IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COGAN HOUSE TOWNSHIP, Counterclaim Defendant	:	No. 14-02035
	:	CIVIL ACTION – LAW
vs.	:	
DAVID and DIANNE LENHART (h/w), Counterclaim Plaintiffs	:	

OPINION AND ORDER

AND NOW, following argument on Counterclaim Defendant's Motion for Partial Summary Judgment, the parties' Motions to Exclude Expert Testimony and Reports, and the parties' Motions in Limine, the Court hereby issues the following OPINION and ORDER.

PRE-APPEAL BACKGROUND

The history of this case, which Cogan House Township ("CHT")[1] commenced by filing a Complaint on August 7, 2014, is detailed extensively in this Court's previous orders as well as the Commonwealth Court's November 15, 2018 Opinion.[2] By way of brief summary, this matter concerns work performed on Post Road in Cogan House Township – essentially taking the form of road construction and related stormwater management work – which involved installing a drainage system

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[1] Although Cogan House Township initiated this matter, no claims raised by Cogan House Township are pending; the only claims presently before the Court are counterclaims raised by David and Dianne Lenhart. As such, in the record, Cogan House Township is variously referred to as both "Plaintiff" and "Counterclaim Defendant," and the Lenharts are referred to as both "Defendants" and "Counterclaim Plaintiffs." To avoid confusion, this Opinion and Order will refer to each party by their abbreviated name ("CHT" and "the Lenharts") rather than their party designation.

[2] The parties dispute the scope of the issues remaining following remand. This Opinion discusses the Commonwealth Court's November 15, 2018 Opinion in detail *infra*.

(collectively the "Post Road Modifications"). CHT's Complaint sought to enjoin the Lenharts, owners of property adjacent to Post Road, from interfering with the drainage system.[3]

The Lenharts pursued a counterclaim, the operative version of which is the Fourth Amended Counterclaim ("FACC") filed on July 27, 2016. In the FACC, the Lenharts included six counts: Count I – Willful Misconduct or Gross Negligence; Count II – Negligence; Count III – Negligence Per Se; Count IV – Nuisance; Count V – Trespass; and Count VI – Equitable Relief. The essence of the Lenharts' claim is that CHT performed the Post Road Modifications without proper preparation or care, causing damage to their property. The Lenharts seek money damages as well as injunctive relief requiring CHT to take affirmative steps to mitigate and remediate the damage.

Per agreement of the parties, the Court bifurcated the issues of liability and damages. The Court scheduled a non-jury trial on liability only before the Honorable Dudley N. Anderson for September 6, 2017 through September 8, 2017. CHT ultimately did not pursue its claims,[4] and therefore the only issues at trial were those causes of action brought by the Lenharts in the FACC. On October 12, 2017, Judge Anderson issued the Court's Opinion and Verdict, ultimately ruling against the

[3] During the pendency of this matter, the Lenharts acquired additional properties along the relevant stretch of Post Road. The parties dispute the effect of these acquisitions, as discussed *infra*.

[4] At trial, the Lenharts made an oral motion to dismiss CHT's claims due to CHT's failure to pursue them. Judge Anderson granted this motion on October 12, 2017, dismissing CHT's claims. CHT did not appeal the October 12, 2017 Order. The Court discusses the effect of this Order *infra.*

Lenharts on each of their claims. Specifically, Judge Anderson made the following four conclusions of law:

> "1. [CHT] did not violate [32 P.S. § 680.13].[5]
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> 2. [CHT] did not violate 25 Pa. Code Chapter 102.[6]
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> 3. [CHT] did violate 25 Pa. Code Chapter 105[7] by not applying for a permit for the pipe replacement in the tributary of Bear Run, but that violation did not cause any damage to the Defendants' property.
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> 4. [CHT] did not violate their Stormwater Management Ordinance.[8]"

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[5] 32 P.S. § 680.13 is the provision of Pennsylvania's Storm Water Management Act [the "SWMA"] that defines the "[d]uty of persons engaged in the development of land," and states:

> "Any… person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures… as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include… assur[ing] that the maximum rate of storm water runoff is no greater after development than prior to development activities; or… manag[ing] the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury."

[6] Title 25, Chapter 102 of the Pennsylvania Code ("Chapter 102") was enacted pursuant to the Clean Streams Law to implement "best management practices" to reduce erosion and sedimentation, manage stormwater, and maintain water quality during construction consisting of, *inter alia*, "earth disturbance activities" and "road maintenance activities." In broad terms, Chapter 102 requires the landowner performing construction to create and implement plans to reduce erosion and sedimentation, and to obtain certain permits from the Department of Environmental Protection (the "DEP").

[7] Title 25, Chapter 105, Subchapter C of the Pennsylvania Code ("Chapter 105") implements permitting requirements for construction done on bridges and culverts. The Post Road Modifications included the placement of a culvert, and thus fell under the scope of Chapter 105.

[8] CHT's Stormwater Management Ordinance "requires preparation and implementation of an approved Storm Water Management Site Plan for all regulated activities, which are defined as '[a]ny earth disturbances or any activities that involve the alteration or development of land in a manner that may affect stormwater runoff.'" *October 12, 2017 Opinion and Verdict*.

The primary holding underlying the verdict was the Court's conclusion that the Post Road Modifications "do not constitute 'alteration or development of land,'" and thus were not subject to many of the duties and responsibilities forming the basis of the Lenharts' claims.

On October 23, 2017, the Lenharts filed post-trial motions, which the Court denied on December 1, 2017. The Lenharts filed a Notice of Appeal to the Commonwealth Court on December 22, 2017, ultimately raising eight allegations of error.

COMMONWEALTH COURT OPINION

On November 15, 2018, the Commonwealth Court reversed the trial verdict and remanded for further proceedings. The Commonwealth Court perceived the Lenharts' eight alleged errors as essentially raising three distinct issues on appeal:

> "(1) whether the trial court erred in ruling that [CHT] did not engage in alteration or development of land for purposes of the [Storm Water Management Act] and [CHT's Stormwater Management] Ordinance; (2) whether the trial court erred in determining that [CHT's] activities constituted road maintenance and not road construction or reconstruction for purposes of DEP's regulations; and (3) whether the trial court erred in failing to address [the Lenharts'] common law claims and request for equitable relief."[9]

The Commonwealth Court addressed each of these issues separately, and found error with respect to all three.

[9] *Cogan House Township v. Lenhart*, 197 A.3d 1264, 1267 (Pa. Cmwlth. 2018).

A. Alteration or Development of Land and Storm Water Runoff

The first issue the Commonwealth Court addressed was whether the Post Road Modifications constituted “alteration or development of land” sufficient to trigger various permitting requirements and other responsibilities under Pennsylvania law and CHT’s ordinance.[10] The Commonwealth Court first noted that the Storm Water Management Act (“SWMA”) does not define the phrase “alteration or development of land,” and explained that the common usage of the phrase “alteration or development” in this context covers any “substantial change of land that may affect drainage runoff characteristics….”[11] With this definition in mind, the Court addressed the trial court’s conclusion “that the work completed did not constitute alteration or development of land… [because] ‘[t]he original location of the road and accompanying ditches was maintained and existing pipes were replaced in their original locations.’”[12]

The Commonwealth Court first found that “no competent evidence [in the record] support[ed] the determination that the work performed was limited to the original location and graded area of the road, and some evidence [existed] to the contrary.”[13] Thus, the Court concluded, the trial court’s factual finding in this regard was erroneous.[14] Furthermore, the Court highlighted “the trial court’s own findings

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[10] *Id.* at 1267-71.
[11] *Id.* at 1268.
[12] *Id.* at 1269.
[13] *Id.*
[14] *Id.* at 1270.

regarding the undisputedly invasive nature of the activities undertaken…."[15] Emphasizing that SWMA liability does not depend on "whether, in hindsight, runoff was in fact affected, but whether the statutory duties were triggered by the potential of such effects," the Court ultimately held that as a matter of law, the Post Road Modifications "constituted alteration or development of land that affected storm water runoff characteristics."[16] The Commonwealth Court "remand[ed] for further evidence as to the amount of damages, if any, which resulted from the Township's failure to comply with the aforementioned law and ordinance provisions."[17]

B. <u>DEP's Regulations</u>

Next, the Court addressed the trial court's holdings that Chapter 102 did not apply to the Post Road Modification and that CHT's violation of Chapter 105 was irrelevant to the Lenharts' damages.

The Court first held that the Post Road Modifications were not "road maintenance," as the trial court found, but "road construction or reconstruction," which falls under the scope of Chapter 102.[18] Thus, CHT was required to obtain a National Pollutant Discharge Elimination System permit, pursuant to 25 Pa. Code § 102.5.[19] Additionally, CHT failed to submit a written erosion and sedimentation

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[15] *Id.*
[16] *Id.* at 1269, 71. The Court further explained: "In other words, the duty to follow the dictates of the statutory provision is neither negated nor cured by whether or not runoff, ultimately, was altered. Of course, the amount of such an effect may be relevant to the issue of damages, but this case has not reached that stage of the proceedings."

[17] *Id.* at 1271.
[18] *Id.* at 1272.
[19] *Id.*

plan as required by 25 Pa. Code § 102.4(b)(2).[20] With regard to Chapter 102, the Court "remand[ed] for further evidence as to the amount of damages, if any, which resulted from [CHT's] failure to comply with Chapter 102…."[21]

Next, the Court considered the trial court's determination that "there was insufficient evidence to support a finding of damage" for CHT's failure to comply with Chapter 105, and thus "there could be no liability for failure to procure a permit."[22] Finding this conclusion erroneous, the Court noted that the trial court "failed to acknowledge the existence of… evidence of harm," and that "the trial was bifurcated as to damages so there was no reason [the Lenharts] should have submitted all of the relevant evidence of harm."[23] With regard to Chapter 105, the Court "(1) reverse[d] the trial court's determination that [CHT's] failure to comply with Chapter 105… was irrelevant because that violation did not cause any damage to [the Lenharts'] property; and (2) remand[ed] for additional evidence, where necessary, and pertinent findings of fact and conclusions of law as to any damages that [the Lenharts] may have sustained."[24]

C. <u>Common Law Claims and Request for Equitable Relief</u>

The Commonwealth Court held that the trial court erred in not addressing the Lenharts' common law and equitable claims, explaining that "common law provides that an owner of land who constructs a drain depositing increased water flow onto a

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[20] *Id.* at 1273-74.
[21] *Id.* at 1274.
[22] *Id.*
[23] *Id.* at 1274-75.
[24] *Id.* at 1275.

neighbor's land can be held liable for damage to the land that results therefrom."[25] The Commonwealth Court "remand[ed] for the trial court's consideration of [the Lenharts'] common law claims and request for equitable relief, which may include additional evidence and must include pertinent findings of fact and conclusions of law."[26]

D. Summary of Issues Remanded

To summarize the issues remaining on remand, the Commonwealth Court has directed this Court to:

1. Take further evidence as to the amount of damages, if any, arising from CHT's violation of the SWMA and CHT's stormwater ordinance;

2. Take further evidence as to the amount of damages, if any, arising from CHT's violation of Chapter 102;

3. Take further evidence if necessary and make findings of fact and conclusions of law as to any damages the Lenharts have sustained from CHT's violation of Chapter 105; and

4. Take further evidence if necessary and make findings of fact and conclusions of law regarding the Lenharts' common law claims and request for equitable relief.

MOTIONS BEFORE THE COURT

The following nine motions are presently before the Court:

1. CHT's Motion for Partial Summary Judgment, filed October 6, 2021.

2. CHT's Motion to Exclude from Trial a Portion of the Expert Report and Testimony of Lake S. Randall, P.E. and Mid-Penn Engineering, filed October 6, 2021.

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[25] *Id.* (citing *Glencannon Homes Ass'n, Inc. v. N. Strabane Twp.*, 116 A.3d 706, 720 (Pa. Cmwlth. 2015)).
[26] *Id.*

3. Lenharts' Motion to Exclude Expert Report and Testimony of Larson Design Group, filed October 6, 2021.

4. CHT's Motion in Limine to Preclude from Trial the Investigative Report, Factual Findings and Testimony of John L. Mullen, P.G. and Four Oaks Geophysics, filed November 12, 2021.

5. CHT's Motion in Limine for De Novo Trial on both Liability and Damages, filed December 10, 2021.

6. Lenharts' Motion in Limine Regarding Scope of Trial, Remand, and Evidence, filed December 10, 2021.

7. Lenharts' Motion in Limine Regarding Law of the Case and Preclusion, filed December 10, 2021.

8. Lenharts' Motion in Limine Regarding Testimony Outside Scope of Township Expert Reports, filed December 10, 2021.

9. CHT's Motion in Limine to Preclude Testimony and Evidence from Trial, filed December 10, 2021.

These motions are each ripe for adjudication.[27] The remainder of this Opinion will address these motions in four sets: the Motion for Summary Judgment, the three motions regarding expert testimony and reports, the first three motions in limine (which deal with the appropriate scope of trial on remand), and the final two motions in limine dealing with miscellaneous evidentiary matters.

CHT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

CHT's Motion for Partial Summary Judgment avers generally that "there is no genuine issue of material fact that requires trial" on the Lenharts' claims of "(a) willful misconduct or gross negligence (Count I); (b) negligence (Count II); (c) negligence

[27] The Court heard argument on the first three of these motions on November 19, 2021, and on the fourth through ninth of these motions on December 20, 2021.

per se (Count III); and (d) nuisance (Count IV), except claims for negligence and nuisance to address the alleged work performed by the Township along the East-West stub of Post Road in 2012…." CHT rests their position on six separate legal bases. Before considering the merits of CHT's Motion, however, the Court must address the Lenharts' threshold contention that a Motion for Summary Judgment is improper at this juncture of the proceedings – and thus should not be entertained by the Court – because trial in this matter has commenced.

A. <u>Propriety of Motion for Summary Judgment</u>

At the outset, the Lenharts argue that "[i]t would be error for this Court to entertain [CHT's] motion for summary judgment – a motion reserved *exclusively for pre-trial practice* – because the trial of the case is already commenced and is now *mid-trial*."[28] They note that the Commonwealth Court did not vacate the September 2017 proceedings "but rather *reversed* and ordered the proceedings to *continue* because of their premature termination by the former presiding trial judge."[29] Entertaining a motion for summary judgment at this stage, the Lenharts argue, would allow CHT to "game the system by relying on evidence as though the case were still in the pre-trial stage"; they characterize CHT's request as "ask[ing] the Court to accept as true evidence that *has not been* admitted into the evidentiary record of the case, while relying on other evidence that *has been* admitted into the record in the first trial proceedings… thus creat[ing] an incognizable evidentiary mishmash of a

[28] Emphasis in original.
[29] Emphasis in original.

factual predicate, and something that doesn't make sense under the applicable standard of review for either" a motion for summary judgment or a motion for compulsory nonsuit. The Lenharts cite *William J. Heck Builders, Inc. v. Martin*[30] in support of this argument.

In response, CHT first notes that the Court's Scheduling Orders, as issued and amended repeatedly following remand, have consistently set a "[c]ut-off date for filing dispositive motions…." CHT argues that *Heck Builders* is inapposite, as this case is not presently in trial, and suggests that *McHugh v. Proctor & Gamble* is more relevant.[31]

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[30] *William J. Heck Builders, Inc. v. Martin*, 462 A.2d 253 (Pa. Super. 1983). In *Heck*, a plaintiff in a bench trial for a breach of contract action made an oral motion for summary judgment at the conclusion of his case-in-chief, which the trial court granted. Finding this to be procedurally improper, the Superior Court declared that "[a]fter trial has commenced, a motion for summary judgment is no longer appropriate." The Court also found that the trial court read the defendant's answer too strictly, and should have acknowledged that it incorporated by reference various writings that were sufficient to defeat a grant of summary judgment. Although *Heck*'s holding is unqualified, its analysis is sparse and its factual situation is confined. Therefore, its applicability to a motion for summary judgment brought during a four-year interlude between the two parts of a bifurcated trial, after both parties have presented their case on the first issue and neither has presented their case on the second, is nebulous. The Court believes that *Heck* is persuasive inasmuch as it clearly states the general principle that a party should bring a motion for summary judgment before the commencement of trial, but not of itself dispositive of the issue here, given the unusual procedural posture of this case.

[31] *McHugh v. Proctor & Gamble*, 875 A.2d 1148 (Pa. Super. 2005). In *McHugh*, the plaintiff filed a personal injury complaint on January 5, 1994, and a jury trial commenced over five years later on September 14, 1999. After a defense verdict, the plaintiff appealed, and was granted a new trial due to the trial court's improper denial of challenges for cause at jury selection. On November 20, 2003, nearly 10 years after the action began, the defendant filed a motion for summary judgment, averring that another party "had sole and exclusive responsibility for" the circumstances of the plaintiff's employment which led to his injury. The trial court granted the motion for summary judgment, and the plaintiff appealed, alleging *inter alia* that the motion was untimely. The Superior Court, however, deemed this argument waived, as the plaintiff "failed to provide relevant case law [and did] not cite any cases which 1) preclude the filing of a motion for summary judgment after remand; and 2) prohibit the use

Motions for summary judgment are governed by Pennsylvania Rules of Civil Procedure 1035.1 through 1035.5. Rule 1035.2 states:

> "After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law:
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> > (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
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> > (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury."

Under Rule 1035.3, the non-moving party must file a response pointing out "evidence in the record" which either "controvert[s] the evidence cited in support of the motion" or "establish[es] the facts essential to the cause of action or defense which the motion cites as not having been produced." For the purposes of motions for summary judgment, Rule 1035.1 defines the "record" to include "any (1) pleadings, (2) depositions, answers to interrogatories, admissions and affidavits, and (3) reports signed by an expert witness that would, if filed, comply with Rule 4003.5(a)(1)…." Rule 1035.4 governs the use of affidavits in motions for summary judgment, and Rule 1035.5 provides that, when the Court does not grant summary judgment in full, it "may, if practicable, ascertain… which material facts relevant to the

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of trial admissions as a basis for a later motion for summary judgment." In a footnote, the Superior Court noted that *Heck Builders* was distinguishable from the facts presented, as in *McHugh* the defendant "filed its motion for summary judgment after [the Superior Court] vacated the judgment" in its favor and "filed its motion before the start of the second trial."

motion exist without controversy and which are actually controverted… make an order specifying the facts that are without controversy… [treat] the facts so specified [as] deemed established and… conduct[] [trial] accordingly."

Although no single Rule of Civil Procedure addresses the process of bifurcation, Rules 213(b) and 224 allow courts to bifurcate proceedings.[32] Rule 213(b) states:

> "The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross-suit, or of an separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues."

Rule 224 states:

> "The court may compel the plaintiff in any action to produce all evidence upon the question of the defendant's liability before calling any witness to testify solely to the extent of the injury or damages. The defendant's attorney may then move for a non-suit. If the motion is refused, the trial shall proceed. The court may, however, allow witnesses to be called out of order if the court deems it wise to do so."

The decision to bifurcate a trial is within the sound discretion of the trial court, and "will not be disturbed absent an abuse of discretion."[33] Confusingly, the courts of Pennsylvania sometimes describe bifurcation as splitting one trial "into two phases," usually "liability and damages," even though the plain language of Rule 213(b) speaks of "separate trial[s]…."[34]

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[32] *See, e.g., Ptak v. Masontown Men's Softball League*, 607 A.2d 297, 299-300 (Pa. Super. 1992).
[33] *Id.* at 299.
[34] *See, e.g., Coleman v. Philadelphia Newspapers, Inc.*, 570 A.2d 552, 554 (Pa. Super. 1990).

The Court has been unable to find a case directly addressing the issue of whether it is proper to file a motion for summary judgment between the two trials in a bifurcated proceeding, and neither party has identified any controlling precedent. As a matter of first principles, "[t]he function of a summary judgment is to avoid a useless trial."[35] The Supreme Court of Pennsylvania has stated, "[t]here is no logical reason for forcing the parties to go to trial when there could be no genuine issue as to a material fact…."[36] Further evidencing that a motion for summary judgment is intended to promote judicial economy is Rule 1035.2's directive that a motion for summary judgment must be filed "within such time as not to unreasonably delay trial…." Both *Heck Builders* and *McHugh* are consistent with judicial economy as the driving force behind the motion for summary judgment: in *Heck Builders*, the motion was inappropriate in part because it was made at a time and in a manner that did not obviate the need for trial; in *McHugh*, the motion, late in the process as it was, promoted judicial economy by narrowing the scope of the (second) trial.

It is important to remember that a grant of summary judgment on a particular issue necessarily implies that the adverse party may not prevail as a matter of law. Therefore, only an *erroneous* grant of summary judgment will prejudice a party; an arguably *premature* grant of summary judgment against a party that cannot prevail as a matter of law is, by definition, harmless error.[37] For these reasons, the Court

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[35] *Id.* at 254.
[36] *Rose v. Food Fair Stores, Inc.*, 262 A.2d 851, 853 (Pa. 1970).

[37] A premature grant of summary judgment is prejudicial, of course, when it occurs before a party has a chance to fully participate in discovery or respond to all issues in the case. *See,*

concludes that a motion for summary judgment is not *per se* improper when filed between the two portions of a bifurcated trial.[38]

In ruling on CHT's Motion for Partial Summary Judgment, the Court stresses that it will only consider the "record" as defined by Rule 1035.1. Further, the Court notes that it is not addressing the parties' claims and defenses *ab initio* – the determinations of the Commonwealth Court are binding upon this Court and the parties, and therefore this Court may not issue a ruling undermining them in any fashion. Additionally, the Lenharts argue that CHT has waived certain of the theories raised in its Motion for Summary Judgment. The Court views this argument as conceptually distinct from the argument concerning the propriety of a motion for summary judgment at this stage, and will therefore address this argument separately as needed.

B. <u>Statute of Limitations</u>

CHT argues that "[t]ort claims, including trespass, negligence and nuisance, are subject to a two-year statute of limitations." Thus, because the Lenharts commenced their action by way of a counterclaim on August 18, 2014, CHT contends that "[a]ll claims related to injuries alleged to have occurred prior to August 18, 2012,

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e.g., Anthony Biddle Contractors, Inc. v. Preet Allied American Street, LP, 28 A.3d 916 (Pa. Super. 2011). Here, both parties have had a full and complete opportunity to conduct discovery, and the record (as defined by Rule 1035.1) is complete.

[38] The Court stresses that this determination is confined to the specific and unusual circumstances presented here.

including all alleged injuries related to Hurricane Lee in September 2011, are barred by the statute of limitations."

The Lenharts first respond that because their tort claims consist of a *continuing* trespass and nuisance, "a new claim accrues upon the occurrence of each event giving rise to injury." At the very least, the Lenharts argue, this means that "[t]he amount and continuing aggravation of the recurring damages attributable to each flooding occurrence is a disputed fact between the parties and should be determined by the fact-finder and cannot be resolved on summary judgment."[39] With regard to the specific issue of "injuries alleged to have occurred prior to August 18, 2012," the Lenharts argue that CHT's position constitutes an affirmative defense that CHT has waived.

The invocation of the statute of limitations to bar an adversary's claim is a waivable affirmative defense.[40] As an affirmative defense, the statute of limitations must "be pleaded in a responsive pleading under the heading 'New Matter.'"[41] On October 28, 2016, CHT filed an Answer with New Matter to the FACC; paragraph 72 of CHT's New Matter pled the statute of limitations in a boilerplate fashion. Due to the lack of factual averments in support of this defense, *had* the Lenharts filed a preliminary objection, the Court would have sustained the objection pursuant to

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[39] The Court does not believe CHT is arguing that *all* of the Lenharts' trespass and related claims are barred by the statute of limitations, or that the Lenharts' have alleged a permanent, rather than continuous, trespass.

[40] *Driscoll v. Arena*, 213 A.3d 253, 257 (Pa. Super. 2019).
[41] Pa. R.C.P. 1030(a).

Lycoming County's long-standing practice as enunciated in *Allen v. Lipson*.[42] However, on November 16, 2016, the Lenharts filed an Answer to CHT's New Matter, denying paragraph 72 as a legal conclusion requiring no answer and, in the alternative, denying that the statute of limitations bars any claims in the FACC.

Between the filing of the Lenharts' November 16, 2016 Answer to CHT's New Matter and the commencement of trial on September 6, 2017, no filing of record by either the parties or the Court referred to the statute of limitations. Furthermore, a review of the trial transcript reveals that no party raised the statute of limitations at trial. Even when a party pleads a statute of limitations defense in a new matter, a party's failure to pursue the defense may result in waiver.[43] Here, prior to and during the first portion of trial on the question of liability, CHT never suggested that it was not liable for any injury sustained by the Lenharts by reason of the Lenharts asserting their claims in an untimely manner. This conduct at trial, when viewed in light of

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[42] *Allen v. Lipson*, 8 Pa. D. & C.4th 390 (Lycoming Cty. 1990).

[43] *Checchio By and Through Checchio v. Frankford Hospital-Torresdale Div.*, 717 A.2d 1058, 1059 n.2 (Pa. Super. 1998); *Cobbs v. Allied Chemical Corp.*, 661 A.2d 1375 (Pa. Super. 1995). In *Cobbs*, an asbestos liability case, the defendant raised the statute of limitations in a new matter. The court conducted the case as a *reverse* bifurcated trial, with the first trial on damages only. Following the conclusion of the damages phase, which resulted in a verdict for the plaintiff, the plaintiff and the defendant entered into a narrow stipulation that the asbestos manufactured by the defendant was a "substantial factor and cause of" the decedent's death, obviating the need for the liability phase of trial. In post-trial motions, the defendant raised the statute of limitations defense, and the plaintiff argued the defendant had waived the defense. The Superior Court held the defendant had not waived the defense by failing to assert it prior to the damages phase of trial, because "the limitations defense was… not implicated, and thus not necessarily raised, in the phase of the trial regarding damages"; furthermore, the stipulation addressed "the narrow issue of causation [which] was entirely separate and apart from the purely legal defense of the statute of limitations." This analysis implies that, had the first trial implicated the issue, the failure to raise the statute of limitations as an affirmative defense may have resulted in waiver.

CHT's failure to assert any facts supporting this defense in its New Matter or during the subsequent years between that filing and the instant Motion for Partial Summary Judgment, results in waiver. CHT may not now use the statute of limitations to block damages for injuries for which it is liable. Furthermore, because the Court should have made a liability determination on the Lenharts' common law claims at the first trial, with the failure to do so constituting error, CHT was required to assert a defense to liability on common law issues prior to those issues being submitted to the Court for a ruling. That the Court independently failed to address those claims does not retroactively alter the effect of CHT's failure to assert the defense when it should have; CHT should not be permitted to reap a procedural windfall due to an erroneous decision of this Court.

C. <u>Gross Negligence and Negligence Per Se Claims</u>

CHT next argues that the Lenharts' gross negligence claim (Count I of the FACC) and negligence *per se* claim (Count III of the FACC) "are subsumed within" Count II, Negligence. More specifically, CHT argues that gross negligence is not different from negligence, but merely a "degree" of negligence, and that Pennsylvania does not treat these as legally distinct causes of action. Further, CHT argues that negligence *per se* is also not a separate cause of action, but rather a concept that "establishes… the elements of duty and breach" in some circumstances of negligence.

The Lenharts respond that this portion of CHT's Motion "is one of form more properly stated in preliminary objections," and that "negligence and gross negligence

are distinguishable concepts in civil law and permitted alternative theories of liability." They contend that the doctrine that "there are no degrees of negligence in Pennsylvania" has been abrogated.[44]

The Court agrees with CHT that the Lenharts could have raised all three negligence theories under a single Count of "negligence," and the Court agrees with the Lenharts that CHT's objection to their pleading is one of form rather than substance. It is clear from the arguments that both parties understand that in order to demonstrate negligence in any form, the Lenharts will need to establish that (1) CHT owed them a duty; (2) CHT breached that duty; (3) there was a causal connection between the breach and the resulting injury suffered; and (4) the Lenharts suffered an actual loss.[45] The Lenharts may attempt to utilize the concept of negligence *per se* to establish some of these elements, or show a "failure to exercise even 'scant care'" as required to demonstrate gross negligence.

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[44] The Lenharts cite *Feleccia Lackawanna College*, 215 A.3d 3 (Pa. 2019). In *Feleccia*, the Supreme Court addressed the specific question of whether a waiver purporting to release the defendant from "any and all liability… that may be sustained" applied to negligence and gross negligence. The Court held that as a matter of public policy, a broad waiver of liability was enforceable with regard to negligence but not enforceable with regard to gross negligence. This Court does not read *Feleccia* as condoning or mandating separate causes of action for negligence and gross negligence; however, *Feleccia* clearly recognizes that negligence and gross negligence are conceptually distinct, and that in certain circumstances a party may wish – or be constrained to attempt – to prove one and not the other.

[45] *See, e.g., Reeves v. Middletown Athletic Ass'n*, 866 A.2d 1115, 1126 (Pa. Super. 2004).

D. Willful Misconduct

CHT next argues, in a similar vein, that the Lenharts' "willful misconduct" claim, also included in Count I, "is not a separate cause of action and should be dismissed." CHT further argues that "[a]ssuming, arguendo, that [willful misconduct] is [a cause of action], [CHT] as a local agency is immune from such a claim in accordance with the Political Subdivision Tort Claims Act."[46]

The Lenharts respond that "willful misconduct lies on a fault continuum somewhere between ordinary negligence and an intentional tort,"[47] and that their "expert reports… establish this as a triable factual issue."

As noted by the Commonwealth Court in *Kuzel*, as defined in the Restatement (Second) of Torts, "willful misconduct" is something less than an intentional tort, as it does not require "intent to cause [an] injury."[48] Under the Restatement (Second)'s definition, "[t]o establish willful misconduct, all that needs to be shown is that the actor was conscious of the risk of harm and that the risk was high either in degree or probability."[49] Confusingly, though, "[f]or purposes of the [PSTCA], 'willful misconduct' is synonymous with the term 'intentional tort.'"[50]

Like the previous claim, the Court views this portion of CHT's Motion as one concerning form rather than substance. The Lenharts may present evidence to show that CHT has breached a duty by acting negligently, intentionally, or somewhere in

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[46] The Court discusses the Political Subdivision Tort Claims Act ("PSTCA") in detail *infra*.
[47] *Kuzel v. Krause*, 658 A.2d 856, 859 n.6 (Pa. Cmwlth. 1995).
[48] *Id.*
[49] *Id.*
[50] *Id.* at 859.

between, and CHT may contest that contention. The parties may then argue about whether the level of culpability established by the Lenharts constitutes willful misconduct for the purposes of the Restatement (Second) of Torts, the PSTCA, neither, or both, as well as the consequences of such a showing under either standard.[51]

E. Injury to After-Acquired Land

CHT avers that of the Lenharts' five parcels of land adjacent to Post Road, only two (Parcels A1 and A2, as identified in Exhibit K to CHT's Motion for Partial Summary Judgment) were owned by the Lenharts prior to the commencement of the Post Road Modifications. CHT contends that the Lenharts purchased parcel C in 2015 – after the Post Road modifications and the filing of their first counterclaim but before the filing of the FACC – and parcels A3 and B in 2018, after they filed the FACC (and, indeed, after the first trial in this matter).

CHT contends that the Lenharts should be "barred from recovering under any theory of liability for injury to land they did not possess at the time of injury" for two reasons: first, that the Lenharts "assumed the risk" when they purchased subsequent parcels knowing they were affected by the modifications and thus lack standing to pursue claims concerning these parcels, and second, that the Lenharts have never amended the FACC or otherwise pled any harm to these parcels.

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[51] The court addresses CHT's specific claims for partial summary judgment under the PSTCA *infra*.

1. **Assumption of Risk and *Beach Street***

First, CHT contends that of the Lenharts' five parcels of land adjacent to Post Road, only two were in their possession prior to the Post Road Modifications. CHT avers that, "with full awareness of [the] issues" giving rise to their claims, the Lenharts acquired the third parcel in 2015, and acquired the fourth and fifth parcels "in 2018 *after* they had already filed the FACC and, therefore, after they were aware of the alleged stormwater runoff issues along post road." Inasmuch as these acquisitions constituted "a conscious decision to tempt fate with these purchases," CHT contends that the Lenharts "have abandoned their right to complain of stormwater damage they knew was occurring as early as 2011" under the doctrine of assumption of risk. In the alternative, CHT argues that the Lenharts lack standing to bring any claims for damage to any particular parcel prior to their acquisition of that parcel. CHT highlights that the Lenharts have requested equitable relief, and suggests that it would be inequitable to allow the Lenharts to purchase property knowing it was subject to alleged storm water issues – possibly receiving a discount for this reason – and yet fashion a remedy for these alleged issues that the Lenharts voluntarily assumed.

The Lenharts respond that the nature of a continuing trespass means that each time a storm water event causes damage, a new breach occurs. At the very least, they contend, this principal allows them to recover for damages occurring after their purchase of a particular parcel, inasmuch as a new claim accrues upon each new occurrence of the trespass or nuisance.

At argument, CHT averred that *Beach Street Corp. v. A.P. Const. Co., Inc.* is dispositive of this issue.[52] In *Beach Street*, a contractor hired by the City of Philadelphia dumped debris onto a property along the Delaware River "from 1985 until February of 1988."[53] In November of 1989, the plaintiff bought the river property, and in August of 1990 the plaintiff filed a complaint in trespass against the contractor.[54] The trial court held that because the contractor's trespass was permanent rather than continuous, the two-year statute of limitations barred the plaintiff's action.[55] On appeal, the Superior Court agreed that the statute of limitations applied, but noted its belief that "the more powerful rationale for dismissal is [the plaintiff's] lack of standing," explaining:

> "Beach Street bought property that had been partially covered with mounds of 'soil and spoil.' There is no question that before purchasing the property, Beach Street could have inspected it and discovered the debris, which had been sitting there for the past two years. Beach Street did not demand that the seller first remove the debris, or make any arrangements for its removal. Rather, Beach Street took a deed for the property as it was, and decided to bring a trespass action over two years later. It is well-settled that any right to sue for the trespass belongs solely to the possessor at the time of the trespass, and does not pass by deed… If real estate development is to be encouraged, the law must at some point cut off potential future liability for changes in the condition of land. The logical point to wipe the slate clean is with a change in ownership. When a buyer can discover the topographical condition of land by simple visual inspection, she will be deemed to have accepted the land 'as is' when she accepts the deed."[56]

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[52] *Beach Street Corp. v. A.P. Const. Co., Inc.*, 658 A.2d 379 (Pa. Super. 1995).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 380.

Beach Street clearly rests upon a determination that it is unfair for the purchaser of a derelict or otherwise affected property to seek judicial redress for a condition that was not inflicted upon him but which he freely assumed through his knowing purchase of the property. It is not self-evident, however, that this principle applies with equal force to a continuing trespass like the one alleged here as to a permanent trespass such as in *Beach Street*. In a continuing trespass:

> "[I]t is impossible to know exactly how many incidents of trespass will occur in the future, or the severity of the damage that may be caused, such that the full amount of damages cannot be calculated in a single action… The possessor may maintain a succession of actions based on the continuing trespass or treat the continuance of the thing on the land as an aggravation of the original trespass. Liability for a continuing trespass is also created by the continued presence on the land of a thing 'if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing.'"[57]

The thrust of *Beach Street* is that a purchaser cannot sue for a trespass that has already occurred when they knew – or should have known – of that trespass when they purchased the property. Thus, the Lenharts may not recover for any damage to any of the five parcels that occurred prior to their purchase of that parcel.

When they purchased each parcel, however, "it [was] impossible" for the Lenharts "to know exactly how many incident of trespass [would] occur in the future, or the severity of the damage that [would] be caused…." Additionally, the Lenharts argue that the Post Road Modifications were *per se* unlawful, and that ensuing

[57] *Kowalski v. TOA PA V, L.P.*, 206 A.3d 1148, 1161 (Pa. Super. 2019).

damages result not only from CHT's performance of the work but also from CHT's failure to rectify the issues identified.

Ultimately, the Lenharts claim damages arising not out of the state of the property when they purchased it but out of subsequent intrusions of water onto their five parcels *after* they acquired each parcel. As stated in *Beach Street*, "any right to sue for the trespass belongs solely to the possessor at the time of the trespass"; in the case of a continuing trespass, the "time of trespass" is each new incident of intrusion.[58] Therefore, the Court concludes that the *Beach Street* principle, and any related assumption of risk doctrine, is inapposite to the Lenharts' particular claims, and will not deprive them of standing to bring these claims.

2. <u>Failure to Plead</u>

Because the Lenharts have standing to bring their claims, the Court must proceed to consider CHT's second argument: that the Lenharts' failure to plead a portion of the damages they now seek bars them from recovery. CHT argues:

> "[B]ecause the Counterclaim was initiated on August 18, 2014, it cannot be construed to include claims of injury to property the Lenharts did not own at that time. The Lenharts have not amended the Counterclaim to include additional claims or damages related to property acquired since the filing of the Counterclaim on August 18, 2014. Therefore, the Lenharts cannot recover for claims alleging damage to Parcels A3, B and C, all of which they acquired after August 18, 2014."

The Lenharts respond that because their "properties are contiguous, and [they] complain of the same wrongdoing as stated in the [FACC]," they have put CHT "on adequate notice of the claim[s] against which it must defend." Specifically, they

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[58] *Beach Street,* 658 A.2d at 380.

aver that CHT "knows exactly where the Lenharts' property is and what property they acquired, and the pleading brought against [CHT's] actions is very detailed as to [CHT's] wrongdoing affecting the property along Post Road. The [FACC] is lengthy, detailed, and provides adequate notice of the matters at issue in this case."

CHT avers that the Lenharts purchased Parcel C in 2015, after the August 18, 2014 filing of the first counterclaim but prior to the July 27, 2016 filing of the FACC. CHT does not analyze the language of the FACC to determine whether it sufficiently pleads causes of action relating not just to parcels A1 and A2 but to parcel C.[59] A fair reading of the FACC demonstrates that it does. The gravamen of the Lenharts' claims in the FACC is not that CHT has damaged their parcels (though this is certainly alleged), but that CHT conducted the Post Road Modifications wrongfully and illegally, which "had a direct, material, and negative effect upon the condition of Defendants' real property…." The Lenharts allege that they "have sustained injury and damages… the value of [their] real property has been reduced… [and they] have been required to undertake significant and expensive repairs and modifications to their real property…." The FACC does not explicitly specify that it includes Parcel C, but it also does not specify that it does not – rather, it refers to the Lenharts' "real property." CHT filed preliminary objections to the FACC, but these did not charge a lack of specificity as to what property was at issue. As such, the most straightforward reading of the FACC, in accordance with its plain terms, is that the Lenharts' claims

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[59] Because the Lenharts purchased Parcels A3 and B *after* the filing of the FACC, it could not possibly have pled a cause of action concerning those parcels, except to the extent that it put CHT on notice of claims against any future property. Parcels A3 and B are discussed *infra*.

are for damages caused by the Post Road Modifications to the property they owned along Post Road at the time they filed the FACC. This includes parcels A1, A2, and C.

The same cannot be said for Parcels A3 and B. The Lenharts purchased these parcels not merely after they filed the FACC but after this Court entered a verdict against them in the first trial. *Had* the Court entered a verdict on the Lenharts liability claims at the conclusion of the September 2017 trial – as the Commonwealth Court says it should have – it could have only done so with regard to the property the Lenharts owned at that time: Parcels A1, A2, and C. But for the Court's error in this regard, the question of liability may very well have been concluded, and the Lenharts would have needed to file a separate lawsuit to recover damages relating to Parcels A3 and B. Stated another way, the case and controversy before the Commonwealth Court regarded 1) the propriety of the Post Road Modifications and 2) common law causes of action and damages concerning Parcels A1, A2, and C. This is the scope of the dispute the Commonwealth Court considered, and this is the dispute the Commonwealth Court remanded to this Court for further proceedings.

Just as CHT cannot benefit from this Court's error by raising an affirmative defense for the first time at a late stage,[60] the Lenharts cannot take advantage of this Court's failure to make findings of fact and conclusions of law on their common law liability claims by taking steps, after the conclusion of the first trial, which affirmatively change the factual circumstances to expand the scope of that liability.

[60] See the discussion of the statute of limitations, *supra*.

Thus, for the reasons stated above, the Lenharts' claims and damages will be limited to Parcels A1 and A2 from the inception of the Post Road Modifications through the present, and Parcel C from its purchase in 2015 through the present.

F. Political Subdivision Tort Claims Act – Immunity Generally

CHT asserts that it is immune to many of the Lenharts' claims by virtue of the Political Subdivision Tort Claims Act ("PSTCA").[61] This assertion consists of three separate, though related, arguments: first, as a matter of law, the Lenharts are unable to establish duty or causation as to certain claims; second, CHT is immune to liability for the acts of third parties Pennoni, HRI and John Ryder; and third, certain of the Lenharts' claims do not fall under an exception to the PSTCA's grant of immunity and must be dismissed.[62]

1. The PSTCA Generally

The PSTCA provides that, in general, "no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person."[63] There are, however, nine enumerated exceptions to this general grant of immunity, and a local agency will be liable for damages for such excepted actions when 1) "[t]he damages would be recoverable… if the injury were caused by a person not having [immunity]" and 2)

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[61] 42 Pa. C.S. § 8541 to § 8564.

[62] CHT brings a fourth claim under the PSTCA regarding the amount of damages; this claim is conceptually distinct from the issue of immunity and thus is addressed separately *supra*.

[63] 42 Pa. C.S. § 8541. For the purposes of the PSTCA, a "local agency" is defined as "[a] government unit other than the Commonwealth government." Thus, CHT is a "local agency" for the purposes of the PSTCA.

"[t]he injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties…."[64] Notably, "negligent acts" under the PSTCA do not include "acts or conduct which constitutes a crime, actual fraud, actual malice, or willful misconduct."[65] CHT points out that although the PSTCA speaks only of "liabil[ity] for any *damages*," the Commonwealth Court has routinely held that the PSTCA applies to actions seeking "an affirmative action" as well as those seeking money damages.[66]

2. Duty and Causation

CHT alleges that as a matter of law, the Lenharts cannot prevail on any "[n]egligence claims premised on [CHT's] alleged failure to require third parties—including Anadarko, Range, Pennoni, HRI and John Ryder—to comply with the [Storm Water Management Ordinance], [Storm Water Management Act] and/or the [Clean Streams Law]," because a municipality has no legal duty to enforce its own ordinances, and only a permissive duty to enforce the SWMA and CSL. Thus, CHT argues, the Lenharts can demonstrate neither duty nor causation as a matter of law.[67] Specifically, CHT avers that its "power to enforce the SWMA and Clean

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[64] 42 Pa. C.S. § 8542(a).

[65] *Id.* As discussed above, although "willful misconduct" in most contexts is something greater than negligence but less than an intentional tort, "[f]or the purposes of the [PSTCA], 'willful misconduct' is synonymous with the term 'intentional tort.'" *Kuzel v. Krause*, 658 A.2d 856, 859 n.6 (Pa. Cmwlth. 1995).

[66] *See Swift v. Dept. of Transp. of Com.*, 937 A.2d 1162, 1168 (Pa. Cmwlth. 2007). The Court discusses this contention *infra*.

[67] The argument that CHT has no duty to require third parties to act in certain ways is facially similar to, but conceptually distinct from, the argument that CHT is immune from liability for

Streams Law ("CSL") is permissive, and that it is well-established that "[a] municipality has no legal duty to exercise discretionary authority [such as] [t]he decision to enforce ordinances [which is] inherently discretionary and beyond judicial review."

CHT cites a number of cases in support of this proposition. In *Wecksler v. City of Philadelphia*, a vehicle that was illegally parked on a sidewalk obstructed a pedestrian's view, causing her to trip on the curb and fall; there was no allegation of defect in the sidewalk.[68] The plaintiff "contend[ed] that the city [was] liable because it failed to stop the practice of parking on the sidewalk, or in other words, failed to enforce its ordinance against parking [in such a manner]."[69] The Superior Court held that because the ordinance "was passed under a discretionary and not a mandatory power," the city was "not liable for failure to enforce [such] an ordinance enacted pursuant to permissive authority."[70]

Similarly, in *Buffalini by Buffalini v. Shrader*, the plaintiff sued for injuries sustained in a motor vehicle accident, alleging that the accident occurred due to the obstruction of a stop sign by a commercial advertisement sign.[71] Although the

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the acts of third parties under the PSTCA. This latter argument is discussed in the next section of this Opinion.

[68] *Wecksler v. City of Philadelphia*, 115 A.2d 898, 899 (Pa. Super. 1955).
[69] *Id*. at 900.

[70] *Id*. at 901. The Court also held that, inasmuch as the plaintiff's claim was premised on a "lack of light" attributable to the vehicle's shadow, the claim against the city was similarly barred because "[t]here is no legal duty on the part of a municipality to light its thoroughfares or streets, and it cannot be held responsible for a mere insufficiency of light."

[71] *Buffalini by Buffalini v. Shrader*, 535 A.2d 684, 686 (Pa. Cmwlth. 1987).

commercial sign was placed by a private business on private property, it was erected without a permit in violation of a township ordinance.[72] The Superior Court held that the Pennsylvania Municipalities Planning Code "clearly intended to grant municipalities the authority to enforce [their] ordinances under the conditions set out in the statute but its permissive language does not mandate that enforcement in all circumstances"; thus, the defendant township had no duty to the plaintiff to enforce its permitting ordinance.[73]

The Lenharts, essentially, dispute that the language of the SWMA prevents them from establishing duty or causation. Their Answer and Brief in Response to the Motion do not explicitly mention the ordinance or the CSL. The Court will address each of these three provisions separately.

a. Storm Water Management Act

The SWMA is codified at 32 P.S. § 680.1 through § 680.17. The duties imposed by the SWMA are described in § 680.13:

> "Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include such actions as are required:
>
> > (1) to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or

[72] *Id.*
[73] *Id.* at 687-88. The Court ruled in the alternative that the township was immune under the PSTCA, as the plaintiff had not demonstrated the applicability of an exception to the general principle of governmental immunity.

> (2) to manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury."

The remedies available under the SWMA are detailed in § 680.15:

> "(a) Any activity conducted in violation of the provisions of this act or of any watershed storm water plan, regulations or ordinances adopted hereunder, is hereby declared a public nuisance.
>
> (b) Suits to restrain, prevent or abate violation of this act or of any watershed storm water plan, regulations or ordinances adopted hereunder, may be instituted in equity or at law by the department, any affected county or municipality, or any aggrieved person. Except in cases of emergency where, in the opinion of the court, the circumstances of the case require immediate abatement of the unlawful conduct, the court may, in its decree, fix a reasonable time during which the person responsible for the unlawful conduct shall correct or abate the same. The expense of such proceedings shall be recoverable from the violator in such manner as may now or hereafter be provided by law.
>
> (c) Any person injured by conduct which violates the provisions of [§ 680.13] may, in addition to any other remedy provided under this act, recover damages caused by such violation from the landowner or other responsible person."

CHT's position misconstrues the Lenharts' argument. The Lenharts' claim is not that some third parties engaged in construction and CHT merely failed to hold them to the requirements of the SWMA. Rather, the Lenharts claim that *CHT itself* violated the SWMA by "engag[ing] in the alteration… of land which may affect storm water runoff characteristics" but failing to "implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property." The Lenharts have clearly alleged that they are "person[s] injured by conduct which violates the

provisions of [§ 680.13]," and that CHT is "the landowner or other responsible person."

It is not merely the case that the Lenharts *may* establish a duty – they have affirmatively done so, as a matter of law. The Commonwealth Court remanded "for further evidence as to the amount of damages, if any, which resulted from [CHT's] *failure to comply with the aforementioned law and ordinance provisions*."[74] This instruction on remand would be nonsensical if CHT did not have a duty to obey the SWMA. It is clear that the two issues the Commonwealth Court has directed this Court to address on remand are 1) damages ("the amount of damages") and 2) causation ("which resulted from" the breach). By necessary implication, then, this Court may not consider the other two elements of negligence – duty and breach – because the Commonwealth Court has concluded that the Lenharts have established them, and that determination binds this Court.

b. <u>Local Storm Water Ordinance</u>

The Commonwealth Court noted that the Ordinance "resembles Section 13 of the SWMA in its use of the phrase alteration or development of land" and "refers to the SWMA as [CHT's] primary authority for regulating storm water management."[75] The Commonwealth Court generally construed the Ordinance as intertwined with the SWMA, in part constituting CHT's implementation mechanism of the requirements of the SWMA.[76] To that end, the Commonwealth Court found that the SWMA and

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[74] *Lenhart*, 197 A.3d at 1271.
[75] *Id.* at 1269.
[76] *Id.*

Ordinance applied to coterminous classes of activities, and that "their stated purposes are the same…."[77]

The Commonwealth Court noted that the Ordinance "requires preparation and implementation of an approved Storm Water Management Site Plan for all 'regulated activities' and that no such activities are to commence until the Township issues written approval of a plan."[78] Just as with the SWMA, the Lenharts are not alleging that CHT merely failed to *enforce* the Ordinance against third parties conducting regulated activity in the township, but that *CHT* conducted that activity themselves, and is thus liable for violating its own Ordinance. As noted above, the Commonwealth Court remanded "for further evidence as to the amount of damages, if any, which resulted from [CHT's] failure to comply with the aforementioned law and ordinance provisions."[79] Therefore, the Commonwealth Court's conclusion regarding the Ordinance was identical to the SWMA: the Lenharts have established a duty and breach, and this Court must hold a trial on damages and causation.

c. <u>Clean Streams Law</u>

The enforcement provision of the CSL permits private suits in a manner similar to the SWMA:

> "Any activity or condition declared by this act to be a nuisance or which is otherwise in violation of this act, shall be abatable in the manner provided by law or equity for the abatement of public nuisances….
>
> [A]ny person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance

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[77] *Id.*
[78] *Id.*
[79] *Id.* at 1271.

> with this act or any rule, regulation, order or permit issued pursuant to this act… against any… person alleged to be in violation of any provision of this act or any rule, regulation, order or permit issued pursuant to this act."[80]

As discussed in footnote 6 *supra*, the Pennsylvania Legislature implemented the Clean Streams Law through Chapter 102 of Title 25 the Pennsylvania Code, which contains the regulations of the Department of Environmental Protection. The Commonwealth Court addressed this Court's ruling on Chapter 102, and remanded for an identical determination as with the SWMA and Ordinance: "we remand for further evidence as to the amount of damages, if any, which resulted from [CHT's] failure to comply with Chapter 102 of DEP's Regulations."

As with the SWMA and Ordinance, this Court is powerless to credit CHT's argument that "[t]he Lenharts cannot recover in negligence where duty and causation are not established" when the Commonwealth Court has conclusively determined that the Lenharts have proved a duty and remanded for a determination of causation.

d. <u>Death of Trees/Water Quality</u>

CHT makes the additional argument that "[t]he record contains no facts supporting claims that [CHT] caused diminution in water quality or death of trees." With regard to the trees, CHT specifically argues:

> "The Lenharts have produced no competent, admissible expert testimony or any other form of evidentiary support for their conclusion that [CHT's] action damaged hemlock trees on their property. Neither the Lenharts, nor their expert, a civil engineer, is qualified to opine on the trees' cause of death. Their mere belief that it is the result of [CHT's] action is insufficient to create a genuine issue of material fact as to the cause of the trees' death."

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[80] 35 P.S. § 691.601(a), (c).

In their Motion for Summary Judgment, CHT does not mention water quality. In their Brief in Support of the Motion, however, they state:

> "The Lenharts are aware of no study that has been undertaken to determine whether there has been a change in any quality or characteristic of Bear Run or the Bear Run Tributary. The Lenharts' expert, a civil engineer, is not qualified to offer an opinion on water quality. Instead, he relies upon a DEP worksheet providing 'pollutant loads' based on generalized inputs of site characteristics. Significantly, no water testing has been produced by the Lenharts to substantiate their speculative conclusion. The Lenharts' and their expert's conclusions as to the existence and cause of the alleged degradation in water quality are not sufficiently supported by facts on the record and claims related thereto should be dismissed."

The Lenharts respond to the contention concerning the trees that even though they "have not retained an arborist in addition to the engineering experts retained, the small analytical step required to support a finding of causation is clearly within the scope of the doctrine of *res ipsa loquitur*… [a]ll of the elements of [which] are unquestionably met." Specifically, they contend that "[t]he dying of a whole grove of hemlocks does not usually occur in the absence of negligence, no other potential responsible cause apart from the massive flooding exists… [and as] the owners of the trees [the Lenharts] are authorized to provide their own lay opinion as to the cause of death in light of the dramatic health-to-injury collapse suffered by the trees." The Lenharts did not mention water quality in either their Answer to the Motion for Summary Judgment or Brief.

The doctrine of *res ipsa loquitur*, meaning that the thing speaks for itself, "reflects a common sense understanding that an inference of negligence may be raised without direct evidence of the negligent act if three conditions exist: (1) the

injury must be of a type not ordinarily occurring absent negligence; (2) the defendant must have had exclusive control of the instrumentality effecting the injury; and (3) the plaintiff must not have contributed to the injury."[81] If the evidence satisfies these three conditions, then no expert testimony – indeed, no testimony at all – is required as to causation. The first of these elements is subject to the condition that "either a lay person is able to determine as a matter of common knowledge, or an expert testifies, that the result which has occurred does not ordinarily occur in the absence of negligence…."[82]

The Court has no hesitation in concluding that the doctrine of *res ipsa loquitur* does not apply to the death of trees, as the Lenharts have not met the first of the three requirements. The assertion that "[t]he dying of a whole grove of hemlocks does not usually occur in the absence of negligence" strikes the Court as odd. At the very least, to accept this assertion, the Court would need to conclude that there is no natural cause such as a disease or parasite that could wipe out a grove of hemlock trees. This is well outside the expertise of the Court or any layperson, and is exactly the sort of contention that a party must establish by expert testimony.

The Court additionally finds that, for similar reasons, it is not obvious that CHT "had exclusive control of the instrumentality" damaging the trees because it is not obvious what that instrumentality is. The classic example of *res ipsa loquitur* is a patient who leaves a hospital following an invasive procedure only to find years later

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[81] *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 824 A.2d 1140, 1145-46 (Pa. 2003).
[82] *Id.* at 1150.

a surgical sponge remaining inside of his body.[83] In such a case, it is clear what the instrumentality of injury is and who was in charge of it. Here, the Lenharts assert that there is no possible instrumentality of damage other than the additional water on their property, but offer no expert support for this contention. Whereas a layperson factfinder can conclude that a sponge in a person's abdominal cavity was the cause of his severe abdominal pain, the connection between increased water on land and the death of or damage to trees is not so readily apparent to the layperson.

The Lenharts have failed to establish that the doctrine of *res ipsa loquitur* applies to the injury to trees on their property, and have not "identif[ied]" any other "evidence in the record establishing the facts essential to the cause of action which the" Motion for Summary Judgment "cites as not having been produced."[84] Thus, the Court grants CHT's motion for summary judgment as to damages to the trees on the Lenharts' property. However, CHT did not include claims about water quality in its Motion for Summary Judgment; the inclusion of this issue in its Brief alone is insufficient to raise the issue, and summary judgment on that particular issue is denied.[85]

3. Acts of Third Parties

CHT argues that the PSTCA "clearly precludes the imposition of liability on… local agencies for the acts of third parties," as none of the exceptions to the general

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[83] *See Fessenden v. Robert Packer Hosp.*, 97 A.3d 1225 (Pa. Super. 2014).
[84] *See* Pa. R.C.P. 1035.3.
[85] This issue is addressed again *infra* in the discussion relating to CHT's Motion for a *Frye* hearing.

principle of immunity allow for such liability.[86] CHT's assertions in this regard are rather significant in scope:

> "It is undisputed that third parties, not [CHT], designed, constructed and installed the 2011 and 2014 Post Road Modifications. Anadarko and/or Range engaged Pennoni to prepare all engineering studies, plans, specifications and permit applications related to this work, and HRI performed substantially all construction. HRI was directed by Pennoni and paid by Anadarko and/or Range. [CHT] did not pay, direct or oversee Pennoni, HRI, Anadarko or Range and did not obtain engineering studies or perform work in connection with the 2011 or 2014 Post Road Modifications. It is also undisputed that [CHT] did not create the alleged diversion terraces in the Ryder Farm field. [CHT] is immune to liability for the actions of Anadarko, Range, Pennoni, HRI and John Ryder, including the design and installation of the 2011 and 2014 Post Road Modifications, the alleged failure to apply for or obtain permits and the creation of the alleged diversion terraces in the Ryder Farm Field. [CHT's] immunity extends to claims predicated upon [CHT's] alleged failure to monitor or supervise Pennoni, HRI or Ryder and claims predicated upon [CHT] stormwater facilities merely transmitting stormwater flow created by the diversion terraces on the Ryder Farm Field. All claims related to the same (e.g., FACC ¶¶ 38(a), (b), (e), (g), (h), (k), (l)-(r), (t)-(z)) should be dismissed as a matter of law."

The Lenharts respond in their Answer to the Motion for Summary Judgment that CHT provided input for the designs, procured materials, directed the work, and made alterations themselves as part of the 2011 and 2014 Post Road Modifications. They also point to a number of exhibits and portions of testimony from the first trial in this matter which they claim support this allegation.

The Court concludes that there is easily enough evidence in the record to raise a material question about whether the actions of CHT or its employees caused or contributed to the issues the Lenharts have alleged. CHT's argument in this

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[86] CHT quotes *Chevalier v. City of Phila.*, 532 A.2d 411, 413 (Pa. 1987) for this proposition.

regard seems to characterize the Lenharts' claim against them as something akin to vicarious liability – essentially, that CHT had no involvement whatsoever in the independent acts of these third parties except for happening to own the land where they occurred. It is of course true that the Lenharts may not recover against CHT for the independent acts of third parties conducted entirely without CHT's knowledge, input, participation or approval; this is not a result of the PSTCA, however, but merely of general principles of liability and causation.[87]

In the alternative, it bears repeating that the Commonwealth Court has found that CHT not only owed the Lenharts a duty but breached that duty on a number of counts. CHT should have raised any arguments that it cannot, as a matter of law, be liable for any of these actions – because they were all committed by third parties – *prior to the liability phase of trial*. That CHT did not previously raise these arguments strongly suggests waiver. The Lenharts will of course need to present evidence establishing a causal connection between the actions of CHT – whatever they were – and the damages they sustained. On the voluminous record in this case, which discusses in painstaking detail exactly what actions CHT has and has not taken over the past 11 years, the Court will not prevent the Lenharts from attempting to prove such a connection.[88]

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[87] The specific exceptions to immunity under the PSTCA are discussed in the next section *infra*.

[88] *See also Glencannon Homes Ass'n, Inc. v. North Strabane Tp.*, 116 A.3d 706 (Pa. Cmwlth. 2015), discussed *infra*. In *Glencannon Homes Association*, both municipal defendants argued that the plaintiff's claims should be dismissed because they were arguing the defendants "w[ere] negligent for the conduct of… third-party contractors." The Court found

4. Exceptions to Immunity under PSTCA

CHT argues that "[t]he question of [CHT's] liability for acts related to [stormwater] facilities must be analyzed under the utility services exception" to the PSTCA. This exception states that a local agency may be held liable for:

> "A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition."[89]

CHT discusses two more of the nine enumerated exceptions to immunity in the PSTCA. CHT specifically contends that the "streets exception" to immunity does not apply because that exception only applies to "[n]egligence that… render[s] a street unsafe for purposes for which it was intended, i.e. travel on the roadway…."[90] CHT also acknowledges the "real estate exception," which "applies where injury is caused by the negligent care, custody or control of real property in the possession of the local agency."[91]

Ultimately, CHT argues that the following claims do not fall under any exception to the PSTCA:

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that this misconstrued the plaintiff's arguments in that case, which were actually that the municipal defendants "negligently maintained the storm water management system."

[89] 42 Pa. C.S. § 8542(b)(5).
[90] 42 Pa. C.S. § 8542(b)(6).
[91] 42 Pa. C.S. § 8542(b)(3).

- “[C]laims related to the design of its stormawater facilities or any purported deficiency in the system’s capacity to convey stormwater.”
- “[C]laims related to stormwater facilities and real estate not owned by [CHT]... includ[ing] the diversion terraces purportedly constructed by John Ryder on the Ryder Farm Field and stormwater facilities under or along Frenchmans Ridge Road.”

In *Glencannon Homes Association*, a homeowner’s association alleged that the defendant school district and township were negligent and violated the SWMA.[92] The Court, reiterating the well-established principle that “stormwater management which involves culverts, basins, swales, and/or drains is the equivalent of a sewer for the purposes of this exception,” held that where the “jury heard evidence regarding the [defendant township’s] improvements to McDowell Lane in 2010, including paving… as well as the existence of a culvert/drain pipe under the road, all of which contributed to an increase in the velocity and quantity of water and sediment which would deposit into a tributary on the [plaintiff’s] property,” the question of the applicability of this exception was properly submitted to the factfinder.[93] Similarly, the Court explained that claims that a city “negligently constructed its stormwater management system by installing a drainage pipe underneath a road… which collected and discharged surface water in such a concentrated fashion onto [the defendant’s] property that it caused a gully and erosion” fell under the real property exception of the PSTCA.[94]

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[92] *Glencannon Homes Ass’n, Inc. v. North Strabane Tp.*, 116 A.3d 706, 710 (Pa. Cmwlth. 2015).
[93] *Id.* at 718-19.
[94] *Id.* at 721-22.

The Lenharts alleged in the FACC that CHT, *inter alia*, failed to exercise care, custody, and control over its real property; caused the volume, rate, and velocity of storm water onto their land to be increased; failed to maintain and repair the relevant storm water management mechanisms; or permitted or failed to require, as the case may be, that third parties do so. They also alleged that Plaintiff "improperly and unlawfully delegated to third parties" many of these responsibilities.

The Lenharts have pled a prima facie case that all or some of their claims fall within the "utility service facility" or "real property" exceptions to the PSTCA, and these issues are appropriately reserved for resolution by the factfinder after the presentation of evidence at trial.

G. PSTCA – Damages Cap

CHT finally alleges that "[t]he Lenharts' recovery is limited to monetary damages measured by the cost of repair to their property and capped by the PSTCA at $500,000." Specifically, CHT makes two separate arguments: that "[a]ffirmative injunctive relief is inappropriate because money damages are an adequate remedy at law" and the PSTCA bars affirmative injunctive relief, and "[t]he Lenharts' damages recovery is limited to the cost of repair to property," which is to be at most $500,000 under the PSTCA.

1. Propriety of Injunctive Relief

CHT argues that "[a]n injunction is an extraordinary remedy to be granted only with extreme caution" and is only appropriate when "necessary to prevent immediate and irreparable harm with no adequate remedy at law," but the Lenharts have not

demonstrated that money damages are inadequate. As such, CHT argues, the Lenharts' attempts to "compel [CHT] to construct various stormwater facilities" is inappropriate. CHT further argues that "[a]n injunction ordering a government agency to take affirmative action to remediate a common law violation… is equivalent to an award of damages to which the governmental entity is immune," and thus this Court may not grant affirmative injunctive relief but may instead only "enter[] a prohibitory order to enjoin the continuing trespass…." CHT cites *Swift* for this proposition, which in turn cites *Bonsavage*.[95]

The Lenharts respond that "equitable relief is expressly ordained as a remedy both in the alternative and as cumulative to damages allowed under the SWMA," and therefore is available to remedy breaches of that statute. They cite *Bonsavage* to essentially argue that equitable relief is not *precluded* by the PSTCA, but is merely another remedy, like monetary damages, that a court may award only if an exception to the general principle of immunity applies.[96] The Lenharts suggest that if they establish the existence of a nuisance, the burden shifts to CHT to prove that an adequate remedy exists that will not require affirmative equitable relief.

In *Bonsavage*, the plaintiffs alleged that a local borough "failed to properly maintain storm sewer and sanitary sewer pipes which resulted in damage to [their] home and sought corrective injunctive relief as well as money damages."[97] The

[95] *Swift v. Cept. Of Transp. Of Com.*, 937 A.2d 1162 (Pa. Cmwlth. 2007) (citing *Bonsavage v. Borough of Warrior Run*, 676 A.2d 1330, 1331 (Pa. Cmwlth. 1996)).
[96] *Bonsavage*, 676 A.2d 1330.
[97] *Id.*

plaintiffs later added the Commonwealth and Department of Transportation as indispensable parties, and these parties contested liability on the grounds of *sovereign* immunity.[98] The Court noted that "sovereign immunity will shield [these parties] from suit, unless the [plaintiffs'] claim fits within one of the exceptions which are set forth in [42 Pa. C.S. § 8522]."[99] In *Bonsavage*, the Court held that the claim against the Commonwealth sounded in negligence, and thus no exception to sovereign immunity applied.[100] The Court also noted that the legislature waived the absolute grant of sovereign immunity *only* with regard to damages, and not for "equitable claims seeking affirmative action by way of injunctive relief," and thus the only claim that survived was against the Department of Transportation for money damages.[101]

Although it does not appear as though any published case has explicitly stated that injunctive relief seeking affirmative action is unavailable under § 8542 as it is under § 8522, a recent line of unpublished cases, which may be cited for persuasive value, has declared as much.[102] The Lenharts cite *Bretz*, which itself cites *E-Z Parks, Inc.*, for the proposition that "governmental immunity applies only to liability for

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[98] *Id.* at 1331. 42 Pa. C.S. § 8501 *et sub.* contains the Pennsylvania legislature's limited waiver of sovereign immunity for state actors, which is in many ways analogous to the waiver of immunity contained in § 8541 *et sub.*, the PSTCA.

[99] *Id.*
[100] *Id.* at 1332.
[101] *Id.*
[102] *See Plaza v. Herbert, Rowland and Grubic, Inc.*, 2017 WL 519827 (Pa. Cmwlth. 2017); *Torma v. Parrot Construction Corp.*, 2018 WL 1477535 (Pa. Super. 2018); *Gosselin Trustee for Living Trust of Clarence K. Shuey v. Supervisors of North Manheim Township, Schuylkill County*, 2021 WL 2199120 (Pa. Cmwlth. 2021).

damages and does not prevent recovery by way of injunctive relief"; the recent cases, however, have contrasted the clear directive of *Bonsavage* concerning affirmative injunctive relief with *Bretz* and *E-Z Parks*, both of which dealt with injunctions "restraining [the] local agency from taking action, [which] is not barred by the PSTCA because it is not a damages claim."[103] The language of § 8522 and § 8542, though not identical, is similar; specifically, § 8542(a) states that "[a] local agency shall be liable for damages… [for] injur[ies]… caused by the negligent acts of the local agency or any employee thereof acting within the scope of his office or duties with respect to one of the categories listed in [§ 8542(b)]." And, as noted by the Lenharts, the waiver of immunity provided by the PSTCA must be strictly interpreted.[104]

The Court concludes that under the PSTCA it may not award equitable relief in the form of an injunction requiring CHT to take affirmative action such as constructing new stormwater management facilities. The Court may order prohibitive injunctive relief forbidding future violations, and – as CHT acknowledges – CHT must then determine what actions it needs to take, if any, to comply with that prohibition.

2. <u>Damages Cap</u>

The PSTCA provides that "[d]amages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed $500,000 in the aggregate."[105] Within this cap, CHT argues,

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[103] *Bretz v. Central Bucks School Dist.*, 86 A.3d 306, 313 (Pa. Cmwlth. 2014) (citing *E-Z Parks, Inc. v. Larson*, 498 A.2d 1364 (Pa. Cmwlth. 1985)); *Plaza*, 2017 WL 519827 at *3.
[104] *See, e.g., Smith v. Manson*, 806 A.2d 518 (Pa. Cmwlth. 2002).
[105] 42 Pa. C.S. § 8553(b).

"[w]here injury to land is reparable, the measure of damages is the lesser of (1) the cost of repair, or (2) the market value of the damaged property before it suffered the damage."[106] Although the Lenharts argued that the Court may grant an affirmative injunction requiring action costing more than $500,000, they did not specifically dispute the applicability of this monetary cap to any money damages portion of recovery, nor did they dispute the measure of damages.

The Court concludes that the $500,000 cap provided by 42 Pa. C.S. § 8553 applies. However, the Court cannot conclude as a matter of law that the injury to the Lenharts' land is reparable; this is a question of fact. Therefore, the Court will determine the appropriate measure of damages, if any, following the presentation of testimony and evidence at trial.

H. Motion for Partial Summary Judgment – Conclusion

For the foregoing reasons, the Court determines that it may consider CHT's Motion for Partial Summary Judgment, and is not precluded from doing so by the procedural posture of this case. The Court GRANTS IN PART and DENIES IN PART CHT's Motion as follows:

- CHT's Motion concerning the statute of limitations is DENIED as waived.
- CHT's Motions concerning the pleading of gross negligence, negligence per se, and willful misconduct claims are DENIED.
- CHT's Motion concerning injury to after-acquired land is GRANTED IN PART. The Lenharts' recovery shall be limited to damages for 1) parcels they acquired prior to the 2017 trial and

[106] CHT cites *Slappo v. J's Development Associates, Inc.*, 791 A.2d 409, 415 (Pa. Super. 2002).

2) injuries to those parcels that occurred on or after the date of the Lenharts' acquisition.

- CHT's Motion for immunity to SWMA, CHT Ordinance, and CSL claims pursuant to the PSTCA is DENIED.

- CHT's Motion for summary judgment on the Lenharts' claim for damages arising out of the death of trees is GRANTED.

- CHT's Motion for summary judgment arising out of an alleged diminution in water quality is DENIED.

- CHT's Motion concerning the acts of third parties is DENIED, as the extent of CHT's responsibility for any of the alleged acts and resulting damages is a factual question.

- CHT's Motion concerning specific exceptions to immunity under the PSTCA is DENIED, as the applicability of any of the alleged exceptions is a factual question.

- CHT's Motion concerning the propriety of affirmative injunctive relief is GRANTED. Damages are limited to monetary damages and prohibitory injunctive relief.

- CHT's Motion concerning the cap of damages is GRANTED IN PART. Monetary damages shall be limited to $500,000. The appropriate measure of damages depends on the resolution of factual questions and will therefore be decided following trial.

MOTIONS TO EXCLUDE EXPERT TESTIMONY AND REPORTS

The parties have each filed motions to exclude certain portions of the other's expert testimony and reports. On October 6, 2021, CHT filed a Motion to Exclude from Trial a Portion of the Expert Report and Testimony of Lake S. Randall, P.E. and Mid-Penn Engineering. That same day, the Lenharts filed a Motion to Exclude the Expert Report and Testimony of Larson Design Group. On November 12, 2021, CHT filed a Motion in Limine to Preclude from Trial the Investigative Report, Factual

Findings and Testimony of John L. Mullen, P.G. and Four Oaks Geophysics. The Court will address each of these motions in turn.

A. CHT's Motion to Exclude Lake S. Randall, P.E. and Mid-Penn under ***Frye***

CHT filed its Motion to Exclude portions of Randall's and Mid-Penn's report[107] and testimony pursuant to Rule of Civil Procedure 207.1, which governs motions to exclude expert testimony which relies upon novel scientific evidence. Rule 207.1 incorporates by reference Rule 702, which requires, *inter alia*, an "expert's methodology [to be] generally accepted in the relevant field," and Rule 703, which allows that the facts underlying an expert's opinion "need not be admissible for the opinion to be admitted" as long as "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject…."

CHT contends that Randall's methodology is not generally accepted in the relevant field.[108] In Pennsylvania, the admissibility of expert testimony is governed by the principles of *Frye v. United States*.[109] CHT asserts that five separate portions of

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[107] The Report was prepared by Lake S. Randall, P.E., an employee of Mid-Penn Engineering Corporation. For clarity, the remainder of this Opinion will refer to the report as "Randall's report."

[108] Although CHT does not specifically identify the "relevant field" in its Motion, Randall's Expert Report is titled "Stormwater Management Report & Culvert Analysis for Post Road Drainage Impact Analysis." At the first portion of trial in September 2017, Randall was admitted without objection as an expert "on the subject of storm-water management plans, permitting, and the engineering associated with the proper planning for erosion and sedimentation control in connection with roadway construction, modification, and maintenance." It is clear that the relevant field is "hydrology," "hydrological engineering," or some subset thereof.

[109] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). This Opinion discusses *Frye* in detail *infra*.

Randall's report are not generally accepted in the relevant scientific community and thus fail to satisfy the *Frye* test: 1) "the methodology used… to ascertain the drainage area purportedly diverted to the Lenharts' property"; 2) "the methodology used… to calculate rate, volume and velocity of stormwater runoff"; 3) "Randall's reliance on models and estimated stormwater flow values when measurement of actual field values is possible"; 4) "Randall's reliance on overly-conservative assumptions about pre-2011 conditions and stormwater flows"; and 5) "Randall's water quality analysis."

This section of the Opinion will discuss the *Frye* test generally and the parties' arguments concerning its applicability to each of the contested portions of Randall's report, before applying the *Frye* standard to determine if a hearing is necessary to address one or more portions of Randall's Report.

1. The *Frye* Test

Pennsylvania applies the test for the admissibility of expert testimony as enunciated in *Frye v. United States*, now in its ninety-ninth year. In *Frye*, the D.C. Circuit stated:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs*."[110]

[110] *Frye*, 293 F. at 1014 (as cited in *Com. v. Topa*, 369 A.2d 1277 (Pa. 1977)).

The Supreme Court of Pennsylvania explicitly adopted the *Frye* standard in 1977 and has repeatedly reaffirmed it as the law of the land despite the acceptance by some other courts of the *Daubert*[111] standard.[112] "One of the primary reasons [the Supreme Court of Pennsylvania] embraced the *Frye* test… was its assurance that judges would be guided by scientists when assessing the reliability of a scientific method"; additionally, the Court has described its rule of "general acceptance" as easier to apply and more consistent than *Daubert*'s multifactor balancing test.[113]

There is no requirement that "trial courts… apply the *Frye* standard every time scientific experts are called to render an opinion at trial…."[114] Rather, "a *Frye* hearing is warranted when a trial judge has articulable grounds to believe that an expert witness has not applied accepted scientific methodology in a conventional fashion in reaching his or her conclusions."[115] Exclusion under *Frye* is appropriate either when an expert's methodology is not generally accepted or when the expert utilizes

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[111] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
[112] *See*, *e.g., Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003).
[113] *Id*. at 1044-45.
[114] *Trach v. Fellin*, 817 A.2d 1102, 1110 (Pa. Super. 2003).

[115] *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 53 (Pa. 2012). In *Betz*, an expert intended to testify that "every single fiber [of asbestos] from among… millions is substantially causative of disease." The Supreme Court of Pennsylvania held that the trial judge's decision to hold a *Frye* hearing was appropriate in light of "the considerable tension between the any-exposure opinion and the axiom… that the dose makes the poison," as well as his inability "to discern a coherent methodology supporting" the expert's opinion. This was especially so, the Supreme Court held, given that the expert's "any-exposure opinion" would have "obviate[d] the necessity for plaintiffs to… establish[] specific causation" due to the opinion's "potency in asbestos litigation…." These articulable concerns justified the trial judge in "permitting evidentiary development so that he could make an informed assessment."

accepted scientific methods in a novel way.[116] As an "exclusionary rule of evidence," the *Frye* test "must be construed narrowly so as not to impede admissibility of evidence that will aid the trier of fact in the search for the truth."[117]

The Supreme Court of Pennsylvania has emphasized four components of "*Frye's* proper application…."[118] First, it is the proponent of the expert testimony who "bears the burden of establishing all of the elements for its admission under Pa.R.E. 702, which includes showing that the *Frye* rule is satisfied."[119] Second, "the proponent of the evidence [must] prove that the methodology an expert used is generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to…."[120] It is important to note, however, that "[t]his does not mean… that the proponent must prove that the scientific community has also generally accepted the experts *conclusion*."[121] Third, the Court must remember that the other requirements of Rule of Evidence 702 – that the expert be qualified by their "scientific, technical, or other specialized knowledge… beyond that possessed by the average layperson" and that this knowledge be helpful to the factfinder – are distinct inquiries that "must be raised and developed separately by the parties, and

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[116] *Id.*
[117] *Trach*, 817 A.2d at 1104.
[118] *Grady*, 839 A.2d at 1045.

[119] *Id.* This directive is "consistent with [Pennsylvania's] traditional adherence to the general evidentiary tenet that the proponent of a proposition bears the burden of proving it…." *Id.*

[120] *Id.*
[121] *Id.* (emphasis added).

ruled upon separately by the trial courts."[122] Finally, like all evidentiary matters, "the admission of expert testimony is [a] matter for the trial court's discretion and should not be disturbed on appeal unless the trial court abuses its discretion."[123]

2. Argument

As noted *supra*, CHT alleges that five separate portions of Randall's report fail to satisfy the *Frye* test. Generally, though, CHT's allegations are that Randall's methodology is not generally accepted within the scientific community – and in a few cases nonexistent – because he relies entirely or predominantly on "hydraulic models – simplifications of real world systems used to evaluate design alternatives in the *planning* stage of stormwater facility design" and "offers conclusory opinions without performing any scientific study…"[124]

The Lenharts generally respond that as written, CHT does not even successfully plead a failure to satisfy the *Frye* standard. The Lenharts argue that the purpose of *Frye* is to exclude "*novel* scientific evidence," but that CHT's "arguments are merely based on its view that [Randall] should have used a *different* method or *different* analysis" and thus go entirely to the weight of the evidence and credibility of Randall's opinions. Thus, the Lenharts contend, inasmuch as a "trial court's proper

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[122] *Id*. at 1045-46. Here, CHT has not explicitly challenged either of the two non-*Frye* prongs of Rule 702 in its motion; it may of course do so at trial.

[123] *Id*. at 1046.

[124] CHT included the affidavit of Jerry K. Snyder, P.E., DEE, DWRE, an engineer with "more than forty years of civil engineer experience, thirty-five of which are in the environmental and water resources engineering field," in support of their contentions. The averments in CHT's Motion, in relevant part, echo Snyder's assertions verbatim.

function [under *Frye* is] to ensure that the expert has applied a generally accepted scientific methodology to reach his or her scientific conclusions" and not to "question the merits of the expert's scientific theories, techniques or conclusions… [or] assess whether it considers those theories, techniques and/or conclusions to be accurate or reliable based upon the available facts and data," CHT's assertions are not sufficient to trigger a *Frye* analysis. Furthermore, the Lenharts argue that CHT's Motion relies almost entirely on Snyder's expert report and his affidavit, which the Lenharts characterize as "highly conclusory and self-referential"; it would be perverse, they argue, for such a proffer to trigger a *Frye* hearing to test the Lenharts' expert's opinions when CHT is "asking this Court to put its faith in [its own expert's] statements with almost no reference to supporting material from the relevant field."

a. <u>Drainage Area Methodology</u>

With regard to the "drainage area," CHT avers that "[t]he generally accepted engineering practice is to rely on measurements and accepted methods in reaching conclusions… [and to] clearly identify… [w]hen estimates or assumptions are utilized… in the engineer's report or design calculations." CHT contends that Randall, however, "speculates that increased amounts of stormwater have been diverted to the Lenharts' property as a result of the placement of millings and elimination of existing culverts on the east-west portion of Post Road," "does not describe any methods or measurements of stormwater flow prior to or subsequent to these purported modifications to substantiate [his] conclusion," and "does not clearly identify these assumptions as assumptions…" Therefore, they argue, "Randall's

conclusions as to the increased amounts of stormwater purportedly diverted to the Lenharts' property as a result of the placement of millings and elimination of existing culverts on the east-west portion of Post Road were not obtained by a methodology generally accepted in the scientific community."

The Lenharts respond that, regardless of how CHT characterizes their averments regarding Randall's analysis of the drainage area, CHT's position consists of an attack on the quality and value of the underlying data as well as "missing explanations or descriptions of assumptions." The Lenharts vehemently dispute CHT's assertion that Randall based his opinions on speculation, and argue that Randall's report and its exhibits are replete with the methods and information he utilized in forming his opinion.

b. <u>Rate, Volume and Velocity Methodology</u>

Regarding "rate, volume and velocity of stormwater runoff," CHT avers that "[e]ngineers utilize curve numbers (CNs) to calculate" this information, and "[w]hen a watershed area contains multiple hydrologic soil groups and/or types of ground cover, the generally accepted methodology of obtaining the CN for the watershed area as a whole is to take a weighted average of the CNs of the various hydrological soil group and ground cover combinations within the watershed area based upon the percentage of the watershed having each CN." CHT contends that Randall, instead of taking this weighted average, "broke out each individual soil type and land coverage, and each subwatershed, treating each as a distinct watershed… and adding them together," which "is not a generally accepted alternative to CN weighting

by area." In doing so, CHT argues, "Randall artificially obtained peak stormwater flow rates" much higher than would be obtained by the generally accepted method. They also contend that Randall used a "Type II rainfall distribution pattern derived from the National Resources Conservation Service" ("NRCS") even though that system is outdated and "[t]he NRCS [now] recommends using the NOAA C distribution for Lycoming County," which "has a lower peak rainfall value than the Type II distribution."

With respect to CNs, the Lenharts aver that Randall's methodology "followed the guidance documents as explained in Mid-Penn's rebuttal to Mr. Snyder's report," and that "Mr. Snyder's 'weighted average' method is [itself] rejected by numerous government agencies." Essentially, the Lenharts argue that CHT is attempting to disguise a dispute over which of two methodologies is *better* as a contention that any methodology other than CHT's preferred method is not generally accepted. With regard to the rainfall distribution, the Lenharts suggest that Randall's method *cannot* be novel, because it has existed since the 1930s and is contemplated, endorsed, or even affirmatively required by various statutes and state authorities.

c. **Reliance on Models**

CHT next argues that "[h]ydrologic and hydraulic models are best used as a planning tool to compare and evaluate design alternatives where stormwater facilities do not yet exist," and "[t]he generally accepted engineering practice in hydraulic design is to calibrate hydrologic and hydraulic modeling based upon measured field values for stormwater flow whenever possible." CHT contends that Randall's report,

however, “rel[ies] solely on hydrologic and hydraulic modeling, without calibration based upon measured field values.” Such values, CHT argues, could have easily been obtained over the many years since the commencement of this lawsuit by renting “[r]emote stormwater flow recorders and samplers” and placing them at “[t]he existing culverts….”

The Lenharts respond that CHT’s assertion that “it would be better to collect data from existing facilities to purportedly ‘calibrat[e]’ the models used by [Randall] follows no established protocol, methodology, or other procedure, and [Snyder] cites to no scientific or governmental authorities that back up his assertions either…. Simply because [CHT] thinks there is additional work that *could* be done does not mean that such work would be reliable, useful, or even helpful” and “is outside the scope of the *Frye* inquiry….”

d. <u>Overly-Conservative Assumptions</u>

CHT’s fourth claim is that “[t]he generally accepted engineering practice in hydraulic design is to use realistic stormwater flow values and realistic assumptions about existing conditions,” but Randall “instead use[d] higher, ‘more conservative’ stormwater flow values to ‘ensure culverts are designed properly.’” These assumptions, CHT contends, were “based on statements made by the Lenharts because ‘an actual field survey had never been performed’… [but] [t]he restriction of the flow capacity of the culverts [Randall assumed in analyzing] the pre-2011 scenario is not a realistic assumption of the impact of the in-kind replacement of culverts that occurred.”

The Lenharts contend preliminarily that the factual averments underlying CHT's position – that the culverts were replaced "in-kind" – are completely at odds with CHT's testimony at the September 2017 trial. Again, the Lenharts contend that "at no point is there any evidence or assertion that [Randall] used 'novel' methods," and CHT makes only a bald, unsupported assertion that his methods are not generally accepted.

e. <u>Water Quality Analysis</u>

Finally, CHT contends that Randall's water quality analysis contains unwarranted conclusions not based on testing or data. CHT states that "[t]he generally accepted practice of water quality experts when assessing water quality and its impact on aquatic life is to conduct a biological assessment of benthic macroinvertebrate and/or fish communities within the waterway in question," with the assessment "performed by a qualified biologist [and] conduct[ed]… using existing peer-reviewed state protocols." CHT argues that Randall's failure to "reference any biological assessment to provide support for the claims related to water quality changes and aquatic biota impacts" constitutes a "deviation from and/or failure to adhere to generally accepted scientific methodology" which requires preclusion of this opinion.

The Lenharts respond that Randall conducted his water quality analysis "using [Pennsylvania Department of Environmental Protection] permitting methods." They contend that "[t]here is no basis to say something… is not generally-accepted when the method is what the state agency in charge of permitting requires to determine

expected stormwater pollutant loadings into a waterway as a result of construction work, such as the Post Road project… There is also no basis to say the method used by [Randall] is incorrect *when it is the same analysis that [CHT] would have to do* if it had applied for a required Chapter 102 permit, which it still has not done." The Lenharts further contest CHT's assertion that they need to show actual pollutants in the water as opposed to the possibility or likelihood of pollution, because "[t]he purpose of state and local stormwater and clear water regulations… is to protect water quality in advance, including for the support of aquatic life."

3. Need for *Frye* Hearing

Preliminarily, the Lenharts contend that CHT's motion does not allege novelty in a manner sufficient to allow the Court to even consider holding a *Frye* hearing. Specifically, the Lenharts contend:

> "The *Frye* test applies *only* to 'novel scientific evidence' and principles. However, [CHT] fails to allege or point to *any* novel methodologies, evidence, or other principles in the Lenharts' expert reports. This is fatal to [CHT's] motion. If something is not novel, there is no basis for proceeding further to analyzing whether a scientific method or piece of evidence is 'generally-accepted.'"[125]

Most cases to have addressed the need for a *Frye* hearing treat the issues of whether science is "novel" and whether methodologies are "not generally accepted" as highly related, though not quite synonymous.[126] The Supreme Court of

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[125] Internal citations omitted; emphasis in original.

[126] *See, e.g.*, *Grady*, 839 A.2d 1038; *Walsh*, 191 A.3d 838; and *Trach v. Fellin*, 817 A.2d 1102 (Pa. Super. 2003). In *Trach*, cited by the Lenharts in support of their contention concerning novelty, the Superior Court explicitly stated that "*Frye* only applies when a party seeks to introduce ***novel*** scientific evidence." *Id*. at 1109 (emphasis in original). The Court

Pennsylvania has explained that "a reasonably broad meaning should be ascribed to the term 'novel.'"[127] A recent line of cases has taken this a step further, clearly suggesting that a court must make a preliminary determination that proposed scientific evidence is novel, followed by the procedurally distinct step of the *Frye* inquiry during which "the proponent must show that the methodology is generally accepted."[128]

The Court does not read *Trach*, *Walker*, and the numerous other cases cited as suggesting it must dismiss CHT's Motion as a matter of law solely because CHT alleges that Randall's methodology is "[not] generally accepted" as opposed to "novel." It is clear from the case law that novelty and acceptance, though conceptually distinct, are related, and science may be not generally accepted by virtue of its novelty. Certainly, CHT's motion could have more clearly explained the *Frye* procedure by indicating that it was alleging Randall's methods were novel and thus demanding that the Lenharts show these methods to be generally accepted, but at worst this renders the Motion unclear as opposed to defective.

In any event, the Court is able to understand the arguments made in CHT's Motion, and accepts them as averring that the various cited portions of Randall's

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went on to explain, however, that "the *Frye* court recognized that the essence of admissibility is general acceptance: that a principle or discovery can fall by the wayside as science advances is just another way of saying it is not generally accepted… [a] prerequisite for applying *Frye* [is] that the scientific evidence is, in some sense, novel…." *Id*. at 1110. *Trach* did not explain exactly whether or how a court must procedurally determine the issue of novelty separately from the issue of general acceptance.

[127] *Betz*, 44 A.3d at 53.
[128] *See, e.g., Com. v. Walker*, 92 A.3d 768, 790 (Pa. 2014).

report do not satisfy the *Frye* test. The resolution of this preliminary question in CHT's favor, however, is distinct from whether CHT's averments have given the Court "articulable grounds to believe that [Randall] has not applied accepted scientific methodology in a conventional fashion in reaching his or her conclusions." For the reasons that follow, the Court will deny CHT's motion for a *Frye* hearing.

a. <u>Drainage Area Methodology</u>

CHT alleges that Randall "speculates that increased amounts of stormwater have been diverted to the Lenharts' property [but] does not describe any methods or measurements of stormwater flow prior to or subsequent to the[] purported modifications to substantiate [this] conclusion," and "does not clearly identify these assumptions as assumptions…." This is at odds, CHT contends, with "[t]he generally accepted engineering practice… to rely on measurements and accepted methods in reaching conclusions."

The suggestion that "the generally accepted engineering practice is to rely on… accepted methods" is tautological and provides no information about what the accepted methods are. A "failure to identify… assumptions as assumptions" is not a methodology; it is simply poor scientific exposition. Ultimately, CHT does not identify how the methodology it claims Randall used is deficient, only stating that "Randall's conclusions as to the increased amounts of stormwater purportedly diverted to the Lenharts' property… were not obtained by a methodology generally accepted in the scientific community." The only potential "articulable grounds to believe that [Randall] has not applied scientific methodology in a conventional fashion"

discernable from CHT's contention is that they are perhaps contending that Randall simply pulled his data concerning the amounts of stormwater diverted prior to and after 2011 out of thin air.

The Court does not have articulable reasons to believe that Randall's methodology is "novel" or "not generally accepted."[129] CHT appears to propose, without explicitly stating, that the *only* acceptable method for comparing whether there has been an increase of stormwater flow over time is to rely on measurements.[130] In his report, Randall alleges that "[t]wo main upslope drainage ways have been diverted" by the Post Road construction, "caus[ing] increased amounts of stormwater to be directed" to certain areas. He further describes additional drainage areas and compares their pre-construction and post-construction states. His report clearly states that in order to determine where various streams of runoff and drainage formerly flowed and where they currently flow, he used "a PA LIDAR hill shade plan… which helps to illustrate the pre-development topography of the area," "previous aerial data and evidence on-site," "historical aerial photos and LIDAR information," and "plans by Pennoni Associates, Inc. of State College, Pennsylvania." Thus, Randall clearly describes his methodology: he viewed old

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[129] The assertion of an expert that an adverse expert's methodology is novel, without elaboration, is insufficient to provide such articulable grounds. A contrary determination would render *Trach*'s assertion that "[o]ur Supreme Court does not intend that trial courts be required to apply the *Frye* standard every time scientific experts are called to render an opinion at trial, a result that is nothing short of Kafkaesque to contemplate," meaningless.

[130] To the extent that CHT claims that other "accepted methods" are appropriate, its failure to state these accepted methods in its motion, or the exhibits thereto, prevents the Court from utilizing them to find "articulable grounds to believe that [Randall] has not applied" those methods in a conventional fashion.

plans, photographs, and maps, and compared them to new ones. CHT has not provided the Court any basis on which to conclude that LIDAR mapping, the aerial data, or the comparison of old maps and plans to observations made on-site are novel methodologies. Indeed, the Court is skeptical that such a basic methodology as comparing old photographs and maps of a given area to new observations of that area can ever be successfully described as novel.

If Randall's conclusions are based on unwarranted assumptions, they will obviously be of limited usefulness, or even devoid of usefulness. In the same way that the Supreme Court in *Betz* acknowledged that the "axiom… that the dose makes the poison" is "manifested in myriad ways both in science and daily human experience," and thus may be accepted by a court without expert testimony,[131] this Court does not need an expert to establish the straightforward principle of "garbage in, garbage out." CHT's experts are welcome to explain at trial why the maps, photographs and other observations relied upon by Randall to conclude that pre-construction drainage followed a certain path do not actually show what Randall claims they show. If CHT's experts can establish at trial that measurements are preferred to assumptions based on old maps and photographs, such testimony will clearly call the weight and reliability of Randall's conclusions into question. Similarly, if Randall is only able to suggest different paths for drainage over time but is unable to produce measurements to demonstrate the amount of drainage, any conclusions he may purport to make concerning the magnitude of the change in drainage over

[131] *Betz*, 44 A.3d at 53.

time may be suspect, to say the least. These considerations each implicate the strength, reliability, and utility of Randall's conclusions. CHT has not explained how they implicate his *methodology*, however, save for a mere assertion that he has used no method at all – an assertion that Randall's references to LIDAR, maps, photographs, and on-site observations appear to belie. The Court will not, therefore, grant a *Frye* hearing concerning drainage area methodology.

b. <u>Rate, Volume and Velocity Methodology</u>

CHT challenges two separate portions of Randall's report concerning "rate, volume, and velocity": his use of "curve numbers" (CNs) and his use of a "Type II" rainfall distribution rather than the "NOAA C" rainfall distribution recommended by the NRCS.

In response to the first of these challenges, the Lenharts cite a number of resources published or utilized by the Pennsylvania DEP and other agencies that they claim support Randall's methodology. Specifically, they cite to a portion of the Pennsylvania Stormwater Best Management Practices Manual, dated December 30, 2006, which they aver is published or endorsed by the DEP. This passage reads:

> "Often a single, area-weighted curve number is used to represent a watershed consisting of sub-areas with different curve numbers. While this approach is acceptable if the curve numbers are similar, if the difference in curve numbers is more than 5 the use of a weighted curve number significantly reduces the estimated amount of runoff from the watershed. This is especially problematic with pervious/impervious combinations: 'combination of impervious areas with pervious areas can imply a significant initial loss that may not take place.' Therefore, the runoff from different sub-areas should be calculated separately and then combined or weighted appropriately. At a minimum, runoff from pervious and directly connected impervious areas should be estimated separately for storms less than approximately 4 inches."

Whether the areas at issue here include multiple sub-areas with highly divergent curve numbers is not a question of methodology but of fact. CHT's experts are free to explain at trial why the method described above is inappropriate for the area at issue, or why Randall's report does not follow the method described above – but they have not done so here. Rather, CHT contends that the only acceptable methodology was to "take a weighted average of the CNs," and in response the Lenharts produced a treatise that stated that "the runoff from different sub-areas should be calculated separately and then combined or weighted appropriately." Again, Randall has stated his methodology, and CHT – rather than demonstrating by reference to a treatise that it is novel and not generally accepted – has merely averred as much. The averment that a methodology is not generally accepted, without *some* additional support, simply cannot be sufficient to create articulable grounds for a *Frye* hearing; if such a bald averment were sufficient, the Kafkaesque scenario feared by the Superior Court in *Trach* would come to pass.

With regard to the rainfall distribution pattern, the Court similarly concludes that a *Frye* hearing is neither necessary nor appropriate. As noted above, a contention that an expert utilized inappropriate *data* is conceptually distinct from a claim that he has applied the wrong *methodology* to that data. CHT describes the NOAA C distribution as "more reliable data." However, an allegation that Randall's data is outdated or unreliable is not a challenge to methodology, which is a prerequisite to a *Frye* hearing. CHT is free to challenge the utility of Randall's claims, and CHT's experts may of course explain why the NOAA C distribution is far more

reliable than the Type II distribution, but such arguments go to the weight and credibility of Randall's opinions, not their admissibility.

c. **Reliance on Models**

The Court agrees with the Lenharts that CHT's contention with regard to Randall's reliance on models is outside the appropriate scope of a *Frye* inquiry. CHT's argument is that it is not generally accepted to "rel[y] on hydrological and hydraulic models *when empirical stormwater flow data is easily obtainable*…."[132] This is not an argument that anything Randall *did* with the models was improper; rather, it is an argument that the *results* Randall reached from the models would be *more* accurate had he "calibrate[d] [them] based upon measured field values for stormwater flow whenever possible." CHT's concession that field values are needed "when possible" reveals that this challenge goes to the reliability of the results, rather than the methodology to obtain them. Suppose it was *not* possible to obtain empirical stormwater flow results.[133] Implicit in CHT's argument is that Randall's methodology – the use of the models – could have been acceptable in that case; CHT argues that empirical data should be used when readily available, but not that the models *do not* constitute proper methodology without them in all cases. Thus, CHT's contention is not that Randall's methodology is flawed, but that his conclusions are not as accurate as they could be had he done additional work to "calibrate" his

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[132] Emphasis added.

[133] Indeed, the Lenharts contend that in large part it *was not possible* to obtain these results, inasmuch as CHT denied the Lenharts permission to go on township land to obtain them. At the very least, a factual dispute exists regarding whether and to what extent Randall could have obtained these measurements.

methodology. Additionally, CHT cites no treatise or other authority in support of its position beyond its own expert's assertion. For these reasons, the Court finds that CHT has not made a threshold showing of novelty with respect to claims concerning Randall's reliance on models.

d. <u>Overly-Conservative Assumptions</u>

CHT next claims that Randall's assumptions were too conservative and unrealistic. The Lenharts respond that CHT's position is based on incorrect contentions of facts that are contradicted by the testimony at the first trial.

Setting aside the factual bases for CHT's contention, an argument that assumptions are "too conservative" or "unrealistic" is not a challenge to methodology. The contention is that "the generally accepted engineering practice in hydraulic design is to use realistic… values and… assumptions…." The essence of CHT's challenge is not that Randall's method of arriving at his assumptions and values was novel and thus not generally accepted, but rather that Randall's assumptions and values are not realistic. CHT is free to introduce expert testimony to rebut Randall's inputs with more realistic and accurate ones or with real measurements, if its expert has them.

e. <u>Water Quality Analysis</u>

CHT next contends that "the generally accepted practice of water quality experts when assessing water quality and its impact on aquatic life is to conduct a biological assessment of benthic macroinvertebrate and/or fish communities within the waterway in question," with the assessment "performed by a qualified biologist

[and] conduct[ed]… using existing peer-reviewed state protocols." CHT attaches to their Motion the Report of Normandeau Associates, Environmental Consultants ("Normandeau"), focusing on this specific issue in Randall's Report. Normandeau details how "the Pennsylvania [DEP] has developed and published specific protocols for evaluating stream water quality through the collection of benthic macroinvertebrates," and explains the detailed process by which such an evaluation is conducted.

The Lenharts respond that the analysis Randall performed was conducted in accordance with the DEP's "stormwater permitting methods for estimating pollutant loadings to streams," which it avers "is the same analysis that [CHT] would have to do if it had applied for a required Chapter 102 permit, which it still has not done." In his report, Randall explains that he has "provided a water quality analysis based on DEP's current NPDES worksheets that calculate the pollutant loads generated by the new development as well as loads from diverted areas to *estimate the pollutant load that needs to be mitigated*…."[134]

Thus, Randall's report acknowledges on its face that it is attempting to *estimate*, rather than *calculate with precision*, the extent of degradation of stormwater quality. Randall does go on to say that "due to the long time that pollution has been allowed to occur from these areas un-checked, the damage is already done" – but any grievance with this averment would stem from whether it is supported by the methodology he performed, as opposed to the validity of the methodology itself.

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[134] Emphasis added.

Certainly, estimates of the extent of pollution may not establish the existence of actual pollution concretely in a manner sufficient to establish damages; however, this determination is part of the ultimate issue rather than a threshold evidentiary matter. The question of whether an expert's methods lead to his conclusions is conceptually distinct from the question of whether those methods themselves are novel or well established.

4. Summary

CHT has raised a number of potential issues with the expert report and conclusions of Randall; many of these challenges, however, go towards the accuracy of either Randall's data or conclusions, and not the path by which he links the former to the latter. None of them allege with sufficient specificity that Randall's methodology is novel and not generally accepted, to provide the court with "articulable grounds to believe that" Randall "has not applied accepted scientific methodology in a conventional fashion in reaching his… conclusions." For this reason, CHT's Motion for a *Frye Hearing* is denied.

B. Lenharts' Motion to Exclude Expert Report and Testimony of Larson Design Group

On October 6, 2021, the Lenharts filed a Motion to Exclude the Expert Report and Testimony of Larson Design Group for five reasons. The Lenharts contend the Larson Design Group ("LDG") Report authored by Coleman Gregory, P.E. (the "Gregory Report"):

> "is almost entirely conclusory or otherwise makes gratuitous and unsupported personal opinions; makes statements directly contradictory to what Mr. Gregory has already told the Pennsylvania Department of

> Environmental Protection; addresses matters that are irrelevant; and repeats issues already decided in this matter and thus that are the law of the case. The Gregory report also identifies the involvement of a [LDG] employee who previously worked as a subordinate to Kenneth Estep, P.E. at Mid-Penn Engineering ("MPE") while MPE and Mr. Estep were handling the Lenharts' matter. Out of an abundance of caution, the Lenharts raise this as a disqualifying conflict of interest."

The Lenharts address each of these contentions more specifically. First, they assert that Gregory "has offered conclusory statements regarding [a] lack of evidence [for Randall's contentions in the Randall Report] without any foundation, much less having reviewed [the entirety of the Randall Report]." Because his assertions are without support, they amount to speculation or personal opinions. Second, they characterize the Gregory Report as "concluding that there has been 'no increase in impervious area' and that 'MPE's assertion that the roadway width was widened is not supported' by specific evidence"; the Lenharts contend, however, that in a May 6, 2021 email "sent to two PADEP employees, Mr. Gregory stated, that the road *had* been widened *and* that there had been an increase in impervious area…." Third, the Lenharts suggest that "Gregory's conclusions… [that] rely almost entirely on his false assertions that the roadway was not widened and that there was no increase in impervious area" are not just contradicted by his May 6, 2021 email but have been conclusively rejected by the Commonwealth Court. Therefore, inasmuch as "Gregory's arguments regarding the nature of the [CHT] road reconstruction project, including changes in road width, have already been decided by this court and the Commonwealth Court… his report fails to speak to a 'fact in issue' or provide evidence that is relevant to establishing something not already determined in this

matter." The Lenharts argue that "introducing evidence on points already established at the 2017 trial is cumulative and a waste of time…." They ultimately contend that:

> "Mr. Gregory's entire report should be stricken as not helpful to the trier of fact, unreliable, and not credible, particularly given his willingness to state something completely opposite to this Court that he has already told a government agency. Exclusion of Mr. Gregory's report will promote judicial economy by shortening the trial and avoiding what will be a lengthy cross-examination of Mr. Gregory on issues and statements that ultimately do not advance closure in this matter. Also, the Township still has two other expert reports, and thus the Gregory Report should also be excluded as cumulative [under] Pa.R.E. 403."

As to the conflict of interest issue, the Lenharts note: "[Matthew] Frick worked for MPE and as a subordinate to Mr. Estep while MPE and Mr. Estep were handling the Lenhart matter. Mr. Frick worked at the desk next to Mr. Estep within verbal hearing distance and Mr. Estep discussed the Lenhart matter with Mr. Frick on numerous occasions. Based on these facts and out of abundance of caution, the Lenharts also seek the exclusion of Mr. Gregory's report on the basis of a conflict of interest."

CHT responds generally that "the Lenharts seek to exclude the entire report on the basis of questions of credibility, reliability, relevance and cumulativeness," which are issues that are better resolved at trial. CHT contends that inasmuch as the Gregory Report "is relevant to establishing the material facts of this case" – *i.e.*, whether the Lenharts can prove damages and whether their proposed remedy is appropriate – this Court should allow CHT to introduce the testimony of Gregory and LDG consistent with the report. CHT also responds that no conflict exists, because although "LDG engineer-in-training Matthew Frick" was previously employed by MPE,

that employment "overlapped this litigation by mere months… the Lenharts have identified no information – privileged, confidential or otherwise – that Mr. Frick obtained in connection with that employment… [and] Mr. Frick's involvement with the [Gregory] Report was limited to assisting Mr. Gregory with collecting empirical field data, a process independent of outside information."

More specifically, CHT avers that "[a]t a minimum, the LDG report has a tendency to disprove the Lenharts' claims of damage to their property, an essential element of the claims on which the Lenharts have the burden of proof." CHT acknowledges that the Commonwealth Court has conclusively decided certain issues, and assures the Court that it "accepts the law of the case in this matter and does not intend to relitigate any binding legal holding." CHT draws a distinction, however, between the legal issues decided by the Commonwealth Court and the "engineering opinion of… Gregory and LDG, which is distinct from, and unaffected by, the legal conclusion reached by the Commonwealth Court." CHT next argues that the Gregory Report:

> "identifies multiple sources of information underlying its conclusions, including a site visit… photographs, contour maps, construction plans, and precipitation data. The fact that LDG relies upon these sources of information rather than trial and deposition testimony, as the Lenharts argue they must, does not render the [Gregory] Report inadmissible…. The fact that LDG drew conclusions that contradict the Lenharts' reading of disputed facts in the record does not justify exclusion of the Report prior to trial. The factual basis of LDH's conclusions is an issue of credibility best left for trial to be evaluated in the context of all evidence presented."

Regarding the conflict of interest issue, CHT suggests that Pennsylvania cases in which an expert has been disqualified for a conflict of interest "have focused

on the expert's possession of, and the introducing party's use of, confidential or privileged information," and argues that here "[i]t is difficult to imagine how any information of a privileged or confidential nature" could have affected Mr. Frick's involvement in this case, which was "limited to assisting… Gregory in collecting observable, empirical field data… more than six (6) years after his employment with Mid-Penn Engineering had concluded."

The Court will not preclude the Gregory Report, with the exception of a small number of particular paragraphs identified *infra*. Although the Lenharts certainly highlight potential shortcomings that may cast doubt on the ultimate utility of Gregory's report, the Court cannot conclude at this time that it fails to "point to, rely on or cite some scientific authority… that the expert has applied to the facts at hand and which supports the expert's ultimate conclusion" so as to render the expert's opinion "more than mere personal belief."[135] The Lenharts interpret Gregory's statement prefacing Section 7 of his report, "[t]he following is a review of MPE's assertions as listed in the Introduction section on page 2," as an "open[] admi[ssion]… that he did not read, and indeed is not even responding to, the entirety of the Lenharts' expert reports [and] [i]nstead… drafted his report based *solely* on one section of the Lenharts' expert report…." The Court does not share this interpretation; Gregory's Report clearly states that he reviewed the MPE report, and his preface to Section 7 appears to simply explain how he is *ordering* the points made in that section. The Lenharts fault Gregory for repeatedly making conclusory

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[135] *Snizavich v. Rohm and Haas Company*, 83 A.3d 191, 197 (Pa. Super. 2013).

statements, but the Court reads the Gregory Report as generally explaining most of its conclusions. Inasmuch as many of Gregory's conclusions are that the MPE report does not contain evidence supporting a specific contention, it is unclear what more they contend Gregory must say. It appears to the Court that Gregory has simply drawn different conclusions from the data underlying the MPE report; he is entitled to explain the reasons for his difference in expert opinion at trial.

Certainly, to the extent that Gregory may attempt to undermine issues already decided, the Court will exclude such testimony. It is possible, however, that testimony that could be construed as undermining a decided issue could also be relevant to an issue still to be decided; in such a case, the Court will admit the testimony and utilize it only for permissible purposes. Gregory may be subject to cross-examination on any of the issues raised by the Lenharts, and any opinions based on assumptions that have already been proven false – especially those contrary to any prior evidence or testimony introduced by CHT – will be disregarded, potentially to the detriment of Gregory's conclusions on the whole. To the extent that Gregory claims that no evidence supports a particular conclusion of MPE, he may be confronted with the evidence that the Lenharts contend supports the conclusion and asked to explain why he disagrees.

The Court does agree with the Lenharts that references "regarding [CHT's] inclination to spend money on certain improvements" are not "within Mr. Gregory's

scope of expertise" and therefore the conclusions identified by the Lenharts regarding CHT's customs and decision-making processes will be precluded.[136]

C. <u>CHT's Motion in Limine to Exclude Report of Mullen and Four Oaks Geophysics</u>

On November 12, 2021, CHT filed a Motion in Limine to Preclude from Trial the Investigative Report, Factual Findings and Testimony of John L. Mullen, P.G. and Four Oaks Geophysics (the "Mullen Report"). Consistent with this Court's typical scheduling practices, the Court provided deadlines for the production of plaintiff's expert reports, defendant's expert reports, and rebuttal reports. CHT contends that at the deadline for rebuttal reports, the Lenharts produced not only three reports that were clearly in rebuttal to CHT's expert reports, but a fourth report – the Mullen Report – which was not fairly a rebuttal report but instead consisted of a factual analysis that neither rebutted any prior reports nor contained any expert opinions at all. Essentially, CHT contends that the Mullen Report "introduces new facts constituting a new cause of action couched as a rebuttal report in a manner unfairly prejudicial to [CHT]," though CHT does not explicitly identify this new cause of action.

In response, the Lenharts claim that the testimony and evidence in this case, including that presented at trial in 2017, has long suggested that multiple pipes or other "flow pathways" existed "across and/or under the Post Road east/west extension." The Lenharts contended that CHT denied them permission to conduct requested excavation to confirm or dispel the existence of these suspected

[136] These are paragraphs 7.5.2, 7.7.1, 7.14.2, 7.14.2.2, and 7.15.1 of the Gregory Report.

pathways, but then faulted the Randall Report for "present[ing] no proof of the pre-developed pipes… to support the assertions." The Lenharts argue that inasmuch as CHT was the party with sole access to the areas in question, their refusal to grant the Lenharts that access prevented the Lenharts from timely taking additional steps to confirm or dispel their beliefs. Thus, following CHT's exchange of its three expert reports – each of which highlighted the Lenharts' experts' failure to establish the existence of purported drainage pathways across the east/west extension – the Lenharts obtained a geophysical survey using non-invasive methods to find some factual support for their claims. The Lenharts assert the fact that the Mullen Report contains no new opinions cuts in their favor rather than against them, as "an attempt to clarify or elaborate on opinions expressed in the original report," rather than introduce new opinions or theories late, is permissible.

The Court will allow the Lenharts to admit the Mullen Report. A review of the transcript from September 2017 reveals that there was an active dispute over whether any work had been done during the Post Road Construction to change drainage routes across the east/west extension of Post Road. The Randall Report indicated that CHT "eliminat[ed] existing culverts along [the east/west extension] as evidenced by historical aerial photos and LIDAR information prior to construction" and "placed… a new culvert… on the north end of Post Road near the Ryder Residence Driveway…. [CHT] has not shared this with us but it is something that we… observed [during] an inspection in June of 2021…." In response, all three CHT expert reports included some variation of there being no record, evidence, proof, or

supporting documentation of any work being done in this area. It was not untimely or unreasonable for the Lenharts, having been previously rebuffed in their attempt to excavate the area, to attempt to use a new method to either confirm or deny a disputed fact, entirely within CHT's zone of control, once they saw the force of the coordinated denial of CHT's experts and the rejection of the Lenharts' circumstantial evidence consisting of "historical aerial photos and LIDAR information…." The Court agrees with the Lenharts that the Mullen Report is "an attempt to clarify or elaborate on," in response to CHT's multiple expert reports, "opinions expressed in" the Randall Report.

MOTIONS CONCERNING SCOPE OF TRIAL ON REMAND

As discussed in detail *supra*, this case is before the Court on remand from the Commonwealth Court with specific binding holdings. These are:

1. The Post Road Modifications "constituted alteration or development of land that affected storm water runoff characteristics."

2. The Post Road Modifications constituted "road construction or reconstruction," and thus CHT was required to obtain a NPDES permit and submit a written erosion and sedimentation plan.

The remand also included specific instructions to this Court, which must:

1. Take further evidence as to the amount of damages, if any, arising from CHT's violation of the SWMA and its stormwater ordinance;

2. Take further evidence as to the amount of damages, if any, arising from CHT's violation of Chapter 102;

3. Take further evidence if necessary and make findings of fact and conclusions of law as to any damages the Lenharts have sustained from CHT's violation of Chapter 105; and

4. Take further evidence if necessary and make findings of fact and conclusions of law regarding the Lenharts' common law claims and request for equitable relief.

The parties disagree over how to apply these findings and instructions moving forward. CHT seeks, to the maximum extent possible, a *de novo* trial. Conversely, the Lenharts seek to strictly circumscribe the issues to be addressed, and to rely as much as possible on the work that has come before.

The Court will summarize each of the parties' motions in limine on this issue before analyzing them together.

A. CHT's Motion for De Novo Trial on Both Liability and Damages

CHT's Motion notes that on July 10, 2020, the parties met for a status conference, after which the Court issued an Order stating, *inter alia*, "[t]he parties agree that the trial scheduled for May of 2021 shall address both liability and damages." Agreeing with this plan, CHT highlights that whereas the first portion of this trial in September 2017 was presided over by the Honorable Dudley N. Anderson, the case has been transferred to a new factfinder due to Judge Anderson's retirement. Inasmuch as a trial judge sitting as factfinder must "resolve questions of evidentiary weight and conflicts in the testimony" as well as "judge the credibility of the witnesses and weight their testimony," which "require[s]… the trial court… to observe witnesses and their demeanor,"[137] CHT contends that "[i]t is especially necessary to conduct a full evidentiary hearing when the judge who is to make a ruling is not the same judge who observed prior testimony and the demeanor

[137] CHT cites *Renfroe v. Com., Dep't of Transp.*, 179 A.3d 644, 651 (Pa. Cmwlth. 2018).

of witnesses." CHT argues that this is consistent with the directive of the Commonwealth Court, which explicitly contemplated the taking of new evidence. CHT further contends that a contrary decision would be unfair and prejudicial, inasmuch as CHT has relied on the parties' agreement made nearly two years ago to conduct trial "of all remaining causes of action" *de novo*.

The Lenharts respond that, although the Commonwealth Court clearly indicated that "there needs to be testimony and evidence presented as to damages/remedies, evidence and testimony as to liability is limited by the findings of the Commonwealth Court, the prior factual findings of this Court that were not overruled, and the Pennsylvania Rules of Evidence, which preclude the admission of unduly repetitive or cumulative evidence." Concerning the July 10, 2020 Order referencing an agreement of the parties, the Lenharts indicate that "counsel was at no time under the impression that all previously-admitted testimony would need to be re-admitted and re-heard." Ultimately, the Lenharts propose that "absent changed conditions and/or new evidence, offering evidence that: 1) undermines the factual determinations already made in this matter; 2) could have been presented at the 2017 trial on liability; and/or 3) *and/or* [sic] contradicts even [CHT's] prior testimony and evidence, are not credibility issues for trial." Rather, the Lenharts request that testimony and evidence be limited to: 1) evidence updating historical developments on the site since the time of the first trial proceedings, 2) evidence as to damages/remedies, and 3) limited testimony as the Court determines in its discretion

from review of the first trial proceedings that it would need in order to determine credibility to adjudge specific disputed factual disputes or to understand context."

B. **Lenharts' Motion in Limine regarding Scope of Trial, Remand and Evidence**

The Lenharts' Motion in Limine regarding scope of trial, remand and evidence is materially consistent with their answer to the CHT's Motion in Limine regarding trial *de novo*. The Lenharts stress that "a trial court must 'strictly comply' with an appellate court's mandate [and] 'cannot modify, alter, amend, set aside or in any way disturb or depart from' an appellate court's judgment."[138] In light of this principle, they argue, any attempts by CHT to present evidence to "challenge the factual underpinnings of the Commonwealth Court's decision" or "seek[] to re-make the record to be more favorable to itself, without identifying what evidence it could not present previously that it now wants to introduce" would be improper. The Lenharts assert that "a full re-trial of everything in this matter, potentially even matters already decided… was not even on the table at the status conference that produced the July 2020 order in question," especially in light of the clarification provided by the Commonwealth Court:

> "Following oral argument, [the Lenharts] filed an uncontested application for post-communication submission advising this Court that the common pleas judge who rendered the non-jury verdict, the Honorable Dudley N. Anderson, had assumed senior judge status. Presumably, Judge Anderson will be available as a senior judge to comply with our directives on remand. To the extent we remand as to most issues only for an assessment of damages, Judge Anderson's availability takes on less significance since the trial was bifurcated as to damages. However, even where this is not the case, we note that our

[138] The Lenharts cite *Koch v. Harshaw*, 655 A.2d 1011 (Pa. Super. 2005).

> Supreme Court recently considered the issue of the proper role of an appellate court when reviewing a non-jury decision where it deemed the trial court's opinion inadequate under Pennsylvania Rule of Appellate Procedure 1925(a), but the judge was no longer available to render a supplemental opinion. In *Dolan v. Hurd Millwork Co.*, the Court determined that an appellate court under such circumstances could decide whether the trial court correctly decided the legal issues and whether the findings of fact were supported by competent evidence."[139]

Similarly, CHT's answer to the Lenharts' Motion is essentially consistent with its Motion regarding trial *de novo*.

C. Lenharts' Motion in Limine regarding Law of the Case and Preclusion

The Lenharts also make a more specific argument regarding the law of the case and preclusion of certain defenses. They note that this case commenced when CHT filed a Complaint alleging that the Lenharts interfered with the Post Road drainage system; CHT, however, chose not to press its complaint, and the Court ultimately dismissed CHT's claims on the Lenharts' motion due to CHT's failure to present any testimony or evidence in support. CHT did not appeal or otherwise challenge this dismissal. The Lenharts argue that this factual scenario means the dismissal of CHT's complaint was with prejudice, and thus "preclusion principles prevent re-litigation of the *facts* and *legal theories* behind [CHT's] now-prejudicially dismissed assertion of prescriptive easement, for it bears the burden of proof on an affirmative defense asserting the same and cannot bear such burden where the facts underlying such defense have already been adversely determined." The Lenharts also claim that the doctrines of waiver and abandonment bar this defense.

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[139] *Lenhart*, 197 A.3d at 1267 n.4.

CHT responds that this defense is not barred under *res judicata*, because the order dismissing CHT's complaint was not "a judgment on the merits…." They further contend that the Lenharts cannot invoke *res judicata* as it is an affirmative defense, and the Lenharts are the counterclaim plaintiffs.

D. Discussion

1. Admissibility of Evidence Generally

The admissibility of evidence is a matter within the sound discretion of the trial court.[140] As discussed throughout this Opinion, the conclusions of the Commonwealth Court bind this Court, and certain issues may not be relitigated on remand. A significant portion of the Commonwealth Court's Opinion, however, was premised on this Court's incorrect determination of threshold questions which ultimately resulted in the Court failing to reach issues it should have reached. A cold record will not reveal the extent to which this Court relied on a particular statement or piece of evidence in reaching its conclusions, and the extent to which this Court previously determined a fact to be conclusively established is obscured both by the remand and the failure to reach questions of liability on common law claims that were squarely presented.

Ultimately, the Court's conclusion on this issue is fairly characterized as being between the two parties' proposals, though it tacks closer to the path proposed by CHT. This Court must determine liability on the Lenharts' common law claims, and in doing so it must assess the credibility of the witnesses. Significant overlap between

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[140] *See, e.g., Mitchell v. Shikora*, 209 A.3d 307, 314 (Pa. 2019).

testimony and evidence presented in September of 2017 and evidence presented at the upcoming trial in this matter is unavoidable. To the extent that a piece of evidence is offered solely to undermine a proposition the conclusive determination of which is inherent in the Commonwealth Court's remand, that evidence will be disallowed. All other testimony, however, will be permitted subject to any more specific objection.

Of course, if a witness testifies at the upcoming trial contrary to their testimony at the previous trial, the adverse party may impeach them. If experts base their conclusions on facts that are contrary to testimony and evidence from the first trial (or established through any other means), they may certainly be confronted with this discrepancy in an effort to highlight shortcomings in their conclusions. The Court ultimately concludes, however, that it must give the parties significant leeway to present testimony and evidence, and will err on the side of admission. This is especially warranted when the Court is sitting as factfinder, and thus there is no danger of a jury misunderstanding just how a certain piece of evidence or testimony may be used (and may not be used) in light of the Commonwealth Court's specific directions.

2. Law of the Case and Issue Preclusion

The parties dispute whether the dismissal of CHT's claims at the first trial precludes those claims – previously raised offensively – from being raised as *defenses*. Particularly at issue is the defense of prescriptive easement. CHT's

Complaint, filed August 7, 2014, alleged the existence of easements; CHT's New Matter in response to the FACC, filed October 28, 2016, avers that:

> "[CHT] had obtained a prescriptive easement across [the Lenharts'] property for storm water runoff prior to the relevant time period, which was adverse, open, continuous, notorious, and uninterrupted for 21 years or more. Assuming *arguendo* that a change in volume, rate or concentration of stormwater has occurred, the [Lenharts'] property is servient to [CHT's] easement for the discharge and drainage of surface water, which is permitted by the normal evolution in use to be reasonably increased."

The parties, in their Motion, Response, and Briefs, variously mention "the law of the case doctrine," *res judicata*, and collateral estoppel. The first of these doctrines, the law of the case, "is comprised of three rules:

> (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court."[141]

The related, but separate, doctrine of *res judicata* "holds that a final judgment upon the merits by a court of competent jurisdiction bars any future suit between the same parties or their privies on the same cause of action."[142] Finally, collateral estoppel is to issues as *res judicata* is to claims:

> "A plea of collateral estoppel is valid if, 1) the issue decided in the prior adjudication was identical with the one presented in the later action, 2) there was a final judgment on the merits, 3) the party against whom the plea is asserted was a party or in privity with a party to the prior

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[141] *Mariner Chestnut Partners, L.P. v. Lenfest*, 152 A.3d 265, 282 (Pa. Super. 2016).
[142] *Khalil v. Cole*, 240 A.3d 996, 1000 (Pa. Super. 2020).

> adjudication, [and] 4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action."

The question, then, with regard to the law of the case is whether allowing CHT's defense of prescriptive easement would "alter the resolution of a legal question previously decided by" Judge Anderson. The related question as to *res judicata* and collateral estoppel is whether the dismissal of CHT's claims-as-plaintiff constituted a "final judgment on the merits" concerning the claim and issues surrounding the existence of a prescriptive easement.

Judge Anderson's October 12, 2017 Order dismissing the claims brought by CHT in their Complaint reads, in operative part, as follows:

> "[U]pon oral motion of [the Lenharts] (made at the time of trial) to dismiss the claims brought by [CHT], it appearing those claims are not being pursued, the motion is GRANTED. The Complaint filed by [CHT] against [the Lenharts] on August 7, 2014 is hereby DISMISSED."

Although the October 12, 2017 Order did not specify precisely which species of judgment the Court granted, it is clear that the Order constituted the grant of a judgment of nonsuit under Rule of Civil Procedure 218. Rule 218(a) provides that "[w]here a case is called for trial, if without satisfactory excuse a plaintiff is not ready, the court may enter a nonsuit on motion of the defendant or a non pros on the court's own motion." Prior to the enactment of the Rules of Civil Procedure, "[t]he practice in Pennsylvania… permitted a plaintiff against whom a compulsory nonsuit has been entered to… institute a new action upon the same cause of action."[143] This principle

[143] *Shenberger v. Western Maryland Ry.*, 77 Pa. D. & C. 492, 494 (Adams Cty. 1952) (citing *Bournonville v. Goodall*, 10 Pa. 133 (Pa. 1848)).

remains unchanged in the present day, as "[i]t is clear from the case law that a dismissal, even with prejudice, for failure to prosecute a claim is not intended to be a *res judicata* of the merits to the controversy."[144] In *Liberatore*, the plaintiff municipality brought "a civil action… seeking to recover business privilege taxes" in 1994, and filed a related "municipal claim… seeking the same business privilege taxes" in 1996.[145] In 1997, the municipality did not respond to a rule to show cause why the first action should not be terminated for inactivity, and the court entered a judgment of non pros, with prejudice.[146] Shortly thereafter, the defendants in the second case filed a petition to strike the complaint on the grounds of *res judicata*, which the trial court granted on the grounds that the "order granting the judgment of *non pros* in the [first] case eliminated the underlying debt for taxes" – that is, conclusively resolved the underlying controversy against the municipality – "thus eliminating anything that could be liened."[147] The Commonwealth Court reversed, concluding that the grant of the *non pros* was not an "adjudication of the merits of the tax liability."[148]

Rule 218 does not suggest a difference between a judgment of non pros and a nonsuit save for the entity that moves for its entry (the court or the adverse party, respectively). Eighty-seven years ago, the Court of Common Pleas of Schuylkill County lamented that although "[t]echnically… [j]udgments of non-suit and non pros

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[144] *Municipality of Monroeville v. Liberatore*, 736 A.2d 31 (Pa. Cmwlth. 1999).
[145] *Id.* at 32.
[146] *Id.* at 32-33.
[147] *Id.* at 33.
[148] *Id.* at 34.

are… different judgments… [t]he courts, in speaking of judgment in such case of delayed prosecution, have not always kept this distinction in mind and have interchangeably used the terms non pros and nonsuit."[149] The important similarity is that both are "dismissals for failure to prosecute a claim" and are thus "not intended to be a *res judicata* to the merits of recovery."[150] Similarly, Judge Anderson's grant of nonsuit did not answer a "legal question" that would be overturned should this Court allow CHT to present its affirmative defense; rather, the nonsuit simply answered in the negative the procedural question of whether CHT was prepared at the time of the first trial to prosecute the claims enumerated in its complaint.

The Court concludes that the October 12, 2017 grant of nonsuit does not implicate the law of the case, *res judicata*, or collateral estoppel, and thus CHT is not precluded from presenting an affirmative defense based on the same claims contained in its complaint. Therefore, the Lenharts' Motion in Limine is denied.

REMAINING MOTIONS IN LIMINE

Each party has filed one additional, miscellaneous motion in limine. The Lenharts' Motion seeks to preclude what they contend is an untimely expert opinion or theory that is not fairly contained within the reports of CHT's experts. CHT seeks to preclude a handful of subjects on the bases of relevance, prejudice, and hearsay.

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[149] *Wildermuth v. Philadelphia & R.R. Co.*, 22 Pa. D. & C. 374 (Schuylkill Cty. 1935).
[150] *Liberatore*, 736 A.2d at 31.

A. **Lenharts' Motion in Limine regarding Testimony Outside Scope of Township Expert Reports**

The Lenharts aver that "[o]n November 29, 2021, in [CHT's] pretrial statement, [CHT] asserted for the first time that, via expert testimony and weather data, it planned to show that two storm events (Hurricane Lee in 2011 and a storm on or about February 26, 2016) 'were extreme events that would have overwhelmed any stormwater management system.'"[151] The Lenharts contend that none of CHT's expert reports fairly put them on notice concerning these claims, and they were thus not in the "fair scope" of the reports. The Lenharts cite *Wilkes-Barre Iron and Wire Works, Inc.* for the proposition that although an expert may "expla[in] and even… enlarge[] [the] expert's written words" within the fair scope of their report, they may not present "new and different" opinions and conclusions that were not contained, in one form or another, in their report.[152] The Lenharts conclude that "[t]his is essentially trial by surprise and is improper."

CHT responds by pointing out that 1) in his report, Snyder "characterized both Hurricane Lee and the February 2016 storm event as 'extreme weather conditions' that caused damage to the Lenharts' driveway independent of the Post Road improvements"; 2) Snyder "testified… in the 2017 trial" to the exceptional nature of the storms, describing Hurricane Lee as a "1,000 year[]" storm; and 3) CHT raised

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[151] Emphasis in original.

[152] *Wilkes-Barre Iron & Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc.*, 502 A.2d 210, 212-13 (Pa. Super. 1985).

the "Act of God" defense in its October 28, 2016 New Matter filed in response to the FACC.

The Court concludes that the proffered testimony constitutes an explanation, and perhaps even an enlargement, of Snyder's expert opinion, but is not so different in scope or character that it constitutes an entirely new opinion or conclusion. Therefore, the Court will not preclude Snyder from testifying to these issues, which are relevant to the causation and damages inquiries before the Court on remand.

B. CHT's Motion in Limine to Preclude Testimony and Evidence

CHT first contends "testimony and exhibits concerning alleged acts occurring outside the period from 2011 through 2014 (and after the filing of the operative Fourth Amended Counterclaim) should be precluded from trial." CHT avers that "[t]he claims raised in the FACC relate solely to alleged damage allegedly resulting from '[CHT's] Post Road Modifications,'" which the Lenharts define as occurring between 2011 and 2014 only, and points out that the Lenharts have never amended the FACC to add later claims. CHT argues that because of this, evidence of such acts is irrelevant to the claims presented by the FACC. Specifically, CHT contends that evidence of the installation or replacement of a pipe in 2019, and modifications occurring in September-October 2018, April 2019 and September-October 2019 is not relevant and therefore inadmissible.

The Lenharts respond by generally denying that CHT "has immunity from subsequent activities it has undertaken that have aggravated its own prior acts and/or constituted additional wrongdoing." They argue that because they have pled

"a *continuing* trespass and *continuing* nuisance,"[153] they have adequately put CHT on notice regarding these claims.

The Court will not wholesale preclude the Lenharts from entering testimony and evidence concerning matters occurring outside of 2011 through 2014. Inasmuch as the Lenharts have alleged a *continuing* trespass and nuisance, with damage unabated to the present day, the Court cannot conclude that evidence from outside that time period is *per se* irrelevant. Because the Lenharts argue that damages continue to accrue, evidence of further modifications after the 2014 Post Road Modifications, the FACC, or even the first trial may be relevant to establish the continuing nature of the breach or to undermine certain anticipated defenses. Thus, the Court declines to issue at this time a blanket preclusion of all post-2014 evidence for that reason alone. Counsel may of course object to the admission of any particular evidence or testimony on relevance grounds, and the proponent will need to establish exactly how the evidence or testimony tends to make a particular issue in the case more or less likely.

CHT next argues that "records of the Pennsylvania State Police or testimony related to the subject therein should be precluded from trial because they are irrelevant and unfairly prejudicial." Specifically, the Lenharts seek to introduce a citation against CHT supervisor Howard Fry, III, and an October 16, 2019 Pennsylvania State Police Incident Report. CHT avers that these documents "have no tendency to make more or less likely that modifications to Post Road and its

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[153] Emphasis in original.

associated stormwater facilities caused damage to the Lenharts' properties," and are also "outside the period of time that the Post Road Modifications occurred (2011 to 2014) and are, therefore, irrelevant" for reasons discussed in this Motion.

The Lenharts respond that "[t]he conviction of the township supervisor for action against David Lenhart establishes [CHT's] malice in its dealings with the Lenharts, and the police report tend[s] to show the existence of damage and contemporaneous reporting to law enforcement of such damage."

CHT attached both the citation and the incident report as exhibits to their Motion. The citation was issued by Pennsylvania State Police Trooper Daniel DeNucci against Howard W. Fry III on July 7, 2014 for summary harassment. The "Nature of Offense" field reads:

> "The Defendant did with intent to harass, annoy, or alarm another, strike, shove, kick or otherwise subject the other person to unwanted physical contact, or attempt or threaten to do the same, to wit; the Defendant did threaten to hit the victim and then spit in the victim's face."

The incident report, dated the same day at time 0953 and filed by Trooper DeNucci, appears to be the first-person account of David Lenhart, who signed the bottom of the page. The report reads:

> "I asked question of engineer. Howard Fry Sr. called me son of a bitch and told me to stay out of his business so I did. I waited for him to finish with the engineer. He went approx. 100' down the hill and I again asked the engineer who to contact at Anadarko. He came back up the hill. He told me this was none of my business. I told him I wasn't talking to him. I was sitting down. He came over [to] me screaming, calling me fat and ugly and screaming in my face calling me names and threatening to hit me. I stood up. He continued [and] flexed several

> times as to hit me. I backed up and he kept coming at me and then he spit in my face and went back down the hill."[154]

The additional pages of the report include a brief description of the allegations by Trooper DeNucci and a notation indicating that Fry pled guilty before Magistrate District Judge William C. Solomon, paying a fine of $25 plus costs.

As discussed above, the PSTCA precludes the imposition of liability against a government agency for an employee's "willful misconduct," which in the context of the PSTCA "is synonymous with the term intentional tort." It is well-established that Pennsylvania law "preclud[es] imputation of intentional or malicious conduct on the part of employees to government units" generally.[155] Although the Lenharts do not seek to hold CHT liable for Fry's acts, the Court does not see how the belligerent acts of a single CHT representative are relevant to whether CHT, as an entity, acted "maliciously" towards the Lenharts. The Court will preclude the introduction of the citation and police report for that reason. Should the Lenharts seek to introduce the citation or police report for some other reason, such as to demonstrate a prior consistent statement, they may make an offer of proof at trial and the Court will make an evidentiary ruling at that time.

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[154] Spelling and grammatical errors corrected.
[155] *King v. City of Philadelphia*, 527 A.2d 1102 (Pa. Cmwlth. 1987).

ORDER

For the foregoing reasons, the Court hereby ORDERS as follows:

1. CHT's Motion for Partial Summary Judgment is not procedurally improper.

2. CHT's Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART as follows:

- CHT's reliance on the statute of limitations is DENIED as WAIVED.
- CHT's motion to dismiss gross negligence and negligence *per se* claims is DENIED.
- CHT's motion to dismiss willful misconduct claims is DENIED.
- CHT's motion to dismiss claims for injury to after-acquired land is GRANTED IN PART. The Lenharts' claims are limited to property they owned prior to the commencement of trial in September of 2017, and their damages are limited to damages incurred following their purchase of that property.
- CHT's motion to dismiss certain claims due to an inability to establish duty or causation is GRANTED IN PART as to all claims for damages attributable to the death of trees. In all other respects this motion is DENIED.
- CHT's motion to dismiss claims attributable to the acts of third parties is DENIED.[156]

[156] This denial merely reflects a determination that the Court cannot conclude as a matter of law, on the record before it, that all acts at issue were performed by third parties. This ruling should not be construed as in any way preventing CHT from arguing or establishing at trial

- CHT's motion to dismiss claims as not falling under any exception to the PSTCA is DENIED.
- CHT's motion to cap damages pursuant to the PSTCA is GRANTED IN PART. The Lenharts' recovery shall be limited to monetary damages, capped at $500,000, and *prohibitive* injunctive relief. The Court will defer a ruling on the appropriate measure of damages until after trial.

3. CHT's Motion to Exclude from Trial a Portion of the Expert Report and Testimony of Lake S. Randall, P.E. and Mid-Penn Engineering, in the form of a motion for a *Frye hearing*, is DENIED.

4. The Lenharts' Motion to Exclude Expert Report and Testimony of Larson Design Group is GRANTED IN PART as to references "regarding [CHT's] inclination to spend money on certain improvements" as stated in paragraphs 7.5.2, 7.7.1, 7.14.2, 7.14.2.2, and 7.15.1 of the report. In all other respects, the motion is DENIED.

5. CHT's Motion in Limine to Preclude from Trial the Investigative Report, Factual Findings and Testimony of John L. Mullen, P.G. and Four Oaks Geophysics is DENIED.

6. CHT's Motion in Limine for De Novo Trial on both Liability and Damages and the Lenharts' Motion in Limine Regarding Scope of Trial, Remand, and Evidence are GRANTED IN PART and DENIED IN PART. The Court will preclude the

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through testimony and evidence that third parties, and not CHT, were the legal cause of any damages suffered by the Lenharts.

introduction of evidence or testimony solely addressed to legal issues conclusively decided by the Commonwealth Court. Except as provided in this ORDER, the admissibility of all other testimony and evidence will be evaluated at the time of trial in accordance with standard evidentiary procedures.

7. The Lenharts' Motion in Limine Regarding Law of the Case and Preclusion is DENIED.

8. The Lenharts' Motion in Limine Regarding Testimony Outside Scope of Township Expert Reports is DENIED.

9. CHT's Motion in Limine to Preclude Testimony and Evidence from Trial is GRANTED IN PART. The Lenharts may not introduce the July 7, 2014 Citation of Howard W. Fry III and related incident report for the purpose of establishing malice on the part of CHT.

IT IS SO ORDERED this 14th day of June 2022.

By the Court,

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Eric R. Linhardt, Judge

ERL/jcr
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