

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MONTGOMERY COUNTY,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 97-6331
	:	
MICROVOTE CORPORATION,	:	
CARSON MANUFACTURING COMPANY, INC.,	:	
and WESTCHESTER FIRE INSURANCE	:	
COMPANY,	:	
	:	
Defendants.	:	

MEMORANDUM

R.F. KELLY, J.

MARCH 31, 2000

Presently before the Court is the Motion of Defendant, Carson Manufacturing Company ("Carson"), for Clarification of the Court's Ruling on Intentional Fraud. All Defendants in this matter previously filed motions for summary judgment, which were granted in part and denied in part by Memorandum and Order dated February 3, 2000, followed by an errata Order dated February 4, 2000. Carson now moves for clarification of this Court's decision on the claim by Montgomery County ("the County") for intentional fraud.

I. STANDARD.

"The general purpose of a motion for clarification is to explain or clarify something ambiguous or vague, not to alter or amend." Resolution Trust Co. v. KPMG Peat Marwick, No. CIV.A.92-1373, 1993 WL 211555, at *2 (E.D. Pa. June 8, 1993).

To the contrary, "[t]he purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986)(citation omitted). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." Continental Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995)(citation omitted). A court "will reconsider an issue when there has been an intervening change in the controlling law, when new evidence has become available, or when there is a need to correct a clear error or prevent manifest injustice." NL Indus., Inc. v. Commercial Union Ins. Co., 65 F.3d 314, 324 n.8 (3d Cir. 1995)(citation omitted); Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994)(citation omitted).

II. DISCUSSION.

Carson's Motion was filed within ten (10) days of the Court's Memorandum Opinion, therefore it is not time-barred. FED. R. CIV. P. 6(a). The Court considers Carson's Motion to Clarify an appropriate motion because the fraud section of the Memorandum Opinion appears confusing as it pertains to Carson. Upon review of the Memorandum Opinion for that purpose, the Court is convinced that Carson's motion for clarification should be treated as a motion to reconsider. See We, Inc. v. City of

Phila. Dept. of Lic. & Inspec., 983 F. Supp. 637 (E.D. Pa. 1997)(treating motion to clarify as one for reconsideration); United States v. Conley, 878 F. Supp. 751 (W.D. Pa. 1994)(motion for clarification requested relief more in nature of reconsideration and court treated as such); Melnyczenko v. Love, No. CIV.A. 90-5830, 1991 WL 87078, *1 (E.D. Pa. May 20, 1991)(interpreting motion for clarification as a motion to reconsider). Accordingly, an analysis of the County's fraud claim against Carson follows.

A. Fraud.

The economic loss doctrine applies to bar the County's negligent misrepresentation claims against both Microvote Corporation ("Microvote") and Carson. Moreover, the County is barred from asserting an intentional fraud claim with regard to Carson's and Microvote's representations after the November, 1995 election, since the County retained a law firm at which Michael I. Shamos, J.D., Ph.D., was a partner, "to analyze past elections and make recommendations to secure properly functioning voting machines for upcoming elections." Montgomery County v. Microvote Corp., No. CIV.A.97-6331, 2000 WL 134708, at *8 (E.D. Pa. Feb. 3, 2000)(quoting Montgomery County v. Microvote Corp., 175 F.3d 296, 298 (3d Cir. 1999)). The retention of Shamos' law firm indicates that the County did not justifiably rely on Microvote's representations in entering into the addendum to the original

sales contract between Microvote and the County. Thus, the only remaining intentional fraud claim for consideration against the Defendants pertains to the Defendants' representations prior to the November, 1995 election.

B. Intentional Fraud By Carson.

The initial question which this Court must address is whether the County meets its summary judgment burden and sets forth sufficient intentional acts or misrepresentations by Carson. The County bases its remaining intentional fraud claim against Carson on the allegation that Carson committed fraud by omission or concealment, i.e., if Carson had disclosed that its machines were defective and negligently designed, the County would not have purchased or begun using the machines. (Compl., ¶ 62.)

"The elements for the tort of intentional non-disclosure are basically the same as that of fraudulent misrepresentation; however, there can be no liability for fraudulent concealment absent some duty to speak." City of Rome v. Glanton, 958 F. Supp. 1026, 1038 (E.D. Pa.), aff'd., 133 F.3d 909 (3d Cir. 1997)(citing Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 611-12 (3d Cir. 1995); Gibbs v. Ernst, 647 A.2d 882, 889 n.12 (Pa. 1994); and In re Estate of Evasew, 584 A.2d 910, 913 (Pa. 1990)). When one party is in a "fiduciary or confidential relationship to the other," a duty to speak

arises. Id. (citing Duquesne, 66 F.3d at 612 and Evasew, 584 A.2d at 912-13). "Aside from the more well-known examples of a confidential relationship . . . a confidential relationship arises when the relative position of the parties results in a situation in which one party has power and means to take advantage of or exercise undue influence over the other." Id. (citing Evasew, 584 A.2d at 913). Here, the County alleges that Carson and the County had a confidential relationship, therefore Carson had a duty to disclose information concerning machine malfunctions or difficulties. In City of Rome, the court noted, citing authority, that:

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

Id. at 1038-39 (citing Duquesne, 66 F.3d at 612-13; Restatement (Second) of Torts § 551). There is no duty to speak, however, "when both a plaintiff and defendant are sophisticated business entities, entrusted with equal knowledge of the facts and equal access to legal representation." Id. at 1039 (citing Duquesne, 66 F.3d at 613).

Carson's President, William H. Carson, has provided an affidavit in which he states that "Carson has never had any oral or written contractual relationship with Montgomery County." (W. Carson Aff. at 3, ¶ 15.) The County has not presented sufficient facts to raise a genuine issue as to whether Carson stood in a confidential or fiduciary relationship with it. In fact, the County fails to establish the existence of any direct relationship between Carson and the County from the time the County purchased the voting system from Microvote until after the November, 1995 election. Consequently, the County's claim for direct intentional fraud by Carson fails.

C. The Relationship Between Carson and Microvote.

An analysis of the intentional fraud allegations against Carson necessarily involves an examination of the relationship between Carson and Microvote to determine if either party is liable for the other's alleged misstatements. Carson correctly states that if the facts regarding its relationship with Microvote are not in dispute, the decision of whether there was an agency relationship between the parties should be made by this Court. (Carson Reply Br. at 48)(citing Feller v. New Amsterdam Cas. Co., 70 A.2d 299, 300-01 (Pa. 1950)("where the facts [giving rise to the relationship] are not in dispute, . . . the question becomes one for determination by the court"); Refuse Management Sys. v. Consolidated Recycling & Transfer Sys.,

671 A.2d 1140, 1147 (Pa. Super. 1996)(citations omitted)("where the facts are not in dispute, the question is one which is properly decided by the court"); and Juarbe v. City of Philadelphia, 431 A.2d 1073, 1076 (Pa. Super. 1981)("If the facts are not in dispute, the question of the relationship between the parties is one which is properly determined by the court.")). Carson maintains that no disputed factual issues exist, therefore the issue of agency is properly before this Court. (Carson Reply Br. at 48.)

"An agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent." AT & T Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1434 (3d Cir. 1994), cert. denied, 514 U.S. 1103 (1995)(citations omitted). In this case, the County alleges that Carson and Microvote were each other's agents. Under Pennsylvania law, there are four types of agency:

- (1) express authority, or that which is directly granted;
- (2) implied authority, to do all that is proper, usual and necessary to the exercise of the authority actually granted;
- (3) apparent authority, as where the principal holds one out as agent by words or conduct;
- and (4) agency by estoppel.

L&M Beverage Co. v. Anheuser-Busch, Inc., No. CIV.A.85-6937, 1988 WL 85670, at *11 (E.D. Pa. Aug. 16, 1988)(citations omitted). The County has the burden of establishing agency. Id. The

County asserts that each type of agency is present in this case, yet does not specifically delineate which of its cited facts support each agency theory.

It is undisputed that Microvote and Carson entered into an exclusive distribution agreement dated September 15, 1986 which governed their relationship at the time Microvote contracted with the County. (W. Carson Dep., Ex. 37.)⁴ Pursuant to the contract terms, Carson manufactured voting machines and Microvote sold and distributed them. The County states that "[h]ere, it is for the jury to decide whether the agency agreement creates an agency relationship for Microvote to sell the Carson machines to Montgomery County under the Microvote trade name." (County's Br. in Supp. of Consolidated Opp'n to Defs.' Mots. Summ. J. at 116-17.) According to the County, because the language of the Carson-Microvote contract specifically states that Microvote is Carson's agent, Carson is liable for Microvote's material omissions and misrepresentations to Montgomery County. (Id. at 114-15.) The Distribution Agreement provides, in pertinent part, that:

⁴William H. Carson testified as to a subsequent agreement dated December 20, 1992 between Carson and Microvote containing the identical provision regarding agency as the September 15, 1986 contract. This subsequent contract, which Carson has produced, was not signed by the parties; therefore, the terms of the September 15, 1986 contract govern Microvote's role when it executed its contract with the County. (W. Carson Dep. at 306, Ex. 37.)

17. Sales Agent. Buyer [Microvote] shall be the exclusive sales agency for the sale of the voting machines for so long as the production and sale of voting machines is profitable to both corporations. The Seller [Carson] agrees to sell the voting machines only to Buyer. The Buyer agrees to buy MICROVOTE machines only from Seller.

(W. Carson Dep., Ex. 37 at 3-4, ¶ 17.)(emphasis added).⁵ The County's conclusive statement that an agency was created by labeling the parties' relationship as an "exclusive sales agency" is erroneous. The use of the term "agency" does not automatically convert a relationship into an agency relationship; rather, it is the essence of the actual relationship which governs whether or not an agency is created. L&M Beverage, 1988 WL 85670, at *14.

The County also cites the following as "significant factual evidence of this agency relationship between Defendants" going beyond the written contract terms: (1) "the two companies

⁵The County also cites a provision in a September 3, 1997 agreement which states, "Seller shall have the sole right, in its absolute discretion to approve or disapprove the use of the other component parts forming a DRE voting system." (W. Carson Dep., Ex. 39 at 3, ¶ 3.)

Although the County contends that this provision establishes that Carson controlled the software through their right to approve or disapprove additional components beyond the MV-464 machine, this contract was executed after the November, 1995 election and thus is not regarded in this fraud analysis. Similarly, two other contracts dated January 29, 1998, and January 30, 1998 are not considered. (W. Carson Dep., Exs. 39& 40.)

admittedly have a very close relationship" (W. Carson Dep., Ex. 22);⁶ (2) "Microvote employees are on the Carson health plan" (W. Carson Dep. at 300); (3) "Carson has the first right to buy out Microvote and Microvote has the first right to buy out Carson" (W. Carson Dep., Exs. 37-41);⁷ (4) "Carson and Microvote jointly executed contracts for the sale of voting machines with counties [other than Montgomery County]"; (5) ". . .they spoke as one. They were a team" (Hoeffel Dep. at 179-80);⁸ (6) the inception of the relationship between Carson and Microvote indicates an agency

⁶Although the County cites William Carson Exhibit 22, this Exhibit has neither been filed of record with the Clerk of Court nor provided to the Court via courtesy copy.

⁷The language of the September 15, 1986 exclusive distribution agreement at issue specifically provides that if Carson should "offer to sell or receive and [sic] offer for their business," Carson "agrees to offer in writing, first rights to purchase manufacturing rights to the MICROVOTE machines, license or patent rights, any drawings and models, any inventory, parts and manufacturing supplies to Microvote. In the event that Carson and Microvote "fail to agree on terms or conditions of sale within 45 days of date of notice," Microvote's right to purchase terminates and Carson "may then offer such rights to a purchase offer to any party." (W. Carson Dep., Ex. 37 at 4, ¶ 21.) Provisions allowing for mutual options to purchase are found in subsequent agreements. As stated in n.5, supra, these contracts were executed after the operative facts of this case and thus will not be considered.

⁸The County did not provide the entire statement given by former Commissioner Hoeffel at his deposition. He states, "And I felt Carson and Microvote both after, were, after the November 95 failure, I don't think I ever heard of Carson before that. When all the problems occurred, then Carson and Ries came to a meeting. And they spoke as one, They were a team. So they made joint representations." (Hoeffel Dep. at 179.) This statement pertains to actions by Carson and Microvote after the November, 1995 election.

relationship since “. . . James F. Ries misappropriated the prototype of an electronic voting machine from another company and asked William Carson to build it so long as Microvote was permitted to exclusively sell the voting machines.” (W. Carson Dep. at 297-99); (7) although the voting machines are manufactured by Carson, they are named “Microvote MV-464 voting machines”; and (8) the fact that Carson, not Microvote, produced in discovery thousands of documents or pieces of correspondence between Microvote and its county clients attempting to resolve problems with the defective machines reflects the intricate relationship which Carson had with Microvote. (County’s Br. in Supp. of Consolidated Opp’n to Defs.’ Mots. Summ. J. at 117-18.) Because the County alleges that these facts support its agency theories, each agency type is hereafter examined to determine which, if any, agency relationship existed between Carson and Microvote.

1. Express Agency.

The basic elements of express agency a plaintiff must show in Pennsylvania are “the manifestation by the principal that the agent shall act for him, the agent’s acceptance of the undertaking, and the understanding of the parties that the principal is to be in control of the undertaking.” L&M Beverage, 1988 WL 85670, at *11 (citing Scott v. Purcell, 415 A.2d 56, 60 (Pa. 1980), and quoting Restatement (Second) of Agency, § 1(1),

cmt. b (1958)). The Restatement (Second) of Agency, section 14J (1958), provides: "one who receives goods from another for resale to a third person is not thereby the other's agent in the transaction; whether he is an agent . . . depends upon whether the parties agree that h[e] . . . is to act primarily for the benefit of the [seller] or is to act primarily for his own benefit." Id. at *13. The County has presented no evidence for this Court to conclude that Microvote consented to act primarily for Carson's benefit or Carson consented to act primarily for Microvote's benefit. It appears, in fact, that Microvote acted for its own benefit and profit, as reflected in the business relationship established between these two parties. James F. Ries, Microvote's President, who previously worked for a voting machine manufacturer, brought a prototype of that company's voting machine to William Carson, asking him to build a similar sort of electronic voting machine, and proposing an exclusive sales and distribution relationship between them. (W. Carson Dep. at 297-99). There is no evidence that, through this transaction, either party controlled the other party's activities.

The history of sales transactions between the parties also indicates little or no control by Carson over Microvote. Carson manufactured machines for Microvote. (W. Carson Dep., Ex. 37 at 1, ¶ 1.) Carson was responsible for tendering delivery of

the machines by notifying Microvote by duplicate invoice containing the serial numbers of the machines as they were shipped. (Id. at 2, ¶ 9.) Carson billed Microvote as each machine was shipped, F.O.B. Carson's dock. (Id.) Risk of loss with respect to the voting machines purchased by Microvote passes as soon as the machines are picked up or shipped out of Carson's manufacturing facility. (W. Carson Aff. at 3, ¶ 11.) In addition, Carson was responsible for training Microvote personnel only and Microvote was responsible for training all of its sales personnel and "any and all necessary employees and service personnel of purchasers of equipment and [was to] provide all field service for equipment." (W. Carson Dep., Ex. 37 at 2, ¶ 11.) The distribution agreement also provided that if the machines were licensed by agreement of both Microvote and Carson, the proceeds of any such agreement would be divided "on a 50%-50% basis between the parties after any expenses incurred in securing and preparing any licensing agreement." (Id. at 3, ¶ 16.) The agreement further provided that Microvote "shall be responsible for all sales, sales promotion, advertising and distribution of the MICROVOTE machine." (Id. at 4, ¶ 19.) This distribution agreement does not permit any exercise of control by one party over the other party.

Agents are characterized as either servants or independent contractors, depending on the amount of control the

principal is capable of exercising over the agent. AT & T v. Winback, 42 F.3d at 1434. The United States Court of Appeals for the Third Circuit ("Third Circuit") states that servants "generally are employees of the principal, and are subject to physical control by the principal." Id. at 1435. In contrast, an independent contractor "is not subject to that degree of physical control, but is only subject to the general control and direction by the principal." Id. "All agents who are not servants are independent contractors." Id. This distinction is important, according to the Third Circuit, because the scope of an employer's liability for its representatives is dependent upon the characterization of their relationship. Id.

The Third Circuit distinguishes the two types of agency as:

If the principal is the master of an agent who is his servant, the fault of the agent, if acting within the scope of his employment, will be imputed to the principal by reason of respondeat superior. . . .On the other hand, 'the principal [generally] is not vicariously liable for the torts of the independent contractor if the principal did not direct or participate in them.'

Id. (citations omitted). Here, the relationship between Carson and Microvote was not a master-servant agency since the County has not set forth sufficient facts to establish that Microvote was employed by Carson or was controlled by Carson. Additionally, there is an insufficient factual basis for any

employment or control of Carson by Microvote.

The next step in the express agency analysis is whether Microvote was an agent independent contractor or a non-agent independent contractor. The Restatement defines a non-agent independent contractor as “[a] person who contracts to accomplish something for another or to deliver something to another, but who is not acting as a fiduciary for the other is a non-agent contractor.” Id. at 1439 (citing Restatement (Second) Agency § 14N, cmt. (b)). In this case, Microvote was the exclusive seller and distributor of the Microvote MV-464 voting machines and neither Microvote nor Carson acted as each other’s fiduciary. Rather, each acted for its own benefit. Thus, Microvote can be considered a non-agent independent contractor of Carson. As such, Carson is not liable for the actions or statements of Microvote.

2. Implied Agency.

The second type of agency is implied agency. Implied authority rests on a finding of express authority. Bensalem Township v. Coregis Indem. Co., 1995 WL 290438, at *12 n.26 (E.D. Pa. May 10, 1995). Because there is no express agency, supra, there likewise cannot be an implied agency between Carson and Microvote.

3. Apparent Agency.

Apparent agency is, under Pennsylvania law, the “power

to bind a principal which the principal has not actually granted, but which leads persons with whom his agent deals to believe that he has granted." L&M Beverage, 1988 WL 85670, at *14 (quoting Revere Press, Inc. v. Blumberg, 246 A.2d 407, 410 (Pa. 1986); Restatement (Second) of Agency, § 27 (1958)). This authority "flows from the conduct of the principal and not from that of the agent." Id. (quoting D & G Equip. v. First Nat'l Bank of Greencastle, 764 F.2d 950, 954 (3d Cir. 1985)). Apparent agency turns on the conduct of the principal "which reasonably interpreted, causes the third party to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Id. (quoting Adriatic Ship Supply Co. v. M/V Shaula, 632 F. Supp. 1573, 1575 (E.D. Pa. 1986)). As set forth in the Restatement (Second) of Agency, section 267,

One who represents that another is his servant or other agent and thereby causes a third person to justifiably rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Drummond v. Hilton Hotel Corp., 501 F. Supp. 29, 31 (E.D. Pa. 1980)(quoting Restatement (Second) of Agency, § 267 (1975)). The County has provided no evidence which indicates any conduct of or by Carson consenting to Microvote's acts or statements. In addition, no evidence has been provided to indicate any contact or interaction between the County and Carson prior to the

November, 1995 election.

The voting systems were marketed as Microvote machines. The machines were also labeled "Microvote MV-464," providing no indication to the end user that Microvote marketed the machines on Carson's behalf. Carson's President, William H. Carson, testified:

Q: Has Carson Manufacturing ever sold voting machines directly to a county?

A. No.

Q: Has Carson Distributing ever sold voting machines directly to a county?

A: No.

(W. Carson Dep. at 296.) In the Introduction to its Response to Bid Specifications for Montgomery County, however, Microvote states:

In addition, the Microvote/Carson "team" offers Montgomery County a team with great corporate stability. Indeed, unlike every other electronic voting system manufacturing and sales partnership, the Microvote/Carson ownership and team has remained virtually unchanged since 1982, now over 11 years. This means we can offer Montgomery County a stable manufacturing, service and support capability with a proven, PRODUCTION election track record.

(Greenhalgh Dep., Ex. 36 at 1.) In addition, copies of machine patents owned by Carson were attached to the same documents.

(Id., Ex. 36.) This document submitted to the County indicates that Carson and Microvote work together, but is not evidence that Carson granted Microvote apparent agency authority because in

order for an agent to possess apparent authority, "there must be 'manifestations by the alleged principal to a third person . . . that the alleged agent is authorized to bind the principal. . . .'" In re Richard Buick, Inc., Nos. CIV.A.92-4957, 92-5137, 90-0080, 1993 WL 166775, at *3 (E.D. Pa. May 17, 1993)(quoting Gizzi v. Texaco, Inc., 437 F.2d 308, 309 (3d Cir.), cert. denied, 404 U.S. 829 (1971)). Here, there are no representations by Carson to indicate to the County that Microvote had any apparent authority to act on Carson's behalf. Thus, because there is no evidence that Microvote indicated to the County that Carson was the machine manufacturer, the County cannot establish any grant of apparent agency authority by Carson to Microvote.

4. Agency by Estoppel.

The final type of agency recognized in Pennsylvania is agency by estoppel, which comprises two required elements: (1) negligence on the part of the principal in failing to correct the belief of the third party concerning the agent; and (2) justifiable reliance by the third party. L&M Beverage, 1988 WL 85670, at *15 (citing Turnway Corp. v. Soffer, 336 A.2d 871, 876 (Pa. 1975)). This concept "depend[s] upon a manifestation by the alleged principal to a third person and a reasonable belief by the third person that the alleged agent is authorized to bind the principal." Id. (quoting Universal Mktg. & Consulting, Inc. v. Hartford Life & Accident Ins. Co., 413 F. Supp. 1250, 1261 (E.D.

Pa. 1976)). The County's agency by estoppel argument fails for the same reasons as its apparent agency theory.

IV. CONCLUSION.

Due to Carson's request for clarification, the Court revisited section III.A.2. of its Memorandum Opinion pertaining to the County's fraud claim against Carson and the evidence provided by the County and Carson in their motions. In order to prevent manifest injustice, Carson's Motion for Summary Judgment for fraud is granted. Count IV of County's Complaint pertaining to Carson is dismissed in its entirety.

Because of the foregoing, I enter the following Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MONTGOMERY COUNTY,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 97-6331
	:	
MICROVOTE CORPORATION,	:	
CARSON MANUFACTURING COMPANY, INC.,	:	
and WESTCHESTER FIRE INSURANCE	:	
COMPANY,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 31st day of March, 2000, upon consideration of the Motion of Carson Manufacturing, Inc. for Clarification of the Court's Ruling on Intentional Fraud, and the County's Response thereto, it is hereby ORDERED that:

1. Carson's Motion is GRANTED;
2. the third full sentence of the February 3, 2000 Memorandum, p. 20, is hereby corrected as follows: "Here, the gist of the action is in contract, and the County's relief for its fraud claim lies in contract damages. Thus, it appears that the economic loss doctrine bars the County's recovery for Defendants' alleged negligent misrepresentations, but further analysis of Carson's alleged intentional misrepresentations is required;"

3. the February 3, 2000 Memorandum in this case is

corrected at p. 26, sentence 2, as follows: "Accordingly, Carson's Motion for Summary Judgment is granted with respect to Count IV of the Complaint and Microvote's Motion for Summary Judgment is denied with respect to intentional fraud prior to the November, 1995 election;" and

4. paragraph 3 of the February 3, 2000, Order is hereby corrected as follows: "Defendants' Motions for Summary Judgment are GRANTED in part and DENIED in part. Carson is DENIED summary judgment on Count II (Breach of Warranty) of Plaintiff's Complaint and Carson is GRANTED summary judgment on Counts I (Negligence) and IV (Fraud) of Plaintiff's Complaint. Microvote is DENIED summary judgment on Counts II (Breach of Warranty) and III (Breach of Contract) of Plaintiff's Complaint and Microvote is GRANTED summary judgment on Counts I (Negligence) and V (Wrongful Use of Civil Proceedings) of Plaintiff's Complaint. Summary judgment on Count IV (Fraud) of Plaintiff's Complaint is DENIED to Microvote for intentional fraud prior to the November, 1995 election. West Chester is

DENIED Summary Judgment on Count VI (Action Under the Performance Bond) of Plaintiff's Complaint."

BY THE COURT:

Robert F. Kelly,

J.