

**IN THE COURT OF COMMON PLEAS OF
DAUPHIN COUNTY, PENNSYLVANIA**

MILTON PURCELL,	:	
ETHEL CAMPBELL,	:	CIVIL DIVISION
GRAHAM MCINTYRE,	:	
IVAN DIETRICH,	:	NO. 2005-CV-0463-EQ
RALPH FINK,	:	
HARVEY DEITRICH,	:	PLAINTIFFS' RESPONSE TO DEFENDANTS'
GIRARD GAUGHAN,	:	MOTION FOR A STAY
HARRY HEATH,	:	
ROBERT PATTON,	:	
GERALD LONG,	:	COUNSEL OF RECORD FOR PLAINTIFFS
JUNIOR VIA,	:	
RICHARD MATTIS,	:	Allen C. Warshaw
CHRISTINE COOK, and	:	Pa. I.D. No. 17145
ROBERT HEIST,	:	
	:	KLETT ROONEY LIEBER & SCHORLING
PLAINTIFFS	:	240 N. Third Street, Suite 700
	:	Harrisburg, PA 17101
vs.	:	(717) 231-7700 PHONE
	:	(717) 231-7712 FAX
MILTON HERSHEY SCHOOL	:	
ALUMNI ASSOCIATION,	:	
JOHN RICE, and	:	
JERRY WATERS	:	
	:	
DEFENDANTS	:	

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
MOTION FOR A STAY**

I. INTRODUCTION

On June 6, 2005, this Court issued an Order requiring Defendants to hold a new election for three officer positions and to allow certain Board members to vote in that election whose votes in the previous election had been disallowed by Defendants. Defendants have appealed that Order and now seek to stay its effect.

II. THERE IS NO RIGHT TO AN AUTOMATIC STAY

Defendants claim that they are entitled to an automatic stay. That claim is preposterous.

Pa.R.A.P. 1736(b) states when a stay shall be automatic, referring to the circumstances set forth in Pa.R.A.P. 1736(a). This case does not satisfy any of the requirements set forth in Pa.R.A.P. 1736(a). Thus, there is no automatic supersedeas.

In arguing that there is an automatic stay, Defendants ignore Rule 1736, arguing, instead, that, while this case is on appeal, this Court has only the power to issue Orders which maintain the status quo.¹ Defendants' argument completely ignores Pa.R.A.P. 1701(b)(2) which explicitly allows the lower court to "enforce any order entered in the matter." That is all that the Court **might** have to do during the pendency of an appeal. Plaintiffs' argument is therefore wholly without merit.

III. THERE IS NO RIGHT TO A DISCRETIONARY STAY

A. The Standard

Defendants correctly state the criteria to establish entitlement to a stay pending appeal. The applicant must demonstrate that: a) he or she is likely to prevail on the merits; b) that without relief he or she will suffer irreparable harm; c) the issuance of the stay will not substantially harm other interested parties in the proceeding; and d) the issuance of the stay will not adversely affect the public interest. Pennsylvania Public utility Commission v. Process Gas

¹It is not at all clear how such a rule would apply to this case since any Order entered while this case is on appeal would likely only restore the status quo that existed before.

Group, 502 Pa. 545, 467 A.2d 805 (1983). Defendants incorrectly claim that they can satisfy those criteria.

B. Defendants Have Not a Strong Showing That They are Likely to Succeed on the Merits

The parties have buried this Court with briefs on the merits of this case. Plaintiffs will not add to that pile. Suffice it to say that Plaintiffs believe that this Court decided all of the issues which are the subject of Defendants' appeal correctly for the reasons set forth in its opinion. Defendants have made no new arguments which require any further response from the Plaintiffs or further consideration by the Court.

C. Defendants Will Suffer No Irreparable Harm if a Stay is Not Granted

Plaintiffs claim that the following irreparable harm will result in the absence of a stay:

- a) Substantial disruption to MHSAA operations and governance will occur as officers presently serving may be displaced;
- b) Disruptions caused by multiple elections;
- c) "Crucial" litigation may be compromised because many of the Plaintiffs have conflicts of interest regarding the litigation;
- d) The Board may lose control of Chapters;
- e) MHSAA by-laws will be rendered meaningless;
- f) The Board will be forced to remove Emeritus Directors; and
- g) Defendants will be deprived of their right to discovery.

These claims border on the absurd.

There is no reason to believe that MHSAA operations will be disrupted if new officers are elected. The transition will be no different than that which takes place normally on an annual basis. In any case, the Board has held only one regular meeting in 2005 so there is not much regular business to disrupt.

It is also difficult to understand the **irreparable** harm that might result from multiple elections. In any case, any harm caused by multiple elections is far outweighed by the benefit of holding a **legal** election.

Defendants' claim that irreparable harm will result because many of the Plaintiffs have conflicts which may cause critical litigation to be disrupted is also without merit. The statute clearly contemplates that directors might have conflicts of interest from time to time. 15 Pa.C.S.A. §5728. Nowhere does it suggest that such conflicts disqualify a person from serving on the Board. If there are conflicts with regard to specific subjects which come before the Board, they can be addressed at that time. In any case, Defendants' claim that there are such conflicts is simply wrong.

Defendants claim that the Board will lose control of the Chapters is also absurd. The MHSAA By-Laws provide a procedure for disciplining Chapters. However, those procedures require thirty days notice. No such notice was given here. And, the real risk is a repeat of what happened in late 2004, a majority of the Board protecting its majority by eliminating opposing Chapter Representatives without any notice and without any basis in fact.

The claim that the By-Laws have been rendered meaningless is, of course, silly. This Court did not rewrite the By-Laws, it interpreted them.

It is virtually impossible to understand the claim that **irreparable harm** will result because the Association may have to remove or replace the Emeritus Directors. That is what happens with every other director, so having to remove or replace the Emeritus Directors, if that is what the Board chooses to do, cannot cause irreparable harm.

Finally, Defendants claim harm, irreparable harm, because they have been denied an opportunity to conduct discovery. At best, that claim rings hollow. This case has been pending for over four months (and for over three and one-half months before the hearing). It was clear from the beginning that the Court might grant relief similar to that ultimately granted. Yet Defendants made no attempt to conduct discovery. They are thus estopped from complaining about an inability to conduct discovery. If they wanted discovery, they should have sought it.

In any case, the Court granted proper relief pursuant to 15 Pa.C.S.A. §5793. That provision makes no reference to the time in which a court may act or the amount of discovery which must be permitted prior to the entry of an Order. Thus, Defendants' claim is without merit.

Finally, there was no question, let alone dispute, regarding the facts on which this Court based its Opinion and Order. Thus, the lack of discovery caused no harm at all.

D. Plaintiffs and Others Would be Irreparably Harmed If a Stay is Granted

In the meetings of November 14 and December 19, 2004, Defendants took actions which deprived many of the Plaintiff Directors of their right to cast their votes. Those same actions also eliminated the votes of many of the members of MHSAA by removing or rejecting the votes of

Directors for whom those members had voted. This Court merely restored the right of those members to vote.²

“The right to vote is a shareholder's most fundamental right.” Reifsnyder v. Pittsburgh Outdoor Advertising Co., 405 Pa. 142, 149 n.8, 173 A.2d 319, 322 n.8 (1961). That is because:

The right to vote helps ensure corporate democracy, the principle that the owners of a corporation should control the direction that their corporation takes. In the face of disagreements with management, shareholders' most basic alternatives are either to sell their shares or to vote in new directors

Warehime v. Warehime, 2001 Pa. Super. 141, 777 A.2d 469, 477-78 (Pa. Super. 2001) (citing, inter alia, Blasius Indus. Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988)). (quotation marks omitted).

The right of a director to vote is equally important since a director has fiduciary duties to the corporation which can only be carried out by voting. The failure or inability to cast a vote on corporate affairs puts the director at risk of violating those duties.

"An injury is regarded as 'irreparable' if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard.” West Penn Specialty MSO, Inc. v. Nolan, 1999 Pa. Super. 218, 737 A.2d 295, 299 (Pa. Super. 1999) (quoting Sovereign Bank v. Harper, 449 Pa. Super. 578, 674 A.2d 1085, 1091(Pa. Super. 1996)). The Order entered by this Court on June 6, 2005 prevented irreparable harm to Plaintiffs who had been denied their votes

²On the other hand, the Court did not eliminate the right of any other Board member to vote.

and to members who had been denied the right to have their Representatives vote. The entry of a stay would cause irreparable harm to those same persons.

IV. CONCLUSION

For the foregoing reasons, and those set forth in this Court's opinion, the Court should deny Defendants' Motion for a Stay.

Respectfully submitted,

KLETT ROONEY LIEBER & SCHORLING
A Professional Corporation

Dated: June 17, 2005

BY: _____

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CERTIFICATE OF SERVICE

On the 17th day of June, 2005, I, Glenda K. Davidson, a secretary in the law offices of Klett Rooney Lieber & Schorling, hereby certify that I have served this day a true and correct copy of the foregoing **Defendants' Response to Plaintiffs' Motion for a Stay** in the above-captioned matter via hand delivery to those persons and addresses indicated below:

Victor P. Stabile, Esquire
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112 Market Street, 8th Floor
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Glenda K. Davidson