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104 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 104 MAP 2022

FREDERICK E. OBERHOLZER, JR.
AND DENISE L. OBERHOLZER

Appellees

v.

SIMON AND TOBY GALAPO

Appellants

BRIEF OF APPELLANTS SIMON AND TOBY GALAPO

On Appeal from the Order of the Superior Court at No. 794 EDA 2020 dated April 18, 2022, Vacating the judgment of the Court of Common Pleas of Montgomery County, Civil Division, by the Honorable Steven C. Tolliver, Sr., entered April 1, 2020, at C.C.P. Docket No. 2016-11267 and Remanding. The order of the Superior Court dated April 5, 2022, withdrew the March 7, 2022, memorandum.

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BRIEF OF APPELLANTS

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to 42 Pa. C.S. § 724(a), which provides that orders of the Superior Court may be reviewed by this Court upon allowance of appeal. *See also* Pa. R.A.P. 1112(a). This Court granted Simon and Toby Galapo's Petition for Allowance of Appeal on October 24, 2022. *See* Appendix G.

II. ORDER IN QUESTION

The Order in question is the Order of the Honorable Steven C. Tolliver, Sr. of the Court of Common Pleas of Montgomery County dated and entered on January 3, 2020,[1] denying post-trial relief as follows:

> AND NOW, this 3rd day of January, 2020, upon consideration of the Motion for Post-Trial Relief of Defendants' [*sic*] Simon Galapo and Toby Galapo, filed on September 20, 2019 (#160), any responses thereto, and after oral argument held on November 26, 2019, it is hereby **ORDERED** and **DECREED** that said Motion for Post-Trial Relief is **DENIED**.
>
> BY THE COURT:
> /s/ Steven C. Tolliver
> Steven C. Tolliver, Sr., J.

[1] The Order appears at Appendix A and is also part of the Reproduced Record. (R. 658a).

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

When reviewing a "trial court's grant of a permanent injunction, pursuant to agreed-upon facts, ... [the Court] must determine whether the trial court committed an error of law, for which [its] standard of review is *de novo* and [its] scope of review is plenary." *Watts v. Manheim Twp. School Dist.*, 121 A.3d 964, 972 (Pa. 2015) (*citing Buffalo Twp. v. Jones*, 813 A.2d 659, 663-64 (Pa. 2002)).

IV. QUESTIONS PRESENTED FOR REVIEW

1. Whether an injunction prohibiting ongoing publication constitutes an impermissible prior restraint under Article I, Section 7 of the Pennsylvania Constitution?

SUGGESTED ANSWER: YES

2. Whether the publication of language which gives rise to tort claims other than defamation cannot be enjoined under Article I, Section 7 of the Pennsylvania Constitution?

SUGGESTED ANSWER: YES

3. Whether the Superior Court committed an error of law by concluding that the injunction was content-neutral and therefore not subject to strict scrutiny?

SUGGESTED ANSWER: YES

V. STATEMENT OF THE CASE

Frederick and Denise Oberholzer (hereinafter "plaintiffs") reside at 812 Suffolk Road in Rydal, Pennsylvania. (R. 12a). Simon and Toby Galapo (hereinafter "defendants") reside at 803 Delene Road in Rydal, Pennsylvania. *Id.* The backyards of the parties' properties abut one another and are separated only by a creek. (R. 13a).

Over a number of years, tensions between plaintiffs and defendants escalated, ultimately culminating in a confrontation between plaintiffs and defendant Simon Galapo in November 2014. (R. 13a-14a; 276a-280a). It was during this confrontation that plaintiff Denise Oberholzer called defendant Simon Galapo a "fucking Jew." (R. 105a-107a; 280a).

In June 2015, in response to what he believes is plaintiffs' racist and/or anti-Semitic behavior, defendant Simon Galapo began posting signs along the back of his property, facing the rear of plaintiffs' residence. (R. 14a-19a; 273a; 283a). While the number of signs posted and their content have varied over the years, the following signs have been posted since June 2015:

No Place 4 Racism

Hitler Eichmann Racists

Racists: the true enemies of FREEDOM

No Trespassing - Violators Will Be Prosecuted

Warning! Audio & Video Surveillance On Duty At All Times

Racism = Ignorant

✡ Never Again

WWII: 1,500,000 children butchered: Racism

Look Down on Racism

Racist Acts will be met with Signs of Defiance

Racism Against Kids Is Not Strength, It's Predatory

Woe to the Racists. Woe to the Neighbors

Got Racism?

Every Racist Action Must be Met With a Sign of Defiance

Racism is Self-Hating; "Love thy Neighbor as Thyself"

Racism - Ignore It and It Won't Go Away

Racism - The Maximum of Hatred for the Minimum of Reason

RACISM: It's Like a Virus, It Destroys Societies

Racists Don't Discriminate Whom They Hate

Hate Has No Home Here (in multiple languages)

Every Racist Action Must Have an Opposite and Stronger Reaction

Quarantine Racism and Society Has a Chance

Racism Knows No Boundaries

(R. 14a-19a; 433a-435a).

On June 7, 2016, plaintiffs filed a civil action, stating claims of private nuisance, intrusion upon seclusion, defamation, false light, and intentional infliction of emotional distress. (R. 1a). An Amended Complaint was thereafter filed on July 5, 2016, which included the same causes of action. (R. 12a-34a). Plaintiffs' claim of intrusion upon seclusion was subsequently dismissed with prejudice by court Order dated September 6, 2018 in response to defendants' Motion for Summary Judgment. (R. 429a).

The parties attended a conference with the Honorable Steven C. Tolliver, Sr. on May 30, 2019. (R. 430a). During this conference, the parties were able to resolve plaintiffs' civil action claims. (R. 433a-435a).[2] Under the terms of the parties' settlement agreement, plaintiffs received a monetary payment from defendants in exchange for a dismissal of these claims. *Id.* The issue of plaintiffs' request for permanent injunctive relief was then to be decided by the Trial Court. *Id.* Pursuant to the parties' agreement, defendants did not admit liability but agreed that they would not argue that

[2] As the parties' Settlement and Release agreement is confidential, the agreement has been redacted to only reveal those portions of the agreement relevant to this appeal.

plaintiffs would not have succeeded on the merits of their claims in response to their request for permanent injunctive relief. *Id.*

The trial of plaintiffs' Petition for Permanent Injunctive Relief was scheduled for August 13, 2019 on a stipulated record before the Honorable Steven C. Tolliver, Sr. (R. 433a). Prior to trial, defendants submitted briefs to the Trial Court in opposition to plaintiffs' Petition for Permanent Injunctive Relief. (R. 445a-467a; 493a-503a). The trial proceeded as scheduled on August 13, 2019, (R. 504a-617a), and on September 12, 2019, the Trial Court entered the following Order:

> **AND NOW**, this 12th day of September, 2019, upon careful consideration of the evidence and in accordance with the Memorandum attached hereto, it is hereby **ORDERED** that Plaintiffs' Motion for a Permanent Injunction is **GRANTED in Part and DENIED in Part** as follows:
>
> A) The signs posted by Defendants on their property are allowed to remain;
>
> B) The signs previously posted on Defendants' property shall be positioned in such a way that they do not directly face and target Plaintiffs' property: the fronts of the signs (lettering, etc.) are not to be visible to the Plaintiffs nor face in the direction of Plaintiffs' home.
>
> BY THE COURT:
> /s/ Steven C. Tolliver
> Steven C. Tolliver, Sr., J.

(R. 618a).

Defendants filed their Motion for Post-Trial Relief on September 18, 2019.[3] (R. 632a-658a). After plaintiffs filed a Petition to Hold Defendants in Civil Contempt (R. 10a), the Trial Court amended its Order on October 11, 2019 to the following:

> **AND NOW**, this 11th day of October, 2019, this Court's Order of September 12, 2019 is amended to read as follows: upon careful consideration of the evidence and testimony presented, upon review of the briefs filed on behalf of Plaintiffs and Defendants, and in accordance with the Memorandum attached to the Order of September 12, 2019, it is hereby **ORDERED** that Plaintiff's [*sic*] Motion for a Permanent Injunction is **GRANTED in Part and DENIED in Part** as follows:
>
> A) The signs posted by Defendants on their property are allowed to remain;
>
> B) The signs previously posted on Defendants' property shall be positioned in such a way that they do not directly face Plaintiffs' property; i.e., the fronts of the signs (lettering, etc.) are not to be visible to the Plaintiffs nor face in the direction of the Plaintiffs' home. In order to ensure that none of the signs are visible regardless of their positioning, these signs shall be constructed with opaque material.
>
> BY THE COURT:
> /s/ Steven C. Tolliver

[3] The docket incorrectly states that the Motion for Post-Trial Relief was filed by plaintiffs. (R. 10a).

Steven C. Tolliver, Sr., J.

(R. 631a).

Argument on defendants' Motion for Post-Trial Relief was heard by the Trial Court on November 26, 2019. (R. 10a-11a). The Trial Court subsequently denied defendants' Motion for Post-Trial Relief on January 3, 2020. (R. 659a).

Defendants filed a Notice of Appeal on January 9, 2020. (R. 11a).[4] After the parties filed briefs, oral argument was held on December 4, 2020. On March 7, 2022, the Superior Court issued its Opinion reversing the Trial Court and remanding the matter for further proceedings. The Opinion was later converted to a published opinion[5] upon the petition of plaintiffs on April 18, 2022. *See* Appendix F.

A Petition for Allowance of Appeal was filed by defendants on April 4, 2022. The petition was subsequently granted on October 24, 2022. *See* Appendix G.

[4] Judgment was entered on the docket on April 1, 2020. (R. 11a).
[5] The published opinion is located at 274 A.3d 738 (Pa. Super. 2022).

VI. SUMMARY OF THE ARGUMENT

The backyards of the parties' properties abut one another, separated by only a small creek. After years of rising tensions, the parties were involved in a verbal confrontation in November 2014 during which plaintiff Denise Oberholzer called defendant Simon Galapo a "fucking Jew."[6] In response to this, as well as years of anti-Semitic based torment at the hands of plaintiffs, defendants erected anti-hate signs in their backyard, facing plaintiffs' property.

In response, plaintiffs filed a civil action against defendants, claiming private nuisance, intrusion upon seclusion, defamation, false light, and intentional infliction of emotional distress. Ultimately, the intrusion upon seclusion claim was dismissed on summary judgment and the remaining four claims were settled by the parties. The parties' settlement agreement provided that plaintiffs would receive a monetary settlement to satisfy any and all damages arising from the posting of the signs in the past, present, or future, but would be allowed to proceed to trial on their demand for permanent injunctive relief, using a stipulated record. A trial was held before the Honorable Steven C. Tolliver, Sr., who granted permanent injunctive relief to plaintiffs, ordering that defendants were to turn the signs around so

[6] The Galapo family is Jewish, of which plaintiff Denise Oberholzer was aware. (R. 11a).

that plaintiffs could not read any of the wording on the signs. Granting injunctive relief was improper.

The Pennsylvania Constitution prohibits prior restraint on Pennsylvanians' right to speak. The Superior Court concluded that the injunction does not constitute a prior restraint because it addresses "existing signs" and not "future communications." However, federal courts, when applying Pennsylvania law and considering injunctions prohibiting a defendant from *repeating* specific words already spoken or *removing* existing publications have uniformly concluded that such injunctions constitute unconstitutional prior restraints. Most importantly, the Pennsylvania Supreme Court, in *Willing v. Mazzacone*, 393 A.2d 1155 (Pa. 1978), determined that an injunction prohibiting the defendant from making future defamatory statements of a certain nature was an unconstitutional prior restraint. These cases demonstrate that the Pennsylvania Constitution prohibits the government from not only prohibiting future communications but also from prohibiting a defendant from *repeating* specific words already spoken or requiring the *removal* of existing publications.

Furthermore, it is the settled law of this Commonwealth that equity will not enjoin defamation. *Id.* The Courts below do not address this common law precept, instead mistakenly concluding that equity can enjoin speech if

the injunction is not a prior restraint. The common law precept that equity will not enjoin defamation, is not dependent on whether the injunction is a prior restraint. Instead, the only question herein is whether this settled Pennsylvania law should be expanded to hold that equity will not enjoin the publication of language which gives rise to tort claims beyond defamation, such as claims of false light, nuisance, and invasion of privacy. Again, federal courts considering this issue have concluded that the Pennsylvania Supreme Court would conclude that equity should not enjoin speech regardless of the alleged tort. As the Pennsylvania Constitution was intended to provide strong protection of citizens' right to speak freely, whether speech will not be enjoined should not depend on a plaintiff bases his or her request for injunctive relief on allegations of defamation, false light, nuisance, or any other tort.

Finally, the lower Courts incorrectly concluded that the injunction is content-neutral and, as such, applied the incorrect level of scrutiny. In determining that the injunction is content neutral, the lower Courts relied on *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), *Klebanoff v. McMonagle*, 552 A.2d 677, 678 (Pa. Super. 1988), and *SmithKline Beecham Corp. v. Stop Huntingdon Animal Cruelty USA*, 959 A.2d 352 (Pa. Super.

2008) – completely inapposite cases. *Madsen* and *Schenck* allowed injunctions prohibiting picketing within a prescribed buffer zone outside of abortion clinics, while *Klebanoff* and *SmithKline* upheld injunctions preventing picketing or demonstrating in the street directly in front of residential homes. The injunctions in these cases were content-neutral because they applied to expressive conduct, and not pure speech, and prohibited or limited protestors from expressing *any message* via time, place, and manner restrictions.

The injunction entered by the Trial Court is not content-neutral, both on its face and in its purpose, as it seeks only to prohibit defendants from communicating specific messages to plaintiffs because plaintiffs find those messages offensive. Strict scrutiny applies when a law is content based on its face or when the purpose and justification for the law are content based and requires the government to prove that the restrictions are narrowly tailored to serve a compelling state interest.

The Courts below cite the government's interest in protecting residential privacy to justify the injunction. They conclude that this is a significant government interest, relying on *Klebanoff* and *SmithKline*, as well as *Frisby v. Schultz*, 487 U.S. 474 (1988), another case involving protesting at the home of a doctor who performed abortions. But in these cases, the

doctors were subject to the protestor's abusive conduct, including yelling, threats, and physical impediments to their comings and goings from their home. No such conduct is at issue in the instant matter, and defendants' signs involve only pure speech, which is entitled to greater protection than expressive conduct. Ultimately, in balancing the defendants' right to speak freely compared to the alleged invasion of plaintiffs' residential privacy, the injunction fails strict scrutiny.

For these reasons, the injunction entered by the Trial Court is violative of Pennsylvania law, the Pennsylvania Constitution, and the United States Constitution. Therefore, the Trial Court's Orders dated September 12, 2019 and October 11, 2019 must be vacated and this matter must be remanded for the entry of judgment in defendants' favor.

VII. ARGUMENT

A. AN INJUNCTION PROHIBITING ONGOING PUBLICATION CONSTITUTES AN IMPERMISSIBLE PRIOR RESTRAINT UNDER ARTICLE I, SECTION 7 OF THE PENNSYLVANIA CONSTITUTION

"Under the federal constitution, any system of prior restraint bears heavy presumption against validity." *Franklin Chalfont Assoc. v. Kalikow*, 573 A.2d 550, 555-56 (Pa. Super. 1990) (*citing New York Times Co. v. United States*, 403 U.S. 713 (1971)). "The Pennsylvania Constitution, which is even more protective of speech than the federal Constitution, prohibits 'prior restraint on Pennsylvanians' right to speak.'" *Id.* at 556 (internal citations omitted) (*citing Goldman Theatres v. Dana*, 173 A.2d 59 (Pa. 1961)).

Article I, Section 7 of the Pennsylvania Constitution provides that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Pa. Const. Art. I, § 7. The Pennsylvania Supreme Court has concluded that this provision was designed "to prohibit the imposition of prior restraints upon the communication of thoughts and opinions, leaving the utterer liable only for an abuse of the privilege." *Goldman Theatres*, 173 A.2d at 62.

In the instant matter, however, the Superior Court concludes that the injunction does not constitute a prior restraint because it addresses "existing signs" and not "future communications." R. 998a. However, because the posting of the messages was ongoing, the signs are both existing communications, as well as future communications. The Pennsylvania courts have not addressed the scenario found herein where a defendant is prohibited from *repeating* specific words already spoken or *removing* existing publications. However, other courts addressing this scenario have held that injunctions which limit or prohibit repeated or existing speech do constitute governmental acts of prior restraint.

The federal courts with jurisdiction in Pennsylvania have considered such scenarios and, applying Pennsylvania law, have concluded that such injunctions run afoul of Article I, Section 7 of the Pennsylvania Constitution and *Willing v. Mazzocone*, 393 A.2d 1155 (Pa. 1978), wherein the Supreme Court held that equity cannot enjoin defamation. For example, in *Graboff v. Am. Ass'n of Orthopedic Surgs.*, 2013 U.S. Dist. LEXIS 63282 (E.D. Pa. 2013), the United States District Court for the Eastern District of Pennsylvania was tasked with determining whether Pennsylvania Courts would enjoin a defendant from continuing to publish an article on its website that a jury had concluded was tortious. *Id.* at *4. The Court predicted that

the Pennsylvania courts would not allow such an injunction to stand. *Id.* at *13-14.

A year later, the United States District Court for the Middle District of Pennsylvania considered whether to grant a plaintiff's emergency motion for a restraining order requiring that previously published libelous statements be removed, and that no more such defamatory statements be published. *Puello v. Crown Heights Shmira, Inc.*, 2014 U.S. Dist. Lexis 91693 (M.D. Pa. 2014). Again, the Court noted that, under Pennsylvania law, equity will not enjoin libel. *Id.* at *4. Therefore, the Court denied the motion as it requested an unconstitutional prior restraint. *Id.* at *5.

Most recently, in August 2020, in *Tarugu v. Journal of Biological Chemistry*, 478 F. Supp. 3d 552 (W.D. Pa. 2020),[7] the plaintiffs alleged that, in retracting an article published in the defendants' scientific journal, the defendants made defamatory statements. *Id.* at 554. The plaintiffs sought an injunction "enjoining the [d]efendants from publicly displaying or further disseminating the Retraction, and requiring [d]efendants to otherwise withdraw the Retraction from all publicly available sources." *Id.* The defendants filed a Partial Motion to Dismiss, seeking to dismiss Count I of

[7] The *Tarugu* decision was published on August 11, 2020, over two months after defendants submitted their brief to the Superior Court.

the plaintiffs' Complaint because the plaintiffs could not be granted the requested injunction as a matter of Pennsylvania law. The United States District Court for the Western District of Pennsylvania agreed, noting that injunctive relief prohibiting *further* dissemination of the publication is impermissible under Pennsylvania law. *Id.* at 559-560.

Curiously, the Superior Court plainly states that "there is no dispute that a permanent injunction can result in a prior restraint on speech," R. 998a, , and cites the United States Supreme Court in noting that "[t]emporary restraining orders and permanent injunctions – *i.e.*, court orders that actually forbid speech activities – are classic examples of prior restraints." R. 997a. Moreover, the Court readily accepts that "[a] prior restraint was also at issue in *Willing*," without making any attempt to distinguish *Willing* from the instant matter, when the fact patterns are so strikingly similar. R. 995a.

In *Willing*, the plaintiffs sought an injunction to prevent a former client from wearing a "sandwich-board" sign around her neck which read "LAW – FIRM of QUINN – MAZZOCONE Stole money from me – and Sold-me-out-to-the INSURANCE COMPANY" while pushing a shopping cart, blowing a whistle, and ringing a cowbell outside of the plaintiffs' office building. 393 A.2d at 1156. While the initial injunction entered by the trial court prohibited the defendant from "further unlawful demonstration, picketing, carrying

placards which contain defamatory and libelous statements and or/uttering, publishing and declaring defamatory statements against the [plaintiffs]", the Superior Court had modified the injunction to prohibit the defendant from making statements to the effect that the plaintiffs had stolen money from her and sold her out to the insurance company.[8] *Id.* at 1157.

In concluding that equity could not enjoin a defamation, the Court noted that Article I, Section 7, of the Pennsylvania Constitution was designed "to prohibit the imposition of prior restraints upon the communication of thoughts and opinions, leaving the utterer liable only for an abuse of the privilege." *Id.* at 1157 (*citing Goldman Theatres*, *supra*). Therefore, the Court concluded that the injunctions entered by the lower courts violated the defendant's state constitutional right to "freely speak her opinion – regardless of whether that opinion is based on fact or fantasy." *Id.* at 1158.

In both *Willing* and the instant matter, the defendants created signs which made statements that the plaintiffs objected to. In both cases, the courts, having reviewed the contents of the signs, entered injunctions to prohibit the defendants from further making the objectionable statements.[9]

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[8] As the Superior Court notes, "[i]n other words, the courts enjoined the defendant from expressing, *from that date on forward*, her view that plaintiffs stole money." R. 996a. (emphasis added).

[9] Although the Trial Court's order allows defendants' signs to remain posted so long as they face only defendants' home, this is still an improper restriction of defendants' speech.

In its Opinion, the Superior Court does not explain why the injunction in *Willing* was a prior restraint, but a similar injunction herein is not.

The restriction of ongoing speech via injunction constitutes a prior restraint of speech. Allowing defendants to continue to post the subject signs only towards their own home, but not toward the back property line – where the perceived threat and intended audience exists – is the type of unconstitutional prior restraint on expression that is prohibited by the Pennsylvania Constitution. Neither the Pennsylvania Constitution nor Pennsylvania case law allows the Trial Court to restrict defendants' posting of the subject signs, even if those signs are tortious, as discussed *infra*. Therefore, the Trial Court's Orders of September 12, 2019 and October 11, 2019 must be vacated and this matter must be remanded for the entry of judgment in defendants' favor.

> Displaying a sign from one's **own residence** often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the 'speaker.' . . . Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.

City of Ladue v. Gilleo, 512 U.S. 43, 56-57 (1994) (emphasis added).

B. THE PUBLICATION OF LANGUAGE WHICH GIVES RISE TO TORT CLAIMS OTHER THAN DEFAMATION CANNOT BE ENJOINED UNDER ARTICLE I, SECTION 7 OF THE PENNSYLVANIA CONSTITUTION

As noted *supra*, in *Willing v. Mazzocone*, the Pennsylvania Supreme Court held that equity cannot enjoin defamation and this has remained the law in this Commonwealth ever since. Pennsylvania Courts have not addressed whether this holding extends to speech leading to tort claims besides defamation, *i.e.,* whether equity can enjoin speech where said speech placed someone in a false light, created a nuisance, invaded privacy, etc.

The federal courts examining this question, though, have concluded that the Pennsylvania appellate courts would continue to hold that injunctive relief prohibiting defamatory, libelous, or otherwise offensive language would be unconstitutional under the Pennsylvania Constitution. The issue was first addressed in *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991), in which the United States Court of Appeals for the Third Circuit considered whether Pennsylvania law allowed the United States District Court to enter a permanent injunction prohibiting the defendant from making further libelous statements about the plaintiff. *Id.* at 669. Therein, a former client of the plaintiff made libelous statements about the plaintiff including that he (1) had "thrown" Thompson's case; (2) had deliberately destroyed certain

documents related to the case; (3) had used drugs and was a member of the highly publicized "Yuppie Drug Ring" organized by Philadelphia dentist Lawrence Lavin; (4) was connected to organized crime; and (5) had committed arson of his own car. *Id.* at 667.

In considering whether the District Court properly enjoined the defendant from publishing further libels against the plaintiff and ordering the defendant to retract past libelous statements, the Third Circuit noted that "[t]he United States Supreme Court has held repeatedly that an injunction against speech generally will not be considered an unconstitutional prior restraint if it is issued after a jury has determined that the speech is not constitutionally protected." *Id.* (*citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rel.*, 413 U.S. 376 (1973)). Therefore, the Court opted to consider whether the Pennsylvania Supreme Court would permit an exception to the rule that equity will not enjoin defamation in cases where there has already been a jury determination that the defendant's statements were libelous.

The Court began by noting that in *Willing*, when presented with the opportunity to re-examine the common-law precept that equity will not enjoin defamation, the Pennsylvania Supreme Court instead upheld the notion. *Kramer*, 947 F.2d at 675. Ultimately, the Court concluded that "the available

evidence leads us to the conclusion that the Pennsylvania Supreme Court would overturn the injunction against prospective libel issued by the district court...." *Id.* at 677. Although five factors were cited for reaching the conclusion, the Court opined that, most importantly, the Pennsylvania Supreme Court "continues to place great emphasis on the adequate remedy doctrine as a bar to equitable relief." *Id.* at 679. Therefore, the Court reversed the lower court's entry of an injunction prohibiting the defendant from making the libelous statements in the future. *Id.* at 680.

Later, in *Graboff v. Am. Ass'n of Orthopedic Surgs.*, 2013 U.S. Dist. LEXIS 63282 (E.D. Pa. 2013), the United States District Court for the Eastern District of Pennsylvania was tasked with determining whether Pennsylvania Courts would enjoin a defendant from making statements that placed the plaintiff in false light. In that case, the plaintiff had been suspended by the American Association of Orthopedic Surgeons, which then published an article about the suspension and circulated this article electronically and in hard copy to its membership. *Id.* at *2-3. The plaintiff successfully litigated a false light claim against the defendant, which resulted in a jury verdict for the plaintiff in the amount of $196,000. *Id.* at *3. The plaintiff then filed a second action seeking to enjoin the defendant from continuing to publish the article at issue on its website. *Id.* at *4.

Noting that the Pennsylvania Supreme Court had not yet addressed whether an injunction is proper in a false light case, the Court relied on the reasoning of the Court in *Kramer* in predicting that the Pennsylvania Supreme Court would adhere to the traditional, common law principle that equity will not enjoin defamation, especially when a party has an adequate remedy at law in the form of money damages. *Id.* at *13-14.

A year later, the United States District Court for the Middle District of Pennsylvania considered whether to grant a plaintiff's emergency motion for a restraining order requiring that previously published libelous statements be removed, and that no more such defamatory statements be published. *Puello v. Crown Heights Shmira, Inc.*, 2014 U.S. Dist. Lexis 91693 (M.D. Pa. 2014). Again, the Court noted that, under Pennsylvania law, equity will not enjoin a libel. *Id.* at *4. Therefore, the Court denied the motion as it requested an unconstitutional prior restraint. *Id.* at *5.

When it adopted the common law notion that equity will not enjoin defamation in *Willing*, the Pennsylvania Supreme Court relied heavily on the notion that the Pennsylvania Constitution was intended to provide strong protection of citizens' right to speak freely. Nothing in the years since *Willing* was decided has lessened the importance of protecting the right of citizens to speak freely in this Commonwealth.

Furthermore, the Courts in *Willing* and its progeny do not suggest that the protection afforded to speech is based on the tort claim arising from the speech. Instead, it is the speech itself that is and must be protected. Therefore, it does not and should not matter whether a plaintiff bases his or her request for injunctive relief on allegations of defamation, false light, nuisance, or any other tort. Therefore, the Trial Court's Orders of September 12, 2019 and October 11, 2019 must be vacated and this matter must be remanded for the entry of judgment in defendants' favor.

C. THE INJUNCTION IS CONTENT-BASED AND THEREFORE SUBJECT TO STRICT SCRUTINY, WHICH IT FAILS

The Trial Court's Order granting plaintiffs' request for a permanent injunction is a content-based restriction of defendants' speech, subject to, and failing, strict scrutiny.[10] In its Opinion, the Pennsylvania Superior Court

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[10] In the instant matter, the Trial Court does not identify the level of scrutiny its injunction is subject to, simply relying heavily on cases that apply forum analyses. However, the U.S. Supreme Court has adopted the forum analysis, known as the public forum doctrine, to determine when the government's interest in limiting the use of property it owns or controls to its intended purpose outweighs the interest of others wishing to use the property for speech-related activities. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). The forum analysis applies differing standards, respectively, to a traditional public forum, a designated public forum and a nonpublic forum.

"The public forum doctrine is a rule governing claims of 'a right of access to public property' and has never been thought to extend beyond property generally understood to belong to the government." *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 827 (1996); *see also, Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1931 n.3 (2019) (internal citation omitted) (*distinguishing Cornelius* stating, "But *Cornelius* dealt with government-owned property....[T]he Court's admittedly imprecise and overbroad phrase in *Cornelius* is not consistent with this Court's case law and should not be read to suggest that *private property owners* or private lessees are subject to *First*

erred in concluding that the injunction at issue is akin to the content neutral injunctions found in cases such as *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), *Klebanoff v. McMonagle*, 552 A.2d 677, 678 (Pa. Super. 1988), and *SmithKline Beecham Corp. v. Stop Huntingdon Animal Cruelty USA*, 959 A.2d 352 (Pa. Super. 2008) which were not subject to strict scrutiny. These cases involve restrictions on the manner of communication; they do not prohibit the communication itself.

In *Madsen*, an abortion clinic received a permanent injunction that "permanently enjoined [protestors] from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic." 519 U.S. at 758. When the clinic returned to court six months later for a broader injunction,

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Amendment constraints whenever they dedicate their private property to public use or otherwise open their property for speech." (emphasis added)). As a result, private property is not a nonpublic forum, or any other forum amenable to the forum analysis or public forum doctrine.

As the conduct at issue in this case occurred on defendants' *private* property, it is not subject to a forum analysis and the principles set forth in *Cornelius*, *Frisby v. Schultz*, 487 U.S. 474 (1988), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972), and the other cases cited by the Trial Court do not govern the outcome of this matter. Instead, "[a] special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (citation omitted, emphasis in original). Therefore, if the injunction is not a presumptively prohibited prior restraint, it remains an impermissible restriction of Defendants' speech on their own private property. To the extent such an overreach into private property is permissible, it is a content-based restriction, subject to strict scrutiny, as discussed *infra*.

> The court found that, despite the initial injunction, protesters continued to impede access to the clinic by congregating on the paved portion of the street -- Dixie Way -- leading up to the clinic, and by marching in front of the clinic's driveways. It found that as vehicles heading toward the clinic slowed to allow the protesters to move out of the way, "sidewalk counselors" would approach and attempt to give the vehicle's occupants antiabortion literature. The number of people congregating varied from a handful to 400, and the noise varied from singing and chanting to the use of loudspeakers and bullhorns.
>
> The protests, the court found, took their toll on the clinic's patients. A clinic doctor testified that, as a result of having to run such a gauntlet to enter the clinic, the patients "manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures." The noise produced by the protesters could be heard within the clinic, causing stress in the patients both during surgical procedures and while recuperating in the recovery rooms. And those patients who turned away because of the crowd to return at a later date, the doctor testified, increased their health risks by reason of the delay.

Id. at 758-59. For these reasons, a broader injunction was entered, which prohibited protestors from

> (1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice [the Melbourne clinic]....
>
> (2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to,

ingress into and egress from any building or parking lot of the Clinic.

(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within [36] feet of the property line of the Clinic.... An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east.... The [petitioners] . . . must remain at least [5] feet from the Clinic's east line. Another exception to the 36 foot buffer zone relates to the record title owners of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zones does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert with the [petitioners]....

(4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

(5) At all times on all days, in an area within [300] feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners]....

(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within [300] feet of the residence of any of the [respondents']

> employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the [respondents'] employees, staff, owners or agents. The [petitioners] and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.
>
> (7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the [respondents'] Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic....
>
> (8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the [respondents'] Clinic.
>
> (9) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

Id. at 759-60.

The protestors argued that the injunction was content-based because it restricted only the speech of anti-abortion protestors. In rejecting this argument, the Court noted:

> The fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion, and of any consequent request that their demonstrations be regulated by injunction. There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioner's message.

Id. at 762-63.

Schenck v. Pro-Choice Network of W. New York, 519 U.S. 357 (1997), also involved an injunction that restricted demonstrations outside of abortion clinics.

> Before the complaint was filed, the clinics were subjected to numerous large-scale blockades in which protesters would march, stand, kneel, sit, or lie in parking lot driveways and in doorways. This conduct blocked or hindered cars from entering clinic parking lots, and patients, doctors, nurses, and other clinic employees from entering the clinics.
>
> In addition to these large-scale blockades, smaller groups of protesters consistently attempted to stop or disrupt clinic operations. Protesters trespassed onto clinic parking lots and even entered the clinics themselves. Those trespassers who remained outside the clinics crowded around cars or milled

around doorways and driveway entrances in an effort to block or hinder access to the clinics. Protesters sometimes threw themselves on top of the hoods of cars or crowded around cars as they attempted to turn into parking lot driveways. Other protesters on clinic property handed literature and talked to people entering the clinics--especially those women they believed were arriving to have abortions--in an effort to persuade them that abortion was immoral. Sometimes protesters used more aggressive techniques, with varying levels of belligerence: getting very close to women entering the clinics and shouting in their faces; surrounding, crowding, and yelling at women entering the clinics; or jostling, grabbing, pushing, and shoving women as they attempted to enter the clinics. Male and female clinic volunteers who attempted to escort patients past protesters into the clinics were sometimes elbowed, grabbed, or spit on. Sometimes the escorts pushed back. Some protesters remained in the doorways after the patients had entered the clinics, blocking others from entering and exiting.

On the sidewalks outside the clinics, protesters called “sidewalk counselors” used similar methods. Counselors would walk alongside targeted women headed toward the clinics, handing them literature and talking to them in an attempt to persuade them not to get an abortion. Unfortunately, if the women continued toward the clinics and did not respond positively to the counselors, such peaceful efforts at persuasion often devolved into "in your face" yelling, and sometimes into pushing, shoving, and grabbing. Men who accompanied women attempting to enter the clinics often became upset by the aggressive sidewalk counseling and sometimes had to be restrained (not always successfully) from fighting with the counselors.

> The District Court found that the local police had been "unable to respond effectively" to the protests, for a number of reasons: the protests were constant, overwhelming police resources; when the police arrived, the protesters simply dispersed and returned later; prosecution of arrested protesters was difficult because patients were often reluctant to cooperate for fear of making their identity public; and those who were convicted were not deterred from returning to engage in unlawful conduct. In addition, the court found that defendants harassed the police officers verbally and by mail, including the deputy police chief. Also harassed were people who testified against the protesters and "those who invoke[d] legal process against" the protesters. This, testified the deputy police chief, "made it more difficult for him to do his job."

Id. at 362-64. An injunction was entered, and protestors challenged three of its provisions: (i) the floating 15-foot buffer zones around people and vehicles seeking access to the clinics; (ii) the fixed 15-foot buffer zones around the clinic doorways, driveways, and parking lot entrances; and (iii) the 'cease and desist' provision that forces sidewalk counselors who are inside the buffer zones to retreat 15 feet from the person being counseled once the person indicates a desire not to be counseled. *Id.* at 371. In considering the injunction, the Court perfunctorily concluded that the injunction was content-neutral given its similarity to the injunction at issue in *Madsen*.

In *Klebanoff*, the Pennsylvania Superior Court considered whether a permanent injunction preventing the defendants and other anti-abortion

protestors from picketing or demonstrating in the street directly in front of the plaintiff's home. *Klebanoff*, 552 A.2d at 677.

> The trial court found that picketing started on a Sunday afternoon with twenty to thirty people parading up and down the sidewalk within five feet of where Dr. Klebanoff was sitting. They carried signs stating among other things, that "Dr. Death Lives Here." The picketers shouted comments to Dr. Klebanoff, and at least one attempted to taunt him into a physical confrontation. Neighbors began to gather because of the commotion and Dr. Klebanoff's son was awakened from his sleep. Mrs. Klebanoff kept their son inside with the shades drawn, despite the beautiful weather because of the picketing.
>
> Many other Sunday afternoon demonstrations followed this first incident and they involved usually five to seven police officers who were dispatched because of the volatility of the situation. This culminated in December, 1987 when Mrs. Klebanoff, who was home alone preparing for a holiday meal, noticed a strange automobile parked outside her house for 15-20 minutes. She was nervous and afraid and telephoned her neighbors and her husband to come to her aid. Her husband returned to find about forty people, protestors, neighbors and police, congregated outside the house, and a television reporter came to the door. Mrs. Klebanoff became so emotionally distraught that she could not prepare her holiday meal, and the police advised that her guests should arrive an hour later than planned because of the protestors. Mrs. Klebanoff became afraid to remain at home alone on Sundays and felt compelled to leave her house for the sake of her son, and her own emotional stability when no one else was in the house. Dr. Klebanoff was fearful that the demonstration would turn violent, because of threats he had received. In general, as the trial court stated,

> the protestors 'succeeded in their express aim to create a crisis in Dr. Klebanoff's life.'
>
> The presence of the protesters also affected the life of the Klebanoff's neighbors who experienced, among other things, police escorts and questioning when driving along the street in front of their homes, requests by the police to remove their children from their play areas because of the picketers, protestors reaching into their car windows and calling Dr. Klebanoff a baby killer, and general chaos resulting in restricted activity for themselves and their families.

Id. at 679-680.

In upholding injunctive relief, the Court found that the injunction was content-neutral, concluding that "[t]he injunction here bans all picketing of Dr. Klebanoff's house without reference to the content or subject matter of the protest. The injunction contains no invitation to subjective or discriminatory enforcement, and is therefore, under all settled criteria, content-neutral." *Id.* at 678-79.

Finally, a similar set of circumstances was presented in the *SmithKline* case. Therein, the defendant and others began protesting pharmaceutical company GlaxoSmithKline and its employees based on its business relationship with a company that performed testing on animals. *SmithKline*, 959 A.2d at 355. While picketing outside the residences of the plaintiff's employees,

> [t]he picketers often threatened the employees with statements such as "we know where you sleep at night" and "I'll kill you, you motherfucker!" The picketers used bullhorns, published defamatory materials, harassed GSK employees and their families and frequently blocked ingress and egress to both private homes and GSK's facilities. On several occasions, the picketers sprayed graffiti on personal property, wore bandanas to cover their faces or wore all black, and made harassing phone calls to employees.

Id. An injunction was entered that prohibited protestors from:

> d) trespassing, entering, coming onto, or interfering with the use and enjoyment of any real property owned, occupied, or in the possession of GSK [or] the Individual Plaintiffs....
>
> f) placing or maintaining upon any website or otherwise disseminating any private or personal information, including but not limited to, names, home addresses, home phone numbers, mobile phone numbers, e-mail addresses, bank account numbers, credit card numbers, social security numbers, vehicle license plate numbers, or drivers' license numbers, regarding GSK [or] the Individual Plaintiffs....
>
> h) at any time or in any manner whatsoever engaging in any picketing, demonstrating, leafleting, protesting or congregating at GSK's facilities, including but not limited to offices, laboratories, manufacturing plants or parking lots, or otherwise preventing or obstructing any ingress or egress of people, vehicles, or any deliveries to or from GSK's facilities;

i) at any time or in any manner whatsoever engaging in any picketing, demonstrating, leafleting, protesting or congregating at the homes of the Individual Plaintiffs and/or any person otherwise affiliated with or providing goods or services to GSK and the Individual Plaintiffs, including any person known or believed to be a GSK employee;

j) in any manner whatsoever engaging in any action or conduct which is intended to or has the necessary effect of threatening, intimidating, harassing or coercing the Individual Plaintiffs and/or any person otherwise affiliated with or providing goods or services to GSK and the Individual Plaintiffs, including any person known or believed to be a GSK employee

Id. at 356.

In a footnote, the Pennsylvania Supreme Court noted that although the protestor challenging the injunction had not raised the issue, it concluded that the injunction was content-neutral. *Id.* at n.2. In so concluding, the Court noted that "the speech is not regulated due to a disagreement with the message conveyed" and the injunction did "not seek to ban any subject matter from being protested. The purpose in enacting the restrictions is to prevent the excessive tactics used by the protesters, not to stifle the message itself." *Id.*

Madsen and *Schenck* allowed injunctions prohibiting picketing within a prescribed buffer zone outside of abortion clinics, while *Klebanoff* and

SmithKline upheld injunctions preventing picketing or demonstrating in the street directly in front of residential homes. The injunctions in these cases were content-neutral because they applied to the expressive conduct, and not pure speech. In effect, these injunctions prohibited or limited protestors from expressing *any message* via time, place, and manner restrictions. The speech activities in *Madsen, Schenck, Klebanoff* and *SmithKline* are classic examples of expressive conduct.

The instant case differs, however, because defendants' signs constitute pure speech, the regulation of which is subject to strict scrutiny. *Rouse Philadelphia Inc. v. AD Hoc '78*, 417 A.2d 1248, 1254 (Pa. Super. 1979) (describing "pure speech" as the "printed page"); *California v. LaRue*, 409 U.S. 109 (1972); *Commonwealth v. Winkleman*, 326 A.2d 496 (Pa. Super. 1974); *Baldwin v. Redwood*, 540 F.2d 1360, 1366 (9th Cir. 1976) ("communication by signs and posters is virtually pure speech"); *Arlington County Republican Comm. v. Arlington County*, 983 F.2d 587, 593 (4th Cir. 1993) (*quoting Baldwin*). Pure speech is "a right which is to be zealously preserved in our society." *Rouse Philadelphia*, 417 A.2d at 1254.

"As a person's activities move away from *pure speech* and into the area of expressive *conduct* they require less constitutional protection. As the mode of expression moves from the *printed* page or from *pure speech* to the

commission of public *acts* the scope of permissible regulation of such expression increases." *Id.* (emphasis in original). Therefore, "[t]he closer the regulated activity is to conduct rather than to pure speech, the wider the scope of permissible regulation." *Klebanoff*, 552 A.2d at 681.[11] Undoubtedly, the converse is true: the closer the regulated activity is to pure speech, the scope of permissible regulation *decreases*.

The Opinion in *Franklin Chalfont Assoc. v. Kalikow*, 573 A.2d 550 (Pa. Super. 1990), is instructive. Therein, homeowners dissatisfied with their home builder's failure to fix problems with their homes posted signs on their properties that were critical of the builder and picketed the sales office:

> Sometime after January 1988, appellants and other Oxbow Ridge homeowners began displaying signs on their front porches, in their windows, or on their front lawns expressing dissatisfaction with their homes. Signs appearing on front lawns were similar in size and appearance to "for sale" signs, with additional words to the effect that the owner was dissatisfied with the home in question. One of these signs was posted by the owner of the property across the street from the model home. At one time, appellants Prevatt had also displayed a somewhat larger sign asking Franklin when they were going to fix the water problem in their home.

---

[11] Even so, a restriction of expressive conduct is still subject to intermediate scrutiny. A government restriction of expressive conduct is justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1967).

> Appellants picketed the model home which served as Franklin's business office for three or four weekends in July and August of 1988. The only evidence introduced as to the nature of the picketing was a photograph showing four individuals each holding a single sign walking or standing by the edge of the road near Franklin's trailer. The signs expressed dissatisfaction with Franklin and its homes and urged support for legislation protecting homebuyers. There was no allegation in Franklin's pleadings that the picketing was other than peaceful, nor was there any evidence that picketers obstructed pedestrian or vehicular traffic, blocked ingress or egress for the model homes or otherwise physically or verbally intimidated prospective homebuyers or others. Picketing ceased after Franklin representatives met with appellants separately to prepare new punch lists.
>
> By January, 1989, additional signs expressing dissatisfaction with the Franklin homes were posted by six other defendant-homeowners. There is no evidence that appellants had urged the other homeowners to post these signs.

Id. at 553-54. The trial court ultimately entered an injunction which

> enjoined and restrained appellants and six other defendants no longer party to this action from picketing Oxbow Ridge or any of the businesses or projects of appellee Franklin Chalfont Associates; from displaying signs tending to impute Franklin's lack of skill, competence, or integrity or tending to interfere with its conduct of business; from publishing statements tending to impute or accomplish the same; from interfering with the lawful conduct of Franklin's business; and ordered the posting of bond.

Id. at 551.

In considering the injunction, the Superior Court noted:

> Without doubt, the injunction which Franklin sought and which the lower court granted was directed at the content rather than the manner of appellants' speech. The injunction only prevents appellants from speech and other expressive conduct which is *critical* of Franklin. It is directed against the ideas expressed because of the detrimental impact which the communication of those ideas has had upon Franklin.

Id. at 557.

Herein, the Trial Court and Superior Court incorrectly concluded that the injunction entered was content-neutral.[12] The injunction entered by the Trial Court is not content-neutral, both on its face and in its purpose, as it seeks only to prohibit defendants from communicating specific messages to plaintiffs because plaintiffs find those messages offensive, similar to the content-based injunction overruled by the Superior Court in *Franklin Chalfont Assoc. v. Kalikow*.[13]

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[12] The Trial Court states only "With regard to the restriction being content neutral, the Court is being clear that all signs, no matter the language or images depicted, may remain but may not face or target the Plaintiff Oberholzers' property." (R. 629a). That the signs may remain on the property – so long as they do not face plaintiffs' property – relates to the manner of the restriction, not the basis for such restriction.

[13] Significantly, plaintiffs did not ask the Trial Court to prohibit posting *any* signs on defendants' property; rather, they asked the Trial Court only to prohibit defendants from posting the signs enumerated in the release agreement. (R. 492a).

Plaintiffs herein similarly sought to prohibit defendants from posting only signs which they find offensive based on their content.[14] (R. 492a). Throughout this litigation, plaintiffs referred to the signs and their content as "hate signs," "scornful," "reprehensible," and "highly offensive to a reasonable person," among other things. (R. 14a; 24a; 481a). In the parties' release, plaintiffs reserved the right to seek an injunction prohibiting defendants from posting only those signs enumerated in the release. (R. 431a-442a). When reviewing plaintiffs' Amended Complaint, petitions and briefs, and hearing transcripts, it is evident that plaintiffs' objection is not to the presence of the signs, but to the messages on these signs. (R. 12a-34a; 468a-492a).

Although the Trial Court suggests that the injunction prohibits defendants from posting *any* signs that face plaintiffs' property, regardless of their content, this is not the injunctive relief requested by plaintiffs (or even that granted by the Trial Court).[15] Instead, plaintiffs requested the removal of the signs because they found their messages offensive. The Trial Court's injunction was meant to satisfy plaintiffs' demand that defendants not be

[14] This is evident in the fact that plaintiffs did not request that the Trial Court require defendants to remove the "No Trespassing" signs that have been posted in the same location as the other signs during the pendency of this litigation.

[15] The Trial Court's Order only addresses "[t]he signs previously posted by Defendants on their property," not simply "any signs posted on defendants' property." (R. 618a; 631a).

allowed to communicate the messages on the signs to plaintiffs. Regardless of how this was accomplished, the injunction was based on the signs' content.

"[S]trict scrutiny applies either when a law is content based on its face[16] or when the purpose and justification for the law are content based." *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015).

> It is well-established that content-based restrictions on speech are presumptively unconstitutional and are subject to the strict scrutiny standard, which requires the government to prove that the restrictions are narrowly tailored to serve a compelling state interest. Government regulation of speech is content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed...A restriction is content based if either the face of the regulation or the purpose of the regulation.

Madsen, 512 at 765-66. "With rare exceptions, content discrimination in regulations of the speech of private citizens on **private property** or in a traditional public forum is **presumptively impermissible**, and this presumption is a very strong one." *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994) (J. O'Connor, *concurring*) (emphasis added) (*citing Simon &*

[16] "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015), *citing Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410 (1993).

Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115-116 (1991)).

Strict scrutiny requires the government to prove that the restrictions are narrowly tailored to serve a compelling state interest.[17] *Madsen*, 512 U.S. at 765-66. The Courts below cite the government's interest in protecting residential privacy to justify the injunction. They conclude that this is a significant government interest, relying on *Klebanoff* and *SmithKline*, as well as *Frisby v. Schultz*, 487 U.S. 474 (1988)[18], another case involving protesting at the home of a doctor who performed abortions. R. 1019a – 1028a.

In these cases, the targets of the protesters were subjected to the presence of protesters, who could number in the hundreds, outside of their homes. These protesters often impeded access to their residences and were loud – to the point that they could be heard from within the homes. The

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[17] Because the Superior Court incorrectly concluded that the injunction was a content-neutral restriction, it improperly considered whether the injunction served only a significant government interest.

[18] The Trial Court also relied on *Rouse Phila. Inc. v. AD Hoc '78*, 417 A.2d 1248 (Pa. Super. 1979). In *Rouse*, a temporary restraining order was entered prohibiting "picketing, handbilling, speechmaking, demonstrating, and boycotting inside or outside The Gallery or Gimbels" after 3,000 to 5,000 protestors converged "at various locations in and around the entrances to a downtown shopping mall in Center City Philadelphia known as The Gallery," blocking ingress and egress. *Id.* at 1251. As the Trial Court correctly notes, "the Superior Court of Pennsylvania reasoned that the purpose of the trial court order was not to limit the expression of ideas that appellants were attempting to communicate, but to limit the conduct by which they chose to communicate their ideas." *Id.* at 1254. The Pennsylvania Superior Court did not suggest that the temporary restraining order furthered the government's interest in protecting residential privacy, as the case did not involve residential property.

residents could not come and go from their homes without being harassed, and they could not remain in their homes without being bothered by the noise of the protesters. In some instances, the protesters became violent, and even the police could not control the chaos. As such, the residents in these cases faced significant impediments to the enjoyment and use of their homes, which ultimately justified the injunctions entered.

In the instant matter, plaintiffs' residential privacy has not been invaded by defendants' signs. The only action taken by defendants was to post signs in their own back yard, the same as one would post a No Trespassing or a Beware of Dog sign. Defendants have not engaged in other expressive behavior towards plaintiffs, such as chanting, singing, yelling, etc. and they do not physically accompany the signs as the protesters in *Klebanoff*, *SmithKline*, and *Frisby*. Plaintiffs are able to come and go as they please and are undisturbed by the signs when inside their home.

While the government may have some interest in protecting residential privacy, the level of interest is not the same in all scenarios. For example, in *Watchtower Bible & Tract Society v. Stratton*, 536 U.S. 150 (2002), the Village of Stratton enacted an ordinance that required all peddlers and solicitors to obtain a permit to do so. *Id.* at 154. The Village argued that the ordinance was necessary for the prevention of fraud, the prevention of

crime, and the protection of residents' privacy. *Id.* at 164-65. While the Court recognized these as important issues, it noted that "[w]e must also look, however, to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve." *Id.* at 165. On balance, the Court concluded that the ordinance failed intermediate scrutiny.

In balancing the defendants' right to speak freely compared to the alleged invasion of plaintiffs' residential privacy, the injunction fails to meet the strict scrutiny test for the reasons explained herein. The injunction herein completely prevents the defendants from objecting to plaintiffs' actions in the way they believe is most direct and most effective. As to plaintiffs' alleged residential privacy, the injunction only stops plaintiffs from seeing the words on the signs. The injunction does nothing more to protect plaintiff's residential privacy than if it ordered defendants to remove some blight from their property.

For these reasons, plaintiffs and the Superior Court have failed to demonstrate that the injunction serves a compelling government interest. Therefore, the injunction fails strict scrutiny. Because it fails strict scrutiny, the injunction violates defendants' right to free speech under the United States and Pennsylvania Constitutions and it must be vacated.

VIII. CONCLUSION

Based upon the foregoing discussion and the case law cited therein, defendants Simon and Toby Galapo respectfully request that this Honorable Court REVERSE the Orders of September 12, 2019 and October 11, 2019 of the Court of Common Pleas of Montgomery County and remand this matter for entry of judgment in defendants' favor.

Respectfully submitted,

KANE PUGH KNOELL TROY & KRAMER, LLP

BY: _____

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, ANDREW J. KRAMER, ESQUIRE, hereby certify this brief does not exceed 14,000 words as established by the word count from the word processing program, Word, used to prepare this brief.

DATE: 1/4/2023

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CERTIFICATE OF ACCURATE AND COMPLETE REPRESENTATION

Pursuant to the Supreme Court's requirements for electronic filings, it is averred that the material included electronically, is an accurate and complete representation of the paper version of the filing.

DATE: 1/4//2023

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CERTIFICATE OF SERVICE

I, ANDREW J. KRAMER, ESQUIRE, hereby certify and state that on the 4th day of January, 2023, in accordance with Rule 121 of the Pennsylvania Rules of Appellate Procedure, I served a true and correct copy of the Brief of Appellants Simon and Toby Galapo via Federal Express to the following:

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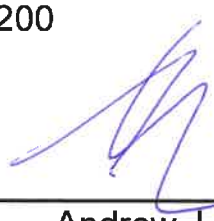

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APPENDIX “A”

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	
SIMON GALAPO and TOBY GALAPO, h/w	:	

ORDER

AND NOW, this 12th day of September, 2019, upon careful consideration of the evidence and testimony presented, upon review of the briefs filed on behalf of Plaintiffs and Defendants, and in accordance with the Memorandum attached hereto, it is hereby **ORDERED** that Plaintiffs' Motion for a Permanent Injunction is **GRANTED in Part and DENIED in Part** as follows:

A) The signs posted by Defendants on their property are allowed to remain;

B) The signs previously posted on Defendants' property shall be positioned in such a way that they do not directly face and target Plaintiffs' property: the fronts of the signs (lettering, etc.) are not to be visible to the Plaintiffs nor face in the direction of Plaintiffs' home.

BY THE COURT:

STEVEN C. TOLLIVER, SR., J.

This Order and Memorandum have been E-Filed on 9/12/19

Copy by **Interoffice Mail** to:
Court Administration – Civil Division (Liz)

Judicial Secretary

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	
SIMON GALAPO and TOBY GALAPO, h/w	:	

MEMORANDUM

Presently before the court is a dispute between neighbors in which Frederick and Denise Oberholzer (Plaintiffs), seek to enjoin Simon and Toby Galapo, (Defendants), their rear neighbors, from posting signs decrying racism and anti-Semitism. The Defendants refuse to remove the signs posted on their property asserting that an injunction requiring them to do so would violate their rights of freedom of expression protected under the First and Fourteenth Amendments to the U.S., Constitution and under Article 1, Section 7 of the Pennsylvania Constitution.

This Court finds that the Defendant Galapos' posting of signs on their property substantially interfers with Plaintiff Oberholzers quiet enjoyment, tranquility, and privacy of their home, thereby entitling Plaintiffs to a permanent injunction consistent with the time, place, and manner restrictions that have been applied by the United States Supreme Court. ***See*** *Grayned v. City of Rockford*, 408 U.S. 104, 104 (1972).

I. FACTUAL HISTORY

On June 7, 2016, Plaintiffs initiated the instant action against Defendants. The Plaintiffs and Defendants are neighbors. Plaintiffs reside on the 800 block of Suffolk Road while the Defendants reside on the 800 block of Delene Road, Rydal, Abington Township, Montgomery County, Pennsylvania.

The underlying facts of the dispute that led to the filing of the civil action began over landscaping that the Defendants began in their backyard. On November 22, 2014, Simon Galapo confronted the Plaintiffs about resurveyed property lines. It was at this time that the Defendants believe that the Plaintiffs used racial slurs toward Defendant husband Simon Galapo. As a result of this brief altercation, the Defendants filed a police report with the Abington Township Police Department about the November 22, 2014 confrontation. It was determined that no police action was warranted and the said incident was cleared. There were no further noteworthy interactions between the neighbors until June 2015, when Defendant husband placed bold and visible signs along the rear of his property line that abutted the Plaintiffs' property. These signs varied in language but consisted of anti-hate and racism speech. These signs were clearly visible and placed in the direct line of sight of the Plaintiffs. The Plaintiff Oberholzers allegedly believe that these signs were placed solely to harass and slander them.

II. PROCEDURAL HISTORY

After the Plaintiffs filed their original complaint, an amended complaint was filed on July 5, 2016. This Amended Complaint averred the following causes of action: (1) private nuisance; (2) intrusion upon seclusion; (3) defamation – libel and slander; (4) intentional infliction of emotional distress; and (5) publicity placing plaintiffs in a false light. The Plaintiffs also sought equitable relief in the form of preliminary and permanent injunction against the Defendants enjoining them from continuing to post their

signs. On August 29, 2016 the parties entered into a Consent Order whereby Defendants would remove the subject signs. By the terms of the Consent Order, it would stay in place until October 29, 2016. A hearing was conducted on October 18, 2016, on Plaintiffs' request for a preliminary injunction. On October 31, 2016 a Stipulation was entered on the record. This Stipulation provided, among other things, that the August 29, 2016 Consent Order would remain in full force and effect until the Court ruled on Plaintiffs' petition for preliminary injunctive relief. On November 17, 2016, the Court entered an order denying injunctive relief to the Plaintiffs. There was a short-lived appeal of that order until September 22, 2017, when Plaintiffs withdrew and discontinued their appeal to the Superior Court of Pennsylvania.

On July 9, 2018, Defendants filed a Motion for Summary Judgment to which Plaintiffs responded with their own cross-motion for summary judgment. On September 6, 2018, this Court issued an order that denied Plaintiffs' cross-motion for summary judgment, and granted in part and denied in part Defendants' motion for summary judgment by dismissing the claim for Intrusion on Seclusion with all other claims allowed to remain. On June 5, 2019, the parties entered into a Confidential Settlement Agreement resolving the four remaining at law claims, with the equitable relief claim for a permanent injunction left to be decided by the Court.

Through their claim for equitable relief, the Oberholzers seek an order: (a) enjoining defendants from posting and publishing hate-signs containing false, incendiary words, content, innuendo and slander, or any signs about plaintiffs at all; (b) enjoining defendants from posting and publishing signs containing open and notorious incendiary racial and ethnic slander, or any signs about plaintiffs at all.

The parties filed briefs in support of their respective positions about Plaintiffs' claims for equitable relief, pursuant to the June 5, 2019 order memorializing the parties' agreement to submit the matter on a stipulated record consisting of the deposition transcripts of Defendants, Christopher Tinsley, Brittany Stern, and Geraline Smith, the Preliminary Injunction hearing transcript, and the parties' selected

exhibits as originally submitted and supplemented. The matter is now ripe for disposition by the court; oral argument having been heard on August 13, 2019.

III. DISCUSSION

RIGHT TO EQUITABLE RELIEF AND FREEDOM OF SPEECH

With the resolution of Plaintiffs' at law claims, the issue presented herein is whether the First Amendment of the U.S. Constitution and Article 1, Section 7 of the Pennsylvania Constitution permits this court to enjoin Defendants from posting signs on their property denouncing hatred, racism and anti-Semitism in their effort to change the perceived offensive behavior of the Plaintiffs.

The First Amendment is rooted in one of our nation's founding principles that individuals must be free to assemble peaceably and exercise freedom of speech without governmental interference. These constitutional rights are applicable to the states by virtue of the Fourteenth Amendment. Further, the Pennsylvania Constitution recognizes an individual's right to freedom of speech and assembly. The government's circumspection about infringing upon these constitutional rights has traditionally focused on the individual's right to use public fora to exercise these rights since these rights are closely associated with the right to assemble and express their ideas in a public forum. *Perry Educational Association v. Perry Local Educator's Association,* 460 U.S. 37, 37 (1983).

A party seeking an award of a permanent injunction must be able to establish that his right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested. *Kuznik v. Westmoreland County Bd. of Com'rs*, 902 A.2d 476, 489 (Pa. 2006). This well-settled rule has been applied where protesters arguably exercising their rights under the First and Fourteenth Amendments of the U.S. Constitution and under Article 1, Section 7 of the Pennsylvania Constitution sought to overturn a

trial court order enjoining them from picketing on the public sidewalk in front of the residence of a physician whose primary practice of performing abortions offended their "pro-life" stance. *Klebanoff v. McMongale,* 552 A.2d 677, 677 (Pa. Super. 1988). This same rule has been applied where a shopping mall sought to enjoin a religious group from demonstrating on a public sidewalk adjacent to its property. *Liberty Place Retail Associates, L.P. v. Israelite School of Universal Practical Knowledge*, 102 A.3d 501, 501(Pa. Super. 2014). There the court recognized that in order to be entitled to a permanent injunction, one must establish: (1) a clear right to relief; and (2) not have an adequate remedy at law. *Id* at 505.

Where an individual uses a public forum to exercise their rights of freedom of expression and speech, the appropriateness of any governmental restriction on those rights has been determined by applying the well-settled time, place, and manner test. Under that test, the restriction imposed on protected speech must be content and viewpoint neutral, leave open ample alternative channels of communication, and be narrowly tailored to further a substantial governmental interest. *Frisby v. Schultz*, 487 U.S. 474, 474 (1988). In *Klebanoff,* the court found that speech protected under the United States and Pennsylvania Constitutions is not permissible in all places and at all times, and that Pennsylvania courts can enjoin expressive activity which violates an individual's residential privacy. *Klebanoff*, 552 A.2d at 678. The U.S. Supreme Court has allowed restrictions on constitutional rights by placing time, place, and manner restrictions because "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 473 U.S.788, 799 (1985). These types of restrictions are proper if they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry*, 460 U.S. at 45. The *Klebanoff* court determined that the injunction restricting the place where expressive activity could occur was permissible because it was content neutral, narrowly tailored to serve a governmental interest, and left ample alternative channels of communication. *Klebanoff*, 552 A.2d at 678. The court in *Klebanoff* recognized

that the public's interest in protecting the well-being, tranquility, and privacy of the home is of the highest order. *Id.* at 679. In determining the reasonableness of a restriction on the exercise of free speech, under the U.S. and Pennsylvania Constitutions, there must be a balancing of those constitutional rights with the governmental interests or individual civil rights. *Id.* at 678. Protecting residential privacy is a governmental interest; therefore, an injunction protects the right to be free from intrusion upon one's solitude or the right to be left alone. *Id.* at 679.

A. BASED ON THE SETTLEMENT AGREEMENT BETWEEN PARTIES, THE PLAINTIFFS HAVE ESTABLISHED A CLEAR RIGHT TO RELIEF AND THAT AN INJUNCTION IS NECESSARY TO AVOID AN INJURY THAT CANNOT BE COMPENSATED BY DAMAGES

On June 5, 2019, all parties signed a Confidential Settlement Agreement that settled all causes of action for relief at law for a monetary value. Per this agreement, the Galapos were barred from objecting to the Oberholzers' request for permanent injunctive relief on the grounds the Oberholzers would have failed to succeed on the merits of the claims for such relief.

> "[T]his Agreement does not prohibit, limit or affect the Oberholzers' rights to seek and/or pursue their claim in equity for injunctive relief against Galapos in this action...[a]lthough the Galapos do not admit any wrongdoing or liability herein, the Galapos agree they will not contest the Oberholzers' request for injunctive relief on the grounds Oberholzers have failed to succeed on the merits of their claim for such relief."

See "Confidential Settlement Agreement" ¶6, 06/05/2019.

The Court is impressed with the deposition testimony of the Plaintiffs, corroborated in part, by that of Christopher Tinsley and Geraline Smith, concerning the impact of the posted signs on the Plaintiffs' residential privacy. Further, the Court has considered all of the exhibits offered by the parties, as well as the pointed preliminary injunction hearing testimony of Defendant Simon Galapo. Despite the monetary settlement reached between the parties, the Court finds that the Defendants' actions severely and negatively impact the Plaintiffs' well-being, tranquility, and quiet enjoyment of their home.

Thus, this Court concludes that: (1) plaintiffs have no adequate remedy at law; and (2) that a greater injury of a continuing intrusion on plaintiffs' residential privacy will result from refusing to grant the equitable relief sought and allowing the existing signs to remain as they are presently positioned on the Defendants' property.

B. THE REASONABLENESS TEST APPLIES IN THE INSTANT CASE INVOLVING THE RIGHT TO FREEDOM OF EXPRESSION

After being subjected to alleged anti-Semitic slurs from the Plaintiffs, Defendant Simon Galapo began posting signs along the rear of his property line that abuts the rear yard of the Plaintiffs. These signs vary with regard to their language but their messages clearly decry racism, some with references to Hitler and the Holocaust. The signs were solely placed at the rear of his property line and facing in direct line of sight of the Plaintiffs' home and property.

Plaintiffs argue that the Defendants' posting of signs on their property, in the manner in which they have, amounts to picketing, as that term is defined in *Frisby*. 487 U.S. at 474. They further argue that the picketing is designed to inflict psychological harm on their family, rather than convey a message of a particular belief or fact, and therefore is expressive conduct which, under the circumstances, is not constitutionally protected.

The Defendants Galapos argue that the posting of signs that disseminate views on racism and Hitler are to be considered pure speech and therefore entitled to the utmost constitutional protection. They also argue that this cannot be considered picketing similar to the actions that occurred in *Klebanoff*.

At the hearing for the preliminary injunction petition, Defendant Simon Galapo testified that the purpose of the signs was "to protest behavior which we perceive as being racist towards myself, my wife, and my family." N.T. 41:10 – 12 (Defnts. Ex. 17) Defendant Simon Galapo was also clear that the signs are directed at the Plaintiffs and their property and would only come down when the racist behavior of the

Plaintiffs as he perceived it ceased. *Id.* at N.T. 41: 16-20, 47:12-14. When questioned regarding the position of the signs only being in the backyard facing the Plaintiffs' home and not anywhere else, Defendant Simon Galapo indicated that the greatest threat to him and his family with regard to racism was the Plaintiffs. *Id.* at N.T. 54:8-14. These beliefs were further cemented during oral arguments regarding the petition to grant a permanent injunction in which Defendant Simon Galapo's counsel indicated that this was a personal protest for Defendant Simon Galapo against his backdoor neighbors, the Plaintiffs. Arguments In Re Permanent Injunction N.T. 61: 9 – 12, August 13, 2019.

Although Defendant Simon Galapo's conduct arguably does not fit the definition of picketing that occurred in *Klebanoff,* this Court finds that Defendant Simon Galapo was not engaged solely in asserting his pure speech rights. These acts were done as a personal protest against the Plaintiffs. The personal and specific messages of the signs are for the alleged racist behavior exhibited by the Plaintiffs, not racism generally existing in society. The placement of the signs indicates that Defendant Simon Galapo is targeting specific individuals with the signs that decry their perceived racist behavior. Furthermore, as in *Klebanoff,* Defendants' personal protest has also affected the lives of the Plaintiffs' and the parties' neighbors who have testified to the signs effect on them.

C. THE DEFENDANTS' ACTIONS VIOLATE PLAINTIFFS' RESIDENTIAL PRIVACY AND ARE PROPERLY RESTRICTED UNDER THE TIME, PLACE AND MANNER TEST

It is clear and indisputable that pure speech is a right which is to be zealously preserved in our society. "However, as a person's activities move away from ***pure speech and into the area of expressive conduct they require less constitutional protection.***" *Rouse Philadelphia Inc. v. Ad Hoc '78,* 417 A.2d 1248, 1254 (Pa. Super 1979) (emphasis added).

In *Rouse Philadelphia Inc.*, a trial court order that enjoined the protesting and boycotting of a downtown shopping mall in Philadelphia was determined to be permissible and not a violation of the appellants' right to freedom of expression. *Id.* There, the protestors intruded onto the premises under the control of the mall stores and frustrated ingress and egress in the mall area. On appeal, the Superior Court of Pennsylvania reasoned that the purpose of the trial court order was not to limit the expression of ideas that appellants were attempting to communicate, but to limit the conduct by which they chose to communicate their ideas. *Id.* at 1254. Here, the Court's objective to limit the Defendant Simon Galapo's conduct is no different than the order that was upheld in *Rouse Philadelphia Inc.*, as the Court's duty to protect residential privacy is paramount.

In furtherance of asserting his First Amendment right to protest his neighbors' perceived racist behavior, Defendant Simon Galapo has infringed on their right to privacy and quiet enjoyment of their residential home. The intent, message, and placement of his signs specifically target the Plaintiffs; the signs are placed solely at the back of his property, and face in no other direction but at the property of the Plaintiffs. As discussed above, this Court finds Defendant Simon Galapo's actions cannot be considered pure speech; therefore, the strongest constitutional protection is no longer warranted.

Defendant Simon Galapo's specific protests against his neighbors, Plaintiff Oberholzers, are analogous to the targeted picketing seen in *Frisby*. In *Frisby*, an ordinance that prohibited the picketing before or about a residence was challenged as a violation of the First Amendment. *Frisby* 487 U.S. at 474. There, a doctor and his family were subjected to a group of protestors on their doorstep in an attempt to force the doctor to stop performing abortions. *Id.* at 487. The court found that the ordinance that prohibited "picketing before or about the residence or dwelling of any individual" was constitutionally valid and permissible. The Ordinance's prohibition of picketing was narrowly directed at the household and not the general public, thus, was not in violation of the First Amendment. *Id.* at 486. In solely

targeting a singular individual with their protest, the picketers in *Frisby* clearly intruded on the quiet enjoyment of the doctor's home with devastating effect. *Id.*

In the instant case, as referenced by his testimony, Defendant Simon Galapo believes that the greatest threat of racism to him and his family are the Plaintiffs Oberholzers. Albeit, not on the level or kind of protest in *Frisby*, the language, as well as the manner and positioning of the signs, indicate these beliefs to be well-founded.

The Defendants' severe interference with Plaintiffs' residential privacy justifies this Court taking action in the way of a time, place, and manner restriction. "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Frisby* 487 U.S. at 487 (quoting *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 542 (1980)).

1. **IT IS WELL ESTABLISHED LAW THAT THE STATE MAY ENFORCE REGULATIONS OF TIME, PLACE AND MANNER THAT ARE CONTENT-NEUTRAL, ARE NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENT INTEREST, AND LEAVE OPEN AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION.**

The Court will address the last element first as it can be easily answered. In ordering the repositioning of signs that are directly facing and targeting the Plaintiffs' property, the Court's order still allows clear and numerous alternative channels of communication. This restriction will not interfere with the general manner of dissemination of Defendant Simon Galapo's message. Defendant Simon Galapo is free to continue to post signs on his property with any message he deems appropriate so long as they do not target or face Plaintiff Oberholzers' property.

With regard to the restriction being content neutral, the Court is being clear that all signs, no matter the language or images depicted, may remain but may not face or target the Plaintiff Oberholzers' property.

Lastly, in granting the injunction, the Court places a restriction that is narrowly tailored to serve the substantial government interest of protecting the Plaintiff Oberholzers' right of residential privacy.

D. THE GALAPOS' ARGUABLE DEFMATORY PUBLICATIONS WILL NOT BE ENJOINED

Defendants are provided greater protection of their exercise of free speech under the Pennsylvania Constitution than the federal constitutional prohibitions. It has been held that Article 1, Section 7 of the Pennsylvania Constitution prohibits prior restraint on the exercise of an individual's right to freely communicate thoughts and opinion. *Goldman Threatres v. Dana, 405 Pa. 83, 173 A.2d 59, cert. denied, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed. 2d 93 (1961).* Consistently, seventeen years later, the Pennsylvania Supreme Court held that equity lacks the power to enjoin the publication of defamatory matter where an injunction would be an unconstitutional prior restraint on freedom of expression. *Willing v. Mazzocone,* 393 A.2d 1155(1978). In the instant case, this trial court has refused to issue a blanket injunction prohibiting all freedom of expression, even in favor of the Plaintiffs' civil rights to be free from invasions of their privacy other at law claims. Consistent with that approach, this court does not find that the facts of this case are strong enough to warrant a deviation from the traditional rule that is followed in Pennsylvania jurisprudence on the topic; accordingly, this Court will not diverge from the well-established law in Pennsylvania.

IV. CONCLUSION

The Court therefore grants the Plaintiff Oberholzers' permanent injunction ordering the repositioning of any signs that are directly facing and targeting the Plaintiffs' property. Any signs that contain words or expressions may be placed anywhere on Defendant Simon Galapo's property, so long as the front of the signs are not visible to the Plaintiffs Oberholzers or face in the direction of Plaintiffs' home.

APPENDIX “B”

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	
SIMON GALAPO and TOBY GALAPO, h/w	:	

AMENDED ORDER

AND NOW, this 11th day of October, 2019, this Court's Order of September 12, 2019 is amended to read as follows: upon careful consideration of the evidence and testimony presented, upon review of the briefs filed on behalf of Plaintiffs and Defendants, and in accordance with the Memorandum attached to the Order of September 12, 2019, it is hereby **ORDERED** that Plaintiff's Motion for a Permanent Injunction is **GRANTED in Part and DENIED in Part** as follows:

A) The signs posted by Defendants on their property are allowed to remain;

B) The signs previously posted on Defendants' property shall be positioned in such a way that they do not directly face Plaintiffs' property; i.e., the fronts of the signs (lettering, etc.) are not to be visible to the Plaintiffs nor face in the direction of the Plaintiffs' home. In order to ensure that none of the signs are visible regardless of their positioning, these signs shall be constructed with opaque material.

BY THE COURT:

STEVEN C. TOLLIVER, SR., J.

This Order has been E-Filed on 10/ // /19:

Copy by **Interoffice Mail:**
Court Administration – Civil Division (Liz)

Judicial Secretary

THIS DOCUMENT WAS DOCKETED AND SENT ON 10/11/2019

APPENDIX “C”

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	
SIMON GALAPO and TOBY GALAPO, h/w	:	

ORDER

AND NOW, this 3rd day of January, 2020, upon consideration of the Motion for Post-Trial Relief of Defendants' Simon Galapo and Toby Galapo, filed on September 20, 2019 (#160), any responses thereto, and after oral argument held on November 26, 2019, it is hereby **ORDERED** and **DECREED** that said Motion for Post-Trial Relief is **DENIED**.

BY THE COURT:

Steven C. Tolliver

STEVEN C. TOLLIVER, SR., J.

This Order a Memorandom **has been E-Filed on 1/3/20**

Copy by **Interoffice Mail:**
Court Administration – Civil Division (Liz)

Mary E. Tausi

Judicial Secretary

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	
SIMON GALAPO and TOBY GALAPO, h/w	:	

MEMORANDUM

Presently before the Court is the Defendants' Motion for Post-Trial Relief following the entry of the Court's Order of September 12, 2019, granting in part and denying in part Plaintiffs' Motion for a Permanent Injunction. The Court allowed the Defendants to post signs on their lawn, but ordered that the signs be situated and positioned in such a way so as to not interfere with Plaintiffs' tranquility and quiet enjoyment of their home and backyard space[1].

Subsequently, on September 23, 2019, Plaintiffs petitioned the Court to hold Defendants in contempt of the September 12, 2019 order for alleged infractions of that order. On October 10, 2019, the court heard the parties' arguments on this contempt petition. Having an opportunity to understand the grounds for the contempt petition, the Court on October 11, 2019 amended its September 12, 2019 order by clearly expressing that the signs should be constructed of opaque material so that the printed language on the posted signs would not be visible to the Plaintiffs.

Thereafter, on November 26, 2019, oral argument was held on Defendants' Motion for Post-Trial Relief in which they contend the following:

[1] Between June 2015 and June 2016, Defendant Simon Oberholzer posted individual signs solely in the area where parties' backyards abut each other and directly facing Plaintiffs' backyard. During this period the signs posted increased from a single sign to as many as twenty-three, all facing Plaintiffs' residence. Signs with language such as "Woe to the Racist, woe to the Neighbors" and "Racism against kids is not strength its predatory". *See* Plaintiffs' Trial Notebook, Exhibit List P-2-21;24-31.

a) Plaintiffs have failed to demonstrate that an injunction is necessary to prevent a legal wrong for which there is no adequate redress at law;

b) Pennsylvania follows the Common Law Rule that equity will not enjoin a defamation and injunctive relief is therefore impermissible under Article I, Section 7 of the Pennsylvania Constitution;

c) This Honorable Court improperly applied a time, place and manner analysis;

1. The "Forum Analysis" or "Public Forum Doctrine" for Speech on Government Property does not apply to Defendants' Signs posted on their private property;

2. Defendants' posting of signs does not constitute "picketing" and therefore is not subject to time, place and manner restrictions;

d) The injunction does not provide an alternative channel for Defendants to convey their message to their intended target; and

The injunction is not content neutral.

See, Defendants' Motion for Post-Trial Relief.

The Court, in an effort to provide transparency to its orders and decisions, filed a Memorandum with its September 12, 2019 order setting forth the cases it believed provided guidance to the Court in its deliberations of the issues presented in this sad case where neighbors cannot forgive and let live peaceably.

In its Memorandum, the Court directed the parties' attention to, among other cases, United States Supreme Court decision, *Frisby v. Schultz,* 487 U.S. 474 (1988) and *Rouse Philadelphia, Inc. v. Ad Hoc '78,* 417 A.2d 1248 (Pa. Super. 1979).

In *Rouse,* the Pennsylvania Superior Court recognized that it is obvious that an open society is enriched by the ability of its citizens to freely express themselves and for that reason courts are extremely reluctant to approve any measure that infringes on a person's exercise of their right to freedom of expression. *Id.* at 1254. However, freedom of expression can morph into expressive conduct justifying some measure of regulation.

The court in *Rouse* found that the demonstrators' conduct constituted public acts which violated an earlier order, thereby justifying some regulation of their expressive conduct. *Id.*

The Court also found guidance in *Klebanoff v. McMonagle*, 552 A.2d 677 (Pa. Super. 1989). The case *sub judice* might be viewed as a case of first impression because it concerns the Galapos' constitutional right to exercise freedom of speech in a residential context. The *Klebanoff* court cited Justice Roberts' concurrence in *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing*, 252 A.2d 622 (1969) where he stated "the question of to what extent purely residential picketing may be proscribed is not before us." *Hibbs*, 252 A.2d at 624. The jurisprudence in this area of the law makes it abundantly clear that the government has a legitimate interest in protecting the well-being, tranquility, and privacy of the home; it is of the highest concern in a free and civilized society. *Carey v. Brown*, 447 U.S. 455 (1980).

Thus, this brought the Court to a balancing of the competing interests as espoused in the *Klebanoff* decision:

> The more difficult question is what constitutes a reasonable restriction on the exercise of First Amendment Rights. A number of doctrines have developed in constitutional jurisprudence which are used in scrutinizing the reasonableness of a given restriction and which require balancing First Amendment rights and their elevated position in the hierarchy of protected values with the legitimate interests of government or individual civil rights.

Klebanoff, 552 A.2d at 678.

Justifiably, the Court felt that some measure be employed to protect the Oberholzers' quiet enjoyment of their home, while simultaneously respecting the Galapos' right to free speech.

The Galapos are critical of the Court's application of time, place and manner restrictions on freedom of expression exercised on private property. However, the Court held that when a citizen's exercise of their right to freedom of speech substantially impacts another citizen's private civil rights, that speech constitutes expressive activity and such expressive activity may be subject to reasonable time, place and manner restrictions. As stated by the Court previously in its memorandum accompanying the September 12, 2019 order, the Court did not label the

conduct of the Galapos to be pure expressive conduct. However, their exercise of their state and federal constitutional rights to freedom of speech morphed beyond the category of pure speech when they targeted the Oberholzers and engaged in a personal feud.[2] This is not to condone or diminish the abhorrent behavior of the Oberholzers that prompted the Galapos' reaction. But, based on the record and evidence presented, the Court found that the Galapos' conduct entered the realm of expressive conduct which negatively affected the Oberholzers' quiet enjoyment of their property. Therefore, pursuant to the holding in *Rouse*, the Court found that the Galapos' conduct required less constitutional protection than that of pure speech. *Rouse*, 417 A.2d at 1254.

Furthermore, despite the fact that the parties had entered into a settlement agreement providing for monetary compensation to the Oberholzers, the Oberholzers had no adequate remedy at law, for the Galapos' exercise of their right to freedom of expression interfered with the Oberholzers' right to peaceful, tranquil enjoyment of their home. Simply put, to hold otherwise would give the Galapos the right to pay to continue to infringe on the Oberholzers' quiet enjoyment of their home.

Accordingly, the order granting the permanent injunction is a time, place, and manner restriction on the Galapos' right to freedom of expression that did not regulate the content of the signs posted by the Galapos.

For these reasons, the court denies the Galapos' motion for post-trial relief.

[2] *See* Trial Court's Order and attached Memorandum, pp.8-11 9/12/19 (#159).

APPENDIX “D”

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vs.	:	
SIMON GALAPO AND TOBY GALAPO, h/w	:	CIVIL ACTION NO. 2016-11267

DEFENDANTS/APPELLANTS SIMON GALAPO AND TOBY GALAPO'S STATEMENT OF ERRORS COMPLAINED OF ON APPEAL PURSUANT TO PA. R.A.P. 1925(B)

Defendant/Appellants, Simon and Toby Galapo, hereby complain of the following errors on appeal from the Order entered on January 3, 2020 (attached as Exhibit "A"):

1. The Trial Court abused its discretion and/or committed an error of law by concluding that an injunction is necessary to prevent a legal wrong for which there is no adequate redress at law.

2. The Trial Court abused its discretion and/or committed an error of law by concluding that injunctive relief is permissible under Article I, Section 7 of the Pennsylvania Constitution.

3. The Trial Court abused its discretion and/or committed an error of law by concluding that equity can enjoin a defamation.

4. The Trial Court abused its discretion and/or committed an error of law by applying a time, place and manner analysis to plaintiffs' demand for injunctive relief.

5. The Trial Court abused its discretion and/or committed an error of law by applying a time, place and manner analysis to activities occurring on private (non-governmental) property.

6. The Trial Court abused its discretion and/or committed an error of law by concluding that defendants' posting of signs constitutes "picketing" and it therefore amenable to time, place, and manner restrictions.

7. The Trial Court abused its discretion and/or committed an error of law by entering a permanent injunction that does not provide an alternative channel for defendants to convey their message to their intended audience.

8. The Trial Court abused its discretion and/or committed an error of law by entering a permanent injunction that is not content neutral.

KANE PUGH KNOELL TROY & KRAMER, LLP

BY: _____

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vs.	:	
SIMON GALAPO AND TOBY GALAPO, h/w	:	CIVIL ACTION NO. 2016-11267

CERTIFICATE OF SERVICE

The undersigned counsel for defendants Simon Galapo and Toby Galapo, h/w certifies that he served a true and correct copy of defendants' Statement of Errors upon the following:

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Philadelphia, PA 19103

The Honorable Steven Tolliver
Montgomery County Courthouse
2 E. Airy Street
Norristown, PA 19401

Dated: January 27, 2020

KANE PUGH KNOELL TROY & KRAMER, LLP

BY: 

ANDREW J. KRAMER, ESQ.
Attorney for Defendant

EXHIBIT "A"

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	
SIMON GALAPO and TOBY GALAPO, h/w	:	

ORDER

AND NOW, this 3rd day of January, 2020, upon consideration of the Motion for Post-Trial Relief of Defendants' Simon Galapo and Toby Galapo, filed on September 20, 2019 (#160), any responses thereto, and after oral argument held on November 26, 2019, it is hereby **ORDERED** and **DECREED** that said Motion for Post-Trial Relief is **DENIED**.

BY THE COURT:

Steven C. Tolliver

STEVEN C. TOLLIVER, SR., J.

This Order a Memorandom **has been E-Filed on** 1/3 **/20**

Copy by **Interoffice Mail:**
Court Administration – Civil Division (Liz)

Mary E. Tausi
Judicial Secretary

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	
SIMON GALAPO and TOBY GALAPO, h/w	:	

MEMORANDUM

Presently before the Court is the Defendants' Motion for Post-Trial Relief following the entry of the Court's Order of September 12, 2019, granting in part and denying in part Plaintiffs' Motion for a Permanent Injunction. The Court allowed the Defendants to post signs on their lawn, but ordered that the signs be situated and positioned in such a way so as to not interfere with Plaintiffs' tranquility and quiet enjoyment of their home and backyard space[1].

Subsequently, on September 23, 2019, Plaintiffs petitioned the Court to hold Defendants in contempt of the September 12, 2019 order for alleged infractions of that order. On October 10, 2019, the court heard the parties' arguments on this contempt petition. Having an opportunity to understand the grounds for the contempt petition, the Court on October 11, 2019 amended its September 12, 2019 order by clearly expressing that the signs should be constructed of opaque material so that the printed language on the posted signs would not be visible to the Plaintiffs.

Thereafter, on November 26, 2019, oral argument was held on Defendants' Motion for Post-Trial Relief in which they contend the following:

[1] Between June 2015 and June 2016, Defendant Simon Oberholzer posted individual signs solely in the area where parties' backyards abut each other and directly facing Plaintiffs' backyard. During this period the signs posted increased from a single sign to as many as twenty-three, all facing Plaintiffs' residence. Signs with language such as "Woe to the Racist, woe to the Neighbors" and "Racism against kids is not strength its predatory". *See* Plaintiffs' Trial Notebook, Exhibit List P-2-21;24-31.

a) Plaintiffs have failed to demonstrate that an injunction is necessary to prevent a legal wrong for which there is no adequate redress at law;

b) Pennsylvania follows the Common Law Rule that equity will not enjoin a defamation and injunctive relief is therefore impermissible under Article I, Section 7 of the Pennsylvania Constitution;

c) This Honorable Court improperly applied a time, place and manner analysis;

1. The "Forum Analysis" or "Public Forum Doctrine" for Speech on Government Property does not apply to Defendants' Signs posted on their private property;

2. Defendants' posting of signs does not constitute "picketing" and therefore is not subject to time, place and manner restrictions;

d) The injunction does not provide an alternative channel for Defendants to convey their message to their intended target; and

The injunction is not content neutral.

See, Defendants' Motion for Post-Trial Relief.

The Court, in an effort to provide transparency to its orders and decisions, filed a Memorandum with its September 12, 2019 order setting forth the cases it believed provided guidance to the Court in its deliberations of the issues presented in this sad case where neighbors cannot forgive and let live peaceably.

In its Memorandum, the Court directed the parties' attention to, among other cases, United States Supreme Court decision, *Frisby v. Schultz,* 487 U.S. 474 (1988) and *Rouse Philadelphia, Inc. v. Ad Hoc '78,* 417 A.2d 1248 (Pa. Super. 1979).

In *Rouse,* the Pennsylvania Superior Court recognized that it is obvious that an open society is enriched by the ability of its citizens to freely express themselves and for that reason courts are extremely reluctant to approve any measure that infringes on a person's exercise of their right to freedom of expression. *Id.* at 1254. However, freedom of expression can morph into expressive conduct justifying some measure of regulation.

The court in *Rouse* found that the demonstrators' conduct constituted public acts which violated an earlier order, thereby justifying some regulation of their expressive conduct. *Id.*

The Court also found guidance in *Klebanoff v. McMonagle*, 552 A.2d 677 (Pa. Super. 1989). The case *sub judice* might be viewed as a case of first impression because it concerns the Galapos' constitutional right to exercise freedom of speech in a residential context. The *Klebanoff* court cited Justice Roberts' concurrence in *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing*, 252 A.2d 622 (1969) where he stated "the question of to what extent purely residential picketing may be proscribed is not before us." *Hibbs*, 252 A.2d at 624. The jurisprudence in this area of the law makes it abundantly clear that the government has a legitimate interest in protecting the well-being, tranquility, and privacy of the home; it is of the highest concern in a free and civilized society. *Carey v. Brown*, 447 U.S. 455 (1980).

Thus, this brought the Court to a balancing of the competing interests as espoused in the *Klebanoff* decision:

> The more difficult question is what constitutes a reasonable restriction on the exercise of First Amendment Rights. A number of doctrines have developed in constitutional jurisprudence which are used in scrutinizing the reasonableness of a given restriction and which require balancing First Amendment rights and their elevated position in the hierarchy of protected values with the legitimate interests of government or individual civil rights.

Klebanoff, 552 A.2d at 678.

Justifiably, the Court felt that some measure be employed to protect the Oberholzers' quiet enjoyment of their home, while simultaneously respecting the Galapos' right to free speech.

The Galapos are critical of the Court's application of time, place and manner restrictions on freedom of expression exercised on private property. However, the Court held that when a citizen's exercise of their right to freedom of speech substantially impacts another citizen's private civil rights, that speech constitutes expressive activity and such expressive activity may be subject to reasonable time, place and manner restrictions. As stated by the Court previously in its memorandum accompanying the September 12, 2019 order, the Court did not label the

conduct of the Galapos to be pure expressive conduct. However, their exercise of their state and federal constitutional rights to freedom of speech morphed beyond the category of pure speech when they targeted the Oberholzers and engaged in a personal feud.[2] This is not to condone or diminish the abhorrent behavior of the Oberholzers that prompted the Galapos' reaction. But, based on the record and evidence presented, the Court found that the Galapos' conduct entered the realm of expressive conduct which negatively affected the Oberholzers' quiet enjoyment of their property. Therefore, pursuant to the holding in *Rouse*, the Court found that the Galapos' conduct required less constitutional protection than that of pure speech. *Rouse*, 417 A.2d at 1254.

Furthermore, despite the fact that the parties had entered into a settlement agreement providing for monetary compensation to the Oberholzers, the Oberholzers had no adequate remedy at law, for the Galapos' exercise of their right to freedom of expression interfered with the Oberholzers' right to peaceful, tranquil enjoyment of their home. Simply put, to hold otherwise would give the Galapos the right to pay to continue to infringe on the Oberholzers' quiet enjoyment of their home.

Accordingly, the order granting the permanent injunction is a time, place, and manner restriction on the Galapos' right to freedom of expression that did not regulate the content of the signs posted by the Galapos.

For these reasons, the court denies the Galapos' motion for post-trial relief.

[2] *See* Trial Court's Order and attached Memorandum, pp.8-11 9/12/19 (#159).

APPENDIX “E”

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	*Superior Court No. 794 EDA 2020*
SIMON GALAPO and TOBY GALAPO, h/w	:	

TOLLIVER, J. **MARCH 12, 2020**

1925 (a) OPINION

Appellants, Simon and Toby Galapo, presently appeal from this Court's Order dated January 3, 2020, which denied Defendants/Appellants Motion for Post-Trial Relief.

The trial court issued three (3) orders dated as follows: January 3, 2020; October 11, 2019; and September 12, 2019. Memoranda setting forth the reasons supporting the trial court's rulings are attached to the January 3, 2020 and September 12, 2019 Orders, copies of which are attached hereto. The trial court respectfully directs the Superior Court to those Memoranda, pursuant to Pa. R.A.P. 1925(a)(1) and submits that it believes the rulings should be affirmed.

RESPECTFULLY SUBMITTED,

STEVEN C. TOLLIVER, SR., J.

This Opinion has been E-Filed on 3/12/2020

Copy by **Interoffice Mail** to:
Court Administration – Civil Division

Judicial Secretary

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w : NO. 2016-11267

V. :

SIMON GALAPO and TOBY GALAPO, h/w :

ORDER

AND NOW, this 3rd day of January, 2020, upon consideration of the Motion for Post-Trial Relief of Defendants' Simon Galapo and Toby Galapo, filed on September 20, 2019 (#160), any responses thereto, and after oral argument held on November 26, 2019, it is hereby **ORDERED** and **DECREED** that said Motion for Post-Trial Relief is **DENIED**.

BY THE COURT:

Steven C. Tolliver

STEVEN C. TOLLIVER, SR., J.

This Order a Memorandom has been E-Filed on 1/3 /20

Copy by **Interoffice Mail:**
Court Administration – Civil Division (Liz)

Mary E. Tavis
Judicial Secretary

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	
SIMON GALAPO and TOBY GALAPO, h/w	:	

MEMORANDUM

Presently before the Court is the Defendants' Motion for Post-Trial Relief following the entry of the Court's Order of September 12, 2019, granting in part and denying in part Plaintiffs' Motion for a Permanent Injunction. The Court allowed the Defendants to post signs on their lawn, but ordered that the signs be situated and positioned in such a way so as to not interfere with Plaintiffs' tranquility and quiet enjoyment of their home and backyard space[1].

Subsequently, on September 23, 2019, Plaintiffs petitioned the Court to hold Defendants in contempt of the September 12, 2019 order for alleged infractions of that order. On October 10, 2019, the court heard the parties' arguments on this contempt petition. Having an opportunity to understand the grounds for the contempt petition, the Court on October 11, 2019 amended its September 12, 2019 order by clearly expressing that the signs should be constructed of opaque material so that the printed language on the posted signs would not be visible to the Plaintiffs.

Thereafter, on November 26, 2019, oral argument was held on Defendants' Motion for Post-Trial Relief in which they contend the following:

[1] Between June 2015 and June 2016, Defendant Simon Oberholzer posted individual signs solely in the area where parties' backyards abut each other and directly facing Plaintiffs' backyard. During this period the signs posted increased from a single sign to as many as twenty-three, all facing Plaintiffs' residence. Signs with language such as "Woe to the Racist, woe to the Neighbors" and "Racism against kids is not strength its predatory". *See* Plaintiffs' Trial Notebook, Exhibit List P-2-21;24-31.

a) Plaintiffs have failed to demonstrate that an injunction is necessary to prevent a legal wrong for which there is no adequate redress at law;

b) Pennsylvania follows the Common Law Rule that equity will not enjoin a defamation and injunctive relief is therefore impermissible under Article I, Section 7 of the Pennsylvania Constitution;

c) This Honorable Court improperly applied a time, place and manner analysis;

1. The "Forum Analysis" or "Public Forum Doctrine" for Speech on Government Property does not apply to Defendants' Signs posted on their private property;

2. Defendants' posting of signs does not constitute "picketing" and therefore is not subject to time, place and manner restrictions;

d) The injunction does not provide an alternative channel for Defendants to convey their message to their intended target; and

The injunction is not content neutral.

See, Defendants' Motion for Post-Trial Relief.

The Court, in an effort to provide transparency to its orders and decisions, filed a Memorandum with its September 12, 2019 order setting forth the cases it believed provided guidance to the Court in its deliberations of the issues presented in this sad case where neighbors cannot forgive and let live peaceably.

In its Memorandum, the Court directed the parties' attention to, among other cases, United States Supreme Court decision, *Frisby v. Schultz*, 487 U.S. 474 (1988) and *Rouse Philadelphia, Inc. v. Ad Hoc '78*, 417 A.2d 1248 (Pa. Super. 1979).

In *Rouse*, the Pennsylvania Superior Court recognized that it is obvious that an open society is enriched by the ability of its citizens to freely express themselves and for that reason courts are extremely reluctant to approve any measure that infringes on a person's exercise of their right to freedom of expression. *Id.* at 1254. However, freedom of expression can morph into expressive conduct justifying some measure of regulation.

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Thus, this brought the Court to a balancing of the competing interests as espoused in the *Klebanoff* decision:

> The more difficult question is what constitutes a reasonable restriction on the exercise of First Amendment Rights. A number of doctrines have developed in constitutional jurisprudence which are used in scrutinizing the reasonableness of a given restriction and which require balancing First Amendment rights and their elevated position in the hierarchy of protected values with the legitimate interests of government or individual civil rights.

Klebanoff, 552 A.2d at 678.

Justifiably, the Court felt that some measure be employed to protect the Oberholzers' quiet enjoyment of their home, while simultaneously respecting the Galapos' right to free speech.

The Galapos are critical of the Court's application of time, place and manner restrictions on freedom of expression exercised on private property. However, the Court held that when a citizen's exercise of their right to freedom of speech substantially impacts another citizen's private civil rights, that speech constitutes expressive activity and such expressive activity may be subject to reasonable time, place and manner restrictions. As stated by the Court previously in its memorandum accompanying the September 12, 2019 order, the Court did not label the

conduct of the Galapos to be pure expressive conduct. However, their exercise of their state and federal constitutional rights to freedom of speech morphed beyond the category of pure speech when they targeted the Oberholzers and engaged in a personal feud.[2] This is not to condone or diminish the abhorrent behavior of the Oberholzers that prompted the Galapos' reaction. But, based on the record and evidence presented, the Court found that the Galapos' conduct entered the realm of expressive conduct which negatively affected the Oberholzers' quiet enjoyment of their property. Therefore, pursuant to the holding in *Rouse*, the Court found that the Galapos' conduct required less constitutional protection than that of pure speech. *Rouse*, 417 A.2d at 1254.

Furthermore, despite the fact that the parties had entered into a settlement agreement providing for monetary compensation to the Oberholzers, the Oberholzers had no adequate remedy at law, for the Galapos' exercise of their right to freedom of expression interfered with the Oberholzers' right to peaceful, tranquil enjoyment of their home. Simply put, to hold otherwise would give the Galapos the right to pay to continue to infringe on the Oberholzers' quiet enjoyment of their home.

Accordingly, the order granting the permanent injunction is a time, place, and manner restriction on the Galapos' right to freedom of expression that did not regulate the content of the signs posted by the Galapos.

For these reasons, the court denies the Galapos' motion for post-trial relief.

[2] See Trial Court's Order and attached Memorandum, pp.8-11 9/12/19 (#159).

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w : NO. 2016-11267

V. :

SIMON GALAPO and TOBY GALAPO, h/w :

AMENDED ORDER

AND NOW, this 11th day of October, 2019, this Court's Order of September 12, 2019 is amended to read as follows: upon careful consideration of the evidence and testimony presented, upon review of the briefs filed on behalf of Plaintiffs and Defendants, and in accordance with the Memorandum attached to the Order of September 12, 2019, it is hereby **ORDERED** that Plaintiff's Motion for a Permanent Injunction is **GRANTED in Part and DENIED in Part** as follows:

A) The signs posted by Defendants on their property are allowed to remain;

B) The signs previously posted on Defendants' property shall be positioned in such a way that they do not directly face Plaintiffs' property; i.e., the fronts of the signs (lettering, etc.) are not to be visible to the Plaintiffs nor face in the direction of the Plaintiffs' home. In order to ensure that none of the signs are visible regardless of their positioning, these signs shall be constructed with opaque material.

BY THE COURT:

Steven C. Tolliver

STEVEN C. TOLLIVER, SR., J.

This Order has been E-Filed on 10/ // /19:

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Court Administration – Civil Division (Liz)

Mary E. Daus

Judicial Secretary

THIS DOCUMENT WAS DOCKETED AND SENT ON 10/11/2019

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	
SIMON GALAPO and TOBY GALAPO, h/w	:	

ORDER

AND NOW, this 12th day of September, 2019, upon careful consideration of the evidence and testimony presented, upon review of the briefs filed on behalf of Plaintiffs and Defendants, and in accordance with the Memorandum attached hereto, it is hereby **ORDERED** that Plaintiffs' Motion for a Permanent Injunction is **GRANTED in Part and DENIED in Part** as follows:

A) The signs posted by Defendants on their property are allowed to remain;

B) The signs previously posted on Defendants' property shall be positioned in such a way that they do not directly face and target Plaintiffs' property: the fronts of the signs (lettering, etc.) are not to be visible to the Plaintiffs nor face in the direction of Plaintiffs' home.

BY THE COURT:

STEVEN C. TOLLIVER, SR., J.

This Order and Memorandum have been E-Filed on 9/12/19

Copy by Interoffice Mail to:
Court Administration – Civil Division (Liz)

Judicial Secretary

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

FREDERICK E. OBERHOLZER, JR. and DENISE L. OBERHOLZER, h/w	:	NO. 2016-11267
V.	:	
SIMON GALAPO and TOBY GALAPO, h/w	:	

MEMORANDUM

Presently before the court is a dispute between neighbors in which Frederick and Denise Oberholzer (Plaintiffs), seek to enjoin Simon and Toby Galapo, (Defendants), their rear neighbors, from posting signs decrying racism and anti-Semitism. The Defendants refuse to remove the signs posted on their property asserting that an injunction requiring them to do so would violate their rights of freedom of expression protected under the First and Fourteenth Amendments to the U.S., Constitution and under Article 1, Section 7 of the Pennsylvania Constitution.

This Court finds that the Defendant Galapos' posting of signs on their property substantially interfers with Plaintiff Oberholzers quiet enjoyment, tranquility, and privacy of their home, thereby entitling Plaintiffs to a permanent injunction consistent with the time, place, and manner restrictions that have been applied by the United States Supreme Court. *See Grayned v. City of Rockford*, 408 U.S. 104, 104 (1972).

I. FACTUAL HISTORY

On June 7, 2016, Plaintiffs initiated the instant action against Defendants. The Plaintiffs and Defendants are neighbors. Plaintiffs reside on the 800 block of Suffolk Road while the Defendants reside on the 800 block of Delene Road, Rydal, Abington Township, Montgomery County, Pennsylvania.

The underlying facts of the dispute that led to the filing of the civil action began over landscaping that the Defendants began in their backyard. On November 22, 2014, Simon Galapo confronted the Plaintiffs about resurveyed property lines. It was at this time that the Defendants believe that the Plaintiffs used racial slurs toward Defendant husband Simon Galapo. As a result of this brief altercation, the Defendants filed a police report with the Abington Township Police Department about the November 22, 2014 confrontation. It was determined that no police action was warranted and the said incident was cleared. There were no further noteworthy interactions between the neighbors until June 2015, when Defendant husband placed bold and visible signs along the rear of his property line that abutted the Plaintiffs' property. These signs varied in language but consisted of anti-hate and racism speech. These signs were clearly visible and placed in the direct line of sight of the Plaintiffs. The Plaintiff Oberholzers allegedly believe that these signs were placed solely to harass and slander them.

II. PROCEDURAL HISTORY

After the Plaintiffs filed their original complaint, an amended complaint was filed on July 5, 2016. This Amended Complaint averred the following causes of action: (1) private nuisance; (2) intrusion upon seclusion; (3) defamation – libel and slander; (4) intentional infliction of emotional distress; and (5) publicity placing plaintiffs in a false light. The Plaintiffs also sought equitable relief in the form of preliminary and permanent injunction against the Defendants enjoining them from continuing to post their

signs. On August 29, 2016 the parties entered into a Consent Order whereby Defendants would remove the subject signs. By the terms of the Consent Order, it would stay in place until October 29, 2016. A hearing was conducted on October 18, 2016, on Plaintiffs' request for a preliminary injunction. On October 31, 2016 a Stipulation was entered on the record. This Stipulation provided, among other things, that the August 29, 2016 Consent Order would remain in full force and effect until the Court ruled on Plaintiffs' petition for preliminary injunctive relief. On November 17, 2016, the Court entered an order denying injunctive relief to the Plaintiffs. There was a short-lived appeal of that order until September 22, 2017, when Plaintiffs withdrew and discontinued their appeal to the Superior Court of Pennsylvania.

On July 9, 2018, Defendants filed a Motion for Summary Judgment to which Plaintiffs responded with their own cross-motion for summary judgment. On September 6, 2018, this Court issued an order that denied Plaintiffs' cross-motion for summary judgment, and granted in part and denied in part Defendants' motion for summary judgment by dismissing the claim for Intrusion on Seclusion with all other claims allowed to remain. On June 5, 2019, the parties entered into a Confidential Settlement Agreement resolving the four remaining at law claims, with the equitable relief claim for a permanent injunction left to be decided by the Court.

Through their claim for equitable relief, the Oberholzers seek an order: (a) enjoining defendants from posting and publishing hate-signs containing false, incendiary words, content, innuendo and slander, or any signs about plaintiffs at all; (b) enjoining defendants from posting and publishing signs containing open and notorious incendiary racial and ethnic slander, or any signs about plaintiffs at all.

The parties filed briefs in support of their respective positions about Plaintiffs' claims for equitable relief, pursuant to the June 5, 2019 order memorializing the parties' agreement to submit the matter on a stipulated record consisting of the deposition transcripts of Defendants, Christopher Tinsley, Brittany Stern, and Geraline Smith, the Preliminary Injunction hearing transcript, and the parties' selected

exhibits as originally submitted and supplemented. The matter is now ripe for disposition by the court; oral argument having been heard on August 13, 2019.

III. DISCUSSION

RIGHT TO EQUITABLE RELIEF AND FREEDOM OF SPEECH

With the resolution of Plaintiffs' at law claims, the issue presented herein is whether the First Amendment of the U.S. Constitution and Article 1, Section 7 of the Pennsylvania Constitution permits this court to enjoin Defendants from posting signs on their property denouncing hatred, racism and anti-Semitism in their effort to change the perceived offensive behavior of the Plaintiffs.

The First Amendment is rooted in one of our nation's founding principles that individuals must be free to assemble peaceably and exercise freedom of speech without governmental interference. These constitutional rights are applicable to the states by virtue of the Fourteenth Amendment. Further, the Pennsylvania Constitution recognizes an individual's right to freedom of speech and assembly. The government's circumspection about infringing upon these constitutional rights has traditionally focused on the individual's right to use public fora to exercise these rights since these rights are closely associated with the right to assemble and express their ideas in a public forum. *Perry Educational Association v. Perry Local Educator's Association,* 460 U.S. 37, 37 (1983).

A party seeking an award of a permanent injunction must be able to establish that his right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested. *Kuznik v. Westmoreland County Bd. of Com'rs*, 902 A.2d 476, 489 (Pa. 2006). This well-settled rule has been applied where protesters arguably exercising their rights under the First and Fourteenth Amendments of the U.S. Constitution and under Article 1, Section 7 of the Pennsylvania Constitution sought to overturn a

trial court order enjoining them from picketing on the public sidewalk in front of the residence of a physician whose primary practice of performing abortions offended their "pro-life" stance. *Klebanoff v. McMongale,* 552 A.2d 677, 677 (Pa. Super. 1988). This same rule has been applied where a shopping mall sought to enjoin a religious group from demonstrating on a public sidewalk adjacent to its property. *Liberty Place Retail Associates, L.P. v. Israelite School of Universal Practical Knowledge*, 102 A.3d 501, 501(Pa. Super. 2014). There the court recognized that in order to be entitled to a permanent injunction, one must establish: (1) a clear right to relief; and (2) not have an adequate remedy at law. *Id* at 505.

Where an individual uses a public forum to exercise their rights of freedom of expression and speech, the appropriateness of any governmental restriction on those rights has been determined by applying the well-settled time, place, and manner test. Under that test, the restriction imposed on protected speech must be content and viewpoint neutral, leave open ample alternative channels of communication, and be narrowly tailored to further a substantial governmental interest. *Frisby v. Schultz*, 487 U.S. 474, 474 (1988). In *Klebanoff,* the court found that speech protected under the United States and Pennsylvania Constitutions is not permissible in all places and at all times, and that Pennsylvania courts can enjoin expressive activity which violates an individual's residential privacy. *Klebanoff,* 552 A.2d at 678. The U.S. Supreme Court has allowed restrictions on constitutional rights by placing time, place, and manner restrictions because "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 473 U.S.788, 799 (1985). These types of restrictions are proper if they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry*, 460 U.S. at 45. The *Klebanoff* court determined that the injunction restricting the place where expressive activity could occur was permissible because it was content neutral, narrowly tailored to serve a governmental interest, and left ample alternative channels of communication. *Klebanoff,* 552 A.2d at 678. The court in *Klebanoff* recognized

that the public's interest in protecting the well-being, tranquility, and privacy of the home is of the highest order. *Id.* at 679. In determining the reasonableness of a restriction on the exercise of free speech, under the U.S. and Pennsylvania Constitutions, there must be a balancing of those constitutional rights with the governmental interests or individual civil rights. *Id.* at 678. Protecting residential privacy is a governmental interest; therefore, an injunction protects the right to be free from intrusion upon one's solitude or the right to be left alone. *Id.* at 679.

A. BASED ON THE SETTLEMENT AGREEMENT BETWEEN PARTIES, THE PLAINTIFFS HAVE ESTABLISHED A CLEAR RIGHT TO RELIEF AND THAT AN INJUNCTION IS NECESSARY TO AVOID AN INJURY THAT CANNOT BE COMPENSATED BY DAMAGES

On June 5, 2019, all parties signed a Confidential Settlement Agreement that settled all causes of action for relief at law for a monetary value. Per this agreement, the Galapos were barred from objecting to the Oberholzers' request for permanent injunctive relief on the grounds the Oberholzers would have failed to succeed on the merits of the claims for such relief.

> "[T]his Agreement does not prohibit, limit or affect the Oberholzers' rights to seek and/or pursue their claim in equity for injunctive relief against Galapos in this action...[a]lthough the Galapos do not admit any wrongdoing or liability herein, the Galapos agree they will not contest the Oberholzers' request for injunctive relief on the grounds Oberholzers have failed to succeed on the merits of their claim for such relief."

See "Confidential Settlement Agreement" ¶6, 06/05/2019.

The Court is impressed with the deposition testimony of the Plaintiffs, corroborated in part, by that of Christopher Tinsley and Geraline Smith, concerning the impact of the posted signs on the Plaintiffs' residential privacy. Further, the Court has considered all of the exhibits offered by the parties, as well as the pointed preliminary injunction hearing testimony of Defendant Simon Galapo. Despite the monetary settlement reached between the parties, the Court finds that the Defendants' actions severely and negatively impact the Plaintiffs' well-being, tranquility, and quiet enjoyment of their home.

Thus, this Court concludes that: (1) plaintiffs have no adequate remedy at law; and (2) that a greater injury of a continuing intrusion on plaintiffs' residential privacy will result from refusing to grant the equitable relief sought and allowing the existing signs to remain as they are presently positioned on the Defendants' property.

B. THE REASONABLENESS TEST APPLIES IN THE INSTANT CASE INVOLVING THE RIGHT TO FREEDOM OF EXPRESSION

After being subjected to alleged anti-Semitic slurs from the Plaintiffs, Defendant Simon Galapo began posting signs along the rear of his property line that abuts the rear yard of the Plaintiffs. These signs vary with regard to their language but their messages clearly decry racism, some with references to Hitler and the Holocaust. The signs were solely placed at the rear of his property line and facing in direct line of sight of the Plaintiffs' home and property.

Plaintiffs argue that the Defendants' posting of signs on their property, in the manner in which they have, amounts to picketing, as that term is defined in *Frisby*. 487 U.S. at 474. They further argue that the picketing is designed to inflict psychological harm on their family, rather than convey a message of a particular belief or fact, and therefore is expressive conduct which, under the circumstances, is not constitutionally protected.

The Defendants Galapos argue that the posting of signs that disseminate views on racism and Hitler are to be considered pure speech and therefore entitled to the utmost constitutional protection. They also argue that this cannot be considered picketing similar to the actions that occurred in *Klebanoff*.

At the hearing for the preliminary injunction petition, Defendant Simon Galapo testified that the purpose of the signs was "to protest behavior which we perceive as being racist towards myself, my wife, and my family." N.T. 41:10 – 12 (Defnts. Ex. 17) Defendant Simon Galapo was also clear that the signs are directed at the Plaintiffs and their property and would only come down when the racist behavior of the

Plaintiffs as he perceived it ceased. *Id.* at N.T. 41: 16-20, 47:12-14. When questioned regarding the position of the signs only being in the backyard facing the Plaintiffs' home and not anywhere else, Defendant Simon Galapo indicated that the greatest threat to him and his family with regard to racism was the Plaintiffs. *Id.* at N.T. 54:8-14. These beliefs were further cemented during oral arguments regarding the petition to grant a permanent injunction in which Defendant Simon Galapo's counsel indicated that this was a personal protest for Defendant Simon Galapo against his backdoor neighbors, the Plaintiffs. Arguments In Re Permanent Injunction N.T. 61: 9 – 12, August 13, 2019.

Although Defendant Simon Galapo's conduct arguably does not fit the definition of picketing that occurred in *Klebanoff*, this Court finds that Defendant Simon Galapo was not engaged solely in asserting his pure speech rights. These acts were done as a personal protest against the Plaintiffs. The personal and specific messages of the signs are for the alleged racist behavior exhibited by the Plaintiffs, not racism generally existing in society. The placement of the signs indicates that Defendant Simon Galapo is targeting specific individuals with the signs that decry their perceived racist behavior. Furthermore, as in *Klebanoff*, Defendants' personal protest has also affected the lives of the Plaintiffs' and the parties' neighbors who have testified to the signs effect on them.

C. THE DEFENDANTS' ACTIONS VIOLATE PLAINTIFFS' RESIDENTIAL PRIVACY AND ARE PROPERLY RESTRICTED UNDER THE TIME, PLACE AND MANNER TEST

It is clear and indisputable that pure speech is a right which is to be zealously preserved in our society. "However, as a person's activities move away from ***pure speech and into the area of expressive conduct they require less constitutional protection.***" *Rouse Philadelphia Inc. v. Ad Hoc '78*, 417 A.2d 1248, 1254 (Pa. Super 1979) (emphasis added).

In *Rouse Philadelphia Inc.*, a trial court order that enjoined the protesting and boycotting of a downtown shopping mall in Philadelphia was determined to be permissible and not a violation of the appellants' right to freedom of expression. *Id.* There, the protestors intruded onto the premises under the control of the mall stores and frustrated ingress and egress in the mall area. On appeal, the Superior Court of Pennsylvania reasoned that the purpose of the trial court order was not to limit the expression of ideas that appellants were attempting to communicate, but to limit the conduct by which they chose to communicate their ideas. *Id.* at 1254. Here, the Court's objective to limit the Defendant Simon Galapo's conduct is no different than the order that was upheld in *Rouse Philadelphia Inc.*, as the Court's duty to protect residential privacy is paramount.

In furtherance of asserting his First Amendment right to protest his neighbors' perceived racist behavior, Defendant Simon Galapo has infringed on their right to privacy and quiet enjoyment of their residential home. The intent, message, and placement of his signs specifically target the Plaintiffs; the signs are placed solely at the back of his property, and face in no other direction but at the property of the Plaintiffs. As discussed above, this Court finds Defendant Simon Galapo's actions cannot be considered pure speech; therefore, the strongest constitutional protection is no longer warranted.

Defendant Simon Galapo's specific protests against his neighbors, Plaintiff Oberholzers, are analogous to the targeted picketing seen in *Frisby*. In *Frisby*, an ordinance that prohibited the picketing before or about a residence was challenged as a violation of the First Amendment. *Frisby* 487 U.S. at 474. There, a doctor and his family were subjected to a group of protestors on their doorstep in an attempt to force the doctor to stop performing abortions. *Id.* at 487. The court found that the ordinance that prohibited "picketing before or about the residence or dwelling of any individual" was constitutionally valid and permissible. The Ordinance's prohibition of picketing was narrowly directed at the household and not the general public, thus, was not in violation of the First Amendment. *Id.* at 486. In solely

targeting a singular individual with their protest, the picketers in *Frisby* clearly intruded on the quiet enjoyment of the doctor's home with devastating effect. *Id.*

In the instant case, as referenced by his testimony, Defendant Simon Galapo believes that the greatest threat of racism to him and his family are the Plaintiffs Oberholzers. Albeit, not on the level or kind of protest in *Frisby*, the language, as well as the manner and positioning of the signs, indicate these beliefs to be well-founded.

The Defendants' severe interference with Plaintiffs' residential privacy justifies this Court taking action in the way of a time, place, and manner restriction. "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Frisby* 487 U.S. at 487 (quoting *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 542 (1980)).

1. It Is Well Established Law That The State May Enforce Regulations Of Time, Place And Manner That Are Content-Neutral, Are Narrowly Tailored To Serve A Significant Government Interest, And Leave Open Ample Alternative Channels Of Communication.

The Court will address the last element first as it can be easily answered. In ordering the repositioning of signs that are directly facing and targeting the Plaintiffs' property, the Court's order still allows clear and numerous alternative channels of communication. This restriction will not interfere with the general manner of dissemination of Defendant Simon Galapo's message. Defendant Simon Galapo is free to continue to post signs on his property with any message he deems appropriate so long as they do not target or face Plaintiff Oberholzers' property.

With regard to the restriction being content neutral, the Court is being clear that all signs, no matter the language or images depicted, may remain but may not face or target the Plaintiff Oberholzers' property.

Lastly, in granting the injunction, the Court places a restriction that is narrowly tailored to serve the substantial government interest of protecting the Plaintiff Oberholzers' right of residential privacy.

D. THE GALAPOS' ARGUABLE DEFMATORY PUBLICATIONS WILL NOT BE ENJOINED

Defendants are provided greater protection of their exercise of free speech under the Pennsylvania Constitution than the federal constitutional prohibitions. It has been held that Article 1, Section 7 of the Pennsylvania Constitution prohibits prior restraint on the exercise of an individual's right to freely communicate thoughts and opinion. *Goldman Threatres v. Dana, 405 Pa. 83, 173 A.2d 59, cert. denied, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed. 2d 93 (1961).* Consistently, seventeen years later, the Pennsylvania Supreme Court held that equity lacks the power to enjoin the publication of defamatory matter where an injunction would be an unconstitutional prior restraint on freedom of expression. *Willing v. Mazzocone,* 393 A.2d 1155(1978). In the instant case, this trial court has refused to issue a blanket injunction prohibiting all freedom of expression, even in favor of the Plaintiffs' civil rights to be free from invasions of their privacy other at law claims. Consistent with that approach, this court does not find that the facts of this case are strong enough to warrant a deviation from the traditional rule that is followed in Pennsylvania jurisprudence on the topic; accordingly, this Court will not diverge from the well-established law in Pennsylvania.

IV. CONCLUSION

The Court therefore grants the Plaintiff Oberholzers' permanent injunction ordering the repositioning of any signs that are directly facing and targeting the Plaintiffs' property. Any signs that contain words or expressions may be placed anywhere on Defendant Simon Galapo's property, so long as the front of the signs are not visible to the Plaintiffs Oberholzers or face in the direction of Plaintiffs' home.

APPENDIX “F”

2022 PA Super 69

FREDERICK E. OBERHOLZER, JR AND DENISE L. OBERHOLZER	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
SIMON AND TOBY GALAPO	:	
Appellant	:	No. 794 EDA 2020

Appeal from the Judgment Entered April 1, 2020
In the Court of Common Pleas of Montgomery County Civil Division at No(s): No. 2016-11267

BEFORE: STABILE, J., NICHOLS, J., and COLINS, J.*

OPINION BY NICHOLS, J.: **FILED APRIL 18, 2022**

Appellants Simon and Toby Galapo (individually, Appellant Husband and Appellant Wife) appeal from the judgment entered in favor of Appellees Frederick E. Oberholzer, Jr., and Denise L. Oberholzer (individually, Appellee Husband and Appellee Wife). Appellants challenge the injunction entered against them and in favor of Appellees as an unconstitutional restraint on Appellants' right to free speech. We vacate and remand for further proceedings, as set forth in detail below.

Procedural and Factual History

We briefly summarize the relevant facts and procedural history of this case. Appellants and Appellees are neighbors in Abington Township. Specifically, the backyards of the parties' respective properties abut each

* Retired Senior Judge assigned to the Superior Court.

other and are separated by a creek. Am. Compl., 7/5/16, at 2-3, R.R. 13a-14a.[1] In November 2014, Appellants allegedly began landscaping their yard during the evening hours in violation of a township noise ordinance. ***Id.*** Appellees eventually complained to the township and the evening noises temporarily ceased. ***Id.***

On November 22, 2014, Appellant Husband confronted Appellees about a resurveyed property line. Trial Ct. Op. & Order, 9/12/19, at 3, R.R. at 620a. During the ensuing argument, Appellant Husband alleged that Appellee Wife called him a "f***ing Jew." Ex. B to Appellants' Mot. for Summary J., 7/9/18, at 4, R.R. at 39a. Appellants subsequently filed a police report, but it was determined that no further police action was warranted. Trial Ct. Op. & Order, 9/12/19, at 3, R.R. at 620a.

Starting in June 2015, Appellants erected signs on their property, which included primarily anti-hate and anti-racist statements. ***Id.*** Appellants' signs contained the following statements:

1. No Place 4 Racism
2. Hitler Eichmann Racists
3. Racists: the true enemies of FREEDOM
4. No Trespassing - Violators Will Be Prosecuted
5. Warning! Audio & Video Surveillance On Duty At All Times
6. Racism = Ignorant

[1] We may refer to the reproduced record for the parties' convenience.

7. ✡ Never Again

8. WWII: 1,500,000 children butchered: Racism

9. Look Down on Racism

10. Racist Acts will be met with Signs of Defiance

11. Racism Against Kids Is Not Strength, It's Predatory

12. Woe to the Racists. Woe to the Neighbors

13. Got Racism?

14. Every Racist Action Must be Met With a Sign of Defiance

15. Racism is Self-Hating; "Love thy Neighbor as Thyself"

16. Racism - Ignore It and It Won't Go Away

17. Racism - The Maximum of Hatred for the Minimum of Reason

18. RACISM: It's Like a Virus, It Destroys Societies

19. Racists Don't Discriminate Whom They Hate

20. Hate Has No Home Here [in multiple languages]

21. Every Racist Action Must Have an Opposite and Stronger Reaction

22. Quarantine Racism and Society Has a Chance

23. Racism Knows No Boundaries

Confidential Settlement Agreement, 6/5/19, at 4-5, R.R. at 434a-35a;[2] Am. Compl., at 2-8, R.R. at 13a-19a; Trial Ct. Op., 1/3/20, at 1 n.1, R.R. at 660a;

[2] Confidential portions of the parties' settlement agreement are not quoted and are not at issue.

see also R.R. at 2b-31b (color photographs of some of the signs at issue). As of June 2016, Appellants posted twenty-three signs on their property, all of which were placed facing towards and in the line of sight of the backyard of Appellees' property. Confidential Settlement Agreement, 6/5/19, at 4-5, R.R. at 434a-35a; Am. Compl., at 2-8, R.R. at 13a-19a.

On June 7, 2016, Appellees filed a complaint, which they amended on July 5, 2016. Trial Ct. Op. & Order, 9/12/19, at 3, R.R. at 620a. Appellees pleaded five causes of action: (1) private nuisance; (2) intrusion upon seclusion; (3) defamation—libel and slander; (4) intentional infliction of emotional distress; and (5) publicity placing Appellees in a false light. Am. Compl., at 1-20, R.R. at 12a-31a. Additionally, Appellees sought a preliminary and permanent injunction against Appellants from continuing to post their signs. ***Id.***

On August 29, 2016, the parties entered into a consent order in which Appellants agreed to remove the signs pending the outcome of the hearing for a preliminary injunction. Trial Ct. Op. & Order, 9/12/19, at 4, R.R. at 621a. On October 31, 2016, the parties stipulated to extend this consent order. ***Id.*** On November 17, 2016, the trial court denied Appellees' request for a preliminary injunction. ***Id.***

Subsequently, the parties filed cross-motions for summary judgment. Trial Ct. Op. & Order, 9/12/19, at 4, R.R. at 621a. On September 6, 2018, the trial court issued a responsive order that granted in part and denied in

part Appellants' motion for summary judgment. Order, 9/6/18, R.R. at 429a. Specifically, the trial court dismissed Appellees' claim for intrusion on seclusion and denied Appellants' motion in all other respects. ***Id.*** The trial court also denied Appellees' cross-motion for summary judgment. ***Id.***

On June 5, 2019, the parties entered into a confidential settlement agreement resolving the remaining claims at law while leaving the issue of permanent injunctive relief for the trial court to decide. Trial Ct. Op. & Order, 9/12/19, at 4, R.R. at 621a; Confidential Settlement Agreement, 6/5/19, at 1-12, R.R. at 431a-42a; N.T. Settlement Agreement H'rg, 6/5/19, at 3-4. The settlement agreement provided, in relevant part, that:

> Notwithstanding the provisions in the preceding paragraphs, this Agreement does not prohibit, limit or affect [Appellees'] rights to seek and/or pursue their claim in equity for injunctive relief against [Appellants] in this action (no. 2016-11267) prohibiting the present and/or future posting of signs on [Appellants'] property enumerated specifically in paragraph 5 of this Agreement, including a final decree with respect thereto, which claim is specifically not released in this Agreement. Although [Appellants] do not admit any wrongdoing or liability herein, [Appellants] agree they will not contest [Appellees'] request for injunctive relief on the grounds [Appellees] have failed to succeed on the merits of their claim for such relief.

Confidential Settlement Agreement, at 5, R.R. at 435a.

The parties stipulated that the trial court would consider various deposition transcripts, the preliminary injunction transcript, and selected exhibits in resolving Appellees' request for permanent injunctive relief. Trial Ct. Op. & Order, 9/12/19, at 4-5, R.R. at 621a-22a. On August 13, 2019, the trial court heard oral argument. N.T., 8/13/19, at 2-97, R.R at 505a-600a.

On September 12, 2019, the trial court entered an order granting Appellees' request for a permanent injunction in part. Trial Ct. Op. & Order, 9/12/19, at 1, R.R. at 618a. The trial court summarized Appellant Husband's preliminary injunction testimony that the signs targeted Appellees:

> [Appellant Husband] testified that the purpose of the signs was "to protest behavior which we perceive as being racist towards myself, my wife, and my family." [Appellant Husband] was also clear that the signs are directed at [Appellees] and their property and would only come down when the racist behavior of [Appellees] as he perceived it ceased. When questioned regarding the position of the signs only being in the backyard facing [Appellees'] home and not anywhere else, [Appellant Husband] indicated that the greatest threat to him and his family with regard to racism was [Appellees]. These beliefs were further cemented during oral arguments regarding the petition to grant a permanent injunction in which [Appellant Husband's] counsel indicated that this was a personal protest for [Appellant Husband] against his backdoor neighbors, [Appellees].

Id. at 8-9, R.R. at 625a-26a (citations omitted); ***accord*** Ex. E to Appellants' Mot. for Summary J., at 41 (agreeing that signs were directed to Appellees and their property), 47, 54 (testifying that the signs were directed to Appellees and about the Appellees), 61, R.R. at 244a, 250a, 257a, 264a.[3]

The trial court concluded that Appellants'

> acts were done as a personal protest against [Appellees]. The personal and specific messages of the signs are for the alleged

[3] We add that Appellant Husband also testified that Appellees were racist and that racism led to the killing of the Jewish people. Ex. E to Appellants' Mot. for Summary J., at 40, 45, R.R. at 243a, 248a. Appellant Husband additionally testified that at least one of the signs could be seen from the sidewalk in front of Appellees' home or anyone driving by Appellees' home. ***Id.*** at 35-36, 41, R.R. at 238a-39a, 244a. We acknowledge that the trial court did not reference any of this testimony in granting Appellees' request for injunctive relief.

> racist behavior exhibited by [Appellees], not racism generally existing in society. The placement of the signs indicates that [Appellant Husband] is targeting specific individuals with the signs that decry their perceived racist behavior.

Trial Ct. Op. & Order, 9/12/19, at 9, R.R. at 626a. As a result, the trial court ordered Appellants to position their signs in such a way so that they did not face Appellees' property. ***Id.***

The trial court justified the injunction for the following reasons: "(1) [Appellees] have no adequate remedy at law; and (2) that a greater injury of a continuing intrusion on [Appellees'] residential privacy will result from refusing to grant the equitable relief sought and allowing the existing signs to remain as they are presently positioned on the [Appellants'] property." ***Id.*** at 8, R.R. at 625a. Ultimately, the trial court concluded that because Appellants infringed on Appellees' right to privacy and quiet enjoyment of their residential home, a time, place, and manner restriction on Appellants' speech was permissible. ***Id.*** at 9-11, R.R. at 626a-28a.

However, the trial court did not enjoin the content of Appellants' signs because under Pennsylvania law, "equity lacks the power to enjoin the publication of defamatory matter where an injunction would be an unconstitutional prior restraint on freedom of expression." ***Id.*** at 12, R.R. at 629a (citing ***Willing v. Mazzocone***, 393 A.2d 1155 (Pa. 1978) (plurality)).

On September 23, 2019, Appellees filed a petition to hold Appellants in civil contempt in which they asserted that although Appellants had turned the signs to face the other direction, the text was still visible to Appellees from

their property. Pet. for Civ. Contempt, 9/23/19, R.R. at 761a-82a. After a hearing, the trial court did not hold the Appellants in contempt, but on October 11, 2019, the trial court amended its initial order granting the injunction in part to require Appellants' signs be constructed of opaque materials. Am. Order, 10/11/19, R.R. at 631a. The order provided as follows:

> A) The signs posted by [Appellants] on their property are allowed to remain;
>
> B) The signs previously posted on [Appellants'] property shall be positioned in such a way that they do not directly face [Appellees'] property; *i.e.*, the fronts of the signs (lettering, etc.) are not to be visible to [Appellees] nor face in the direction of [Appellees'] home. In order to ensure that none of the signs are visible regardless of their positioning, these signs shall be constructed with opaque material.

Id. (formatting altered).

Meanwhile, Appellants filed a timely motion for post-trial relief on September 20, 2019.[4] Appellants' Mot. for Post-Trial Relief, 9/20/19, R.R. at 632a-58a. The trial court denied Appellants' motion for post-trial relief on January 3, 2020. Order, 1/3/20, R.R. at 659a. The trial court's order did not enter judgment. ***Id.*** The trial court explained that "when a citizen's exercise of their right to freedom of speech substantially impacts another citizen's private civil rights, that speech constitutes expressive activity and such

[4] "Filing an immediate appeal from an injunction under [Pa.R.A.P.] 311(a)(4) is not mandatory, and an appellant may elect instead to engage in normal post-trial procedures and then appeal from a final judgment. ***See*** Pa.R.A.P. 311(g)." ***Thomas A. Robinson Family Ltd. P'ship v. Bioni***, 178 A.3d 839, 847 n.11 (Pa. Super. 2017) (***Bioni***).

expressive activity may be subject to reasonable time, place and manner restrictions" and that its injunction contained permissible time, place, and manner restrictions on Appellants that did not regulate the content of their signs. Trial Ct. Op., 1/3/20, at 3-4, R.R. at 662a-63a.

Appellants timely filed a notice of appeal on January 9, 2020, and filed a timely court-ordered Pa.R.A.P. 1925(b) statement. On March 12, 2020, the trial court filed a Rule 1925(a) opinion that incorporated its January 3, 2020 opinion and order, October 11, 2019 order, and September 12, 2019 opinion and order. Trial Ct. Op., 3/12/20.

On March 31, 2020, this Court issued a rule to show cause why this appeal should not be quashed as no judgment had been entered below. Appellants filed a response to the rule to show cause on April 16, 2020. The response contained a copy of the trial court docket indicating that judgment had been entered on April 1, 2020. This Court discharged the rule to show cause on April 20, 2020. ***See*** Order, 4/20/20.

On appeal, Appellant raises the following issues for our review:

1. Did the trial court commit an error of law by improperly concluding that an injunction was necessary to prevent a legal wrong for which there is no adequate redress at law?

2. Did the trial court commit an error of law by improperly concluding that injunctive relief is permissible under Article I, Section 7 of the Pennsylvania Constitution?

3. Did the trial court commit an error of law by entering a content-based injunction that is not narrowly tailored to serve a compelling governmental interest?

4. Did the trial court commit an error of law by entering an injunction that fails to further an important or substantial governmental interest, is not narrowly tailored, and/or does not leave open ample alternative channels for communication?

Appellants' Brief at 4 (formatting altered).

All of Appellant's issues involve challenges to the trial court's entry of permanent injunctive relief. A permanent injunction is a permanent order requiring an individual or entity to comply with mandatory conditions imposed by the court. ***See, e.g., Kuznik v. Westmoreland County Board of Commissioners***, 902 A.2d 476 (Pa. 2006); ***Thomas A. Robinson Family Limited Partnership v. Bioni***, 178 A.3d 839 (Pa. Super. 2017). Additionally, a permanent injunction may be granted only where: 1) the party seeking the injunction has established that its right to relief is clear; 2) an injunction is necessary to avoid an injury where there no adequate remedy at law, *i.e.*, damages will not compensate for the injury; and 3) a greater injury will result from refusing rather than granting injunctive relief. ***Kuznik***, 902 A.2d at 489 (Pa. 2006); ***see also Liberty Place Retail Associates, L.P. v. Israelite School of Universal Practical Knowledge***, 102 A.3d 501, 505-06 (Pa. Super. 2014). Unlike a preliminary injunction, a permanent injunction does not require proof of immediate irreparable harm. ***Morgan v. Millstone Resources Ltd.***, 267 A.3d 1235, 1249 (Pa. Super. 2021). With these principles in mind, we now proceed to discuss the merits of Appellants' claims.

1. Adequate Remedy at Law

Appellants raise two arguments that the trial court erred by granting a permanent injunction in favor of Appellees: (1) Appellees have an adequate remedy at law that precludes any award of injunctive relief, and (2) regardless, the parties' settlement agreement permitted Appellants to challenge Appellees' request for injunctive relief on two of the three elements required for a grant of injunctive relief. ***Id.*** at 17, 22, 24.

First, Appellants note that the settlement agreement provided that Appellants would pay Appellees to compensate Appellees "for past, present and **future** damages suffered as a result of the posting of the signs." ***Id.*** at 19. Appellants reason that because Appellees have received monetary compensation, an adequate remedy at law exists. ***Id.*** at 20. Appellants explain that because (1) Appellees have an adequate remedy at law, and (2) Appellees actually "received an adequate remedy in the form of monetary compensation," Appellees "are not entitled to permanent injunctive relief." ***Id.*** at 20-21.

Second, Appellants further claim that under the parties' settlement agreement, Appellants agreed to "refrain from arguing that [Appellees] failed to satisfy the first requirement for permanent injunctive relief: the clear right to relief." ***Id.*** at 23-24. Appellants, therefore, reason that they could challenge whether Appellees proved the other two requirements for permanent injunctive relief, including the third prong "that greater injury will

result from refusing [injunctive relief] rather than granting the relief requested." ***Id.*** at 24. Appellants explain that their remaining issues, which are based on Article I, Section 7 of the Pennsylvania Constitution, "undoubtedly contests the merits of injunctive relief" under the third prong. ***Id.***

Appellees counter that the parties' settlement agreement expressly reserved their right to pursue injunctive relief notwithstanding the settlement and release of all claims at law. Appellees' Brief at 12. Appellees quote the clause of the parties' settlement agreement that Appellants "agree they will not contest [Appellees'] request for injunctive relief on the grounds [Appellees] have failed to succeed on the merits of their claim for such relief." ***Id.*** (formatting altered). The trial court's opinion did not directly address this issue.

In reviewing Appellant's claims, we are guided by the following principles. In ***Bioni***, we stated the standard of review:

> The grant or denial of a permanent injunction is a question of law. Regarding the trial court's legal determination, our standard of review is *de novo*, and our scope of review is plenary. As in all equity matters, however, we must accept the trial court's factual findings and give them the weight of a jury verdict where they are supported by competent evidence.

Bioni, 178 A.3d at 843 (citation omitted); ***see also Madsen v. Women's Health Center, Inc.***, 512 U.S. 753, 765-66 (1994) (discussing standard of review for content-neutral injunction).

In ***Professional Flooring Co. v. Bushar Corp.***, 152 A.3d 292 (Pa. Super. 2016), this Court stated the following in construing a settlement agreement:

> The meaning of an unambiguous written instrument presents a question of law for resolution by the court and is subject to *de novo* review. When the words in a writing are unequivocal, the writing speaks for itself, and a meaning cannot be given to it other than that expressed.
>
> Moreover, principles of contract law govern the interpretation and applicability of settlement agreements. Questions of contract interpretation are matters of law that we review *de novo*. A court determines the effect of a release from its language, and we give language its ordinary meaning unless the parties clearly intended a different meaning. A release ordinarily covers only such matters as can fairly be said to have been within the contemplation of the parties when the release was given. We must read portions of contractual language interdependently, considering their combined effects in the totality of the document. Additionally, specific language controls the general.

Professional Flooring, 152 A.3d at 299-300 (citations omitted and formatting altered). We add that injunctive relief is an equitable remedy that "will lie where there is no adequate remedy at law." ***SLT Holdings, LLC v. Mitch-Well Energy, Inc.***, 249 A.3d 888, 894-95 (Pa. 2021) (citation omitted and formatting altered).

Here, Appellants' first argument does not address the import of the clause in the parties' settlement agreement:

> Agreement does not prohibit, limit or affect [Appellees'] rights to seek and/or pursue their claim in equity for injunctive relief against [Appellants] in this action prohibiting the present and/or future posting of signs on [Appellants'] property . . . , which claim is specifically not released in this Agreement. Although [Appellants] do not admit any wrongdoing or liability herein,

> [Appellants] agree they will not contest [Appellees'] request for injunctive relief on the grounds [Appellees] have failed to succeed on the merits of their claim for such relief.

R.R. at 435a.

Upon giving the above release language its ordinary meaning, the parties unequivocally agreed that Appellees could pursue injunctive relief notwithstanding any monetary payments by Appellants. ***See Professional Flooring***, 152 A.3d at 299-300. Moreover, Appellants' argument that Appellees have an adequate remedy at law and that injunctive relief is an equitable remedy unavailable in actions at law is meritless. ***See SLT Holdings***, 249 A.3d at 894-95. In sum, we conclude that the parties' settlement agreement did not bar Appellees from pursuing injunctive relief adverse to Appellants.

2. Enjoining Defamation Under the Pennsylvania Constitution

Appellants next argue that an injunction cannot enjoin defamation. Appellants' Brief at 25-27. Appellants reason that Article I, Section 7 of the Pennsylvania Constitution prohibits prior restraints on communication. ***Id.*** at 26. Appellants explain that because defamation is a form of communication, an injunction on defamation is an impermissible prior restraint. ***Id.*** at 27 (summarizing ***Willing***, 393 A.2d 1155). Appellants summarize Pennsylvania federal court cases in support of its position. ***Id.*** at 28-32. Appellants conclude that the instant "restriction of speech via injunction constitutes an impermissible prior restraint of speech." ***Id.*** at 32. Therefore, Appellants

argue that the trial court cannot limit their posting of signs on their property, "even if those signs are defamatory or place [Appellees] in false light." ***Id.*** at 33.

Appellees counter that they did not pursue injunctive relief on defamation, as Appellees released that claim. Appellees' Brief at 16. Further, in Appellees' view, Appellants' signs were not "content-driven speech, but solely to torment and invade" Appellees' right to privacy and right to seclusion. ***Id.*** at 17. Appellees explain that the injunction is not a prior restraint because the parties' settlement agreement explicitly listed the signs that Appellants agreed Appellees could challenge. ***Id.*** at 20. Appellees reiterate the trial court's reasoning that Appellants' signs were a "personal protest" and therefore not content-driven speech. ***Id.*** at 21.

The trial court reasoned that because it did not issue a "blanket injunction prohibiting all freedom of expression," it did not impose an impermissible prior restraint. Trial Ct. Op. & Order, 9/12/19, at 12, R.R. at 629a.

Article I, Section 7 of the Pennsylvania Constitution states in relevant part that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. . . ." Pa. Const. Art. I, § 7. It "provides protection for freedom of expression that is broader than the federal constitutional guarantee." ***Pap's A.M. v. City of Erie***, 812

A.2d 591, 605 (Pa. 2002) (citations omitted and formatting altered). Specifically, it "prohibit[s] the imposition of prior restraints upon the communication of thoughts and opinions, leaving the utterer liable only for an abuse of the privilege." ***William Goldman Theatres, Inc. v. Dana***, 173 A.2d 59, 62 (Pa. 1961).

For example, in ***Phila. Newspapers, Inc. v. Jerome***, 387 A.2d 425 (Pa. 1978), our Supreme Court defined a prior restraint as a court order that "prevents publication of information or material in the possession of the press . . . ." ***Jerome***, 387 A.2d at 432 (citations omitted). A court order that does "not prevent petitioners from publishing any information in their possession or from writing whatever they pleased" does "not constitute a prior restraint upon publication." ***Id.*** at 433 (footnote omitted); ***accord Commonwealth v. Genovese***, 487 A.2d 364, 366, 369 (Pa. Super. 1985) (holding that a court order preventing the press "from publishing information obtained during a public trial," was a prior restraint).

A prior restraint was also at issue in ***Willing***, in which the defendant had hired the plaintiffs as her counsel in an underlying lawsuit, who then obtained a favorable settlement. ***Willing***, 393 A.2d at 1156. The plaintiffs deducted from the settlement amount the costs of the case, including an expert witness fee that was actually disbursed to that witness. ***Id.*** The defendant, believing that the plaintiffs wrongfully retained a portion of the expert witness fee, started marching for several hours each day next to the

court buildings where plaintiffs practiced. ***Id.*** at 1156-57. The defendant "wore a sandwich-board sign around her neck" asserting that the plaintiffs' law firm stole money from her, pushed a shopping cart with the American flag, and "continuously rang a cow bell and blew on a whistle to further attract attention." ***Id.*** at 1156 (formatting altered).

The plaintiffs moved for injunctive relief against the defendant, which the trial court granted and enjoined the defendant from "further unlawful demonstration, picketing, carrying placards which contain defamatory and libelous statements and or uttering, publishing and declaring defamatory statements" against plaintiffs. ***Id.*** at 1157. The defendant appealed to this Court, which affirmed but it modified the trial court's order to enjoin the defendant from "demonstrating against and/or picketing" plaintiffs by "uttering or publishing statements to the effect" that plaintiffs stole money from her. ***Id.*** (citation omitted). In other words, the courts enjoined the defendant from expressing, from that date on forward, her view that plaintiffs stole money. ***See id.*** The defendant appealed to our Supreme Court, which reversed in a plurality decision. ***Id.*** at 1156. The ***Willing*** Court reasoned that the state constitution prohibited prior restraint of even a defamatory matter. ***Id.*** at 1158.

The Pennsylvania state law definition of a "prior restraint" is also mirrored in federal jurisprudence. For example, in ***Alexander v. United***

States, 509 U.S. 544 (1993), the United States Supreme Court explained as follows:

> The term prior restraint is used to describe administrative and judicial orders **forbidding** certain communications when issued in advance of the time that such communications are to occur. Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints. This understanding of what constitutes a prior restraint is borne out by our cases . . . . In ***Near v. Minnesota ex rel. Olson***, [283 U.S. 697 (1931)], we invalidated a court order that perpetually enjoined the named party, who had published a newspaper containing articles found to violate a state nuisance statute, from producing any future "malicious, scandalous or defamatory" publication. ***Id.***, at 706. ***Near***, therefore, involved a true restraint on future speech—a permanent injunction. So, too, did ***Organization for a Better Austin v. Keefe***, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed.2d 1 (1971), and ***Vance v. Universal Amusement Co.***, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed.2d 413 (1980) (*per curiam*), two other cases cited by petitioner. In ***Keefe***, we vacated an order "**enjoining** petitioners from distributing leaflets anywhere in the town of Westchester, Illinois." 402 U.S., at 415, 91 S. Ct., at 1576 (emphasis added). And in ***Vance***, we struck down a Texas statute that authorized courts, upon a showing that obscene films had been shown in the past, to issue an injunction of indefinite duration prohibiting the future exhibition of films that have not yet been found to be obscene. 445 U.S., at 311, 100 S. Ct., at 1158–1159. ***See also New York Times Co. v. United States***, 403 U.S. 713, 714, 91 S. Ct. 2140, 2141, 29 L. Ed.2d 822 (1971) (*per curiam*) (Government sought to enjoin publication of the Pentagon Papers).

Alexander, 509 U.S. at 550 (emphases in original and formatting altered); ***accord Golden Triangle News, Inc. v. Corbett***, 689 A.2d 974, 979 (Pa. Cmwlth. 1997) (***Corbett***) (holding that "a prior restraint is a prohibition on speech in **advance** of its publication or expression, and a restraint must

unduly burden the expression before it will be in violation of Article I, § 7" (citation omitted and formatting altered)).[5]

Instantly, there is no dispute that a permanent injunction can result in a prior restraint on speech. A prior restraint involves an order forbidding **future** communications. ***See Alexander***, 509 U.S. at 550; ***Willing***, 393 A.2d at 1157; ***Corbett***, 689 A.2d at 979. The instant permanent injunction, however, does not involve a prior restraint on speech. Rather, it addresses the existing signs, *i.e.*, preexisting, and not **future**, communications: "The signs posted by [Appellants] on their property are allowed to remain" but turned away from Appellees' property. R.R. at 631a. Because the permanent injunction does not affect future communications, we conclude that Appellants are due no relief on this issue.[6]

3. Whether the Injunction is Content-Based or Content-Neutral, *i.e.*, Positioning of the Signs to Face Away From Appellees' Home

We briefly quote the order at issue:

> A) The signs posted by [Appellants] on their property are allowed to remain;

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[5] Although decisions of the Commonwealth Court are not binding on this Court, they may provide persuasive authority. ***See Maryland Cas. Co. v. Odyssey***, 894 A.2d 750, 756 n.2 (Pa. Super. 2006).

[6] We discuss recent Supreme Court and Third Circuit jurisprudence resolving government restriction of offensive speech, *infra*. ***See, e.g.***, ***Mahanoy Area Sch. Dist. v. B. L. by & through Levy***, 141 S. Ct. 2038, 2046-47 (2021) (***Mahanoy***) (explaining that a student's vulgar speech criticizing her school team and coaches was constitutionally protected). As noted elsewhere, more recent jurisprudence has not balanced a recipient's right to residential privacy against unwanted or unrequested speech.

> B) The signs previously posted on [Appellants'] property shall be positioned in such a way that they do not directly face [Appellees'] property; *i.e.*, the fronts of the signs (lettering, etc.) are not to be visible to [Appellees] nor face in the direction of [Appellees'] home. In order to ensure that none of the signs are visible regardless of their positioning, these signs shall be constructed with opaque material.

Am. Order, 10/11/19, R.R. at 631a.

Appellants argue that even if the injunction is not a prior restraint on their speech, the injunction is content-based. Appellants' Brief at 33. Because the injunction is content-based, Appellants assert that the injunction is subject to a strict scrutiny standard of review, and it fails that review. ***Id.*** at 33-34. Appellants explain that the trial court's injunction is not content-neutral because they are prohibited "from communicating specific messages to [Appellees] because [Appellees] find those messages offensive . . . ." ***Id.*** at 36.

Appellees counter that because the court's injunction does not refer "to the specific beliefs of [Appellants] on any sign," the injunction is "*prima facie* content neutral." Appellees' Brief at 34. Appellees argue that in ***Klebanoff v. McMonagle***, 552 A.2d 677 (Pa. Super. 1988), this Court "reached a near-identical holding on content-neutral enjoinment," by affirming injunctive relief that prohibited demonstrators from picketing in a public street in front of a private property. ***Id.***

The trial court reasoned that because the injunction was "clear that all signs, no matter the language or images depicted, may remain but may not

face or target" Appellees' property, the injunction was content-neutral. Trial Ct. Op. & Order, 9/12/19, at 12, R.R. at 629a.

Background

Initially, the general rule is that the government cannot censor offensive speech in the open/free marketplace of speech. The burden is on the viewer to avoid offensive speech. ***Snyder v. Phelps***, 562 U.S. 443, 459 (2001);[7] ***Erznoznik v. Jacksonville***, 422 U.S. 205, 210-11 (1975); ***Cohen v. California***, 403 U.S. 15, 21 (1971).

Courts "have long recognized that each medium of expression presents special First Amendment problems." ***F.C.C. v. Pacifica Found.***, 438 U.S. 726, 748 (1978). "Each method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method." ***Metromedia, Inc. v. City of San Diego***, 453 U.S. 490, 501 (1981) (footnote omitted and formatting altered). Therefore, the analytical

[7] The ***Snyder*** Court explained as follows:

> In most circumstances, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes. As a result, the ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

Snyder, 562 U.S. at 459 (citations omitted and formatting altered).

framework for billboards may or may not be identical to the framework for school speech, signs, a gag order, or picketing. ***Compare id.***, ***with Mahanoy***, 141 S. Ct. at 2044-45; ***City of Ladue v. Gilleo***, 512 U.S. 43, 48 (1994) (***Gilleo***);[8] ***S.B. v. S.S.***, 243 A.3d 90, 104 (Pa. 2020); ***Klebanoff***, 552 A.2d at 678; ***see also SmithKline Beecham Corp. v. Stop Huntingdon Animal Cruelty USA***, 959 A.2d 352, 356-57 (Pa. Super. 2008) (***SmithKline***).

Further, the subject matter of the speech may modify the analytical framework. For example, "speech on matters of public concern is at the heart of the First Amendment's protection." ***Snyder***, 562 U.S. at 451-52 (citation

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[8] In ***Gilleo***, the High Court noted the distinctive problems presented by a municipal ordinance banning almost all outdoor signs on private property:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. However, because regulation of a medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs.

Gilleo, 512 U.S. at 48 (citations omitted). The ***Gilleo*** Court noted that "a person who puts up a sign at her residence often intends to reach **neighbors**, an audience that could not be reached nearly as well by other means." ***Id.*** at 57 (emphasis in original and footnote omitted). In any event, as discussed *infra*, a municipal ordinance differs from an injunction.

omitted and formatting altered). Speech on matters of private concern, in contrast, are subject to lesser protections.[9] ***Id.*** at 452.

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[9] The ***Snyder*** Court explained as follows:

> The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.
>
> Not all speech is of equal First Amendment importance, however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas; and the threat of liability does not pose the risk of a reaction of self-censorship on matters of public import.

Snyder, 562 U.S. at 452 (citations omitted and formatting altered).

Different limitations also apply to obscene or commercial speech. ***See Davenport***, 551 U.S. at 188 (stating, "[f]or example, speech that is obscene or defamatory can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas." (citation omitted)); ***Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York***, 447 U.S. 557, 563 (1980) (holding the "Constitution . . . accords a lesser protection to commercial speech" (citation omitted)).

In ***Mahanoy***, for example, the United States Supreme Court explained that the speech at issue was not obscene:

> Consider B.L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B.L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. B.L.'s posts, while crude, did not amount to fighting

In addition to the subject matter of the speech, the nature of the forum at issue may alter the analytical framework. ***See S.B.***, 243 A.3d at 104 (noting, "First Amendment freedoms must be applied in light of the special characteristics of the relevant environment" (citation omitted and formatting altered)); ***see also Davenport v. Washington Educ. Ass'n***, 551 U.S. 177, 189 (2007) (stating it is "black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter" (citation omitted)); ***Gilleo***, 512 U.S. at 58 (noting a "special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to **speak** there" (emphasis in original and citations omitted)); ***see generally Perry Educ. Ass'n v. Perry Local Educators' Ass'n***, 460 U.S. 37 (1983). For example, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." ***Morse v. Frederick***, 551 U.S. 393, 404-05 (2007); ***accord Mahanoy***, 141 S. Ct. at 2044-45.

> words. And while B.L. used vulgarity, her speech was not obscene as this Court has understood that term. To the contrary, B.L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection.

Mahanoy, 141 S. Ct. at 2046-47 (citations omitted).

The right to free speech also includes the right to listen to or receive speech.[10] ***Snyder***, 562 U.S. at 459-60; ***Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.***, 425 U.S. 748, 756 (1976) (stating, "freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both" (formatting altered)); ***accord PG Pub. Co. v. Aichele***, 705 F.3d 91, 100 n.9 (3d Cir. 2013). Additionally, Pennsylvania recognizes a right to privacy that includes the right to be free from unwanted

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[10] In ***Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico***, 457 U.S. 853 (1982), the Supreme Court of the United States explained that

> the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. In keeping with this principle, we have held that in a variety of contexts the Constitution protects the right to receive information and ideas. This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the **sender's** First Amendment right to send them: The right of freedom of speech and press embraces the right to distribute literature, and necessarily protects the right to receive it. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.
>
> More importantly, the right to receive ideas is a necessary predicate to the **recipient's** meaningful exercise of his own rights of speech, press, and political freedom.

Pico, 457 U.S. at 866-67 (emphases in original, citations omitted, and formatting altered).

speech, which we discuss in further detail, *infra*. ***See Klebanoff***, 552 A.2d at 679.

Instantly, the alleged state action at issue, the trial court's order granting a permanent injunction, may change the analytical framework. For example, the analysis for a municipal ordinance is different than the analysis for a court injunction. ***Madsen***, 512 U.S. at 764; ***see also Gilleo***, 512 U.S. at 50-51 (discussing the two analyses for challenging a municipal ordinance regulating signs on private property).

Standard of Review

The "standard of review is *de novo* and our scope of review is plenary." ***S.B.***, 243 A.3d at 104 (citation omitted). "In conducting our inquiry, we acknowledge that in cases raising First Amendment issues an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." ***Id.*** (citation omitted and formatting altered). We next summarize the applicable law addressing the existence of a state action and resolving whether a state action is content-based or content-neutral.

Existence of a State Action

The First Amendment "prohibits only **governmental** abridgment of speech. [It] does not prohibit **private** abridgment of speech." ***Manhattan Comm'n Access Corp. v. Halleck***, 139 S. Ct. 1921, 1928 (2019) (emphases

in original and citations omitted); ***see also Crozer Chester Medical Ctr. v. May***, 506 A.2d 1377, 1380 (Pa. Super. 1986). Article I, section 7 of the Pennsylvania Constitution similarly prohibits governmental "intrusion upon an individual's right of free speech." ***W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.***, 485 A.2d 1, 6 (Pa. Super. 1984) (stating "there is no historical basis for concluding that the framers of the [Pennsylvania] Constitution intended to reach the owners of purely private property when they adopted the original free speech provisions of the Constitution" (footnote omitted and formatting altered)). Therefore, the threshold inquiry is whether a state action is at issue. ***Halleck***, 139 S. Ct. at 1930. A state action includes a court order that infringes upon speech and is issued at the request of a private party in a civil lawsuit. ***See, e.g.***, ***Madsen***, 512 U.S. at 764; ***New York Times Co. v. Sullivan***, 376 U.S. 254, 265 (1964). Based on the foregoing, we conclude that the instant trial court's order granting a permanent injunction constitutes state action.

Whether the Governmental Restriction on Speech is Content-Based or Content-Neutral

Next, we examine whether the state action restricting speech, such as a court order, is content-based or content-neutral. ***See Madsen***, 512 U.S. at 763; ***see generally United States v. O'Brien***, 391 U.S. 367 (1968). In determining whether a court order restricting speech is content-based or content-neutral, our Supreme Court provided the following guidance:

> It is well-established that content-based restrictions on speech are presumptively unconstitutional and are subject to the strict scrutiny standard, which requires the government to prove that the restrictions are narrowly tailored to serve a compelling state interest. Government regulation of speech is content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed.
>
> Determining whether a particular restriction on speech is content based or content neutral is not always a simple endeavor. A restriction is content based if either the face of the regulation or the purpose of the regulation is based upon the message the speaker is conveying.
>
> To the contrary, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.
>
> * * *
>
> The High Court has explained that the principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.

S.B., 243 A.3d at 104-06 (citations and footnote omitted and formatting altered); ***accord Reed v. Town of Gilbert***, 576 U.S. 155, 163 (2015) (stating, "government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed" (citations omitted and formatting altered)).

"The government's purpose of the speech restriction is the controlling consideration and, if the purpose is unrelated to the expression of content, the restriction is deemed neutral, even though the speech restriction may have an incidental effect on some speakers or messages, but not others."

S.B., 243 A.3d at 106 (citation omitted); ***see also Ward v. Rock Against Racism***, 491 U.S. 781, 791 (1989) (noting that "the government's purpose is the controlling consideration" (formatting altered)); ***accord Friends of Danny DeVito v. Wolf***, 227 A.3d 872, 902 (Pa. 2020). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is **justified** without reference to the content of the regulated speech." ***Ward***, 491 U.S. at 791 (emphasis in original, citations omitted, and formatting altered).

As our Supreme Court observed, "[d]etermining whether a particular restriction on speech is content based or content neutral is not always a simple endeavor." ***S.B.***, 243 A.3d at 105. For example,

> laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral. ***See, e.g.***, ***Members of City Council of Los Angeles v. Taxpayers for Vincent***, 466 U.S. 789, 804, 104 S. Ct. 2118, 2128, 80 L. Ed.2d 772 (1984) (ordinance prohibiting the posting of signs on public property "is neutral—indeed it is silent—concerning any speaker's point of view")

Turner Broadcasting Sys., Inc. v. F.C.C., 512 U.S. 622, 643 (1994) (***Turner***).

When an injunction restricts the expression of a speaker, that speaker may argue that because the restriction affects the speaker or message, the restriction must be content-based. Courts, however, have rejected that

argument. For example, in ***Madsen***, an injunction case, the United States Supreme Court rejected the petitioners' argument that because the court's injunction affected only them, the injunction must be content-based:

> We begin by addressing petitioners' contention that the state court's order, **because** it is an injunction that restricts only the speech of antiabortion protesters, is **necessarily** content or viewpoint based. Accordingly, they argue, we should examine the entire injunction under the strictest standard of scrutiny. **We disagree**. **To accept petitioners' claim would be to classify virtually every injunction as content or viewpoint based.** An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, **and perhaps the speech**, of that group. It does so, however, because of the group's **past** actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.

Madsen, 512 U.S. at 762 (citation omitted and emphases added).

In ***Schenck v. Pro-Choice Network of W. New York***, 519 U.S. 357 (1997), the High Court resolved a similar issue that also involved injunctive relief. The ***Schenck*** Court reasoned that "in assessing a First Amendment challenge, a court looks not only at the private claims asserted in the complaint, but also inquires into the governmental interests that are protected by the injunction, which may include an interest in public safety and order." ***Schenck***, 519 U.S. at 375 (citations omitted). The injunction at issue had a "cease and desist" provision that prevented petitioners from speaking with individuals who indicated they did not want to be "counseled" "in an attempt to persuade them not to get an abortion." ***Id.*** at 363-64. The petitioners

argued that the "cease and desist" provision was "content based, because it allow[ed] a clinic patient to terminate a protester's right to speak based on, among other reasons, the patient's disagreement with the message being conveyed." ***Id.*** at 384. Like the ***Madsen*** Court, the ***Schenck*** Court rejected the petitioners' argument because the injunction was directed only against the petitioners and was a direct result of the petitioners' past actions. ***Id.*** at 384-85; ***see also Bruni v. City of Pittsburgh***, 941 F.3d 73, 87 (3d. Cir. 2019) (holding that an **ordinance**, which banned congregating, patrolling, picketing, and demonstrating outside health care facilities, was content-neutral because regulations of those acts are "based on the manner in which expressive activity occurs, not its content").

In ***Klebanoff***, this Court affirmed a permanent injunction that prevented the defendants "from picketing or demonstrating in the street directly in front of" the plaintiff's home. ***Klebanoff***, 552 A.2d at 677. The ***Klebanoff*** Court first acknowledged that public streets and sidewalks are public fora. ***Id.*** at 678. The Court reasoned that because the permanent injunction banned all picketing of the plaintiff's "house without reference to the content or subject matter of the protest," the injunction was content-neutral. ***Id.*** at 678-79. The ***Klebanoff*** Court, as discussed *infra*, also acknowledged Pennsylvania's substantial interest in protecting an individual's right to privacy of one's home. ***Id.*** at 679. The Court summarized the evidence that the plaintiff's right to privacy was intruded upon and held the

injunction was constitutionally permissible. ***Id.***; ***see also Schenck***, 519 U.S. at 375 (holding that courts, when issuing an injunction, must examine the governmental interests involved).

In ***SmithKline***, this Court similarly addressed injunctive relief that banned the defendants from "picketing, demonstrating, leafleting, protesting or congregating" at the plaintiffs' homes, among other places.[11] ***SmithKline***, 959 A.2d at 356. The ***SmithKline*** Court noted that the injunction was like the injunction in ***Klebanoff*** and was similarly content-neutral:

> This means the speech is not regulated due to a disagreement with the message conveyed. A restriction on speech that is not content based is still considered neutral even if it might affect some speakers or messages and not others. The . . . injunction, on its face, does not seek to ban any subject matter from being protested. The purpose in enacting the restrictions is to prevent the excessive tactics used by the protesters, not to stifle the message itself.

Id. at 356 n.2 (citations omitted); ***see also id.*** at 357 (citing ***Madsen***, 512 U.S. at 765).[12]

But even if the court's order appears content-neutral on its face, we must determine whether "it is nevertheless a content-based regulation of

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[11] ***SmithKline*** also involved injunctive relief granted in favor of the plaintiffs' employer, as well as the individual plaintiffs, who were employees. ***SmithKline***, 959 A.2d at 356. For ease of discussion, when we refer to the plaintiffs, we refer to the individual plaintiffs.

[12] The defendants did not argue that the injunction was content-based, but the ***SmithKline*** addressed whether the injunction was content-based or content-neutral. ***Id.*** at 356 n.2

speech because it cannot be justified without reference to the content of the regulated speech." ***Reed***, 576 U.S. at 164 (explaining that, "our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys" (citation omitted and formatting altered)); ***see also Ward***, 491 U.S. at 791. The government's intent or motive is not a factor. ***Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.***, 502 U.S. 105, 117 (1991) (holding evidence of improper motive or illicit "intent is not the *sine qua non* of a violation of the First Amendment"). Having summarized the applicable law, we turn to the instant state action at issue.

The Instant Order is Facially Content-Neutral

Here, state action is involved, as the trial court issued, at Appellees' request, injunctive relief that specifically ordered Appellants to position the signs away from Appellees' property with the front of the signs not visible to Appellees. Order, 9/12/19, at 1; ***see, e.g.***, ***Madsen***, 512 U.S. at 764; ***Sullivan***, 376 U.S. at 265; ***Klebanoff***, 552 A.2d at 677. The trial court specified that the justification of the order is to protect Appellees' "right of residential privacy." Trial Ct. Op., 9/12/19, at 12.

Like the injunctions in ***SmithKline*** and ***Klebanoff*** that enjoined all picketing or demonstrating in front of the plaintiffs' homes, the instant injunction was also, on its face, content-neutral as it was "without reference to the content or subject matter" of the signs. ***See SmithKline***, 959 A.2d at 356 n.2; ***Klebanoff***, 552 A.2d at 678. Identical to the injunctions in ***SmithKline*** and ***Klebanoff***, the justification of the instant injunction was to ensure Appellees' constitutional right of residential privacy. ***See SmithKline***, 959 A.2d at 357-59; ***Klebanoff***, 552 A.2d at 679. The instant order, to paraphrase ***Ward***, serves a purpose unrelated to the content of the signs at issue. ***See Ward***, 491 U.S. at 791; ***see also Turner***, 512 U.S. at 643; ***S.B.***, 243 A.3d at 105-06. In sum, the trial court's order is facially content-neutral, as it is unrelated to the content of the speech. ***See S.B.***, 243 A.3d at 105-06.

However, under ***Reed***, we must also examine whether the trial court's injunction order, although "facially content neutral," can be "justified without reference to the content of the regulated speech." ***See Reed***, 576 U.S. at 164 (citation omitted and formatting altered). As set forth above, the trial court ordered that Appellants' signs face away from and not be otherwise visible to Appellees. In ***SmithKline***, the injunction barred the defendants from protesting within 100 feet of the plaintiffs' homes. ***See SmithKline***, 959 A.2d at 355. In ***Klebanoff***, the injunction enjoined the defendants from protesting in front of the plaintiff's home. ***See Klebanoff***, 552 A.2d at 677.

Both Courts justified the injunction on the basis that the plaintiffs' right to residential privacy was violated. ***See SmithKline***, 959 A.2d at 357-59; ***Klebanoff***, 552 A.2d at 679. Because a complete bar on protesting without reference to the content of the defendant's speech was held to be a content-neutral restriction, it follows that a similar restriction preventing Appellants' signs from being seen because it violated Appellees' right to residential privacy, is also content-neutral.[13] ***See SmithKline***, 959 A.2d at 356-59; ***Klebanoff***, 552 A.2d at 678-79, 682.

Furthermore, the United States Supreme Court has rejected Appellants' argument that because the injunction restricts speech that Appellees find offensive, the injunction must be content-based. ***See Madsen***, 512 U.S. at 762; ***accord Schenck***, 519 U.S. at 384; ***cf. Bruni***, 941 F.3d at 87. The ***Madsen*** Court, as discussed above, rejected the antiabortion protestors' argument that because the injunction restricted their speech, the injunction was "necessarily content or viewpoint based." ***Madsen***, 512 U.S. at 762. To accept that argument, the High Court ruled, "would be to classify virtually every injunction as content or viewpoint based" **even if** the injunction affects speech. ***Id.***; ***accord Schenck***, 519 U.S. at 384 (holding that an injunction's

[13] We acknowledge that the mode of expression in ***SmithKline*** and ***Klebanoff***, *i.e.*, picketing or demonstrating on public fora, differs from the instant mode of expression, *i.e.*, posting of signs on private property. ***See Gilleo***, 512 U.S. at 45. But our focus at this stage is whether the order is content-neutral or content-based. Whether the instant trial court's injunction passes constitutional muster is discussed *infra*.

"cease and desist" provision was content-neutral despite banning the speech of only antiabortion protestors). Therefore, we conclude Appellants' argument that the injunction is content-based is due no relief. We next address whether the trial court's injunction passes constitutional scrutiny.

4. Whether the Injunction, Even If Content-Neutral, Fails Scrutiny

Appellants lastly argue that even if the injunction is content-neutral, it still fails. Appellants' Brief at 39. Appellants assert that the injunction fails to further a significant governmental interest by distinguishing the three cases the trial court relied on: ***Frisby v. Schultz***, 487 U.S. 474 (1988), ***Klebanoff***, and ***Rouse Phila. Inc. v. Ad Hoc '78***, 417 A.2d 1248 (Pa. Super. 1979) (***Rouse***). ***Id.*** at 40-47.

Appellants also argue that the injunction, even if it furthers a significant governmental interest, is not narrowly tailored. ***Id.*** at 51. Appellants reason that the trial court's injunction cannot be both content-neutral and narrowly tailored. ***Id.*** Appellants assert that a content-neutral injunction "must leave open ample alternative means of communication." ***Id.*** at 53. In their view, the trial court's injunction did not leave Appellants those alternative means of communication. ***Id.*** Appellants point out that the right to free speech protects both the speaker's ability to convey their message and the speaker's ability to ensure the message reaches the intended recipients. ***Id.*** Appellants therefore reason that if they cannot post signs protesting Appellees' anti-Semitic behavior in a manner that can be seen by the intended recipients, *i.e.*,

Appellees, Appellants have no alternative means of communicating their message. ***Id.*** at 54-55.

Appellees counter that Appellants' signs are an "unwanted invasion of [their] privacy in the occupancy of their home." Appellees' Brief at 31. Appellees assert that all they see from the back of their home and backyard are Appellants' signs. ***Id.*** at 32. Appellees claim they stopped using their backyard and are afraid to go outside. ***Id.*** In Appellees' view, the trial court correctly adhered to the reasoning of ***Klebanoff*** and ***Rouse***. ***Id.*** at 33. Appellees contend that Appellants have ample alternatives means of communicating their speech. ***Id.*** at 35.

The trial court, relying on ***Klebanoff***, ***Rouse***, and ***Frisby***, reasoned that Appellants' actions violated Appellees' right to residential privacy. Trial Ct. Op., 9/12/19, at 9-12, R.R. at 626a-29a. Critically, the trial court asserted that its time, place, and manner restrictions were proper. ***Id.*** at 9, R.R. at 626a. In the trial court's view, its injunction was narrowly tailored because Appellants are "free to continue to post signs on [their] property with any message [they] deem[] appropriate so long as they do not target or face" Appellees' property. ***Id.*** at 11, R.R. at 628a. We next summarize the applicable law.

Background

Generally, governmental regulations of speech "that are unrelated to the content of speech are subject to an intermediate level of scrutiny because

in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." ***S.B.***, 243 A.3d at 105 (citation omitted). For example, a gag order may be constitutional if it complies with the well-settled ***O'Brien*** test.[14] ***See id.*** (summarizing the four-part ***O'Brien*** test).

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[14] In ***S.B.***, our Supreme Court addressed the constitutionality of a court order, specifically, a gag order that prohibited a party and her counsel from speaking publicly about the case. ***Id.*** at 100.

> A content-neutral regulation of speech passes constitutional muster if it satisfies the following four-part standard set forth by the High Court in ***United States v. O'Brien***, [391 U.S. 367 (1968)]: (1) the regulation was promulgated within the constitutional power of government; (2) the regulation furthers an important or substantial governmental interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.
>
> So long as the regulation of speech is not a means, subtle or otherwise, of exercising content preference, it is not presumed invalid.
>
> Restrictions on the time, place and manner of expression, whether oral, written or symbolized by conduct, are a form of a content-neutral regulation of speech. These restrictions may make it more difficult for an individual to engage in a desired speech-related activity by targeting, *inter alia*, the means of speech or the method of communication, but they do not target the content of the message ultimately conveyed. Time, place, and manner restrictions are valid, provided that they: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant governmental interest unrelated to speech; and (3) leave open ample alternative channels for communication of the information.

See S.B., 243 A.3d at 105-06 (most citations and footnote omitted); ***see also Gilleo***, 512 U.S. at 56-59 (rejecting the time, place, and manner restriction

An injunction, however, requires a "more stringent application of general First Amendment principles" than the ***O'Brien*** test. ***Madsen***, 512 U.S. at 765. In ***Madsen***, the United States Supreme Court explained why a court injunction was subject to greater scrutiny than a legislative ordinance:

> If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in ***Ward*** . . . , and similar cases. Given that the forum around the clinic is a traditional public forum, ***see Frisby*** . . . , we would determine whether the time, place, and manner regulations were narrowly tailored to serve a significant governmental interest.
>
> There are obvious differences, however, between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Injunctions, of course, have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred.
>
> We believe that these differences **require a somewhat more stringent** application of general First Amendment principles in this context. In past cases evaluating injunctions restricting speech, we have relied upon such general principles while also seeking to ensure that the injunction was no broader than necessary to achieve its desired goals. Our close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, that injunctive relief should

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on ordinance banning nearly all signs on private property because it failed to provide alternative mediums of communication).

> be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs. Accordingly, when evaluating a content-neutral injunction, **we think that our standard time, place, and manner analysis is not sufficiently rigorous**. We must ask instead whether the challenged provisions of the injunction **burden no more speech than necessary** to serve a **significant government interest**.

Id. at 764-65 (footnote and most citations omitted, formatting altered, and emphases added); ***accord SmithKline***, 959 A.2d at 356-57. We discuss ***Madsen*** in further detail, *infra*.[15]

Significant Governmental Interest of Residential Privacy

As the ***Madsen*** Court set forth above, an injunction must serve a significant governmental interest. Although the general rule is that the burden is on the viewer to avoid offensive speech, one exception to that general rule is when that speech is unwanted and uninvited in the viewer's home. ***Sorrell v. IMS Health Inc.***, 564 U.S. 552, 575 (2011) (holding that "personal privacy even in one's own home receives ample protection from the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors" (citation omitted and formatting altered)). This is known as the captive audience doctrine. ***Snyder***, 562 U.S. at 459 (explaining that "as a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech" (formatting altered)). The protection of one's personal, residential privacy, *i.e.*, a captive audience,

[15] ***Madsen*** was filed after this Court's decisions in ***Klebanoff*** and ***Rouse***.

is considered a significant governmental interest, which the ***SmithKline*** and ***Klebanoff*** Courts recognized exists in Pennsylvania. ***See Frisby***, 487 U.S. at 484; ***SmithKline***, 959 A.2d at 357; ***Klebanoff***, 552 A.2d at 679, 681; ***cf. Gilleo***, 512 U.S. at 54 (noting that the municipal ordinance that nearly completely banned signs posted on private property, almost "foreclosed a venerable means of communication"; the signs at issue, however, were not directed to a captive audience).

In ***Frisby***, the plaintiffs were anti-abortion activists who picketed on a public street outside a doctor's home in the town of Brookfield, Wisconsin. ***Frisby***, 487 U.S. at 476. Subsequently, the town enacted an ordinance banning all residential picketing, specifically, "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield."[16] ***Id.*** at 477 (citation omitted). The ordinance stated that its primary purpose was

[16] The ***Frisby*** Court defined "picketing" as "posting at a particular place, a characterization in line with viewing the ordinance as limited to activity focused on a single residence." ***Frisby***, 487 U.S. at 482. "Picketing" has also been defined as follows:

> The demonstration by one or more persons outside a business or organization to protest the entity's activities or policies and to pressure the entity to meet the protesters' demands; esp., an employees' demonstration aimed at publicizing a labor dispute and influencing the public to withhold business from the employer.

Black's Law Dictionary (11th ed. 2019). The conduct at issue in ***Rouse*** falls within this definition.

> the protection and preservation of the home' through assurance that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy [and because] the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants and has as its object the harassing of such occupants.

Id. (citations omitted and formatting altered).[17]

The ***Frisby*** Court explained that a significant government interest is the protection of residential privacy:

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. Our prior decisions have often remarked on the unique nature of the home, the last citadel of the tired, the weary, and the sick, and have recognized that preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.
>
> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. That we are often captives outside the sanctuary of the home and subject to objectionable speech does not mean we must be captives everywhere. Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid

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[17] The plaintiffs sued the town and other defendants, and moved for preliminary injunctive relief, which the district court granted. ***Frisby***, 487 U.S. at 478. The appellate court ultimately affirmed, and the High Court granted the defendants' petition for *certiorari*. ***Id.*** at 479.

Initially, the ***Frisby*** Court held that the speech at issue was on an issue of public concern, and therefore presumptively protected speech. ***Id.*** The ***Frisby*** Court then identified the forum at issue, which was the town's public streets. ***Id.*** at 479-80. The ***Frisby*** Court did not challenge the lower courts' prior holdings that the ordinance was content-neutral. ***Id.*** at 482. The ***Frisby*** Court therefore examined whether the ordinance was narrowly tailored to serve a significant governmental interest. ***Id.***

> intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.
>
> This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas. In all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes. In [***Schneider v. State of New Jersey (Town of Irvington)***, 308 U.S. 147, 162-63 (1939)], for example, in striking down a complete ban on handbilling,[18] we spoke of a right to distribute literature only to one willing to receive it. Similarly, when we invalidated a ban on door-to-door solicitation in [***Martin v. Struthers***, 319 U.S. 141 (1943)], we did so on the basis that the homeowner could protect himself from such intrusion by an appropriate sign that he is unwilling to be disturbed. We have never intimated that the visitor could insert a foot in the door and insist on a hearing. There simply is no right to force speech into the home of an unwilling listener.

Frisby, 487 U.S. at 484-85 (some citations omitted and formatting altered).[19]

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[18] Handbilling is the distribution, by hand, of literature, such as advertisements. ***Schneider***, 308 U.S. at 154.

[19] The ***Frisby*** Court therefore held as follows:

> The First Amendment permits the government to prohibit offensive speech as intrusive when the captive audience cannot avoid the objectionable speech. The target of the focused picketing banned by the Brookfield ordinance is just such a captive. The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Thus, the evil of targeted residential picketing, the very presence of an unwelcome visitor at the home, is created by the medium of expression itself. Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored.

Id. at 487-88 (citations omitted and formatting altered).

We have previously stated the facts of ***Klebanoff***, which provided guidance in determining whether a governmental restriction on speech is content-neutral. In addressing the government's interest, the ***Klebanoff*** Court held that "courts of this Commonwealth can enjoin activity which violates an individual's residential privacy, and that the injunction in this case, which restricts the place where the expressive activity can occur, is a proper time, place and manner restriction." ***Klebanoff***, 552 A.2d at 678. Relying on ***Frisby***, ***supra***, the ***Klebanoff*** Court recognized that only "weighty and substantial reasons" can justify a governmental restriction on the use of public fora, such as the residential street at issue. ***Id.***

The ***Klebanoff*** Court noted that the

> this injunction serves to protect a substantial interest recognized in both Pennsylvania law, and in the United States Constitution. It protects what has been variously called the individual's right of privacy, the right to be free from intrusion upon one's solitude or seclusion, or the right to be left alone.
>
> The public's interest in protecting the well-being, tranquility, and privacy of the home is of the highest order. The home has been called the last citadel of the tired, the weary, and the sick. The home serves to provide, among other things, a [refuge] from today's complex society where we are inescapably captive audiences for many purposes. ***Rowan v. United States Post Office***, 397 U.S. 728, 738, 90 S. Ct. 1484, 1491, 25 L. Ed.2d 736 (1970). Normally, outside of the home, consonant with the Constitution, we expect individuals to avoid unwanted speech, simply by averting their eyes. But such avoidance within the walls of one's own house is not required. Therefore, the courts have repeatedly held that individuals are not required to welcome unwanted speech and the State may act to avoid such intrusions into the privacy of the dwelling place.

Id. at 679 (formatting altered and most citations omitted). In sum, Pennsylvania's right to privacy includes the right to not be forced to listen to unwanted and uninvited speech.[20] ***See id.***; ***see also Sorrell***, 564 U.S. at 575; ***Snyder***, 562 U.S. at 459-60; ***Frisby***, 487 U.S. at 484-85, 488; ***Pico***, 457 U.S. at 866-67.

The ***SmithKline*** Court similarly affirmed a permanent injunction that prevented the defendants from picketing within 100 feet of the plaintiffs' homes. ***SmithKline***, 959 A.2d at 359. The Court, citing ***Frisby*** and ***Klebanoff***, acknowledged Pennsylvania's governmental interest in protecting an individual's residential privacy. ***See id.*** at 357. The ***SmithKline*** Court noted that the defendants had graffitied the plaintiffs' homes, glued the door locks shut, used bullhorns, and shouted obscenities and threats, among other actions. ***Id.*** at 358-59. Therefore, the ***SmithKline*** Court concluded, "ample evidence" of record existed that the defendants had "intruded upon the privacy interests" of the plaintiffs.[21] ***Id.*** at 359.

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[20] The ***Klebanoff*** Court concluded that the record established that the picketing of the plaintiff's home significantly intruded upon the plaintiffs' privacy. ***Klebanoff***, 552 A.2d at 679-80. In the Court's view, the record established that the picketing caused emotional stress to the plaintiff's family, impacted the quiet enjoyment of their home, and interfered with their holidays and family routines. ***Id.*** After noting that "[e]ven a complete ban on all expressive activity in a traditional public forum is permissible if substantial privacy interests are being invaded in an essentially intolerable manner," the Court held that the injunction was constitutionally permissible. ***Id.*** at 680 (citation omitted).

[21] In contrast, ***Rouse*** did not address the governmental interest in residential privacy. In ***Rouse***, the plaintiff obtained a temporary restraining order

In ***Madsen***, the United States Supreme Court addressed a similar state court injunction involving targeted speech and the governmental interest in residential privacy. In ***Madsen***, pro-life activists "picketed and demonstrated [on] the public street" that gave access to a Florida abortion clinic. ***Madsen***, 512 U.S. at 758. A Florida state court permanently enjoined the activists from "blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic." ***Id.*** The clinic, however, sought a broader injunction because the activists, among other things, had continued to impede access to the clinic and had picketed in front of the clinic employees' private residences. ***Id.*** at 758-59.

The trial court agreed and enjoined the activists from entering a 36-foot buffer zone surrounding the clinic. ***Id.*** at 768-69. This buffer zone included the public access street to the clinic as well as private property surrounding the clinic. ***Id.*** at 769. The amended injunction also prohibited the activists from using "images observable to or within earshot of the patients" inside the clinic. ***Id.*** at 760. The trial court also enjoined the activists from "picketing,

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against the defendant from picketing from within the public areas inside a shopping mall, the entrance to a department store located in the shopping mall, an exterior courtyard area, and the sidewalk surrounding the shopping mall. ***Rouse***, 417 A.2d at 1251-52. The trial court held the defendant in contempt of the order. ***Id.*** at 1248. The defendant appealed and argued, among other things, that the order violated his "First Amendment rights of freedom of speech and expression." ***Id.*** at 1252. The ***Rouse*** Court disagreed because the order did not limit the defendant's "expression of the ideas" but instead limited the conduct in which the defendant chose to express those ideas. ***Id.*** at 1254.

demonstrating, or using sound amplification equipment within 300 feet of the [private] residences of clinic staff." ***Id.*** at 774.

The ***Madsen*** Court initially held that the amended injunction was content-neutral.[22] ***Id.*** at 763-64. It also agreed that the activists' picketing was "directed primarily at patients and staff of the clinic." ***Id.*** at 769 (distinguishing between generally disseminated communication such as handbilling and solicitation that may not be banned in public fora, and focused picketing, which can be banned).

With respect to the private property encompassed by the 36-foot buffer zone, the ***Madsen*** Court invalidated that part of the injunction. ***Id.*** at 771. The ***Madsen*** Court reasoned that there was no "evidence that [the activists] standing on the private property have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation . . . ." ***Id.*** The ***Madsen*** Court therefore held that the 36-foot buffer zone, to

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[22] Specifically, the ***Madsen*** Court reasoned as follows:

> That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group whose conduct violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.

Madsen, 512 U.S. at 763. Thus, an injunction enjoining the communicating of a particular viewpoint, *e.g.*, pro-life or anti-racism, does not presumptively render the instant trial court's injunction content or viewpoint based. ***See id.***

the extent it applied to the private property surrounding the clinic, "burdens more speech than necessary to protect access to the clinic." ***Id.***

The ***Madsen*** Court also overturned the portion of the trial court's injunction that prohibited the activists from using "images observable" to any patients inside the clinic:

> Clearly, threats to patients or their families, however communicated, are proscribable under the First Amendment. But rather than prohibiting the display of signs that could be interpreted as threats or veiled threats, the state court issued a blanket ban on all "images observable." This broad prohibition on all "images observable" burdens more speech than necessary to achieve the purpose of limiting threats to clinic patients or their families. Similarly, if the blanket ban on "images observable" was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by "images observable" inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment.

Id. at 773.

With respect to the portion of the trial court's injunction that prohibited the anti-abortion activists from picketing within a 300 feet zone of the clinic employees' private homes, the ***Madsen*** Court held that the zone was too large:

> As for the picketing, our prior decision upholding a law banning targeted residential picketing remarked on the unique nature of the home, as the last citadel of the tired, the weary, and the sick. We stated that the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.

> But the 300–foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in ***Frisby***. The ordinance at issue [in ***Frisby***] made it unlawful for any person to engage in picketing before or about the residence or dwelling of any individual. The prohibition was limited to focused picketing taking place solely in front of a particular residence. By contrast, the 300–foot zone would ban general marching through residential neighborhoods, or even walking a route in front of an entire block of houses. The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result.

Id. at 775 (citations omitted and formatting altered).[23]

In sum, the ***Madsen*** Court struck "down as unconstitutional the 36–foot buffer zone as applied to the private property [around] the clinic, the 'images observable' provision, . . . and the 300–foot buffer zone around the [clinic employees' private] residences, because [those] provisions [swept] more broadly than [was] necessary to accomplish the permissible goals of the injunction." ***Id.*** at 776. Having summarized the applicable law, we next address the instant trial court's injunction.

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[23] We comment that the ***Madsen*** Court's reasoning must also be considered in light of the heightened scrutiny of an injunction, as compared to the ordinance in ***Frisby***. ***See Madsen***, 512 U.S. at 764-65. We add that ***Madsen*** involved targeted picketing to a private residence, as compared to the untargeted signs at issue in ***Gilleo***. ***See Gilleo***, 512 U.S. at 55 (citing and quoting ***Frisby*** for the proposition that "picketing focused upon individual residence is 'fundamentally different from more generally directed means of communication that may not be completely banned in residential areas,'" *i.e.*, signs (citation omitted)).

The Instant Trial Court Did Not Apply the Heightened Scrutiny Standard in Enjoining Appellants' Targeted Speech of Appellees

With respect to Appellants' argument that the injunction does not further a significant government interest, they are incorrect. In ***Frisby***, the United States Supreme Court remarked that all members of the community have a right to residential privacy, which includes the right to "enjoy within their own walls . . . an ability to avoid . . . unwanted speech . . . ." ***See Frisby***, 487 U.S. at 484-85. Pennsylvania has similarly recognized this right and that courts may enjoin any activity violating an individual's right to residential privacy. ***See Klebanoff***, 552 A.2d at 678; ***accord SmithKline***, 959 A.2d at 357-58. A right to residential privacy may be violated when a listener is subjected to targeted speech, including picketing and protesting. ***See Frisby***, 487 U.S. at 484-85; ***Klebanoff***, 552 A.2d at 678-80; ***accord SmithKline***, 959 A.2d at 359. As previously set forth above, Appellant Husband testified that Appellants' signs targeted Appellees. Trial Ct. Op., 9/12/19, at 8-9, R.R. at 625a-26a (citations omitted); ***accord*** Ex. E to Appellants' Mot. for Summary J., at 41, 47, 54, 61, R.R. at 244a, 250a, 257a, 264a.

Because an injunction could further the significant governmental interest in Appellees' right to residential privacy, the trial court should have applied the heightened, more rigorous standard under ***Madsen*** in tailoring its injunction. ***See Madsen***, 512 U.S. at 765 (holding, "when evaluating a content-neutral injunction, we think that our standard time, place, and

manner analysis is not sufficiently rigorous"). The instant trial court, however, instead applied the time, place, and manner test in justifying its injunction. ***See*** Trial Ct. Op. & Order, 9/12/19, at 9, R.R. at 626a. Like the ***Madsen*** Court, which closely reviewed the terms of the state court's injunction to the extent it impacted private property, including the clinic employees' right to residential privacy, the instant trial court should have also similarly tailored its injunction to ensure it "burden[ed] no more speech than necessary to serve" Pennsylvania's right to residential privacy. ***See Madsen***, 512 U.S. at 765; ***see also Pap's A.M.***, 812 A.2d at 605 (noting that Pennsylvania's right to freedom of expression is broader than the First Amendment). Therefore, because the trial court applied an incorrect legal standard, we must vacate the trial court's judgment and amended injunction and remand for further proceedings.[24] ***See Madsen***, 512 U.S. at 765. For these reasons, we vacate the judgment, and vacate the injunction.

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[24] When a trial court has applied an incorrect legal standard, we should vacate and remand. For example, in ***In re M.B.***, 228 A.3d 555 (Pa. Super. 2020), because the trial court improperly held the appellant to a higher standard of proof, the ***M.B.*** Court vacated the order and remanded for further proceedings. ***M.B.***, 228 A.3d at 577; ***see also Barak v. Karolizki***, 196 A.3d 208, 221, 224 (Pa. Super. 2018) (vacating and remanding to have trial court apply correct law when it improperly applied the preliminary injunction standard to *lis pendens*); ***New Milford Twp. v. Young***, 938 A.2d 562, 566 (Pa. Cmwlth. 2007) (vacating permanent injunction and remanding because trial court failed to hold the hearing required by law).

The same principle also binds this Court. In ***Commonwealth v. Clay***, 64 A.3d 1049 (Pa. 2013), our Supreme Court held that when "a reviewing court applies the incorrect legal standard, our court generally will remand the matter with appropriate directions." ***Clay***, 64 A.3d at 1057 (citation omitted).

Because the Superior Court in ***Clay*** applied the incorrect standard of review, our Supreme Court "reverse[d] the decision of the Superior Court and remand[ed] this matter to the Superior Court for reconsideration of [the] claims under the appropriate abuse of discretion standard." ***Id.***

Federal courts have similarly remanded to have the lower courts apply the proper legal standard. ***See, e.g.***, ***Roberts v. City of Honolulu***, 938 F.3d 1020, 1022 (9th Cir. 2019) (explaining that "[b]ecause we agree that the district court did not apply the correct legal standard . . . , we vacate and remand for application of the correct legal standard" (formatting altered)); ***Genband US LLC v. Metaswitch Networks Corp.***, 861 F.3d 1378, 1381 (Fed. Cir. 2017) (holding that "where it is not evident that a district court has applied the correct legal standard in exercising its discretion, we may vacate and remand for the district court to do so in the first instance, especially where further factual findings may be warranted under the correct legal standard" (citation omitted and formatting altered)); ***G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.***, 822 F.3d 709, 715 (4th Cir. 2016) (stating, "because we conclude that the district court used the wrong evidentiary standard in assessing [the] motion for a preliminary injunction, we vacate its denial and remand for consideration under the correct standard" (formatting altered)), *vacated and remanded*, 137 S. Ct. 1239 (2017); ***Holton v. City of Thomasville Sch. Dist.***, 425 F.3d 1325, 1356 (11th Cir. 2005) (remanding for reconsideration because "we conclude that the court failed to apply the correct legal standard and that this error tainted its factual findings on this issue"); ***see also Pullman-Std. v. Swint***, 456 U.S. 273, 291 (1982) (explaining that "when an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings" (formatting altered)); ***Willis v. Town of Marshall, N.C.***, 426 F.3d 251, 267 (4th Cir. 2005) (vacating district court's denial of preliminary injunction and remanding for reconsideration because district court failed to address equal protection claim); ***Hamad v. Woodcrest Condominium Ass'n***, 328 F.3d 224, 233-34 (6th Cir. 2003) (rejecting argument that appellate court should issue preliminary injunction despite district court's failure to apply the correct law); ***Real Truth About Obama, Inc. v. Federal Election Comm'n***, 796 F. Supp.2d 736, 744 (E.D. Va. 2011) (construing High Court's vacate and remand mandate as instruction to consider whether subsequent Supreme Court caselaw would alter its holding).

For example, in ***Lair v. Bullock***, 798 F.3d 736 (9th Cir. 2015), the district court "applied the wrong legal standard" in granting a permanent injunction resolving a First Amendment issue regarding campaign contributions. ***Lair***, 798 F.3d at 740, 749. Because the district court applied an incorrect legal

Judgment vacated. Trial court's amended October 11, 2019 order and September 12, 2019 order granting injunctive relief vacated and we remand for further proceedings.[25] Jurisdiction relinquished.

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standard, the ***Lair*** Court held that the district court "abused its discretion when it entered a permanent injunction, and we remand for the district court to apply the correct standard." ***Id.*** at 748 (footnote omitted); ***accord Stormans, Inc. v. Selecky***, 586 F.3d 1109, 1142 (9th Cir. 2009) (vacating preliminary injunction involving First Amendment issue and remanding to have district court apply the "rational basis level of scrutiny" because the district court "abused its discretion in applying an erroneous legal standard of review"). Similarly, in ***Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n***, 263 F.3d 379 (4th Cir. 2001) (***Virginia Soc'y***), *overruled on other grounds by* ***The Real Truth About Abortion, Inc. v. Federal Election Comm'n***, 681 F.3d 544 (4th Cir. 2012), the Circuit Court vacated the district court's nationwide injunction regarding a First Amendment issue because it was too broad and remanded for the district court to amend it. ***Virginia Soc'y***, 263 F.3d at 394.

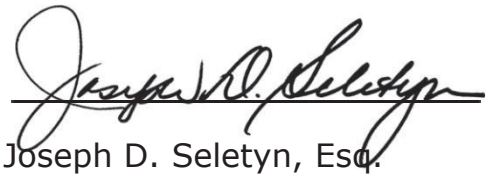
Here, similar to the district courts in ***Lair*** and ***Stormans***, as well as the trial court in ***M.B.***, and this Court in ***Clay***, the instant trial court applied an incorrect legal standard. ***See Clay***, 64 A.3d at 1057; ***M.B.***, 228 A.3d at 577; ***accord Lair***, 798 F.3d at 748; ***Stormans***, 586 F.3d at 1142. As set forth herein, the instant trial court erroneously applied the less strict "time, place, and manner" ***O'Brien*** test in justifying its injunction and did not apply the heightened, stricter ***Madsen*** test. Because the trial court applied an incorrect legal standard, we remand "for the [trial] court to apply the correct standard." ***See Lair***, 798 F.3d at 748; ***Stormans***, 586 F.3d at 1142; ***Clay***, 64 A.3d at 1057; ***M.B.***, 228 A.3d at 577; ***cf. Virginia Soc'y***, 263 F.3d at 394. Upon application of the correct legal standard, the trial court may decide to deny relief or if it grants relief, may tailor a properly narrowed injunction that may withstand constitutional scrutiny.

[25] Although the Concurring and Dissenting Statement agrees that the trial court applied an incorrect legal standard, it concludes that the relief ordered by the trial court burdened no more speech than necessary and results in harmless error. Concurring and Dissenting Statement at 8. Considering the impact of the instant decision on fundamental constitutional rights, including the First Amendment, we cannot agree that the error was harmless. Additionally, we conclude that the application of an erroneous legal standard requires remand for a proper determination by the trial court. ***See*** 17

Judge Colins joins the opinion.

Judge Stabile files a concurring and dissenting opinion.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/18/2022

Standard Pennsylvania Practice 2d § 92:103 (remand to correct errors of law) (citing ***In re J. F.***, 408 A.2d 1382, 1387 (Pa. 1979)). The trial court should be given the opportunity to correct its error as it is not for this Court to presuppose what the trial court's decision would be upon applying the proper legal standard. ***See In re B.S.***, 861 A.2d 974, 977 (Pa. Super. 2004) (remanding with instructions for the trial court to apply the correct legal standard in an adoption matter); ***cf. Osial v. Cook***, 803 A.2d 209, 215 (Pa. Super. 2002) (noting that although this Court could correct the error, the better course of action was to remand for the trial court to decide the matter).

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FREDERICK E. OBERHOLZER, JR AND DENISE L. OBERHOLZER	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
SIMON AND TOBY GALAPO	:	
Appellants	:	No. 794 EDA 2020

Appeal from the Judgment Entered April 1, 2020
In the Court of Common Pleas of Montgomery County
Civil Division at No: No. 2016-11267

BEFORE: STABILE, J., NICHOLS, J., and COLINS, J.*

CONCURRING/DISSENTING OPINION BY STABILE, J.:

FILED APRIL 18, 2022

I concur fully with the Majority's able discussion and summary of applicable legal principles in its analysis of this case. I, however, respectfully dissent from the Majority's holding to vacate the trial court's judgment and amended injunction and to remand this case to the trial court with direction to reconsider its injunctive remedy because it applied an incorrect standard. I believe that to be unnecessary because the relief ordered by the trial court comports with the applicable standard governing content-neutral injunctions that have the effect of restricting speech.

As the Majority correctly notes, the Court in ***Madsen v. Women's Health Center, Inc.***, 512 U.S. 753 (1994), recognized that the standard

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* Retired Senior Judge assigned to the Superior Court.

time, manner and place analysis for assessing the constitutionality of content-neutral *regulations* is not the appropriate test when assessing the constitutionality of a content-neutral *injunction*. The ***Madsen*** Court reasoned that a higher level of scrutiny is required when assessing injunctions (as opposed to ordinances) that affect content-neutral speech because injunctions carry greater risks of censorship and discrimination, since they are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. ***Id.*** (citing ***United States v. W.T. Grant Co.,*** 345 U.S. 629, 632-633 (1953)). Therefore, because the standard time, place, and manner analysis is not sufficiently rigorous to assess the constitutionality of an injunction that affects content-neutral speech, the challenged provisions of such an injunction must be examined under the higher standard of whether the injunction burdens no more speech than necessary to serve a significant government interest. ***Madsen***, ***supra***.

To ascertain what limits, if any, may be placed on protected speech, the Court often has focused on the "place" of that speech, considering the nature of the forum the speaker seeks to employ. ***Frisby v. Schultz,*** 487 U.S. 474, 479 (1988). The Court's cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property at issue." ***Id.*** (citing ***Perry Education Ass'n. v. Perry Local Educators' Ass'n.,*** 460 U.S. 37, 44 (1983)). With respect to the home, it is well-established that the government has a significant interest in protecting

the privacy of a person's home. "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." ***Frisby,*** 487 U.S. at 484 (citing ***Carey v. Brown,*** 447 U.S. 455, 471 (1980)). One important aspect of residential privacy is protection of the unwilling listener. A special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. ***Frisby,*** 487 U.S. at 485.[1] Thus, the Court repeatedly has held that individuals are not required to welcome unwanted speech into their own homes, and that the government may protect this freedom. ***Id.*** In the present case, it is not disputed that the object of the trial court's injunction was to address Appellants' actions that were unlawfully interfering with Appellees' privacy interest in their home by the intentional targeting and intrusion of anti-hate and anti-racist messages into Appellees' home. Appellant's husband candidly admitted that the placement of the signs in the rear of their yard facing Appellees' home was meant to protest behavior which he perceived as being racist towards himself, his wife, and his family. The trial court took a very measured and narrow approach to fashioning its

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[1] ***Frisby*** addressed the validity of a township *ordinance* that prohibited picketing before or about the residence or dwelling of any individual. Although the point has been made that a higher level of scrutiny is warranted when examining an injunction as opposed to an ordinance, it would seem ***Frisby***'s recognition of the special protection afforded unwanted intrusions in one's home when examining an ordinance is more compelling in the context of examining the constitutionality of an injunction restricting speech.

injunction to protect Appellees' privacy interest in their home by ordering only that the signs be positioned so as not to face Appellees' property. When this initial directive proved ineffective because the messages nonetheless could be read through the back of the signs, the court entered an amended injunction (now on appeal) ordering that the sign material be opaque so that the messages could not be seen even when the signs were turned away from Appellees' home. The trial court did not ban or seek to modify any content of the offending signs. It did not limit the number of signs or the number of messages that could be posted. No restriction was placed on the time when the signs could be placed, the location of the signs upon Appellants' property, or who may see the signs other than Appellees. In sum, the only restraint the court imposed upon Appellants' personal protest against Appellees was to construct the signs of opaque material and to face the signs away from Appellees' home. In my opinion, the trial court took the most conservative approach to enjoining Appellants' conduct that burdened no more speech than necessary to serve a significant government interest to address the unwanted messaging targeted at Appellees that could be seen from within the privacy of their home. Upon review of the court's amended injunction, I cannot fathom a more narrowly tailored remedy under the more stringent standard not to burden speech any more than necessary than that ordered by the trial court. Under these circumstances, I would conclude that the trial court's improper reliance upon a time, place and manner standard to fashion its injunctive

remedy was harmless error not warranting a remand. I, therefore, disagree with that part of the Majority's decision to vacate the trial court's judgment and injunction so that the remedy ordered may be examined under the stricter standard of ***Madsen***. It is my opinion that standard already has been met.

I find the cases cited by the Majority, whereby it feels it has no choice but to order a remand, to be distinguishable from the present matter. ***See*** Majority Opinion at 51, n.24 ("[w]hen a trial court has applied an incorrect legal standard, we should vacate and remand."). While I cannot quibble with the general proposition that a remand ordinarily is in order when an incorrect legal standard is employed, I do not find a remand necessary where the error here is harmless, since the injunctive remedy ordered by the trial court comports with the ***Madsen*** standard. Nowhere in the cases cited by the Majority do I find a mandate for remand where the error is harmless. In fact, in the lone Pennsylvania Supreme Court case cited by the Majority, ***Commonwealth v. Clay***, 64 A.3d 1049 (Pa. 2013), discussed more fully, *infra,* it was the Court's statement that when "a reviewing court applies the incorrect legal standard, our court **generally** will remand the matter with appropriate directions." ***Id.*** at 1057 (emphasis added). This statement does not compel a remand every time an error is made in the standard employed.

In the first of two Superior Court cases cited by the Majority, ***In re M.B.***, 228 A.3d 555 (Pa. Super. 2020), the trial court expunged the record of M.B.'s Section 302 commitment. In its accompanying opinion, the trial court

explained that the PSP "bore the burden of establishing *via* clear and convincing evidence that M.B.'s commitment was sufficient and complied with the Mental Health Procedures Act." This statement of the law was incorrect, since the trial court erroneously held PSP to a higher standard of proof than the law mandates. This Court therefore vacated the portion of the trial court's order that expunged the record of M.B.'s Section 302 commitment. Upon remand, with the correct standard employed, it was possible the PSP could prevail, thus the error was not harmless.

In ***Barak v. Karolizki***, 196 A.3d 208, 222 (Pa. Super. 2018), wherein a *lis pendens* was filed against a piece of real estate, the trial court applied the wrong legal test — namely, the standard for a preliminary injunction — and ordered the court clerks to remove the *lis pendens* from their judgment index. To properly determine whether a *lis pendens* notice should be stricken from judgment indices, we noted our appellate courts have developed a two-part test; step one is to ascertain whether title is at issue in the pending litigation. ***Id.*** (citing ***In re: Foremost Industries, Inc. v. GLD****,* 156 A.3d 318, 322 (Pa. Super. 2017)). If this first prong is satisfied, the analysis proceeds to a second step where the trial court must balance the equities to determine whether (1) the application of the doctrine is harsh or arbitrary and (2) whether the cancellation of the *lis pendens* would result in prejudice to the non-petitioning party. ***Id.*** We remanded for the trial court to apply step two of the *lis pendens* test having found that the first step already was satisfied.

It is obvious that when comparing the erroneous standard used by the trial court with the correct standard that a wholly different result could be reached. The error was not harmless.

In ***Clay***, ***supra***, our Supreme Court considered whether this Court applied an incorrect standard of review with respect to a claim that the verdict was against the weight of the evidence. This Court had held the trial court's decision was an abuse of discretion and vacated Appellees' convictions. The Supreme Court concluded that we abused our discretion by employing an incorrect standard of review by erroneously substituting our own conclusions for those of the jury and the trial court. The Court observed that it was evident from the Superior Court's opinion that the decision was not based on a determination that the trial court exceeded its limits of judicial discretion or invaded the province of the jury. This Court simply disagreed with the jury's verdict and improperly substituted its own conclusions therefor. Accordingly, the Supreme Court reversed and ordered a remand for reconsideration under the proper standard. The error by this Court was not harmless. The trial court's exercise of discretion in determining whether the evidence was against the weight of the evidence, although different from how this Court may view the evidence, could very

well be affirmed as within the trial court's discretion upon remand. The error was not harmless.[2]

On the other hand, our Supreme Court has on at least one occasion declined to order a remand where the wrong legal standard was applied, opting instead to address the error itself. In ***Commonwealth v. Widmer***, 744 A.2d 745 (Pa. 2000), the Supreme Court concluded that this Court improperly merged the standard of review for a weight of the evidence claim with the standard of review for a sufficiency of the evidence claim. Given this error, the Supreme Court could not then accept this Court's assessment of the trial court's exercise of discretion. In fashioning a remedy to address this error, the Supreme Court held

> Normally where the reviewing court applies the incorrect legal standard our court will remand the matter with appropriate directions. However, given the fact that the parties in this case have already been through the appellate process twice, in the interest of justice we will review the question of whether the trial court abused its discretion in awarding a new trial on the grounds that the verdict was against the weight of the evidence.

Id. at 752-753. Similarly, here the parties have expended great time and energy litigating this dispute between them with the trial court issuing an injunction and an amended injunction. The material facts are not in dispute.

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[2] For sake of brevity, I do not review individually the federal cases cited by the Majority, which are only persuasive authority to this Court, as I find them similarly distinguishable.

Review of the amended injunction under the correct standard is as a matter of law. A more narrow injunction cannot be fashioned that would burden speech more than necessary to address Appellants' unwanted intrusion of messaging into the Appellees' home. In the interests of justice, I believe we too may review the scope of the amended injunction to decide as a matter of law whether the limited injunction granted by the trial court comports with the ***Madsen*** standard.

I previously stated my belief that while the trial court improperly looked to a time, manner and place analysis in coming to the injunctive relief it ordered, the relief nonetheless burdened no more speech than necessary to serve the significant government interest in protecting the privacy of the Appellees' home. As such, I do not believe a remand is necessary to come to the same conclusion and therefore, any error in the standard used was harmless. I therefore respectfully dissent from that part of the Majority's decision to vacate the judgment and amended injunction in order to remand this matter for a determination under the ***Madsen*** standard.

FREDERICK E. OBERHOLZER, JR AND DENISE L. OBERHOLZER	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
SIMON AND TOBY GALAPO	:	
Appellant	:	No. 794 EDA 2020

Appeal from the Judgment Entered April 1, 2020
In the Court of Common Pleas of Montgomery County Civil Division at No(s): No. 2016-11267

BEFORE: STABILE, J., NICHOLS, J., and COLINS, J.*

ORDER

AND NOW, this 5th day of April 2022, Appellees' application to convert the March 7, 2022 non-precedential decision in this matter to a precedential opinion is hereby GRANTED. The March 7, 2022 memorandum and the corresponding concurring and dissenting memorandum are hereby withdrawn.

PER CURIAM

* Retired Senior Judge assigned to the Superior Court.

FREDERICK E. OBERHOLZER, JR AND DENISE L. OBERHOLZER	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
SIMON AND TOBY GALAPO	:	
Appellant	:	No. 794 EDA 2020

Appeal from the Judgment Entered April 1, 2020
In the Court of Common Pleas of Montgomery County Civil Division at No(s): No. 2016-11267

BEFORE: STABILE, J., NICHOLS, J., and COLINS, J.*

CORRECTED ORDER

AND NOW, this 5th day of April 2022, Appellees' application to convert the March 7, 2022 non-precedential decision in this matter to a precedential opinion is hereby GRANTED. The March 7, 2022 memorandum and the corresponding concurring and dissenting statement are hereby withdrawn.

PER CURIAM

* Retired Senior Judge assigned to the Superior Court.

APPENDIX “G”

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

FREDERICK E. OBERHOLZER, JR. AND DENISE L. OBERHOLZER,	:	No. 154 MAL 2022
Respondents	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
SIMON AND TOBY GALAPO,	:	
Petitioners	:	

ORDER

PER CURIAM

AND NOW, this 24th day of October, 2022, the Petition for Allowance of Appeal is **GRANTED**. The issues, as stated by petitioners, are:

(1) Whether an injunction prohibiting ongoing publication constitutes an impermissible prior restraint under Article I, Section 7 of the Pennsylvania Constitution?

(2) Whether the publication of language which gives rise to tort claims other than defamation cannot be enjoined under Article I, Section 7 of the Pennsylvania Constitution?

(3) Whether the Superior Court committed an error of law by concluding that the injunction was content-neutral and therefore not subject to strict scrutiny?