

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

<b>METRODEV NEWARK, LLC, f/k/a</b>	)	
<b>CHELSEA ON THE SQUARE</b>	)	
<b>APARTMENTS</b>	)	CIVIL ACTION NUMBER
	)	
Appellant	)	06A-12-005-JOH
v.	)	
	)	
<b>JUSTICE OF THE PEACE COURT</b>	)	
<b>NO. 13 and JOHN W. GILLESPIE</b>	)	
	)	
Appellees	)	Consolidated with
	)	
	)	
<b>CHELSEA ON THE SQUARE</b>	)	
<b>APARTMENTS</b>	)	CIVIL ACTION NUMBER
	)	
Appellant	)	08A-09-005-JOH
v.	)	
	)	
<b>JOHN W. GILLESPIE</b>	)	
	)	
Appellee	)	

*Submitted: November 2, 2009*

*Decided: February 18, 2010*

**MEMORANDUM OPINION**

*Upon Appeal from a Writ of Certiorari of the Justice of the  
Peace Court No. 13 - **REVERSED AND REMANDED***

*Upon Appeal from a Decision of the Court of Common Pleas - **AFFIRMED***

*Upon Motion of Chelsea on the Square Apartments to  
Quash the Counterclaim for Vexatious Proceedings - **GRANTED***

*Appearances:*

Joseph J. Bellew, Esquire, of Cozen O'Connor, Wilmington, Delaware, Attorney for Appellant

John W. Gillespie, 3702 Winterhaven Drive, Newark, Delaware, 19702, Appellee

HERLIHY, Judge

The Court has before it two consolidated, related matters. One is a writ of *certiorari* from a three member Justice of the Peace decision of December 1, 2006. The other matter is an appeal from a Court of Common Pleas decision of September 4, 2008. The appellant and petitioner are the same, Chelsea on the Square Apartments (“Chelsea”).<sup>1</sup> The respondent and appellee are the same, John W. Gillespie (“Gillespie”).

The dispute between these parties has consumed much judicial resources in three courts and has occurred over a number of years. Gillespie is a tenant of Chelsea’s and most of the litigation, but not all, has involved Chelsea’s efforts to terminate his lease. In sum, the Justice of the Peace Court determined that Chelsea’s letter giving notice of termination was a retaliatory act, prohibited under the Landlord Tenant Code. As a result, it awarded him rent damages and further barred Chelsea from regaining possession of the rental properties.

This Court finds the Justice of the Peace Court overstepped its jurisdiction and committed an error of law by barring the lease termination and preventing Chelsea from regaining possession. Such a bar is not a remedy for a retaliatory act and is beyond that court’s power to award. That court’s opinion barring termination is REVERSED. That portion of the court’s opinion awarding three month’s rent is REVERSED for the reasons stated herein.

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<sup>1</sup> In the *certiorari* matter the petitioner’s full name is Metrodev Neark, LLC, f/k/a Chelsea on the Square Apartments.

Chelsea separately appealed the decision of the Court of Common Pleas. That action was consolidated, despite Gillespie's claim they were not related. Chelsea has chosen, however, not to brief any of the issues it raised in its Notice of Appeal. It has, therefore, waived any claimed defects in that court's opinion. That decision is, therefore, AFFIRMED.

### *Factual Background<sup>2</sup>*

The tortured and complex procedural history of this matter is intertwined with the factual history and will be discussed together.

Gillespie has resided at 3702 Winterhaven Drive, Apartment 2 in Newark since September 1996. In 2002, Chelsea purchased the apartment complex from its former owner.<sup>3</sup> Chelsea and Gillespie did not execute a new lease and Gillespie's annual tenancy converted by operation of law to a month-to-month tenancy.<sup>4</sup>

Gillespie filed suit against Chelsea on October 16, 2002, in the Court of Common Pleas alleging a violation of the Landlord Tenant Code ("Code") based on allegedly illegal

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<sup>2</sup> The factual background is derived primarily from the two lower courts' opinions. This Court, sitting as an appellate court, will not upset the factual determinations made by the trial courts in so far as they are supported by logical and orderly reasoning and absent any legal errors.

<sup>3</sup> Chelsea on the Square has since changed names to Metrodev Newark.

<sup>4</sup> 25 *Del. C.* § 5106(b).

entries into Gillespie's apartment.<sup>5</sup> Gillespie filed a second suit against Chelsea in March of 2005 over rental amounts after he was allegedly without heat for several days.<sup>6</sup> Both of these cases concluded in 2006.<sup>7</sup>

On October 15, 2005, Chelsea informed Gillespie that it was not renewing his lease and he must vacate the apartment by December 31, 2005. Gillespie never vacated the apartment and Chelsea filed a summary possession action pursuant to 25 *Del. C.* § 5702 in the Justice of the Peace Court 12 on January 6, 2006. In the summary possession action, Gillespie filed a compulsory counterclaim alleging retaliatory eviction in violation of 25 *Del. C.* § 5516.

The Justice of the Peace Court dismissed the summary possession action before trial on February 10, 2006.<sup>8</sup> (Unless otherwise stated, the reference to "court" hereafter will be only to the Justice of the Peace Court whether it is a single Justice of the Peace or a three member panel). Chelsea initially filed for a trial *de novo* to a three judge court panel. As an example of the procedural morass extant in this case, the clerk of the court informed Chelsea it should instead appeal to the Court of Common Pleas. It did so, but

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<sup>5</sup> *Gillespie v. Chelsea on the Square*, C.A. No. 02-10-338 (Del. Com. Pl.).

<sup>6</sup> *Gillespie v. Chelsea on the Square*, C.A. No. 05-03-512 (Del. Com. Pl.).

<sup>7</sup> *Gillespie v. Chelsea on the Square, et al.*, U405-03-512 (Del. Comm. Pl. Sept. 22, 2006); *Gillespie v. Chelsea on the Square, et al.*, U402-10-338 (Del. Comm. Pl. Aug. 24, 2006).

<sup>8</sup> *Chelsea on the Square Apts. v. Gillespie*, C.A. No J06-01-0463-12 (Del. J.P. Feb. 10, 2006)(ORDER); Appellant's Br. at Ex. 4.

that court determined it had no appellate jurisdiction over summary possession proceedings, and remanded the case for a three judge panel in Justice of the Court.<sup>9</sup> On remand from the Court of Common Pleas, the panel found it was error to dismiss Chelsea's action before trial and remanded the matter to a single justice of the peace.<sup>10</sup> On the subsequent remand, the Justice of the Peace Court found that Chelsea's actions were retaliatory and in violation of 25 *Del. C.* § 5516 because it pursued an action for summary possession while a suit was pending related to Gillespie's tenancy. In a decision on October 4, 2006, a Justice of the Peace awarded Gillespie three months rent, \$2,340.00,<sup>11</sup> and continued possession of the rental unit.<sup>12</sup> That decision was affirmed by a three judge Justice of the Peace panel on December 1, 2006.<sup>13</sup> Chelsea paid the rental judgment. After the panel's decision, Chelsea filed a writ of *certiorari* in this Court. This Court held that the writ should have been filed in the Court of Common Pleas,<sup>14</sup> and it was transferred

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<sup>9</sup> *Chelsea on the Square Apts. v. Gillespie*, C.A. No. 2006-02-232 (Del. Com. Pl. Apr. 26, 2006); Appellant's Br. at Ex. 5.

<sup>10</sup> *Chelsea on the Square Apts. v. Gillespie*, C.A. No. J06-01-0463-12 (Del. J.P. Jun. 7, 2006); Appellant's Br. at Ex. 6.

<sup>11</sup> Three months rent is provided as a remedy by 25 *Del. C.* § 5516(c).

<sup>12</sup> *Chelsea on the Square Apts. v. Gillespie*, C.A. No. J06-01-463-12 (Del. J.P. Oct. 4, 2006); Appellant's Br. at Ex. 7.

<sup>13</sup> *Chelsea on the Square Apts. v. Gillespie*, C.A. No. J06-01-463-12 (Del. J.P. Dec. 1, 2006); Appellant's Br. at Ex. 8-A.

<sup>14</sup> *Chelsea on the Square Apartments v. Justice of the Peace Court 13*, Del. Super., C. A. No. 06A-12-005, Del Pesco, J. (January 12, 2007).

there.<sup>15</sup> Finally, after the Supreme Court's decision in *Maddrey v. Justice of the Peace Court 13*<sup>16</sup> established this Court's exclusive jurisdiction on a writ of *certiorari* to review possession proceedings, Chelsea's writ was transferred back here.

The second case, the one being appealed, was filed in the Court of Common Pleas. Gillespie alleged that one day following the Justice of the Peace Court's October 4, 2006, verdict awarding him possession, Chelsea sent him notice that it considered him as a holdover tenant. The Court of Common Pleas found this to be a blatant disregard of the authority of the court below and held Chelsea liable under § 5516.<sup>17</sup> Chelsea appealed that court's ruling as well.<sup>18</sup>

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<sup>15</sup> There was further procedural confusion and disagreement over whether Superior Court or Common Pleas had jurisdiction over *certiorari* proceedings involving "summary possession."

<sup>16</sup> 956 A.2d 1204 (Del. 2008).

<sup>17</sup> *Gillespie v. Chelsea on the Square*, 2008 WL 4302971, (Del. Comm. Pl. Sept. 4, 2008).

<sup>18</sup> Multiple suits have been filed by Gillespie that are not part of this consolidated appeal. These cases all involve Gillespie claiming retaliatory actions in that Chelsea has pursued its rights to appeal the Court of Common Pleas and Justice of the Peace actions. The Court of Common Pleas held that when Chelsea brought Gillespie's rent up to fair market value or initiated appellate proceedings, it did not commit a retaliatory act. *Gillespie v. Chelsea on the Square*, C.A. No. 2006-02-007 (Del. Comm. Pl. Apr. 19, 2007). The following day, the Justice of the Peace Court adjudicated seven separate actions filed by Gillespie against Chelsea. These lawsuits, with one exception, all allege that Chelsea's initiation of appellate proceedings were retaliatory. Gillespie also brought an action alleging that Chelsea's alleged letter that allegedly sought to have Gillespie remove "stained glass window or sticker/decal" was retaliatory. The court found for Chelsea in all instances. *Gillespie v. Chelsea on the Square*, C.A. Nos. J0610040912, J0610090912, JP12-07-002423, JP12-07-002503, JP12-07-002883, JP12-07-003036, JP12-07-003553 (Del. J.P. Apr. 20, 2007)(ORDER); Appellant's Br. at Ex. 16. In addition, the parties acknowledge that both  
(continued...)

On April 21, 2009, this Court accepted *certiorari* and, over Gillespie’s objection, granted Chelsea’s consolidation of the Justice of the Peace (C.A. No. 06A-12-005) writ of *certiorari* and Court of Common Pleas (C.A. No. 08A-12-005) appeal on April 21, 2009.<sup>19</sup>

### *Parties’ Contentions*

#### *Justice of the Peace Writ*

Chelsea argues that the Justice of the Peace erred when it found that a retaliatory act had occurred. It cites the court’s finding that Gillespie was a month-to-month tenant and argues that it had provided the required notice to lawfully terminate the rental agreement. It first contends it was error to find a retaliatory action after lawful notice has been established.

Second, Chelsea argues that the court should have ruled its action was not retaliatory as a matter of law. It argues that because more than 90 days had passed since Gillespie initiated the suits, its action cannot be retaliatory. It further argues that the

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<sup>18</sup>(...continued)

have filed actions with the Office of Disciplinary Counsel against each other and have sued in the Court of Chancery. The Court of Chancery granted summary judgment in favor of Chelsea, as plaintiff, holding that it was permitted to enforce a nonsolicitation provision in the rental agreement without running afoul of the federal or Delaware constitutions. Chelsea alleged that Gillespie defamed it by referring to it as “tyrannical” and its actions as a “bait and switch.” The court held that Gillespie violated the nonsolicitation policy. *896 Associates d/b/a Chelsea on the Square v. Gillespie*, 2008 WL 2025629 (Del. Ch. Apr. 22, 2008).

<sup>19</sup> Docket # 20.

court's ruling can create an absurd result allowing a tenant to file continuous suits creating a situation where a landlord would never be able to remove a tenant.

Finally, Chelsea contends that the court should not have awarded continuing possession to Gillespie. It argues that Gillespie no longer had a property interest when he was a holdover tenant and the court fashioned a remedy that was not authorized by the Code. It further argues that the Code establishes the exclusive remedies available for the Justice of the Peace Court to award and possession is not an appropriate remedy under the anti-retaliatory provisions of § 5516.<sup>20</sup>

In response, Gillespie argues that a landlord cannot make legal an illegal act of retaliation by giving notice of the act. Further, he states that Delaware law is clear that a landlord cannot bring any summary possession action as long as there is a suit arising from the tenancy pending in a Delaware court. He represents that Chelsea never attempted to argue that any of the defenses listed in § 5516 are applicable, nor has it denied that the summary possession action was retaliatory. He states that § 5516 is a burden shifting statute and does not stand for the position that if the suit is more than 90 days old then it cannot be retaliatory. Finally, he states that the 90 day burden shifting rule has been met because the tenant is still pursuing an action. He states that the Justice of the Peace

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<sup>20</sup> In its Notice of Appeal, Chelsea argues the Court of Common Pleas erred when it found Chelsea had committed a retaliatory act. Such a finding, it contended in its Notice, can only be made by a Justice of the Peace Court. The Notice asserts several other errors, but this Court's disposition of Chelsea's appeal negates any need to consider them.

magistrates routinely deal with summary possession actions and were unanimous in their approach.

In response to Chelsea's argument that § 5516 continual possession of the rental unit as a remedy, Gillespie relies on several arguments. One is that it would be unjust to give a landlord possession when it had committed a retaliatory act. Two, he relies upon the "expertise" of Justices of the Peace in landlord-tenant matters to contend they have the power to deny possession or to allow a tenant to retain possession.

Chelsea's reply to Gillespie's arguments is to assert its notice of termination was not an "illegal" act. As a month-to-month tenant, it was entitled and empowered to give Gillespie the notice of termination. Also the summary possession litigation was filed because Gillespie refused to vacate. It also points to a series of other decisions holding various acts by Chelsea were not retaliatory acts.<sup>21</sup>

Chelsea also restates its argument that § 5516 does not create the remedy of denying a landlord's taking possession. It notes that other provisions of the Code allow a tenant to recover possession. From this observation, Chelsea contends that reading these statutes together, the Legislature chose not to provide for retention of possession as a remedy under § 5516.

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<sup>21</sup> Appellant's Br. Exs. at 15-17. Curiously, these decisions becloud the issues in this case even more and betray Gillespie's motives to keep the litigation pot boiling rather than vacating. Not that Chelsea's actions have not all been above reproach.

### *Standard of Review*

This Court has exclusive jurisdiction over a common law writ of *certiorari*.<sup>22</sup> The Court's role after accepting a writ of *certiorari* is considerably more limited than during its statutory appellate review.<sup>23</sup> The Supreme Court has clarified the Court's function when addressing this writ. "[T]he Superior Court's scope of review on common writ of *certiorari* issued to any inferior tribunal in any type of case, is limited to errors on the face of the record."<sup>24</sup> "A writ of *certiorari* is *not* a substitute for, or the functional equivalent of, an appeal."<sup>25</sup> It is more limited in scope. "Review on a writ of *certiorari* issued by the Superior Court differs fundamentally from appellate review because review on *certiorari* is on the record and the reviewing court may not weigh evidence or review the lower court's factual findings."<sup>26</sup> The Court's limitation to the record coincides with this Court's limited review. "That record is nothing more than the initial papers, limited to the complaint initiating the proceedings, the answer or response (if required), and the docket entries."<sup>27</sup>

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<sup>22</sup> *Maddrey*, 956 A.2d at 1207.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1213 (emphasis in original).

<sup>26</sup> *Id.* (citations omitted).

<sup>27</sup> *Id.* at 1216. Other information that is included "in the box" of the record that should not have been included is not considered part of the record as the Court is instructed to disregard it.

In a summary possession case the Court will look for fundamental errors that appear on the face of the record.<sup>28</sup> These errors include, errors of law, “[improper] service of the complaint and irregularity of process, a lack of jurisdiction, or a remedy ordered outside of the statutory authority.”<sup>29</sup> Questions of statutory interpretation are questions of law and are reviewed *de novo* for errors.<sup>30</sup>

A description of the Court’s standard of review for statutory appeals from the Court of Common Pleas is not needed because the Court determines that Chelsea abandoned the appeal for the reasons set forth below.

### *Discussion*

#### *Writ of Certiorari from the Justice of the Peace Court Appeal*

To decide the issues raised by the writ of *certiorari* from the December 1, 2006, Justice of the Peace decision, this Court must interpret 25 *Del. C.* § 5516. In interpreting a statute, the Court’s role is to determine and give effect to the legislature’s intent.<sup>31</sup> Statutes must be read as a whole and all words must be given effect.<sup>32</sup> Where a statute is unambiguous and there is no reasonable doubt as to its meaning, the Court must give effect

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<sup>28</sup> *Id.* at 1215.

<sup>29</sup> *Id.*

<sup>30</sup> *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 652 (Del. 2006).

<sup>31</sup> *Ramirez v. Murdick*, 948 A.2d 395, 398 (Del. 2008).

<sup>32</sup> *Williams v. State*, 818 A.2d 906, 912 (Del. 2003).

to its literal meaning.<sup>33</sup> If a statute is reasonably susceptible to different conclusions or interpretations, it is ambiguous.<sup>34</sup> When it is ambiguous, the Court must determine the legislative intent.<sup>35</sup> If uncertainty exists, the statute must be interpreted to avoid absurd or mischievous results.<sup>36</sup>

***The Court Erred When it Held, as a Matter of Law, That a Summary Possession Action is Retaliatory if it Occurs During The Pendency of Litigation***

The Court below found that there was no valid lease between Gillespie and Chelsea and that Chelsea provided the 60 days notice required under 25 *Del. C.* § 5106(d) to terminate a month-to-month lease. Gillespie was required to vacate by December 31, 2005. When he failed to do so, he was a holdover tenant. The Code defines holdover tenant as, “a tenant who wrongfully retains possession or who wrongfully exercises control of the rental unit after the expiration or termination of the rental unit.”<sup>37</sup> Landlords have the right to remove holdover tenants through summary possession proceedings.<sup>38</sup> Further,

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<sup>33</sup> *Ramirez*, 948 A.2d at 398.

<sup>34</sup> *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1988).

<sup>35</sup> *Id.*

<sup>36</sup> *Delaware Bay Surgical*, 900 A.2d at 652.

<sup>37</sup> 25 *Del. C.* § 5141(11).

<sup>38</sup> 25 *Del. C.* § 5702(1).

landlords are able to recover up to double rent for each day the tenancy-at-sufferance continues.<sup>39</sup> It clear from a plain reading of the Code that holdover tenants are disfavored.

When the court addressed Gillespie's counterclaim for retaliatory eviction, it held:

The Panel determined that the landlord's notice of termination and subsequent filing of the summary possession action while the lawsuits instituted by [Gillespie] were still pending in the Court of Common Pleas constituted retaliatory acts as defined in the Landlord Tenant Code.<sup>40</sup>

Landlord and Tenant relations are governed by Delaware Code, Title 25. The proscription for retaliatory acts, § 5516, states:

- (a) Retaliatory acts are prohibited
- (b) A retaliatory act is an attempt on the part of the landlord to: pursue an action for summary possession or otherwise cause the tenant to quit the rental unit involuntary; demand an increase in rent from the tenant; or decrease services to which the tenant is entitled after:

\* \* \*

- (4) The tenant has pursued or is pursuing any legal right or remedy arising from the tenancy.
- (c) If the tenant proves that the landlord has instituted any of the actions set forth in subsection (b) of this section within 90 days of any complaints or act as enumerated above, such conduct shall be presumed to be a retaliatory act.<sup>41</sup>

It appears from the record presented and which is properly reviewable on *certiorari* that the court misapplied § 5516(c). Its opinion, in effect, finds Chelsea committed a

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<sup>39</sup> 25 Del. C. § 5515(b). The Court estimates that this section could impose greater than \$37,000 of liability on Gillespie in addition to his regular rent payments for his continual possession as a holdover tenant for greater than 3 years.

<sup>40</sup> *Chelsea on the Square*, C.A. No. J0601046312, at 2 (Del. J.P. Dec. 1, 2006).

<sup>41</sup> 25 Del. C. § 5516.

retaliatory act and converted the presumption of subsection (c) into a *per se* interpretation. This was error. First, that subsection uses “presumption.” It does not create a strict liability for any of the landlord actions listed under subsection (b). Second, § 5516(d) lists various defenses for a landlord on a claim of a retaliatory act. That list would be rendered meaningless if subsection (c) were read to create a *per se* rule. In interpreting statutes, courts are admonished to avoid reaching an interpretation which leads to an unreasonable result.<sup>42</sup>

The retaliatory eviction action was presented as a counterclaim to the summary possession allegations. Unless otherwise provided, the party presenting the counterclaim bears the burden of proving his allegations by a preponderance of the evidence. Both the three judge panel and single justice of the peace held that the summary possession action was retaliatory solely because it was filed while the other suits were pending. This constitutes error. The party alleging retaliatory eviction must produce evidence, and the presumption can be utilized, that the landlord’s actions were actually in retaliation for the tenant’s lawful actions.

Section 5516 is a burden shifting statute. The burden of proof is as follows: the tenant has the burden of proving the landlord’s retaliation for taking lawful action relating to the tenancy as enumerated in § 5516(b). However, if the tenant can prove that the alleged retaliation occurred within 90 days of the initiation of the lawful action, the burden

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<sup>42</sup> *Snell v. Engineered Sys. & Designs, Inc.*, 669 A.2d 13, 20 (Del. 1995).

shifts to the landlord to prove that his actions were not retaliatory. In either scenario, the trial court must make a finding that determines if the landlord's actions were actually retaliatory.

The summary possession action was initiated greater than 90 days from the date Gillespie had filed his latest action in the Court of Common Pleas.<sup>43</sup> Therefore, he had the burden of proving a retaliatory action.<sup>44</sup> The mere filing of a summary possession during the time a suit is pending is insufficient as a matter of law to discharge tenant's burden to prove retaliation. Gillespie argues that Chelsea never raised to the courts below any of the defenses available to it under subsection (d). The trouble with that argument is that the transcript of the trial is not what this Court can consider on *certiorari* and the opinions below do not address them.<sup>45</sup> Accordingly, this Court cannot consider that argument.

The court below erred when it failed to make its determinations on the record of which actions by Chelsea, other than simply filing the summary possession, were retaliatory. This Court does not sit as the trier of fact; therefore the judgment in favor of Gillespie is **REVERSED** and the matter is **REMANDED** for a determination of whether Chelsea action's were actually retaliatory.

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<sup>43</sup> *Gillespie v. Chelsea on the Square*, C.A. No. 2006-02-007, at 3 (Del. Comm. Pl. Apr. 19, 2007)(available at 2007 WL 3326109 (Del. Ch. Apr. 20, 2007)). That particular Court of Common Pleas decision is not part of this consolidated appeal.

<sup>44</sup> *Id.*

<sup>45</sup> This Court notes the full record presented to it, primarily because of the appeal from Common Pleas, makes it hard to determine who is retaliating against whom.

***Section 5516 Does Not Permit the Court to Award Possession to a Holdover Tenant***

Chelsea also argues that § 5516 does not permit the Justice of the Peace Court to award possession to a holdover tenant. It argues that the Code is an exhaustive list of the remedies available under each provision and, by the fact that § 5516 does not include possession, tenants' remedies are limited to three months rent.

The court found that Gillespie was a holdover tenant.<sup>46</sup> A landlord has the right to remove a holdover tenant from its rental unit by way of an action for summary possession.<sup>47</sup> A landlord can terminate a month-to-month rental agreement as long as sufficient notice is given to the tenant, as it was here.<sup>48</sup> Once the notice has been given, the tenant is subject to eviction through a summary possession action.

The court below erroneously granted possession to Gillespie when, by operation of the lease between the two parties, Gillespie no longer held a leasehold interest in the property. Such a grant is an error of law. The Code regulates all legal rights and remedies that stem from a residential rental agreement.<sup>49</sup> Section 5516 does not give the court authority to award possession, even in a retaliation case. Summary possession is covered in Chapter 57 the Code. Section 5702 details eleven different circumstances in

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<sup>46</sup> *Chelsea on the Square Apartments v. Gillespie*, C. A. J0601046312 at 3, (Del. J.P. Dec. 1, 2006).

<sup>47</sup> 25 Del. C. § 5702(1).

<sup>48</sup> 25 Del. C. § 5106(c).

<sup>49</sup> 25 Del. C. § 5101(a).

which a landlord can repossess his rental unit from a tenant, of which one is that the tenant is a holdover. It is the landlord's burden to prove that one of those circumstances are met. Since the court found Gillespie to be a holdover tenant, Chelsea satisfied § 5702 and the court should have awarded possession.<sup>50</sup> The court below, however, added a remedy not set forth in the retaliatory eviction statute.

Given the fact that § 5702 requires the landlord to prove the tenant has committed some act that entitles the landlord to seek summary possession, the tenant's interests are protected from a landlord's abuse. The tenant has a right to a jury trial to determine if the landlord has proven that it is entitled to summary possession. The court viewed dispossessing Gillespie as "rewarding" the landlord who engaged in retaliatory actions. However, an award of possession back to the landlord, even if a retaliatory act occurred, is not reward. It is the operation of the lease and the Code which allows the landlord to reclaim its property after the tenancy is expires. This is the very same lease that protects tenants from a landlord's interference during the life of the tenancy. The Court in *Maddrey* discussed the legislative intent of summary possession proceedings, "Landlords need to know whether they may move forward and *tenants need to know whether they may remain on the premises for the balance of the lease* or whether they must move on."<sup>51</sup> In

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<sup>50</sup> 25 *Del. C.* § 5702(1).

<sup>51</sup> *Maddrey*, 956 A.2d at 1215. (emphasis added).

Gillespie's case, the balance of the lease had already expired years ago. He has no right to remain on the premises.

Justice of the Peace courts now enjoy a certain constitutional status<sup>52</sup> where once they were exclusively of statutory creation.<sup>53</sup> Neither of the recent constitutional provisions, however, conferred any or new jurisdiction upon these courts. Their jurisdiction derives from that given to them by the General Assembly. Civil jurisdiction is conferred to Justice of the Peace Courts primarily in 10 *Del. C.* § 9301. Included in that grant of jurisdiction are summary possession actions.<sup>54</sup> That jurisdiction is likewise found in 25 *Del. C.* § 5701. While summary possession jurisdiction is exclusive to Justice of the Peace Courts, actions for rent are not.<sup>55</sup>

By definition, the jurisdiction for remedies is statutorily prescribed. Several provisions in the Code set out obligations for tenants and landlords. Each such provision has specified remedies. A comparison of various Code provisions demonstrates how the court below erred.

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<sup>52</sup> DEL. CONST. Art. IV, §§ 29-30.

<sup>53</sup> *Townsend v. Harman*, 171 A.2d 178 (Del. Super. 1933).

<sup>54</sup> 10 *Del. C.* § 9301(3).

<sup>55</sup> 25 *Del. C.* § 5103.

Where a tenant fails to pay rent, after notice, the landlord may sue for rent or for summary possession or both.<sup>56</sup> Where a tenant abandons the leasehold, the landlord may sue for rent.<sup>57</sup> If a tenant breaches certain material conditions of a lease and does not remedy the breach after notice, the landlord can remedy it and bill the tenant, terminate the lease and seek summary possession, or all three, depending on the circumstances.<sup>58</sup>

Likewise, tenants have certain remedies for landlord defalcations. One is where the landlord refuses to get possession from a holdover tenant, the new tenant may abate the rent, terminate the lease, or seek summary possession.<sup>59</sup> Where the substantial part of a unit is unusable or the whole unit is uninhabitable, the tenant has several specific remedies available.<sup>60</sup> A landlord's failure to repair can result in authority to reduce the rental obligation.<sup>61</sup> Further, where the landlord fails to provide water, electricity, hot water, etc., the tenant is authorized, after notice, to abate the rent due.<sup>62</sup> By the same token, if

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<sup>56</sup> 25 *Del. C.* § 5202.

<sup>57</sup> 25 *Del. C.* § 5507.

<sup>58</sup> 25 *Del. C.* § 5513.

<sup>59</sup> 25 *Del. C.* § 5304.

<sup>60</sup> 25 *Del. C.* § 5306.

<sup>61</sup> 25 *Del. C.* § 5307.

<sup>62</sup> 25 *Del. C.* § 5308.

a Justice of the Peace Court on a summary possession actions finds the rent was wrongfully withheld, it can award either possession or the wrongfully withheld rent.<sup>63</sup>

It is particularly instructive to compare this latter provision to the one at issue on this writ. Section 5516, as noted, prohibits landlord retaliatory acts:

Retaliatory acts prohibited.

(a) Retaliatory acts are prohibited.

(b) A retaliatory act is an attempt on the part of the landlord to: pursue an action for summary possession or otherwise cause the tenant to quit the rental unit involuntarily; demand an increase in rent from the tenant; or decrease services to which the tenant is entitled after:

(1) The tenant has complained in good faith of a condition in or affecting the rental unit which constitutes a violation of a building, housing, sanitary or other code or ordinance to the landlord or to an authority charged with the enforcement of such code or ordinance; or

(2) A state or local government authority has filed a notice or complaint of such violation of a building, housing, sanitary or other code or ordinance; or

(3) The tenant has organized or is an officer of a tenant's organization; or

(4) The tenant has pursued or is pursuing any legal right or remedy arising from the tenancy.

(c) If the tenant proves that the landlord has instituted any of the actions set forth in subsection (b) of this section within 90 days of any complaints or act as enumerated above, such conduct shall be presumed to be a retaliatory act.<sup>64</sup>

If the Justice of the Peace Court determines that the act was retaliatory, it has this statutory remedy:

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<sup>63</sup> *Id.*

<sup>64</sup> 25 *Del. C.* § 5516.

(e) Any tenant from whom possession of the rental unit has been sought, or who the landlord has otherwise attempted to involuntarily dispossess, in violation of this section, shall be entitled to recover 3 months' rent or treble the damages sustained by tenant, whichever is greater, together with the cost of the suit but excluding attorneys' fees.<sup>65</sup>

That remedy is statutory. There is no broad grant of power to the Justice of the Peace court to go beyond that remedy. First, there is nothing in the Code or 10 *Del. C.* § 9301 which enlarges the jurisdiction of the Justice of the Peace courts to order remedies under the Code beyond those which are expressly given and limited.<sup>66</sup>

In addition, the review above of the various remedies for various breaches indicates unequivocally the General Assembly's unambiguous choice to match remedies to wrongs. It clearly could have added to § 5516 denial of possession along with the triple rent sanction, but chose not to. It is not appropriate for this Court to assume it was a Legislative oversight to omit denial of summary possession in § 5516 but allow possession for wrongfully withheld rent, for example, in § 5308 as a remedy.

Further:

The Legislative body is presumed to have inserted every provision for some useful purpose and construction, and when different terms are used in various parts of a statute, it is reasonable to assume that a distinction between the terms was intended.<sup>67</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> See *Boomba's Rest. & Cocktail Lounge, Inc. v. Lord De La Warr Hotel, Inc.*, 389 A.2d 766 (Del. 1978). The Court acknowledges this decision pre-dated the constitutional provisions cited above, *Supra* p. 17, but the Justice of the Peace Courts' jurisdiction is still statutorily based.

<sup>67</sup> *C & T Associates v. Gov't of New Castle*, 408 A.2d, 27, 29 (1979).

This statutory doctrine has another name which is *expressio unius est exclusio alteris*.<sup>68</sup> This Court holds that by virtue of the General Assembly not including denying summary possession in § 5516, it did not intend it to be a remedy for a retaliatory act.<sup>69</sup>

The findings of the court below allow a tenant to remain in a rental unit indefinitely if he has committed some retaliatory action. Even if there were a retaliatory act, Gillespie no longer had any rights to occupy the apartment after the termination of his lease. If, on remand, the court finds that Chelsea violated § 5516 then Gillespie's remedies are limited to three months rent or treble damages as stated in § 5516.

This Court holds that the Justice of the Peace Court fashioned an unlawful remedy not authorized by § 5516 and not within the powers granted to it. Such a grant constitutes an error of law. That decision is **REVERSED** and the matter **REMANDED** with instruction to award Chelsea a writ of possession.

*C.A. No. 08A-09-005, the Court of Common Pleas Appeal*

*Chelsea Abandoned Its Appeal of the Lower Court's Decision*

Chelsea filed an appeal of the Court of Common Pleas' finding of September 4, 2008, that, by virtue of Chelsea sending a letter stating that it considered Gillespie a

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<sup>68</sup> "A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY at 581 (6th ed. 1990).

<sup>69</sup> It is up to the Legislature, not the courts to determine if the "remedy" of denying a landlord's summary possession action is appropriate for a retaliatory act. For certain, the Legislature has provided a remedy for a landlord's retaliatory act(s): treble the rent.

holdover tenant it violated § 5516 and engaged in a retaliatory act. Chelsea moved this Court to consolidate the Justice of the Peace and Court of Common Pleas cases. It argued, “The consolidation of these matters will result in the issuance of only one briefing schedule and will allow oral argument on both matters to be conducted at the same time.”<sup>70</sup> Over Gillespie’s objection, the Court granted Chelsea’s motion to consolidate on April 21, 2009.

But now Chelsea does not address the Court of Common Pleas appeal at any part in the body of its opening brief. The only mention of this appeal in its briefing is in a footnote in which it states, “This Court indicated that it would stay the appeal on the 08 (sic) action pending a ruling in the Writ of Certiorari in regards to the summary possession issue.”<sup>71</sup> After reviewing the docket and this Court’s oral decision on April 21, 2009, the Court does not find any indication that it agreed to stay the appeal or that Chelsea sought to have its stayed at any time.

This Court has held, “Generally an appellant’s failure to raise a legal issue in the text of an opening brief constitutes a waiver of the claim on appeal.”<sup>72</sup> In *Paoli v. Lankford*, the appellant failed to raise arguments on issues he noticed for appeal and the Court deemed them abandoned.<sup>73</sup> Our Supreme Court has held:

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<sup>70</sup> Appellant’s Mot. to Consolidate at 3.

<sup>71</sup> Appellant’s Br. at 6, n. 5.

<sup>72</sup> *Williams v. Unemployment Insur. Bd.*, 2002 WL 970422 (Del. Super. May 10, 2002)(citing *State v. Murphy*, 632 A.2d 1150, 1152 (Del. 1993)).

<sup>73</sup> 2005 WL 1953075 (Del. Super. Jul. 12, 2005).

The appealing party is generally afforded the opportunity to select and frame the issues it wants to have considered on appeal. A corollary to that opportunity is the requirement that the appealing party's opening brief *fully* state the grounds for appeal, as well as the arguments *and supporting authorities* on each issue or claim of reversible error. Therefore, this Court has held that the failure of a party appellant to present and argue a legal issue in the text of the opening brief constitutes a waive of that claim on appeal.<sup>74</sup>

This Court finds that Chelsea's appeal is waived and the Court of Common Pleas decision is **AFFIRMED**.

***Gillespie's Counterclaim Is Not Properly Before This Court***

Gillespie brings a counterclaim in this Court for vexatious proceedings. Chelsea has moved to quash the counterclaim. Rule 72(g) determines this Court's jurisdiction on statutory appeals from the Court of Common Pleas. It states, "Appeals shall be heard and determined by the Superior Court from the record of proceedings below, except as may be otherwise expressly provided by statute."<sup>75</sup> A counterclaim for vexatious proceedings is not part of the record below and is therefore not a part of the record. The Court, acting as an appellate court, does not have authority to decide a new cause of action. The counterclaim cannot be brought under the Court of Common Pleas appeal.

The record on a common law writ of *certiorari* is more narrow than that on statutory appeal. This Court cannot consider anything other than the record as set forth

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<sup>74</sup> *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008).

<sup>75</sup> Super. Ct. Civ. R. 72(g).

in *Maddrey*.<sup>76</sup> The counterclaim is not part of that record and the motion to quash is **GRANTED.**

*Conclusion*

For the foregoing reasons the Court holds:

1. Appeal on a writ of certiorari to the Justice of the Peace Court, **REVERSED AND REMANDED.**
2. Appeal from the Court of Common Pleas, **AFFIRMED.**
3. Chelsea's motion to quash the counterclaim for vexatious proceedings, **GRANTED.**

**IT IS SO ORDERED.**

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J.

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<sup>76</sup> See *supra* pages 6-7.