negotiations for sponsorship of international art exhibit; foundation and president alleged a closed-ended scheme in which official engaged in series of false deals, but record only produced evidence of failed deals in which official pursued courses of action in what might be described as a less than graceful manner. 18 U.S.C.A. § 1962(c, d).

***1030** James E. Beasley, Michael A. Smerconish, Beasley, Casey and Erbstein, Philadelphia, PA, for Plaintiffs.

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ORDER AND MEMORANDUM

KATZ, District Judge.

AND NOW, this 15th day of April, 1997, upon consideration of plaintiffs' and defendants' Motions for Summary Judgment, and the responses and replies thereto, and after a hearing, it is hereby **ORDERED** that the said motions are **GRANTED**.

I. *Factual Background*

While satellite disputes have not been lacking in the course of this litigation, the central dispute involves a potential exhibition of one of the most renowned art collections in the world. The **Barnes Foundation** was chartered in 1922, and between 1922 and 1992, the works in the collection did not travel outside the campus of the **Foundation** in Merion, Pennsylvania, at the express direction of its founder, Albert C. **Barnes**. On July 21, 1993, a ruling of the Montgomery County Orphans' Court permitted a one-time exhibition tour of select masterpieces from the **Barnes Foundation** to take place between April 1993 and September 1995, as part of an effort to raise funds to renovate the **Barnes**. After receiving court approval, the defendants assembled select works from the **Foundation** for a travelling exhibition entitled "From Cezanne to Matisse: Great French Paintings from the **Barnes Foundation**" (the "Exhibition"). The Exhibition was to conclude in April of 1995 at the Philadelphia Museum of Art, after which the collection was to return to its permanent venue, the **Barnes**.

***1031** In September 1992, one of the plaintiffs, Antonio Guizzetti, was introduced to defendant Richard Glanton, the President of the **Barnes Foundation**. Pl. Resp. Ex. A. In the months that followed, Guizzetti and Glanton had a number of conversations and an ongoing correspondence about Rome as a venue for the Exhibition. In the course of their conversations and correspondence, Glanton asked Guizzetti to assist him in being retained for legal business. Pl. Resp. Ex. B.

On January 12, 1994, Glanton wrote to Guizzetti and outlined the conditions required to bring the Exhibition to Rome:

[A] fee of $3 million, plus expenses related to travel and other incidental costs, in exchange for the loan of the paintings. The catalogue rights would have to be worked out with our publisher, Alfred A. Knopf, Inc., and we would be able to assist you in this regard.

At present, we are unable to conduct any negotiations on future decisions about additional venues because of the pending petition in the Orphans' Court of Montgomery County....

Compl. Ex. D.

On December 2, 1994, Glanton wrote a letter to Guizzetti that included the following:

You asked that I confirm which certain conditions were mandatory in order for the **Barnes Foundation** to agree to this project. First, the exhibition would require a minimum of $3 million in cash payments to be made in three equal installments prior to the opening of the exhibition. Second, all related costs, such as travel insurance, packaging, and any other related expense would be the responsibility of the sponsors. Third, the exclusive merchandise rights could be granted to Marsilio Editore. However, catalogue rights would be subject to negotiations with Knopf....

Pl. Resp. Ex. O.

On December 14, 1994, Glanton wrote another letter to Guizzetti following another conversation "concerning the prospects for the exhibition in Italy":

First, you requested that I reaffirm the fees required for the exhibition to occur, subject to Court approval. In response, this will confirm that the Foundation requires a fee of $3 million payable in advance in order for the exhibition to take place.

Secondly, you requested advice as to whether an Italian publisher could be permitted to publish a catalogue in connection with the exhibition. In this connection, I will make every effort to negotiate an agreement with Knopf....

Pl. Resp. Ex. P.

Glanton toured the Museo Capitolino, the potential site of the exhibition, when he visited Rome in December of 1994. Pl. Resp. Ex. C; Compl. Ex. G. He returned to Rome in February, 1995, and was a guest of the City of Rome. Pl. Resp. Ex. D. Glanton once again toured the Museo Capitolino during his February, 1995 visit and met with various city officials. Pl. Resp. Exs. C, D. Glanton had concerns about the security available in the Museo Capitolino and mentioned certain aspects of his concerns to Guizzetti. Pl. Resp. Ex. C. Glanton met with Paulo Gentiloni, the Director of Communications, Guizzetti, Maurizio Venafro, another Roman official, and Gianni Borgna, the Cultural Minister, to discuss the terms for staging the Exhibition in Rome. Def. Resp. Exs. L, M; Pl. Resp. Exs. A, E, F. Glanton did not meet at length with the Mayor, who walked through at the end of the meeting and greeted Glanton briefly. Pl. Resp. Ex. E. Glanton dictated a letter that he requested the Mayor sign, which included the following statement:

The fee agreed upon is $3 million, payable in two installments. The initial payment shall be made upon the signing of the Agreement between the sponsors of the exhibition and The Foundation, and the balance shall be paid on or before the 21st of April, 1995.

Pl. Resp. Ex. G.

The Mayor then signed and faxed a letter that included the following:

This will confirm our discussions of today in which it was agreed that the city of Rome would enter into an Agreement with The **Barnes Foundation**, subject to the approval of the Orphans' Court of Montgomery***1032*** County, Pennsylvania, for the Exhibition of "Great French Paintings" from The **Barnes Foundation**, to be held in Rome beginning in April 1995. The fee agreed upon is $3 million, payable in two installments.

Pl. Resp. Ex. H.

On Monday, March 20, 1995, the Board of Trustees of the **Barnes Foundation** met and discussed, among other topics, potential venues for the Exhibition. Pl. Resp. Ex. Q. The minutes of the meeting state: "Mr. Glanton did not recommend Italy based on his visits and discussions with staff there. However, he felt that Munich's museum was first class and would do a very good job of mounting the exhibition." *Id.* On March 25, 1995, an article appeared in the Philadelphia Inquirer, which revealed the Board of Trustees' vote to stage the exhibition in Munich. Pl. Resp. Ex. J. Guizzetti saw the *Inquirer* article on March 27, 1995, and sent Glanton a fax marked "Urgent," asking that he and Glanton discuss "the misinformation being provided to my office, the city of Rome, and the *Philadelphia Inquirer.*" Pl. Resp. Ex. J. Guizzetti then called Glanton, who denied the proposed staging of the Exhibition in Munich and claimed that the news account was a racial attack. Pl. Resp. Ex. A. Glanton then faxed a copy of the petition to the Orphans' Court. Pl. Resp. Ex. L. The petition identified the requested additional venue only as "an additional premier art museum in Europe." Pl. Resp. Ex. L. Glanton did not communicate with the plaintiffs prior to March 27, 1995 about his change of mind, "for the reason that they were not in a position to make a commitment that we would accept .... they had not even met the minimal conditions that I had outlined to them, in terms of what would be required to execute an agreement to have an exhibition." Pl. Resp. Ex. C. The plaintiffs continued to prepare for the Exhibition prior to the Orphans' Court ruling. Pl. Resp. Ex. A.

The **Barnes Foundation** received Superior Court approval to stage one additional venue for the Exhibition, and the Exhibition toured the Haus der Kunst in Munich in October, 1995. The Haus der Kunst paid $2.15 million for the Exhibition. Pl. Resp. Ex. I. Plaintiffs filed this action. Count I is for breach of contract; Count II is for detrimental reliance; Count III is for breach of duty of good faith and fair dealing; Count IV is for fraudulent misrepresentation; Count V is for negligent misrepresentation; Count VI is for fraudulent concealment; and Count VII is for civil conspiracy. Plaintiffs have since indicated that they will not pursue the specific performance claim in Count VIII and that their claims against defendants Frank, Jackson, Sudarkasa, and Walker will be voluntarily dismissed, so the court will not address issues that relate to this count or to these defendants. *See* Def. Mot. for Summ. Judg. Ex. EE; Pl. Reply Ex. B; Stipulations of April 9, 1997. Defendants have filed a number of counterclaims and crossclaims as well: Count I is an abuse of process claim; Count II is a breach of good faith negotiation claim; Count III is for fraudulent misrepresentation; Count IV is for fraudulent misrepresentation; Count V is for libel and slander; Count VI is a RICO claim; Count VII is a claim for contribution. Defendants have stipulated to a dismissal of all counterclaims on behalf of defendants Sudarkasa and Jackson; the court will not address Count I or issues that relate to defendants Sudarkasa or Jackson. Both plaintiffs and defendants have moved for summary judgment.

II. *Standard*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56 (c). The moving party has the burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn therefrom in favor of the non-moving party. *Tigg Corp. v. Dow Corning Corp.,* 822 F.2d 358, 361 (3d Cir.1987); *Baker v. Lukens Steel Co.,* 793 F.2d 509, 511 (3d Cir.1986). In other words, if the evidence presented by the parties***1033*** conflicts, the court must accept as true the allegations of the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986).

III. *Discussion*

A. *Choice of Law*

[1] As a threshold matter, this court must determine the law that applies to the claims in this case. A federal court sitting in diversity applies the choice of law rules of its forum state. *Klaxon v. Stentor Electric Mfg. Co.,* 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941); *LeJeune*

v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir.1996). Under Pennsylvania's choice of law rules, the court must first determine whether a false conflict or a true conflict exists. *LeJeune*, 85 F.3d at 1071. A false conflict exists if only one jurisdiction's interests are impaired by the application of the other jurisdiction's law, or if there is basically no difference between the laws of the jurisdictions. *See id.*; *Lucker Manufacturing v. Home Insurance Co.*, 23 F.3d 808, 813 (3d Cir.1994). If a true conflict exists, then this court must use Pennsylvania's choice of law analysis and apply the law of the jurisdiction with the greatest interest in the application of its laws. *See Lucker Manufacturing*, 23 F.3d at 813. [FN1] Italy's Code mandates a more restrictive interpretation of contract formation and the duties that attend such negotiations than Pennsylvania law. *See* F.R.C.P. 44.1; Affidavit of Avv. Mario Beltramo; Def. Mot. for Summ. Judg. Ex. DD. Italy's system of tort recovery is more restrictive than Pennsylvania's. *See* John G. Culhane, *The Limits of Products Liability Reform Within a Consumer Expectation Model: A Comparison of Approaches Taken by the United States and the European Union*, 19 Hastings Int'l & Comp. L.Rev. 1, 23-50 (1995); Franco Ferrari, *Comparative Remarks On Liability for One's Own Acts*, 15 Loy. L.A. Int'l & Comp. L.J. 813 (1993). In this setting, both Italy and Pennsylvania have an interest in regulating torts and contracts that affect their own domiciliaries, as well as in controlling the outcomes that result from the conflicts between the organizing principles of their legal systems. In this situation, the court finds that a true conflict exists and that it must apply Pennsylvania's choice of law analysis.

> FN1. Defendants insist that Italian law applies to the question of the existence of the contract, but that Pennsylvania law applies to all other legal questions in the case. Plaintiffs announced at the hearing that Italian law applies to defendants' libel and slander claims against Gianni Borgna, but they have argued throughout the course of this action that Pennsylvania law applies to the state law counts. The court sees no reason to disturb the parties' areas of agreement as to choice of law and will address only the choice of law issues that relate to the contract claims and the libel and slander counterclaim.

Pennsylvania's choice of law analysis involves a hybrid of the most significant relationship test set forth in the Second Restatement of Conflict of Laws and Currie's governmental interest analysis. This approach applies to both tort and contract actions. *Melville v. American Home Assur. Co.*, 584 F.2d 1306, 1311-13 (3d Cir.1978); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

[2] As for the contract claims at issue,[FN2] a number of the relevant contacts occurred or would occur in Rome, as the site where the contract was to be performed, and as the site in which the bulk of the contract negotiations took place.[FN3] However, central to the parties' ***1034*** discussions and negotiations was the understanding that their agreement had to be approved by the Montgomery County Orphans' Court.[FN4] As a singular undertaking by the **Barnes Foundation**, the Exhibition was subject to number of legal proceedings in Pennsylvania before it could travel to a foreign venue. The interests of Pennsylvania in applying its own law, not only for its interest in the uniformity of the Orphans' Court's approval of the Exhibition in a variety of venues, but also for its interest in the Orphans' Court's ability to enforce and control the manner in which the Barnes and the City of Rome handled their proposal for the Exhibition, receive greater weight in this instance. As a result, for the counts that may be characterized as either contract or quasi-contract claims, and the issues therein, Pennsylvania law applies.

> FN2. Defendants note that a court may apply the principle of depecage, or "piecemeal" analysis, to different choice of law issues. *See Broome v. Antlers' Hunting Club*, 595 F.2d 921, 924 (3d Cir.1979); *Kelly v. Ford Motor Co.*, 942 F.Supp. 1044, 1045 (E.D.Pa.1996); *see also Chemetron Investments v. Fidelity & Casualty Co.*, 886 F.Supp. 1194, 1199 (W.D.Pa.1994). This court's ultimate conclusion is that this doctrine is not warranted in this particular case.

> FN3. The more specific provisions of the Second Restatement are not wholly on point for

this type of contract, *see* Restatement (Second) of Conflict of Laws §§ 189–197, so this court has applied the more general provision, § 188(2), in which the relevant factors include: the place of contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicil, residence, nationality, place of incorporation and place of business of the parties. These factors are to be read in light of the factors in § 6(2): the needs of the interstate and international systems; the relevant policies of the forum and other interested states; the protection of justified expectations; policies underlying the particular field of law; certainty, predictability, and uniformity of result, and ease in the determination and application of the law to be applied. *See also Knauer v. Knauer,* 323 Pa.Super. 206, 470 A.2d 553, 557–58 (1983).

FN4. As plaintiff notes, contracts for the other foreign venues for the Exhibition contained choice of law clauses for Pennsylvania law, so the application of foreign law to the "agreement" the parties reached regarding the proposed Rome Exhibition would be an anomaly. Pl. Resp. Ex. N.

[3] For the libel and slander counterclaims, Pennsylvania law applies. Defendant Glanton is a Pennsylvania domiciliary, and despite the international nature of these negotiations and this lawsuit, any harm to his professional and personal reputation that resulted from the allegedly defamatory statements occurred within this state.[FN5]

FN5. The parties agree that Pennsylvania law applies to the libel and slander claims involving plaintiff Guizzetti's comments in the Philadelphia *Inquirer,* and the court agrees with their contentions. Their area of disagreement involves statements made to an Italian newspaper, *La Repubblica.* Defendant Glanton claims that the statements in question were published in both Italy and Pennsylvania.

Section 150 of the Second Restatement includes the following:

(1) The rights and liabilities that arise from defamatory matter ... are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) When a natural person claims that he has been defamed by an aggregate communication, the state of the most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state.

As defendant Glanton is a Pennsylvania domiciliary, § 150(2) indicates that Pennsylvania law applies to defendant Glanton's claims.

B. *Defendants' Motion for Summary Judgment*

1. *Introduction*

The contract claim in this case raises two difficult issues. How far should the legal system go to supply terms for parties to an enterprise who have failed to make their own provision? At what point in the resolution of that issue should a judge, rather than a jury, make the call?

My resolution of these issues turns this premise: the law requires a normative standard of what the parties mutually must resolve for themselves. There must be an objective demonstration of

accord, concreteness, and predictability, before a fact finder may infer an enforceable contract.

Whether there was an enforceable promise for a promise is case specific. How central to the negotiation was the unresolved portion? How clear was the communication on the issues that were raised? Was there a meeting of the minds? The notions of offer, counteroffer, and acceptance are sometimes used as conclusory labels. The intent of the parties is a useful statement of the question, not necessarily the incantation for a jury trial. We should not reach conclusions by reifying fictions.

Every issue of degree is not, in itself, a genuine issue of fact. Rhetoric does not turn mole hills into mountains, and not all disputes are material.

In this case, what stands out is that Glanton, on behalf of the Barnes Foundation, came to Rome with, and never changed a proposition to supply an exhibition for $3 million payable *in advance.* For whatever subjective reasons, the Mayor of Rome, after Glanton left, unilaterally struck the provision ***1035** in Glanton's proposition that the $3 million would be paid *in advance.* For whatever reasons, the exhibition went to Munich. Why should the law permit a finding that this disagreement constituted an enforceable contract?

One can speculate that the Barnes Foundation controlled the paintings and that the parties might have resolved the matter of payment themselves. But the reality remains that they did not. Ultimately, I would leave the market to regulate this level of sharp dealing. Not all betrayal is a tort.

2. *Breach of Contract, Promissory Estoppel, Breach of Good Faith Negotiation*

a. *Lack of Mutual Assent*

[4] The plaintiffs' contract claim fails because there was no contract to breach. Specifically, plaintiffs cannot establish a meeting of the minds on when the $3 million would be paid. The Mayor's letter of February 8, 1995 simply stated: "The fee agreed upon is $3 million, payable in two installments." Mr. Glanton's draft letter of Feb. 6, 1995 provided: "The fee agreed upon is $3 million, payable in two installments. The initial payment shall be made upon the signing of the Agreement between the sponsors of the exhibition and the foundation, and the balance shall be paid on or before the 21st of April, 1995." The materiality of the advance payment of the $3 million was made clear in Glanton's letter to Guizzetti of December 14, 1994.

The testimony confirms the lack of mutual assent. Guizzetti testified that there was no discussion between the parties regarding the time of payment of the three million dollars. Def. Reply, Ex. A at 340. Venafro confirmed that the Mayor of Rome deleted the lines of Glanton's draft letter that called for payment in advance. *Id.* Ex. E at 53–54. The Mayor of Rome did not recall any negotiations that resolved the issue of when payment would be made. *Id.* Ex. G. Gentiloni testified that Guizzetti was not authorized to represent the City of Rome in negotiating the contractual arrangements, and that the parties did not reach any resolution as to when the $3 million would be paid. *Id.* Ex. H at 19, 22, 23, 35–36. Borgna did not recall any discussions about when the $3 million would be paid. *Id.* Ex. J at 101–02. The president of Marsilio Editore, Cesare De Michelis, testified to the absence of a fundamental agreement. *Id.* Ex. R at 45–46.

Given the absence of an agreement on an essential term, there was no binding contract under Pennsylvania law and, *a fortiori,* under the more demanding requirements for a contractual obligation under Italian law.[FN6] Conclusory opinions and contentions to the contrary are not a substitute for evidence from persons having firsthand knowledge of the facts. The fact that Gentiloni, Glanton, and the others agreed on the wording of the letter does not say the parties agreed on a contract. No evidence is presented that they agreed to leave the terms of payment open. The evidence is that they disagreed on the terms of payment. If they agreed to leave the terms of payment open, the law would supply the term that the $3 million would be paid within a reasonable time. If they did not so agree, the letter was not a contract. The objective manifestations of intent do not give rise to a genuine issue of material fact; there was no deal, no intention to be bound, no seriousness. It was a world of game playing, not deal making. It was not commercially reasonable for Rome to spend one lira given what it knew of the deal. The deal was gossamer. Nor was it reasonable for Glanton to spend the Foundation's money, given Guizzetti's grandiosity and Rome's lack of commitment.

FN6. *See* Affidavit of Avv. Mario Beltramo, Exs. A, B.

Mr. Gentiloni offers no explanation for why the terms of payment were deleted from the Mayor's letter. He doesn't remember. *Id.* Ex. H at 41–42. This is hardly evidence that the parties resolved their disagreement on those terms. In *Channel Home Centers v. Grossman*, 795 F.2d 291, 298–300 (3d Cir.1986), on which plaintiffs rely, there was an agreement to negotiate in good faith. This record contains no evidence that the parties mutually intended to enter into such a binding agreement. The failure to resolve the advance payment issue left the negotiations without sufficient specificity to make their ***1036** preliminary negotiations an enforceable contract. There is no evidence the parties intended Rome's payment of $3 million and the pictures to go to Rome to be enforceable promises, given the state of the summary judgment record. There is no evidence that both parties manifested an intention to be bound by the Mayor's letter. At most there was an agreement to agree, not a closed proposition. Leaving open when Rome would pay the $3 million left the terms of the deal not sufficiently definite to be enforced. The Mayor's letter and the surrounding circumstances suggest the parties formulated a prelude to a lawsuit, not a mutually binding commitment.

The Mayor's statement that his letter constitutes an agreement is a legal view not shared by this court. *See* Pl. Mot. Ex. B at 38–39. The letter does not look like an agreement, and to say, as the Mayor does, "[i]f you change your ideas, you have to pay," expresses anger and a feeling of betrayal, but does not supply a contract term over which the parties did not agree, namely, when to pay. *See id.* at 38. To say one should pay for betrayal is different from saying one should pay damages for breach of contract.

At most the parties agreed to agree on the terms of payment after the Barnes obtained Orphans' Court approval of the exhibition in Rome. The Barnes betrayed this agreement by taking the exhibition to Munich. The letter that the Mayor of Rome signed was not a contract, even assuming the parties agreed on its wording. The circumstances surrounding the Mayor's letter in their totality do not demonstrate a meeting of the minds on the terms of payment, which were both material and disputed. To say that the law should supply the missing term by requiring payment within a reasonable time would be to write a contract for the parties which they did not make themselves.

The undisputed facts are that the time when payment would be made was unsettled. One alternative is to instruct a jury that in the absence of agreement over the terms of payment, there is an implied condition that payment is to occur upon completion of the exhibition. *See Ingrassia Const. Co., Inc. v. Walsh*, 337 Pa.Super. 58, 486 A.2d 478, 484 (1984). In a different contractual context, another alternative is to instruct a jury that, absent such agreement, payment was due within a reasonable time. *See, e.g.,* P.L.E. (Contracts) § 271. Such dispositions would be troublesome in view of the undisputed facts that Barnes wanted advance payment and Rome deleted that language from the Mayor's letter. As Professor Corbin writes:

> A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood. It is not even enough that they have actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of any enforceable contract.

1 Arthur Corbin, *Corbin on Contracts* § 4.1, at 525 (Rev. ed.1993). This court cannot determine what the contract is with regard to payment. The undisputed facts are that the parties reached no agreement on this point. Is it commercially reasonable for a court to allow a jury to fix terms of payment on a $3 million executory contract for an international art exhibit between relatively sophisticated parties with access to counsel where the parties have not done so? The claim for specific performance is withdrawn; but were it not, should a court order the exhibition to Rome and leave payment open for an unspecified reasonable time in the future? I think the better course is to leave the parties where they left matters themselves: open and disputing on a term vital to agreement and,

therefore, without a contract.

As Professor Corbin posed the difficult issue:

> *Courts do not make contracts.* Courts have often said that they do not make contracts for the parties, very often in cases in which they wash their hands of a difficult problem that is thrust upon them ***1037** by reason of incompleteness or indefiniteness in the expression of some term in a written instrument by which the parties clearly intended to be bound. They may be quite justified in this, for the matter is one of degree, but it is otherwise if the case is one in which other courts, on closely similar facts, have gone farther afield in the search for intention and have been able to overcome the indefiniteness of expression and to effectuate the purposes for which the instrument was executed. In this process, the latter courts can correctly say that they 'do not make a contract for the parties' but merely determine the just legal effect of the contract that the parties made.

Id. at 529.

This court finds the just legal effect to be to leave the parties with their quarrel about the terms of payment, not a contract.

There is ample authority for rejecting a contract where the parties have, on the undisputed facts, failed to agree on the terms of payment. As Professor Corbin says:

> Frequently the price is agreed upon but the terms of payment are left to be agreed upon later. Many cases have found that such an agreement is fatally defective.

Id. § 4.3 at 579.

b. *No Acceptance of Counteroffer by Defendant Glanton*

[5] Plaintiffs argue in the alternative that even if the Mayor's letter could be considered a counteroffer, that 1) the question of whether a reply is an acceptance or a counteroffer is a question for the jury, and 2) Glanton's behavior in March acted as an acceptance of that offer. If there is a genuine dispute about whether the Mayor's letter was an acceptance or a counteroffer, the question is for the jury. *See* Honeywell v. American Standards Testing Bureau, 851 F.2d 652, 659 (3d Cir.1988). Here there is no genuine dispute as to whether the Mayor's letter changed the terms Glanton proposed. As the court said in *Honeywell,*

> The common-law rule is that a reply to an offer which purports to accept but is conditioned on the offeror's assent to term ... different from those offered is not an acceptance but is a counter-offer.

Id.; see also Accu-Weather, Inc. v. Thomas Broadcasting Co., 425 Pa.Super. 335, 625 A.2d 75, 77 (1993).

[6] If the mayor's letter can be characterized as a counteroffer, it was not accepted by Glanton's silence to Borgna's letter. Silence or inaction does not constitute acceptance in the absence of a duty to speak, and the facts of this case do not indicate such a duty existed. Johnston the Florist, Inc. v. TEDCO Const. Corp., 441 Pa.Super. 281, 657 A.2d 511, 516 (1995); Chorba v. Davlisa Enterprises, Inc., 303 Pa.Super. 497, 450 A.2d 36, 39 (1982). Nor does Glanton's conduct constitute acceptance; his untruthfulness about asking for court approval to send the exhibition to Munich might, on a different record, constitute some basis for tort recovery, but it does not create a question of material fact for plaintiffs' breach of contract claims. *See* Accu-Weather, 625 A.2d at 78.

c. *Promissory Estoppel*

[7] [8] [9] While plaintiffs also assert arguments involving promissory estoppel, these arguments are unavailing. A promise will be enforced, if the following elements exist: 1) a promise to a promisee; 2) which the promisor should reasonably expect will induce action by the promisee; 3) which does induce such action; and 4) which should be enforced to prevent injustice to the promisee.

See C & K Petroleum Prods., Inc. v. Equibank, 839 F.2d 188, 192 (3d Cir.1988).[FN7] It was not ***1038** reasonable for plaintiffs to rely on Mr. Glanton's statements, given the level of uncertainty about the terms of payment for the exhibition in Rome. Nor was it reasonable to rely on Mr. Glanton's forwarding Mr. Guizzetti a copy of the petition requesting permission for the Barnes to accept "an opportunity to receive an additional $2,500,000 for exhibition of works of art at an additional premier art museum in Europe," since the terms described differ from those set forth in the Mayor's letter providing for $3 million to be paid at an unspecified time.

FN7. The defendants assert that the appropriate burden of proof for plaintiffs' promissory estoppel claim is the version used by some of our district courts; this approach rests on the premise that promissory estoppel is a variant of equitable estoppel and should be proven by clear and convincing evidence. *See* Jersey Const., Inc. v. Pennoni Assoc., Inc., No. Civ. A. 91-7331, 1993 WL 29999 (E.D.Pa. Feb.4, 1993), *aff'd,* 8 F.3d 811 (3d Cir.1993); Josephs v. Pizza Hut of America, Inc., 733 F.Supp. 222, 223-24 (W.D.Pa.1989), *aff'd,* 899 F.2d 1217 (3d Cir.1990). This court has chosen not to follow this approach, given the somewhat conflicting approaches to promissory and equitable estoppel taken by the Pennsylvania Supreme and Superior Courts. *See* Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc., 535 Pa. 469, 636 A.2d 156, 159-60 (1994); Straup v. Times Herald, 283 Pa.Super. 58, 423 A.2d 713, 719-20 (1981); *see also* Carlson v. Arnot-Ogden Memorial Hosp., 918 F.2d 411, 416 (3d Cir.1990); *but see* Business Growth, Inc. v. Woodland Marble and Tile Co., 443 Pa. 281, 278 A.2d 922, 926 (1971).

d. *Duty of Good Faith and Fair Dealing*

[10] [11] [12] Every contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract. Liazis v. Kosta, Inc., 421 Pa.Super. 502, 618 A.2d 450, 454 (1992), *alloc. den.,* 536 Pa. 630, 637 A.2d 290 (1993); Restatement (Second) of Contracts § 205. The duty of good faith has been defined as "honesty in fact in the conduct or transaction concerned." Somers v. Somers, 418 Pa.Super. 131, 613 A.2d 1211, 1213 (1992). The obligation to act in good faith in the performance of contractual duties varies somewhat with the context and is impossible to define completely, but it is possible to recognize certain strains of bad faith which include: evasion of the spirit of the bargain; lack of diligence and slacking off; willful rendering of imperfect performance; abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. *Id.* Absent a contract, however, there is no breach of the duty of good faith and faith dealing, and plaintiffs have not met their burden in the first instance, so the court cannot allow this count to stand.

3. *Fraudulent Misrepresentation*

[13] [14] A party asserting a claim of fraudulent misrepresentation must establish five elements by clear and convincing evidence: 1) a misrepresentation; 2) a fraudulent utterance thereof; 3) an intention by the maker that the recipient will thereby be induced to act; 4) justifiable reliance by the recipient upon the misrepresentation and 5) damage to the recipient as the proximate result. Delahanty v. First Pennsylvania Bank, 318 Pa.Super. 90, 464 A.2d 1243, 1252 (1983). Given the absence of an agreement on material terms, plaintiffs have not demonstrated justifiable reliance on misrepresentations by Glanton that have been the proximate cause of injury to them. Nor have the plaintiffs demonstrated that Glanton's alleged misrepresentation after the March 17, 1995 *Inquirer* article was the proximate cause of any injury to them. Accordingly, summary judgment is entered on this count as well.

[15] [16] Plaintiffs allege fraudulent concealment on the part of defendant Glanton and the Board through failure to disclose their negotiations with Munich and the Haus der Kunst. The elements for the tort of intentional non-disclosure are basically the same as that of fraudulent misrepresentation; however, there can be no liability for fraudulent concealment absent some duty to speak. Duquesne Light Co. v. Westinghouse Electric Corp., 66 F.3d 604, 611-12 (3d Cir.1995); Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882, 889 n. 12 (1994); In re Estate of Evasew, 526 Pa. 98, 584 A.2d

910, 913 (1990). A duty to speak arises when one party is in a fiduciary or confidential relationship to the other. *Duquesne*, 66 F.3d at 612; *Evasew*, 584 A.2d at 912–13. Aside from the more well-known examples of a confidential relationship—such as the fiduciary relationship between an attorney and her client, or a guardian and her ward—a confidential relationship arises when the relative position of the parties results in a situation in which one party has power and means to take advantage of or exercise undue influence over the other. *Evasew*, 584 A.2d at 913.

[17] [18] A duty to speak may also arise as a consequence of an agreement between parties, or as a result of one party's reliance on the other's representations, if one party is the only source of information to the other party, or the problems are not discoverable ***1039** by other reasonable means. A duty to speak may also occur when disclosure is necessary to prevent an ambiguous or partial statement from being misleading; where subsequently acquired knowledge makes a previous representation false; or where the undisclosed fact is basic to the transaction. *Duquesne*, 66 F.3d at 612–13; Restatement (Second) of Torts § 551. However, a duty to speak does not arise when both a plaintiff and defendant are sophisticated business entities, entrusted with equal knowledge of the facts and equal access to legal representation. *Duquesne*, 66 F.3d at 613.

[19] The plaintiffs have not raised a genuine issue as to whether Glanton stood in a confidential or fiduciary relationship to them. The parties here had ample negotiating skills and access to legal representation, and the plaintiffs have not demonstrated that Glanton or the Board of the Barnes Foundation exercised some form of undue influence over them or had a heightened duty toward them.

Defendant Glanton and plaintiff City of Rome were parties of roughly equal business sophistication with access to legal representation, and the plaintiffs have set forth any legal authority that creates an exception to the general rule that mere silence is not sufficient absent a duty to speak. These parties had equal knowledge of the facts about whether a contract existed between the Barnes and Rome, and Glanton's silence about subsequent events was not a proximate cause of Rome's professed injury.

4. *Negligent Misrepresentation*

[20] The elements of negligent misrepresentation are: 1) a misrepresentation of a material fact; 2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity, or must make the representation under circumstances in which he ought to have known of its falsity; 3) the representor must intend the representation to induce another to act on it; and 4) injury must result to the party acting in justifiable reliance on the misrepresentation. *Gibbs v. Ernst*, 538 Pa. 193, 647 A.2d 882, 890 (1994). Negligent misrepresentation differs from intentional misrepresentation in that the speaker does not have to know that his words are untrue, but instead has not made a reasonable investigation of the truth of those words. *Id.* The parties set forth no contentions in their proffers regarding the negligent misrepresentation claim. The court rejects it.

C. *Plaintiffs' Motion for Summary Judgment*

1. *Additional Discovery Pursuant to Rule 56(f)*

Pursuant to Rule 56(f), defendants have requested that the court not decide plaintiffs' motion, due to what they perceive as a need for additional discovery. Def. Resp. Ex. KK. A 56(f) affidavit must specify what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained. *See Dowling v. City of Philadelphia*, 855 F.2d 136, 139–140 (3d Cir.1988). While 56(f) motions are usually granted when the information sought is in the exclusive control of the party seeking summary judgment, this rule is not absolute. *See Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 779–80 (3d Cir.1983). A court may deny a continuance of discovery when a party's motion is based on speculation or raises merely colorable claims, when the party has already had an adequate opportunity to discover the information, or when the discovery requests themselves are irrelevant. *See Mid-South Grizzlies*, 720 F.2d at 781; *Jeffries v. Deloitte Touche Tohmatsu Int'l*, 893 F.Supp. 455, 458 (E.D.Pa.1995); *Clarke v. Mellon Bank*, Civ. A. No. 92-4823, 1993 WL 170950 at *6–*7 (E.D.Pa. May 11, 1993); *Paravati v. Bell Asbestos Mines*,

Civ. A. No. 85-0021, 1986 WL 4535 at *1-*2 (E.D.Pa. April 16, 1986).

[21] In their affidavit, defendants claim that their diligence has been frustrated by plaintiffs' resistance to the production of discoverable information, and that the fraud and RICO counterclaims require further discovery. Def. Resp., Ex. KK. Defendants have not set forth reasons sufficient to justify a continuance to permit further discovery on these counts or on any other counterclaim issues. Defendants have had more than adequate***1040*** time for discovery, and a large record has been produced to date on both plaintiffs' and defendants' claims. The court has mediated the discovery disputes that have occurred and has attempted to accommodate both the defendants' and the plaintiffs' discovery requests. Last-ditch efforts to obtain discovery do not qualify as adequate diligence in the eyes of this court. *See* Order of March 21, 1997. Accordingly, the court finds that the defendants have not set forth reasons sufficient to preclude this court's consideration of the plaintiffs' motion for summary judgment.

2. *Breach of Good Faith Negotiation*

[22] Defendants also claim that if any contract occurred, the plaintiffs breached their duty to negotiate that contract in good faith. Counterclaim Count II, ¶ 7. Good faith in the bargaining or formation stages of the contracting process is distinguishable from the common law duty to perform in good faith. *Channel Home Centers v. Grossman*, 795 F.2d 291, 299 n. 8 (3d Cir.1986). A breach of good faith negotiation claim can result from an enforceable agreement to negotiate in good faith under Pennsylvania law. *Id.* at 298-99. The record available does not demonstrate a factual issue of whether an agreement to negotiate in good faith existed, nor does it demonstrate any breach of a common law duty to perform the contract in good faith, as this court has found that no contract exists. As a result, summary judgment is granted on this count.

3. *Fraudulent Misrepresentation*

Defendants also assert a claim for fraudulent misrepresentation. As stated above, a party asserting a claim of fraudulent misrepresentation must establish five elements by clear and convincing evidence: 1) a misrepresentation; 2) a fraudulent utterance thereof; 3) an intention by the maker that the recipient will thereby be induced to act; 4) justifiable reliance by the recipient upon the misrepresentation; and 5) damage to the recipient as the proximate result. *Delahanty v. First Pennsylvania Bank*, 318 Pa.Super. 90, 464 A.2d 1243, 1252 (1983).

Defendants allege that Guizzetti misinformed both Glanton and the Barnes Foundation that he had made arrangements with cities in Italy and with others, that he was authorized to speak for these entities, and that a commitment of $3 million would be paid in substantial part at the signing of the agreement. Def. Resp. Ex. A. To underscore their claims, they point to deposition testimony in which Guizzetti testifies that he "exaggerated" the nature of his conversations with the potential sponsor of the Exhibition, ENI, and that he did so as a means of "pressuring Mr. Glanton." Def. Mot. Ex. T.

[23] Despite their efforts, defendants have not established a genuine issue as to how they were harmed or how they acted in reliance on Guizzetti's actions. Defendants' counterclaim for fraud against Guizzetti falters on the unreasonableness of their reliance on Guizzetti's misrepresentations given the amorphous status of the deal with Rome.

In Count IV, defendants claim that Rutelli, Borgna, and Gentiloni defrauded them by stating falsely that a letter was from the Mayor of Rome and that they had a commitment from a sponsor, and that Guizzetti was a respected financier. Counterclaim Count IV, ¶¶ 29-32.[FN8] On the record at hand, defendants have not created a question of fact regarding the material falsity of this alleged activity, or the reasonableness of their reliance on such allegations. Accordingly, summary judgment is entered on Counts Three and Four as well.

FN8. Defendants assert this claim against Rutelli, Borgna, and Gentiloni but also assert that their claim stands against all of the plaintiffs. Counterclaim Count IV, ¶¶ 29-32. Third Circuit case law indicates that under Rule 13(h), a counterclaim or cross-claim may not be directed exclusively against non-parties, but that joinder under Rule 20(a) must

include at least one existing party. *See* F.D.I.C. v. Bathgate, 27 F.3d 850, 872-74 (3d Cir.1994); *see also* 4 James Wm. Moore et al., *Moore's Federal Practice,* § 20.02(2)(b)(i) (3d ed.1997).

4. *Libel and Slander*

In Count V, defendant Glanton asserts that Gianni Borgna defamed him by referring to him as a "con man" in an article in *La Repubblica,* an Italian newspaper, and that these comments were distributed in Philadelphia.*1041 [FN9] He also claims that plaintiff Guizzetti and certain Roman officials defamed him through comments made to the *Philadelphia Inquirer.*

FN9. Plaintiffs and defendants dispute the status of Gianni Borgna in relation to defendant Glanton's libel and slander claims. Plaintiffs assert that Borgna is not a party to this action, and that Rule 14(a) does not allow a party to implead a nonparty solely to assert a counterclaim against him. *See, e.g.,* Toberman v. Copas, 800 F.Supp. 1239, 1241-42 (M.D.Pa.1992); *see also* United States Fire Ins. Co. v. Reading Municipal Airport Auth., 130 F.R.D. 38, 39 (E.D.Pa.1990). The court's view on the disputed procedural issue is explicated in footnote 8, *supra.*

[24] Whether defendant Glanton is a public figure is a question of law to be determined initially by the court. Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1081 (3d Cir.1985). Defendant Glanton has not developed "such pervasive notoriety in the community that he should be deemed a public figure for all purposes." *Id.* at 1082. However, as a result of his role as the President of the Barnes Foundation at the time of the well-known and widely celebrated tour of the Exhibition, defendant Glanton is deemed a limited purpose public figure for this court's analysis of the libel and slander counterclaims.

As a result of his status as a limited purpose public figure, the counterclaim must be analyzed along both state and federal law lines: 1) whether the counterclaim defendants have harmed Glanton's reputation within the meaning set forth by Pennsylvania law, and 2) if so, whether the First Amendment precludes recovery. *Id.* at 1077.

[25] The burden of proof for a defamation cause of action is set forth in 42 Pa. Cons.Stat. Ann. § 8343(a):

1) The defamatory character of the communication;

2) Its publication by the defendant;

3) Its application by the plaintiff;

4) The understanding by the recipient of its defamatory meaning;

5) The understanding by the recipient of it as intended to be applied to the plaintiff;

6) Special harm resulting to the plaintiff from its publication; [FN10]

FN10. A party may succeed in a claim for defamation absent proof of special harm where spoken words constitute slander per se. Walker v. Grand Cent. Sanitation, Inc., 430 Pa.Super. 236, 634 A.2d 237, 241-244. Four categories that constitute slander per se are: words imputing criminal offense; loathsome disease; business misconduct; or serious sexual misconduct. Tuman v. Genesis Assoc., 935 F.Supp. 1375, 1392 (E.D.Pa.1996); Clemente v. Espinosa, 749 F.Supp. 672, 677 (E.D.Pa.1990).

7) Abuse of a conditionally privileged occasion.

[26] [27] [28] Under Pennsylvania law, the court must determine, in the first instance, whether the statements of which Glanton complains are capable of a defamatory meaning. A statement is defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *United States Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 923 (3d Cir.1990). The court must interpret the statement within its context to determine whether it has a defamatory meaning. *Baker v. Lafayette College*, 516 Pa. 291, 532 A.2d 399 (1987). The test is as follows:

> The test is the effect the [utterance] is fairly calculated to produce, the impression it would naturally engender in the minds of the average persons among whom it is intended to circulate. The words must be given by judges and juries the same signification that other people are likely to attribute to them.
>
> *Id.*

[29] In context, the term "con man" was capable of a defamatory meaning. The effect that this statement would have had on *La Repubblica* 's readership, and any subsequent audience in Pennsylvania, could be to defame defendant Glanton as a criminal. *See, e.g.*, *Frederick and Filosa v. Reed Smith, Shaw & McClay*, No. Civ. A. 92-0592, 1994 WL 57213 at *10-*12 (E.D.Pa. Feb. 18, 1994); *Clemente*, 749 F.Supp. at 672, 677; ***1042** *Agriss v. Roadway Exp., Inc.*, 334 Pa.Super. 295, 483 A.2d 456, 461-63 (1994)

[30] As for the supposedly defamatory statements involving plaintiff Guizzetti, the article that defendant Glanton has cited involves Guizzetti's unfavorable personal opinions of Glanton's actions in Rome, i.e., his having "purposefully misled me, the Mayor of Rome, and other high-level city administrators, the ambassador of italy to the United States, and the Italian corporate sponsors who offered U.S. $3 million to host the exhibition," rather than matters that would harm Glanton's reputation. Def. Countercl. Ex. D. A statement that is a mere expression of opinion is not defamatory. *Walker*, 634 A.2d at 240. As a result, Guizzetti's statements are not actionable. Nor do the Roman officials in the article allege "criminal conduct" on the part of defendant Glanton in "obtaining the hospitality of the City of Rome under false pretenses." Def. Counterclaim Count V, ¶ 38. Rather, in the article in question they express their opinions about what they believed the status of the negotiations with the Barnes Foundation to be. *See id.* Ex. D; *Walker*, 634 A.2d at 240.

[31] In addition, with regard to the incidents involving Borgna, Guizzetti, and plaintiff City of Rome, Glanton has not established actual malice. Actual malice has been defined as knowledge that the statements in question were false or were published with reckless disregard of their falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964). The standard for "reckless disregard" is a subjective one, and it requires that the defendant either have in fact entertained serious doubt as to the truth of his published statement, or that the defendant actually had a high degree of awareness of the probable falsity of that statement. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696, 105 L.Ed.2d 562 (1989). Actual malice must be shown by clear and convincing evidence. *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1318 (3d Cir.1994).[FN11] Defendant Glanton has not established any evidence that plaintiff Guizzetti, or Borgna and other Roman officials, were aware that their sentiments were unfounded when they were made.

> FN11. The Third Circuit applies the *New York Times* standard to media and non-media defendants, when applicable. *See U.S. Healthcare*, 898 F.2d at 931.

[32] [33] Defendant Glanton has also claimed that plaintiffs have deliberately caused widespread publication of libels within the public press. These allegations have centered primarily on quotations from pleadings and orders filed before this court and repeated in the press. *See id.* Ex. E.

Statements made during the course of a judicial proceeding are absolutely privileged. *Pawlowski v. Smorto*, 403 Pa.Super. 71, 588 A.2d 36, 41 (1991). Media statements disseminated by attorneys are extrajudicial communications protected by a qualified immunity, even in their reiteration of the contents of privileged judicial documents. *Pelagatti v. Cohen*, 370 Pa.Super. 422, 536 A.2d 1337, 1344 (1987), *alloc. den.*, 519 Pa. 667, 548 A.2d 256 (1988). The media accounts filed with the court during this proceeding reported statements made in documents filed during the litigation. These included reports of discovery disputes about whether defendant Glanton used the negotiations with Rome and Munich as a subterfuge for advancing his private law practice. FN12 The court ruled on ***1043** those discovery disputes. Among those rulings was an order that defendant Glanton give deposition testimony on that issue and orders cutting off a wild goose chase to depose newspaper reporters and Rome's lawyer in this case on that issue. *See* Court's Order of Feb. 12, 1997 (order quashing subpoena of Shannon Duffy); Court's Order of Feb. 12, 1997 (order quashing subpoenas of Joseph Daughen and Leonard W. Boasberg); Court's Order of February 10, 1997 (order granting plaintiffs' Motion for a Protective Order); Court's Order of February 5, 1997 (order granting in part and denying in part plaintiffs' Motion for Sanctions and to Compel the Continued Deposition of Richard Glanton). Such management of the case was necessary to keep the litigation within the bounds of reason; the court has given the defendants an adequate opportunity for discovery on this claim, and the claim has proven to be without merit. Summary judgment is entered on this count.

FN12. *See, e.g.*, Plaintiff's Motion for Sanctions and to Compel the Continued Deposition of Richard Glanton, Ex. A, in which defendant Glanton set forth the revenue structure at Reed, Smith, Shaw, & McClay:

> Q: [H]ow is the calculation made as to the way in which your revenue is tied to business you generate?
>
> A: It's not, except in a very general way ... to the extent that revenue is one of the factors. We're not what you call an eat what you kill firm, and we're not what you call a quote, attribution firm. We are an institutional firm and the clients where the firm have been there, basically Reed, Smith was a firm that represented the robber barons and has an established client base, over 100 years. And as a consequence, we don't have the topsy-turvy, up and down sort of casino activity compensation system that might prevail at other places. Ours is very steady, easy as you go, narrow band between the highest and lowest paid lawyers. The highest paid lawyer cannot make more than 3.5 times the lowest paid lawyer, so within that compensation band, I'm compensated. *Id.* at 305–06.

5. *RICO*

Plaintiffs also seek summary judgment on defendants' RICO claims. In Count VI, the defendants allege that plaintiff Guizzetti engaged in various acts of wire and mail fraud to induce defendant Glanton to go to Rome while misrepresenting the nature of the proposed negotiations with the Mayor of Rome. Counterclaim Count VI, ¶¶ 49–53. Defendants also allege that Guizzetti's misrepresentations to Glanton were part of a larger scheme of fraudulent transactions with other companies and art exhibitions. Counterclaim Count VI, ¶¶ 43–47.

The RICO statute creates a private cause of action for any person injured in his business or property by a violation of 18 U.S.C. § 1962. *See* 18 U.S.C. § 1964(c). Section 1962(c) prohibits a person employed by or associated with any enterprise engaged in or the activities of which affect interstate or foreign commerce, to conduct or participate in conduct of the enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. § 1962(c). To maintain a claim for a violation of § 1962 (c), a litigant must set forth: 1) the existence of an enterprise that affects interstate commerce and is separate and distinct from the defendant; 2) that the defendant was associated with the enterprise; 3) that the defendant conducted or participated in the affairs of the enterprise; 4) that each defendant engaged in a pattern of racketeering activity; and 5) the racketeering was the proximate cause of injury to the plaintiff. *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1165 (1989). A § 1964(c) action based on § 1962(c) requires a claim against defendant "persons" acting through a

distinct "enterprise," but allegations of conduct by officers or employees who operate or manage a corporate enterprise will satisfy this requirement. *See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 268 (3d Cir.1995). Section 1962(d) prohibits any person from conspiring to violate §§ 1962(a)-(c). 18 U.S.C. § 1962(d). A claim under § 1962(d) requires a litigant to plead and prove 1) an agreement to commit the predicate acts; 2) knowledge of those acts as part of a pattern of racketeering in violation of (a), (b), or (c); and 3) an injury proximately caused by the conspiracy. *Shearin*, 885 F.2d at 1166.

To survive summary judgment on a § 1964(c) claim predicated on § 1962(c), a litigant must establish a pattern of racketeering activity, and this "pattern" must include at least two instances of statutorily specified activities within a ten year period, although two acts in and of themselves may not constitute a "pattern" for the purpose of RICO liability. 18 U.S.C. § 1961(5); *H.J. Inc., v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237, 109 S.Ct. 2893, 2899-2900, 106 L.Ed.2d 195 (1989). A RICO litigant need not establish the existence of multiple criminal schemes. *Id.* at 240, 109 S.Ct. at 2901. Predicate acts that further a single scheme may suffice, provided that the scheme meets the other requirements of a pattern of racketeering activity: 1) the predicate acts are related; and 2) the predicate acts amount to or pose a threat of continued criminal activity. *Id.* at 239-40, 109 S.Ct. at 2900-01.

Predicate acts are "related" if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240, 109 S.Ct. at 2901. For the purpose*1044 of a RICO claim, continuity may be considered either a closed or open-ended concept, "referring either to a closed period of repeated conduct, or by past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241, 109 S.Ct. at 2902 (citing *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3d Cir.1987)). A litigant may demonstrate closed-ended continuity by proving a series of predicate acts over a "substantial" period of time. *Id.* at 242, 109 S.Ct. at 2902. Whether a period of time is "substantial" will turn on the facts of an individual case, but conduct that does not last for more than twelve months will not meet the standard in this circuit for closed-ended continuity. *Tabas v. Tabas*, 47 F.3d 1280, 1293 (3d Cir.), *cert. denied*, 515 U.S. 1118, 115 S.Ct. 2269, 132 L.Ed.2d 275 (1995). As for open-ended continuity, predicate acts that occur over a few weeks or months will not satisfy the continuity requirement unless these acts demonstrate a threat of future criminal activity. *H.J. Inc.*, 492 U.S. at 242-43, 109 S.Ct. at 2902-03.[FN13]

> FN13. A RICO litigant need not prove that the predicate acts pose some form of "societal threat" to satisfy the continuity requirement, as the focus of analysis of the continuity requirement is on the commission of predicate acts or the threat of similar acts in the future. *Tabas*, 47 F.3d at 1293 n. 17; *see also H.J. Inc.*, 492 U.S. at 242-43, 109 S.Ct. at 2902-03.

Mail fraud has two elements: 1) a scheme to defraud, and 2) use of the mails in furtherance of the scheme. 18 U.S.C. § 1341; *United States v. Dreer*, 457 F.2d 31 (3d Cir.1972). Wire fraud requires: 1) a scheme to defraud, and 2) use of interstate communications in furtherance of the scheme. 18 U.S.C. § 1343. Defendants have indeed alleged predicate acts of wire and mail fraud, but they have not produced sufficient evidence on this record to establish a question of material fact as to the elements of mail and wire fraud.

[34] ☑ Moreover, despite an actively pursued course of discovery, defendants have not offered up evidence of record to establish the existence of a pattern of racketeering activity or the requisite causation for either § 1962(c) or (d). Defendants have alleged a closed-ended scheme in which Guizzetti engaged in a series of false deals. The record has only produced evidence of failed deals in which Guizzetti pursued courses of action in what might be described as a less than graceful manner. In *Tabas,* the Third Circuit recognized that its interpretation of the RICO requirements would encompass "garden variety fraud cases," *see Tabas,* 47 F.3d at 1296, and this court also recognizes that RICO must be "read broadly." *Id.* at 1297. RICO was not meant to sweep this broadly, nor was the statute intended to remedy all sharp dealing. Summary judgment is entered on this count as well.

6. *Contribution*

In Count VII, defendants assert a claim for contribution and state that any right to recovery that plaintiffs may have can be attributed to the false statements that plaintiffs and third party defendants made to one another "concerning defendants' position regarding the necessary elements of the contract." Counterclaim Count VII, ¶ 55. Plaintiffs argue that this claim is premature and can only arise after trial and judgment against the defendants. *See* Stahl v. Ohio River Co., 424 F.2d 52, 55-56 (3d Cir.1970); 42 Pa. Cons.Stat. Ann. § 8324(a)-(b) (West 1982 & Supp.1996).

Putting aside the difficult jurisdictional issues that this count presents, defendants have not demonstrated how the third parties they have sought to join are or may be liable to defendants for all or any part of the claims against the defendants, even if Rule 14(a) permits acceleration as a procedural matter. *See, e.g.,* 3 James Wm. Moore et al., *Moore's Federal Practice,* §§ 14.05(2), 14.07 (3d ed.1997). Thus, while Rule 14(a) authorizes the assertion of future, contingent, unmatured claims against third parties, defendants have not demonstrated any substantive basis for such a claim. *See* Stahl, 424 F.2d at 56. Summary judgment is entered on this count.

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Judges | Attorneys

Judges

- **Katz, Hon. Marvin**
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